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THE  
SOUTHWESTERN REPORTER,  
(ANNOTATED),  
VOLUME 117,

CONTAINING ALL THE CURRENT DECISIONS OF THE

SUPREME AND APPELLATE COURTS OF ARKANSAS,  
KENTUCKY, MISSOURI, TENNESSEE,  
AND TEXAS.

PERMANENT EDITION.

APRIL 21—MAY 12, 1909.

A TABLE OF STATUTES CONSTRUED IS GIVEN  
IN THE INDEX.

ST. PAUL  
WEST PUBLISHING CO.  
1909

KF  
135  
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v. 117

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### TAX ON APPEALS.

Counsel, in writing briefs, are requested by the court to write only on one side of the paper.

The tax on appeals is two dollars, and in all cases must be paid to the clerk of the Court of Appeals before the cases will be filed.

Amended March 15, 1906.

### ADDITIONAL RULE.

XXXII.—It is ordered that all opinions of this court hereafter are selected for official publication, except such as are by a vote of the court, or if a division, determined to be of not sufficient importance for such publication.

Adopted Sept. 25, 1908.

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\*For rules as previously adopted, see 92 S.W. ix; 112 S. W. v.

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SOUTHWESTERN REPORTER.  
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**HUFFMAN et al. v. HUFFMAN.**

(Supreme Court of Missouri. March 9, 1909.)

**1. DEEDS (§ 211\*)—COMPETENCY OF GRANTOR—EVIDENCE.**

Evidence held to justify a finding that a grantor possessed sufficient mental capacity to execute a deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 638-640; Dec. Dig. § 211.\*]

**2. APPEAL AND ERROR (§ 1009\*)—FINDINGS OF CHANCELLOR—CONCLUSIVENESS.**

The findings of the chancellor on conflicting testimony of witnesses appearing before him will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3972; Dec. Dig. § 1009.\*]

**3. DEEDS (§ 196\*)—UNDUE INFLUENCE—CONFIDENTIAL RELATIONS—BURDEN OF PROOF.**

Such a fiduciary relation between parent and child as casts on the child the burden of proving that a conveyance to him from the parent was of the free will of the parent does not arise merely from the fact that an aged and infirm parent is under the ministering care of a son who attends to the business of the parent as to the renting of his farm and negotiating a loan.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 589; Dec. Dig. § 196.\*]

**4. DEEDS (§ 211\*)—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.**

Evidence held to justify a finding that a deed by a parent to a child was not procured by undue influence, though it be assumed that a confidential relation existed between them so as to cast on the son the burden of proving that the deed was of the free will of the parent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 641, 642; Dec. Dig. § 211.\*]

Woodson, J., dissenting.

In Banc. Appeal from Circuit Court, Monroe County; David H. Eby, Judge.

Action by Rebecca Huffman and others against William T. Huffman. From a judgment for defendant, plaintiffs appeal. Affirmed.

The following is the opinion delivered by VALLIANT, J. (with whom LAMM and GRAVES, JJ., concurred), in division No. 1:

"Rebecca Huffman, who has died since this appeal has been pending, and whose executor has been made a party herein, was the widow, and the other parties, plaintiffs and the defendant, are the children and heirs at law of Jacob F. Huffman, deceased, who died

intestate February 29, 1904. Six days before his death he executed a deed conveying to his son William T., the defendant, 120 acres of land. The aim of this suit is to set aside that deed, on the alleged grounds that the intestate was not of sufficient mental capacity to make it, and that defendant exerted undue influence over him. The trial resulted in a finding and judgment for the defendant, and the plaintiffs appealed.

"The evidence for the plaintiffs established the fact that the intestate, then an old man of 74 years, and his wife, Rebecca, 69, in September, 1903, moved from his farm, on which he had before been living, to the home of defendant, which was another farm, and he lived there, in his son's home, until he died; that is, from some day not specified, in September, 1903, to February 23, 1904. Both these farms belonged to him; that is, the title to both was in him. For two or three years he had been in very bad health. According to the widow's testimony, he had asthma, rheumatism, heart trouble, kidney trouble, and other bodily infirmities. He required great care and tender treatment, and these he received at her hands. Questioned as to his mental condition on the day the deed was executed, she said, 'It was very unbalanced, his mind was, his condition in every way.' Again she said: 'His mental condition was bad. \* \* \* He could not remember anything scarcely at all. He never said anything; he never talked any that day. If I asked him anything, he would not answer. All he wanted was a little milk.' Dr. McMurry, the physician who attended him, and saw him on the 26th of February, which was three days after the execution of the deed, and three days before his death, a witness for plaintiffs, described his physical condition as very bad—much as Mrs. Huffman had described it. He was then asked to say 'as to his mental condition, as to whether or not in your opinion he was able to make contracts and transact ordinary business? A. He would only talk when I talked to him, and then give me very short answers. He seemed to understand what I said to him, and I understood what he said. His answers were simply "Yes" or "No," or

"Feeling very bad" is about the extent of what he said. Q. You have not answered my question. I asked you whether or not, in your opinion as a physician, whether he was mentally able to make contracts and carry on ordinary business? A. Well he was in no shape for a general line of business. He was sufficiently rational to appreciate what I said and give me a rational answer; but, to judge of the degree and strength and liability, I could not draw a line there hardly. That is the substance of the plaintiffs' testimony on the point of mental incapacity.

"On the subject of undue influence the plaintiffs' testimony tended to show that after the old man moved to defendant's home, the latter attended to the renting of his farm for him, and attended to negotiating some real estate loans for him. That on the day before the deed was executed defendant went to Paris, the county seat, and employed an attorney, who was also a notary public, to come out to the farm and write the deed and take the acknowledgment. He insisted that the lawyer come the next afternoon, and the lawyer went as he agreed to do, arriving rather late in the afternoon because of obstructions in the road caused by rain-flooded creeks. That when the lawyer arrived, defendant met him at the fence, and conducted him into the house and to the door of the room where the old man and Mrs. Huffman were, and announced to them that Mr. Rodes (the attorney) had arrived. That Mrs. Huffman had not been informed that the attorney was expected or what his business was. Her account of the meeting and what occurred is substantially as follows: Mr. Rodes stated that he had been requested by William (the defendant) to come out there; and he requested to have William called into the room, which was done. When William came, Rodes said he was ready for information as to the lines of the 120 acres, and he and William went out on the porch, and there William showed him how the lines were. Then they came back into the room. The paper that Rodes had prepared became blurred with water, and he had to write another. After it was written, he read it to William, and asked him if it was right, and William said it was. Rodes said, 'Mrs. Huffman, you must sign it,' but she said she would not, because they had not given her any of the improvements, and she would not sign it until Ed. Huffman was provided for. Then there was some wrangling, in which she told them that her husband was not competent to make a deed. She said: 'Well, we fussed a while, and I looked at my husband. He looked so poor and bad, and he was sitting there not hearing or seeing anything at all, I just thought not to have any trouble I will sign it.' She also said the deed was not read to her or her husband. She did not see the deed in her husband's hands at all, and did not think he

delivered it to William. Plaintiffs' testimony also tended to show that this 120 acres was the only land the old man owned that was not incumbered, and that it was worth \$500 to \$1,000 more than the other 120 acres.

"On the part of the defendant the testimony was to the following effect: Neighbors and acquaintances testified that they called on the old man, and he recognized them and talked with them rationally. He complained of his physical infirmities, and said he was suffering, but they testified that they saw no impairment of his mental faculties. The family had come to Missouri from Illinois, and this 240-acre farm, 120 acres of which were covered by this deed, was purchased with the proceeds of the sale of their farm in Illinois, in which the defendant had an interest. The old man had, at several times in past years, been heard to say that half the farm belonged to William, and he refused to put this 120-acres tract into a mortgage he was giving for money he was then borrowing, because he said it rightfully belonged to William, and when on one such occasion it was suggested to him by the bank cashier in the course of the transaction that, if it belonged to William, he ought to give William a deed to it, he said it was unnecessary because all the family understood it. The 120 acres in question were not more valuable than the remaining 120, except it contained more improvements, which were not very valuable.

"The testimony of Mr. Rodes was that he was employed by William to go out to the farm and write the deed and take the acknowledgments, and that William paid him for the work after it was done. As to what occurred after he arrived at the farm, he said, in substance, that when he entered the room he was cold, and he first warmed himself by the stove; then turned to Mr. Huffman, and said, 'It is growing late, and we had better get about that business.' 'I asked him, 'What land is it you want to deed to William?' He says, 'I want you to deed all of this land that is unincumbered to William.'" Witness then prepared the deed, filling in the names, and when he got down to stating the consideration he asked, 'Mr. Huffman, what consideration do you want put in this deed?' He said, '\$40, just what the land cost,' referring to the cost price years ago. William was not in the room at that time, only Mr. and Mrs. Huffman and the attorney. Mrs. Huffman made objection to signing the deed, because she said there was some mistake in the lines that gave William the house. Then she called William into the room. He pointed out the lines (it does not appear from the evidence from what document the pointing out was done, but presumably from a map). Then William went out of the room again, and then Mrs. Huffman said some provision should be made for Eddie, because of some improvement

Eddie had put on the Illinois farm. Rodes said he knew nothing about that. Then Mrs. Huffman called William into the room again, and requested that he remain there. Then she and William discussed her proposal to make provision for Eddie. William contended that the alleged improvement made by Eddie was of no value. The old man interrupted the discussion, saying, 'Eddie has forfeited any right he had there by leaving and going to California.' The discussion led to no agreement. At its close the attorney asked Mrs. Huffman if she was then willing to sign the deed. She said, 'Mr. Rodes, it isn't legal; my husband isn't able to make a deed.' Mr. Rodes then turned to Mr. Huffman, and said, 'Q. Do you know who I am? A. Yes; Friend Rodes. Q. Do you know what I came out here for? A. Yes. Q. What was it? A. To make a deed to William. Q. Do you want that need made? A. I do. Q. Do you remember a conversation you had with me in my office in the fall of 1900, in which you told me that William T. Huffman owned a half interest in this prairie farm? A. I do. Q. Do you recall that you stated that you expected to make him a deed? A. I do. Q. Is it your wish that the deed now be made? A. It is.' Mr. Rodes then turned to Mrs. Huffman, and said, 'Mr. Huffman is entirely rational and competent; knows what he is doing. Are you willing to sign the deed, and she answered, "yes." Then the deed was signed, Mr. Huffman saying he was not able to write. He touched the pen as Mr. Rodes made his mark, and Mrs. Huffman signed, and they both acknowledged it. Then it was handed to Mr. Huffman, and he handed it to William.

"Mrs. Huffman testified that her husband was forgetful; that his physical sufferings rendered him helpless, and in her opinion he was not capable of making a deed. Dr. McMurry, who knew and well understood his physical condition, his general breaking down, speaking of his mental condition, would venture no farther than to say that 'he was in no shape for a general line of business. He was sufficiently rational to appreciate what I said, and give me a rational answer; but, to judge of the degree and strength and liability, I could not draw a line there hardly.' The testimony of defendant's witnesses showed that he was of as sound mind as could be expected of a man of his age and physical infirmities. He had passed his allotted three score years and ten, and by reason of his strength he had gone beyond that age, yet, in the language of the Psalmist, his 'strength was labor and sorrow.'

"We do not mean to say that there was no evidence to support the plaintiffs' claim. The evidence was conflicting, but the chancellor who tried the case had a better opportunity than we have to judge of the reliance that ought to be placed in the testimony of each

witness. He had the witnesses before him; he heard them and saw them, under examination and cross-examination, and it is the experience of all triers of the fact that the personal appearance and manner of the witnesses have much influence, and rightly so, in weighing the evidence and reaching a verdict. It is our duty, under such circumstances, to defer to the findings of the trial judge, and so we do in this case.

"On the charge of undue influence there was no evidence, but the plaintiffs rely on what they consider was the fiduciary relation existing between father and son, which they contend threw the burden of proof on the son. The only evidence for plaintiffs on that point was that the old father and mother, when the former had become so helpless, by reason of his physical infirmities, that his every want had to be attended to by his wife, moved to their son's home. What the purpose was, or at whose instance or request this move was made, we have only to surmise. Giving the strongest inference in favor of the plaintiffs, we may surmise that it was on the invitation of the son; and, if so, then, in the absence of any evidence tending to show a sinister motive, it was to his credit. After the father had moved to the son's home the son attended to the renting of his farm for him, and to the negotiating of a real estate loan. That is all he did in the way of attending to his business until we come to the transaction which is the subject of this suit. It is but natural to presume that the son or his wife, or both, ministered to the wants and comfort of his father and mother while they were under his roof; that they at least relieved the mother of household duties that would have burdened her if she was living alone with her husband. The mother, who was hostile to this defendant in relation to this deed, gave no hint of any conduct on his part that could be construed as imposing his influence on the old man.

"In the brief of the learned counsel are cited many cases in this court in which it has been held that the circumstances in those cases created a fiduciary relation, and cast the burden on him who claimed under the instrument in question to show that it was the fair and the free will of the maker. There is no disputing that proposition. But it is not every case in which an aged, sick, and infirm parent, who is under the ministering care of a son or daughter, that raises such a presumption of undue influence as would justify the setting aside of a deed or will in the child's favor. *Bonsal v. Randall*, 192 Mo. 527, 91 S. W. 475, 111 Am. St. Rep. 528. The old father in the case at bar could not attend to the renting of his farm or negotiating the loan. What, then, more natural than that he should ask the son, in whose home he was living, to attend to those things for him? The mother testified that she had heard nothing of the contemplation of making this deed until the arrival of the attor-

ney. Why she was not informed of it, if in fact she was not, we do not know. If it was intentionally kept a secret from her it would be a suspicious circumstance; but she might have been mistaken about that fact, or have forgotten it, because she herself was old and care-worn. The defendant could not explain, because, one party to the contract in question being dead, the other was incompetent as a witness. What passed between the father and the son that led to the son's going to town and employing the lawyer to write the deed we do not know, but we do know from the very satisfactory testimony of Mr. Rodes, whose testimony bears on its face the character of candor and intelligence, that Mr. Huffman was not surprised by the coming of the lawyer. He was expecting him, and knew what he came for. When Mrs. Huffman expressed her opinion that her husband did not know what he was about to do, Mr. Rodes asked him questions in her presence on that subject, and received answers that not only satisfied him, but seemingly satisfied Mrs. Huffman also, because she then signed the deed. Whether it was the father who, realizing that his days were coming to a close, proposed to the son to go to the county seat and engage a lawyer to come out to the farm for this purpose, or the son proposed it to the father, we have no means of knowing because, if the mother did not know, the only living person who did know was the son, who was incompetent to testify, and therefore, in the absence of evidence, the only ground for plaintiff's contention is that a presumption arises in their favor on account of the supposed fiduciary relation casting the burden of proof on the defendant. If the burden of proof was on the defendant, the thing for him to prove was that the deed was an honest and fair transaction, and that it expressed the free will of the grantor. If that burden was on him, he has discharged it. He has shown that it was executed under circumstances free from suspicion, and has also shown by several witnesses, reputable and intelligent, that the father, several years before this transaction, said that one-half this land belonged to William; that it was purchased to that extent with the proceeds of William's interest in the Illinois farm. We conclude, therefore, that the making of the deed was but a delayed act of justice. So the chancellor thought, and so we think.

"The judgment is affirmed."

James L. Boyd, for appellants. J. H. Whitecotton and T. T. Rodes, for respondent.

VALLIANT, C. J. The foregoing opinion, delivered by me in division No. 1, is adopted as the opinion of the court in banc. All concur, except WOODSON, J., who files a dissenting opinion.

WOODSON, J. (dissenting). I am unable to lend my concurrence to the conclusions

reached by the majority opinion delivered in this case, for the reason that I believe my Brethren have overlooked some of the most important testimony, and have failed to give proper weight to the entire evidence as disclosed by the record. The evidence bearing upon the mental and physical condition of the grantor, Jacob F. Huffman, at the time of the execution of the deed is as follows:

Rebecca Huffman, the widow of the grantor, Jacob F. Huffman, and the mother of defendant, W. T. Huffman, testified on behalf of plaintiff as follows:

"Q. How old are you, Mrs. Huffman? A. I am 69. Q. When did your husband die? A. He died the 29th day of February, 1904. Q. How old was Jacob F. Huffman at the time of his death? A. I think he was 74. Q. Mrs. Huffman, you may state to the court what the condition of Jacob F. Huffman's health had been for 2 or 3 years prior to the time of his death. A. He was very poorly with rheumatism. Q. Describe to the court, if you can, his condition. A. He was almost helpless; his hands were cramped, drawn up with it; his right eye was out; he had been paralyzed. Q. When was he paralyzed? A. '58; he kept growing worse. Q. Mrs. Huffman, after you moved from your farm here, in September, the Dye farm to the farm W. T. Huffman lived on, what was the condition of his health? A. Very poorly, suffering everything; he had asthma, heart trouble, rheumatism, and was growing bad every day. Q. I will ask you, Mrs. Huffman, who attended to his business, if any one, after you moved from the Dye farm out to W. T. Huffman's? A. Wm. T. Huffman. Q. That is the defendant in this cause? A. Yes, sir. Q. Mrs. Huffman, do you remember the occasion when this deed was made from your husband and yourself to Wm. T. Huffman—the deed in regard to the land in controversy—you remember the occasion of it? A. Yes, sir. Q. Do you remember the day when it was made? A. 23d day of February, 1904. Q. You may state when you first ascertained or had any knowledge or information that there was to be a deed made and executed. A. I knew it when Wm. Huffman came to the door that afternoon, 23d day of February, and drew the door open, and said, 'Mr. Rodes has come.' I did not know then what he had come for. He came in. I invited him in. He asked 'how the old gentleman was.' I told him very poorly—he was blind in both eyes. Q. How long had he been blind? A. About two weeks he had been blind, I think. Q. Now, what was his physical condition at that time? A. He was cold, his limbs were; he was very sick, could not eat; could not hold nothing in his hands to eat. I fed him; I waited on him in his weak condition. Q. Where was he when Mr. Rodes came in there, Mrs. Huffman? A. Propped up in his chair. Q. Why was he propped up in his chair? A. He was not able to sit up, not able to walk across the floor, nor move his feet. His hands were all

drawn and cramped up, he could not hold a spoon to feed himself. I fed him like a baby. Q. You may describe his condition mentally when Mr. Rodes came. A. It was very unbalanced, his mind was; his condition in every way. Q. Just describe now, Mrs. Huffman, his condition there, bodily, physically, his bodily condition when Mr. Rodes came there. A. He was very poorly. Q. Just describe it, Mrs. Huffman. A. I can't; it would kill me. He was sick and weak; could not hardly move. I waited on him like a baby [witness crying].

"By Counsel for Plaintiffs: You will have to compose yourself before you can testify in the case. Q. State his physical condition? A. Well, he was sick; his limbs were swollen and cold as ice, and sore; he could not see; he was blind; could not hear you speak to him scarcely; he did not know any one in the room; he would forget he ate his supper, or breakfast, or dinner, and ask who I was when I come in and speak to him. Q. How long had his memory been in this condition? A. About two weeks. Q. How long had he been blind? A. About the same, two weeks, he could not see out of one eye, and the other one—he could not see with either. He was perfectly blind. Q. How long—you spoke of his being affected with asthma awhile ago—how long had he been afflicted with asthma? A. About 18 months. Q. You may describe his condition as to that disease to the court? A. Well, he smothered; he lost his breath. I would smoke with the asthma cure. Sometimes I would smoke two hours before he got any relief. Q. Where was he in the room when Mr. Rodes came there that day? A. Sitting in front of the stove at the foot of my bed, wrapped up in quilts and blankets. Q. State to the court why he was setting up, if you know. A. He could not lie down; he could not breathe when I laid him down; he had heart trouble, kidney trouble, and rheumatism and asthma. Q. You may state his mental condition that day. A. His mental condition was bad. Q. Just state the facts now, and describe to the court. A. He could not remember anything scarcely at all. He never said anything; he never talked any that day at all. If I asked him anything, he would not answer. All he wanted was a little milk. Q. How long had he been in this condition—he would not talk or have anything to say? A. About a week, as well as I remember. Q. Can you show the court the posture he was sitting in when Mr. Rodes came into the room? A. Sitting with his face in his hands that way [indicating]; his elbows on his knees. And I had wrapped him up and placed his feet on a chair so he could rest easy. Q. State to the court how long he remained in that position after Mr. Rodes came into the room. A. I laid his feet down after Mr. Rodes came in, and put them on the floor on a cushion. Q. You spoke of his limb being sore, explain that to the court. A. His limb was sore, very, and it had gotten terribly offensive to dress it. I had just got-

ten through dressing it when Mr. Rodes came, and laid him down, but he had no feeling at all in his legs. Q. Now, Mrs. Huffman, I will get you to state just what took place there after Mr. Rodes came that day, between Mr. Rodes and your husband and Wm. T. Huffman and yourself. A. As far as Mr. Huffman was concerned he never said anything. Q. Mrs. Huffman, who do you refer to? A. My husband, Jacob F. Hoffman. Q. Well you may just state what took place. A. Mr. Rodes asked me when he came in 'how the old gentleman was.' I told him very bad; he did not have anything to say. He said 'that was bad. I will shake hands with the old gentleman when my hands become warm.' I told him he could not shake hands; he could not grip anything, he was too feeble. Q. Well, go ahead now. A. And he said, 'he had come out there. Mr. Wm. T. Huffman had requested him to come, and wanted to know where he was.' I told him he was in here a few minutes ago; he went out somewhere in the yard, and he asked me to call him. I went to the door and called him. He came in the house, and Mr. Rodes spoke to him, and he then commenced to write, Mr. Rodes did, and William got up and walked out again, and he asked me where he was. I went out to the door again. I says, 'Do you wish to see him?' He says, 'Yes.' I went to the door; his wife was there. I told her we wanted Will (interrupted).

"By the Court: Who was that, defendant's wife? A. Yes, sir; and I said, 'He must come in and stay here, Myrtle. I will not call him any more. He has got to stay if he wants anything.' Q. Go ahead now. A. And then Mr. Rodes was writing, and says, 'William, Mr. Will, I am now ready for the lines of that 120 acres.' They went out on the porch to give him the lines. He marked it off. I wanted to see, too. I saw him tell him how the lines ran; saw him tell him William T. Huffman (interrupted).

"Q. The defendant in this case? A. Yes, sir; that man sitting there, and it was leaking water, dripped down off the roof. It dripped down upon Mr. Rodes' book and spoiled it. William Huffman says, 'Now that spoiled it.' 'Oh no, never mind,' Mr. Rodes says, 'I can soon write another.' So they went back and wrote it again, and then he read what he had written about the lines, and he asked William 'if that was right.' He said, 'It was; that was right' (interrupted).

"Q. And who asked Will, did you say? A. Mr. Rodes asked Will 'if that was right.' He said 'It was,' and then Will he was sitting by the stove, and I sat by Jacob F. Huffman, my husband, and he said he read a few lines he had written about these lines, the 120 acres and the 40. He says, then, 'Here is the lines. Is that right?' He said 'Yes.' Q. Who said 'Yes'? A. Will, William T. Huffman, the defendant you call him, and he says, 'Mrs. Huffman, you must sign it.'

Ed says 'No, I will not sign it, you didn't give me any improvements, that 80 acres and the 20 over on the right side of the road.' He said, 'The 80 was the best of the three, that 80 was.' Well, I said, 'It might be to somebody, but it ain't to me.' He wanted me to sign it. I told him I would not do it until Ed Huffman was provided for. Then he turned round, and asked Will 'what he thought about it.' Then we wrangled and fussed a little, and of course it was very unpleasant. I looked at my husband; he was sitting by my side. Q. I will ask you what, if anything, was said then in regard to your husband's ability to make a deed? A. I told him— Q. Told who? A. Told Mr. Rodes that he was not competent to make a deed—all three in there. Q. You told Mr. Rodes while William T. Huffman was in the room? A. Yes, sir; sitting right there. I told him he was not competent to make a deed, to sign a deed. He said 'he was.' Q. Who said that? A. Mr. Rodes. Q. Well go on now, just state what took place. A. And I says, 'I can't sign it until you have Ed provided for.' He said, 'how much do you claim for Ed.' Q. Who said that? A. Mr. Rodes. I said, '\$500 he had when he built his house, on the Fisher farm we call it, the farm that Will occupied, and Ed built at the time we sold to come here,' and then I told Mr. Rodes he could not sign the deed for he could not hold a pen. I have to feed him, and he can't see. He says, 'I will hold his hand and let him make a dot or his mark.' Well I says, it is illegal, that is not legal, and he did not like it, but I said it. I said, 'Mr. Rodes, you know it is not legal to take a man's deed now for he ain't capable of making a deed.' Well we fussed awhile, and I looked at my husband. He looked so poor and bad, and he was sitting there not hearing or seeing anything at all. I just thought, not to have trouble, have no wrangling and fussing, I will sign it.

"Q. Now I will get you to state whether that deed was read to you and your husband or not. A. No, sir; it was not. Q. I will ask you if anything was said to him in regard to signing the deed. A. Mr. Rodes told him that he wanted him to sign it, but I never heard Mr. Huffman say a word. I was right by Mr. Rodes. He said 'he was willing,' but he was not; he could not talk. Q. Did you hear or see him make any sign as if he recognized what was going on? A. No, sir; not that I saw. Q. Did you know that Mr. Rodes was coming before he arrived there? A. No, sir. Q. Did you know that anybody was coming to make a deed that day to Wm. R. Huffman? A. Nobody at all. Q. Did you know anything about any deed going to be made there? A. No, sir; not then. I thought Mr. Huffman was too far gone for anybody to think about making a deed. Q. What, if anything, was paid that day or any day after that time, to Wm. T. Huffman for the land? A. Nothing that I

ever knew of. Q. Do you know whether any notes were given or not? A. No, sir; no, sir. Q. You are one of the administrators of the estate? A. Yes, sir. Q. Was the deed read over to Jacob F. Huffman after it was written? A. No, sir; not that I know of. I was right there, and never heard it. Q. Did anybody explain to him what the instrument was they were making there, or anything of the kind? A. No, sir; I don't think they did. Q. I will get you to state whether or not he was in such physical or mental condition that he could have understood anything. A. I don't think he could. Q. Mrs. Huffman, I will ask you, Mrs. Huffman, whether or not you had moved all of your household and kitchen furniture from the lower place in September. A. Yes, sir. Q. I will ask you to state to the court if that was to be your permanent home. A. No, sir; it was not; no, sir. I told Mr. Huffman I would stay there until (interrupted).

"Q. I will ask you whether or not you were living with your husband on this land that was deeded to Wm. T. Huffman at the date of his death. A. Yes, sir. Q. I will ask you to state whether or not that farm was rented to Wm. T. Huffman the year before that. A. Yes, sir; he rented it. Q. Do you remember the occasion of Dr. McMurtry visiting your husband? A. Yes, sir; he was there on the 26th of February. Q. The date of this deed was the 23d day of February? A. Yes, sir. Q. Now, I will ask you, Mrs. Huffman, what was the physical and mental condition of your husband at the time Dr. McMurtry was there as compared to the time that Mr. Rodes? A. Just the same about when Mr. Rodes took the acknowledgment as when Dr. McMurtry was there. Q. Dr. McMurtry here? A. Yes, sir. Q. When had Dr. McMurtry been there before do you know? A. Along in the fall, in September, I think he was there—we got medicine from him all the time. Q. I will ask you, Mrs. Huffman, who took that deed that day, if you know? A. Mr. Rodes folded it up and handed it to Mr. Huffman. I can't tell you whether Mr. Huffman had it in his hands or not. I don't think he did. I saw his hands. Q. Which Mr. Huffman's? A. Jacob F. Huffman, will call him my husband; I did not see him do it. I saw Mr. Rodes hand Will the deed. Q. Saw Mr. Rodes hand Will the deed? A. Yes, sir; handed Will the deed.

"By the Court: Did you see his hands? A. I saw Mr. Huffman's hands, but could not say the deed was ever in his hands. Mr. Rodes had it in his hand. He handed it to my husband, then handed it to Wm. T. Huffman—Mr. Rodes. I think I am correct. They was all in a bunch right there."

Examination continued:

"Q. How did Mr. Rodes get hold of that deed? A. He folded it up. I never had my hands on it. Q. I will ask if you know who



sent for Mr. Rodes to come out there? A. I think Will was there the day before; that would be the 22d. Q. Where? A. In this town, and I never knew that Mr. Rodes was coming until that evening, late that evening, that Wm. T. Huffman opened my door, and hollowed in there; says, 'Mr. Rodes is coming,' and Mr. Huffman never moved. Q. I will ask you to state whether or not you have ever heard the defendant, Wm. T. Huffman, or did he say at the time he sent for T. T. Rodes? A. No, sir; never heard him say so, never heard him say anything about it. The deed never has been mentioned until now.

"By the Court: Did you have any conversation with your husband on the day of this convention? A. No, sir; he could not talk to no one, his tongue—he could not use his tongue."

Dr. McMurphy, of lawful age, being duly sworn, testified on the part of plaintiffs as follows:

Direct examination:

"Q. Where do you reside? A. Paris, Mo. Q. What is your occupation? A. Physician. Q. How long have you been practicing medicine? A. About 3½ years. Q. Are you a graduate of any medical college? A. Yes; Washington Medical College. Q. Were you acquainted with Jacob F. Huffman in his lifetime? A. I was. Q. Was you ever called there as a physician? A. I was. Q. When was the last time you was there? A. February 26, 1904. Q. What time in the day, Doctor? A. It was late in the evening; I think it was dark before I left there. Q. I will ask you to describe the physical condition of Jacob F. Huffman at the time you was there. A. Well he had been troubled for a number of years—I don't know how long, ever since I had known him, however—with chronic rheumatism affecting the joints. The joints were enlarged; his hands and feet and toes were drawn, not only affecting those joints, but other joints of the body. He had kidney trouble, chronic nephritis, and then some sympathetic heart trouble, enlarged arteries. And do you want me to go into the history of the case as it was? Q. Yes, sir; just as you found it there on the 26th of February. What I had reference to, give the history as it had been since you had been his physician, and on the 26th of February there. A. About a year or more before—I would not say definitely, at least a year anyway—he began to be troubled with asthma, and that gradually grew worse, and I gave him medicine; good deal of the time he was unable to lie down to sleep. I think it was about the third to the last visit, which was in August, 1903, I visited him, that was when he lived right south of town here about two miles, he told me then how long it had been since he had been able to lie down; I don't remember though. His eyes were swollen very much, and red. However, he could see with one eye. Whether he could see with both or not

I am unable to say. Then the next visit I made was along the first, fore part of September, 1903. His condition was practically, along the same line, though more advanced. He was troubled at that time also with his limbs swelling; his lower limbs were swollen. And the last visit was on February 26, 1904. When I arrived I went in the room. He was sitting up in a chair, with his elbows on his knees and his head—his face in his hands. I went in. I spoke to Mrs. Huffman, I think, in the other part of the house first, and warmed, I think. When I first went in he did not speak to me at all, but I went up to him and spoke to him, and he spoke to me. That is all he said. I then said something to Mrs. Huffman, and then directed my attention to Mr. Huffman, but he would answer me only when I would speak to him. I asked him how he was feeling. He did not raise up, but said, 'Very bad, Doctor, mighty bad,' and his limbs at that time were cold up to his knees, and also discolored, purple up about two-thirds of the way to the knee. I could feel no pulsation in the lower two-thirds of his leg—lower limb. In addition to that, he was also suffering with an attack of la grippe. I did not take his temperature, if I remember correctly. I examined his pulse. His heart action was not good at that time, it was ordinary, very ordinary, and sufficient to indicate poor circulation; his eyes—that is, the external appearance—swollen and red. He told me that he could not see, and I asked how long, but I forget how long he said since he could see.

"Q. Do you know what caused—what affected his eyesight? A. Well his eyesight had been falling for a number of years, I think, but the disease he had would naturally tend to impair the eyesight, as well as the general condition of the body, and la grippe was present affecting the eyesight. Q. What effect did the disease he had have upon the brain, if any? A. The chronic rheumatism, the cause of rheumatism, whatever it may be, medical science has not discovered that yet, an enlargement of the arteries, an enlarged artery, will not permit of proper circulation through any of the tissues, and the lack of that proper circulation produces a malnutrition of the blood tissues all over the body. Q. I believe you said something about uræmic position with the kidney trouble, did you? A. Well there is always more uræmic secretion in the kidneys, not formed in the kidneys to the best of our knowledge; and usually in rheumatic trouble we find an increase of that uræmia. Q. What was his condition as to being troubled with that uræmia? A. Well there was no symptoms of what we call 'uræmic convulsions,' or anything of that kind; no symptoms of what we call 'acute uræmia poison' in his condition there at that time.

"Q. Doctor, from your observation of him that day, and what conversation you carried on with him and examination you made,

what would you say as to his mental condition as to whether or not in your opinion he was able to make contracts and transact ordinary business? A. He would only talk when I talked to him, and then give me very short answers. He seemed to understand what I said, and I understood what he said. His answers were simply 'Yes' or 'No,' or 'feeling very bad' is about the extent of what he said. Q. You have not answered my question. I asked you whether or not in your opinion as a physician whether he was mentally able to make contracts and carry on ordinary business. A. Well he was in no shape for a general line of business. He was sufficiently rational to appreciate what I said and give me a rational answer; but, to judge of the degree and strength and liability, I could not draw a line there hardly."

The foregoing was all of plaintiffs' evidence regarding the physical and mental condition of the grantor, Jacob F. Huffman, at the time he executed the deed.

Defendant introduced the following testimony:

Jacob Schraeder, of lawful age, being duly sworn, testified on the part of defendant as follows:

"Q. Mr. Schraeder, where do you live? A. Well it is about three-quarters of a mile from Wm. T. Huffman's. Q. From this land in controversy? A. Yes, sir. Q. How long have you resided there? A. Well for 50 years. Q. Did you know Jacob F. Huffman in his lifetime? A. Yes, sir. Q. How long had you known him prior to his death? A. I don't know. I expect some 4 or 5 or 6 years. Q. Did you see him a short time prior to his death at Wm. T. Huffman's? A. I did. Q. At what times about now before his death? A. I was there Sunday afternoon. He died next Monday morning a week, if I recall right. Q. Next Monday week? A. Yes, sir. Q. Do you know how long before the time he made this deed? A. Sunday before the deed was made on Tuesday I think. Q. Did you see Mr. Huffman? A. Yes, sir; I saw him in the room where he was. Q. Did you talk with him? A. Yes, sir. Q. Tell the court what his condition was physically? A. He seemed to be suffering considerably with asthma. He said 'he was suffering with his eyes and head.' He had his elbows on his knees, and his hands over his face. Q. You say that was Sunday before he died? A. Sunday week before he died. He died Monday morning. Q. Sunday before the Tuesday the day the deed was made? A. Yes, sir. Q. Just go ahead and state what you saw of him. A. I saw he seemed to be suffering. I talked to him, I don't know how long, maybe—perhaps—maybe in the room two hours, maybe more. I went on purpose to see him. Q. Tell the court what you talked about. A. Just talked about the matters in general on the farm. One of the things we talked about rats

through the country eating up all our corn. He just remarked, 'Will is losing enough corn, rats eating up enough to feed 100 head of cattle,' conversation just at that time, just on the farm. Q. General topics? A. Yes, sir; nothing in particular at all. Q. State what his mental condition was at that time. A. His mental condition just as good as I had ever seen it, although suffering. Taking that in consideration he might not be as well, though he seemed to talk as rational as I had ever heard him talk. He seemed to be suffering with his eyes and head, and said 'he was feeling bad.'"

Cross-examination:

"Q. Did Mr. Huffman remain in the position you described? A. Only when I shook hands with him, he handed me his hand. It was drawn that way [indicating]. Q. He sat with his head in his hands? A. Yes, sir; he said he was suffering with his head and eyes. Q. Said 'rats were eating enough corn to feed 100 head of cattle'? A. Yes, sir. Q. Do you think that day you saw Mr. Huffman there he was in a condition to do business. A. Yes, sir. Q. He could have gotten out and attended to business? A. I don't know whether he could have gotten out. He was capable of attending to business in the house there. I did not see him get up, or anything like that, but I was there Sunday before that he was up and around and walked about. I say two weeks before I was there on Sunday evening; he was able to be up and walk around the house and went out of the house. Q. You say the Sunday before? A. Two weeks before he was able to walk outdoors. Q. Then he raised his head up in his hands when he shook hands? A. Did not, only reached out one hand. Q. How long did you stay there? A. I suppose I was there two hours. Q. He stayed in that position all the time you were there? A. Yes, sir."

Mrs. Mary E. Cadle, of lawful age, being duly sworn, testified on the part of defendant as follows:

Direct examination:

"Q. Give your name to the reporter, please? A. Mary E. Cadle. Q. Where do you reside? A. One-half mile west of Will Huffman's. Q. How long have you resided there? A. I have lived there about 10 years. Q. Did you know Jacob F. Huffman in his lifetime? A. Yes, sir. Q. How long had you known him? A. About 6 years. Q. Do you know how soon after you moved back did you see Jacob F. Huffman? A. I saw him on New Year's day, and was with him there a week. Q. Where was that? A. At Will Huffman's. Q. That was when you were back? A. No; come back to stay. We was waiting to get possession of our place. Q. You moved on your farm the 1st of February? A. Yes, sir; I was at Wm. Huffman's visiting. Q. What was Jacob F. Huffman's condition that week you were there? A. Well he was crippled up. Q. Had the rheumatism? A. Yes, sir.

Q. What about his mind, did you notice? A. His mind seemed all right to me. Q. About his conversation? State about his conversation. A. Well he talked to me like he always did. Ask him, 'How do you feel,' he would say, 'Well feeling bad,' or 'feeling pretty bad.' Q. Well do you know when he died? A. Well, yes. Q. About when? A. I don't know just the day of the month. Q. How long before that you had seen him? A. Evening before, at 7 o'clock. Q. Evening before he died? A. Yes, sir. Q. Now when were you there prior to that time? A. I was there Thursday and Friday. Q. What was his condition Thursday and Friday? A. Well just crippled up with rheumatism; that is all I could tell. Q. What about his mind? A. Well I could not notice anything about his mind being wrong. His mind seemed all right to me. Q. Did you have any conversation with him? A. Only just 'Good morning.' When I would go in, he would shake hands with me, and call me 'Mrs. Cadle.' I asked him how he was feeling, he would say 'he was feeling pretty bad' sometimes; that would be about all. Q. Was he sitting in the house? A. Why yes. Q. Now you said you saw him on Sunday. Did you have any conversation with him? A. When I went to leave, I went in and shook hands, and said, 'Good-bye, Uncle Jacob.' He said 'Good-bye, Mrs. Cadle, come back soon.' That is all he said."

Cross-examination:

"Q. You said nothing to him on Thursday, Friday, Saturday, or Sunday, except just to speak to him? A. Just go in the room, and say, 'How do you do,' and call him Uncle Jacob, and he would say, 'Good morning, Mrs. Cadle,' and I would ask him how he was feeling. Q. Was he blind then? A. I don't know whether he was blind or not. Q. You don't know whether he was or not? A. No, sir. Q. What position was he in then? A. Head over with his hands up this way [indicating] sometimes, and sometimes over this way. Q. His wife was there in the room with him all the time? A. No, sir; not all the time, but going back and forwards. Q. Who waited on him? A. Well his wife some. I think they all waited on him. Q. Mrs. Huffman, Rebecca Huffman, stayed in there most of the time? A. Yes. Q. Did you have any conversation with him other than the three days before he died, Thursday, Friday, Saturday, and Sunday, four days? A. Nothing, only just go in and say 'How do you do,' and ask him how he was. Q. As you passed in and out of the room, did you hear him say anything with anybody, carry on any conversation? A. Nobody to carry on one with but him and I and Mrs. Huffman. Q. Did you hear him carry on a conversation with his wife? A. Only just when he wanted a drink; ask for water. When I was in there I would get it. Q. How long before that Thursday when you saw him? A. The Sunday before that.

Q. About the same condition that he was on Thursday? A. I did not see any difference in him. Q. You did not see any difference on Saturday and Sunday before he died? A. Well only just he seemed a little bit weaker; did not walk around that day any. Q. Walked round Sunday? A. He walked the week before that Sunday I was there. Q. What day of the week? A. I don't know just exactly. Q. When was you there before that time? A. I was there on New Year's day, and he walked then. Q. He walked then? A. Yes, sir. Q. Do you know anything about the condition of his limbs? A. They was swollen up and cold. Q. You did not know he was blind then? A. No; I did not know he was blind. Q. You did not know that? A. No, sir. Q. You did not know what condition his mind was in, you did not talk to him? A. Yes, sir; I did talk to him, I always asked how he felt. Q. You never entered into a conversation with him? A. Not with him about his business. Q. Well about anything except speak to him and ask him how he was? A. I would talk to him and ask him how he was feeling every day."

Will B. Schraeder, of lawful age, being duly sworn, testified on the part of defendant as follows:

Direct examination:

"Q. Your name is Will B. Schraeder? A. Yes, sir. Q. You are a son of Jacob Schraeder? A. No, sir. Q. Who is your father? A. Tom Schraeder. Q. Mr. Schraeder, did you know Jacob F. Huffman in his lifetime? A. Yes, sir. Q. How close did you live to him? A. Why about a half a mile the houses are apart. Q. Did you visit him during his last illness? A. Yes, sir. Q. How long did you see him before he died? A. I was there on Saturday, and he died early Sunday morning. Q. Wasn't it Monday morning? A. Let me see. Yes, sir; Monday morning. Q. Well did you stay there with him? A. Yes, sir; I stay up that night. Q. Tell the court there what his mental condition was at that time? A. Well he was, seemed pretty feeble; sat up in a chair; did not have much to say, only when Will Huffman would speak to him, ask him what he wanted, he would tell him what he wanted, or if he did not want anything he would say 'No.' Q. He sat up in a chair? A. Yes, sir. Q. You waited on him any, did you, while there? A. Well, no, sir. Q. You was there with him? A. Yes, sir. Q. Did he, when had you seen him next before that Saturday night? A. Well I could not exactly state the time, it was some, quite awhile, I was helping gather corn that fall. Q. Had not seen him since that time? A. No, sir."

Cross-examination:

"Q. Did not say anything only when Will Huffman would go and ask what he wanted? A. Answer Mr. Huffman's questions. Q. Just say 'Yes' or 'No.' A. Yes, or tell him what he wanted, if he wanted any-

thing. Q. You could not tell anything about the condition of his mind, not having any conversation with him? A. He answered very rational. Q. You had no conversation with him though? A. No, sir; I had no conversation with him. Q. You was in there all night? A. Biggest portion of the night; yes, sir. Q. You said nothing to him, or him to you? A. No, sir; I don't believe I even spoke to him. He seemed to be asleep when I went in; I did not bother him. Q. Just sat up there with his head in his hands? Show the position. A. Head over this way; hands down this way, one of them [indicating]. Q. Just sat up all the time? A. Yes, sir."

T. T. Rodes, of lawful age, being duly sworn, testified on the part of defendant as follows:

Direct examination:

"Q. You may state your name in full, residence, and occupation. A. T. T. Rodes, residence Paris, Mo., occupation lawyer. Q. How long have you been engaged in the practice of law? A. Since '85. Q. I will get you to state whether or not you are acquainted with the defendant in this suit, Wm. T. Huffman. A. I am. Q. How long have you known him? A. I think about a year last August, Mr. Whitecotton. I have known him by sight quite awhile. Q. Did you know Jacob F. Huffman? A. Yes, sir. Q. How long did you know him? A. I have known him since the summer of 1900. Q. Since 1900? A. Yes, sir. Q. I will get you to state to the court, Mr. Rodes, whether or not you ever had any conversation with him, in which he made any statement as to the ownership of this 240 acres of land prior to the making of the deed. A. I did. Q. Tell the court what it was? A. I never was associated with Jacob F. Huffman as an attorney in any instance. Q. At any time? A. No, sir. Q. When did you see him again following that? A. It was the 23d day of February, 1903. Q. Well you may state where you found him? A. George T. Huffman came to my office the day prior to the making of this deed. No, W. T. Huffman told me his father wanted to make a deed; said to me, 'You come out to-morrow afternoon to fix the papers.' I said to him, 'Won't to-morrow morning do as well? I have got to go to Moberly.' He says, 'No, you come out to-morrow afternoon.' He said, 'My father is suffering from asthma. He does not sleep at night, and what rest he has is in the morning, and I don't want him disturbed in the morning. You come out in the afternoon.' I told him, 'All right, I would be out to-morrow afternoon.' I started out there. I got out to the south part of town. I found a little branch running very swift; great deal of water passing. I found I could not cross at Elk fork, which is direct route to Mr. Huffman's, and made inquiry of parties, and found it was past fording. I then had to go round by the Mexico bridge

to Turkey creek, and get in Mr. Huffman's road as soon as possible. I crossed at the Mexico bridge, and got to Turkey creek, and found that past fording. Then that caused me to go 6 or 7 miles out of the way to get to Mr. Huffman's residence, which made it very late in the afternoon getting there. Mr. Wm. T. Huffman met me at the fence. As I said, Wm. T. Huffman met me at the fence, and went with me to the door, where his father and mother, in the room where his mother and father were, and, as I recall it, he went in the room with me, and immediately passed on at the southwest corner of the room. I was very much chilled, and sat there a little while warming by the stove. As soon as I got sufficiently warm, I turned to Mr. Huffman and said—

"By the Court: Who was in the room at that time? A. Jacob F. Huffman and his wife, Rebecca Huffman, and myself only. I turned to Mr. Huffman, and said to him, 'It is growing late, and I expect we had better get about that business.' I said, 'What land is it you wanted deeded to William? He said, 'I want you to deed all of this land to William that is unincumbered.' I told him that I knew the numbers of the land, and could prepare the deed. I prepared the deed, putting in the names of the parties, got down to the point where it was necessary for the consideration. I turned to Jacob F. Huffman, and says, 'Mr. Huffman, what consideration do you want put in this deed?' He said, '\$40, just what the land cost,' naming the number of years ago when he bought it. The number of years I don't now recall—5 or 6 years. I completed the deed with the exception of the taxes. I asked about the taxes. He said 'he did not want to pay any more taxes.' All future taxes were then excepted. I then turned to Mrs. Rebecca Huffman, and asked if she was willing to sign the deed. She said, 'No, Mr. Rodes. This is all new to me. They never talked business before me, and I don't know anything about it'—says there has been a mistake in the place that gave Will the house. I told her I did not know the lines. They could show it to me. She stepped to the door, and called Wm. T. Huffman in the room. I told him that I wanted to see the lines of the land that I was deeding, and he and I stepped out of the northwest door. He pointed out the lines to me while out there. It was raining, and dripped through the leak in the porch and fell on the deed I had prepared and spoiled it. I returned and told Mrs. Huffman the result of my investigation; also said that the deed that I had made was spoiled, and I would have to rewrite it. Wm. T. Huffman went out of the room immediately. I prepared another deed just like the one that had been spoiled by the water being splashed on it. I made it the same in every respect—the land consideration and everything else. I again asked Mrs. Huffman if she was willing to sign the

deed. She said 'Mr. Rodes, I think Eddie ought to be provided for.' She said that 'Eddie built a house on our farm in Illinois, and think he is entitled to something.' I said, 'I know nothing about that. How much do you think your son Eddie ought to have?' 'I think he ought to have as much as \$250.' I says, 'Call W. T. Huffman and talk the matter over, and see if you can adjust the matter as to what Eddie ought to have,' and she stepped to the door and called Mr. Huffman, 'Will, I wish you would stay in here; you are needed.' He came in; took his seat near the stove. Mrs. Huffman was sitting in the east part of the room. Mr. Jacob F. Huffman sat at the foot of the bed about 10 or 12 feet from Mrs. Rebecca Huffman, and I occupied a place near the west side of the house near a window. Then Will Huffman and his mother begun discussing their affairs in Illinois, Mrs. Huffman taking the position that Eddie built the house there, and ought to have something for it. W. T. Huffman, maintaining his side, said, 'The house Eddie built was no account. I had to build two other rooms. It was no account, and very small, and I completed that, building other rooms; built the corn crib and other buildings, barn,' etc. They had it there for some time, talking back and forth in regard to Eddie's rights. During a lull in the conversation, Jacob Huffman spoke up and says, 'Eddie has forfeited any rights he may have had there by leaving and going to California.' That is the only time he took any part in the conversation when not directly addressed. After they got through talking no conclusion was agreed to between them as to Eddie's rights. I again said to Mrs. Huffman, 'Are you willing to sign the deed?' She said, 'Mr. Rodes, it ain't legal.' She says, 'My husband ain't able to make a deed.' I says, 'Mrs. Huffman, that is no fight of yours. Your husband is competent, and knows what he is about.' I says, 'If you have any doubt in regard to it, I will hold a conversation with him in your presence.' I then moved my chair over there to where Mr. Huffman was sitting. 'Jacob Huffman,' I says to Mr. Huffman, 'Do you know who I am?' He says, 'Yes, Friend Rodes.' He called me 'Friend Rodes.' 'Do you know what I came out here for?' He says 'Yes.' 'What was it?' 'To make a deed to William.' I says, 'Do you want that deed made?' 'I do.' I said to Mr. Huffman, 'Do you remember a conversation you had with me in my office in the fall of 1900, in which you told me that "Wm. T. Huffman owned a half interest in this prairie farm?"' He said 'I do.' I said, 'Do you recall that you stated that you expected to make him a deed?' He said, 'I do.' I says, 'Is it your wish that the deed now be made?' He said, 'It is.' I then turned to Mrs. Huffman. I said, 'Mrs. Huffman, Mr. Huffman is entirely rational and competent; knows what he is doing. Are

you willing to sign this deed?' She says, 'Yes.' I asked him if he was able to sign his name. He said he was not. I wrote his name, and went to where he was, and had him to touch the end of the pen to make a cross. I asked him if that was his free act and deed for the uses and purposes therein mentioned. He said it was. I did attest his signature by signing it myself. I then again returned to Mrs. Huffman, and asked if she was willing to sign the deed. She said she was, but could not see where she was. She then come to where I was sitting and signed it. I then took her acknowledgment; asked her if that was her free act and deed, and she said it was. I then took it to Jacob F. Huffman; handed it to him. He took it in his right hand. I says, 'Mr. Huffman, here is the deed to this land to Wm. T. Huffman.' I says, 'If you want him to have the deed, it is your duty to deliver it to him.' He shifted it from his right hand to his left, and held it out in the direction where Wm. T. Huffman was sitting. Wm. T. Huffman come and got the deed. I said to Jacob F. Huffman, 'Will now has the deed. Is that your wish?' He said, 'It is.' I then prepared myself and left. A. I will further say that Wm. T. Huffman paid me for my services for going there."

By R. N. Bodine, Counsel for Plaintiffs: "Q. Did he employ you? Did Wm. T. Huffman employ you to come out there and make that deed? A. He paid me for my trip out there."

Examination continued by Mr. Whitecotton: "Q. I hand the witness Exhibit I, and get you to state what is that, if you know? A. Yes, sir; it is a deed from Jacob F. Huffman and Rebecca Huffman to W. T. Huffman to 120 acres of land. Q. I will ask you if that is the deed you have referred to in speaking of deed? A. It is."

Cross-examination:

"Q. Now when there was objections offered to the making of that deed, you did everything you could to get Mrs. Huffman to sign and remove all difficulties in the way, did you not? A. I have stated the entire transaction as I remember it, Mr. Boyd. Q. Now you said you told Mrs. Huffman that it was no concern of hers, or what did you say? A. I said, when she said to me, 'Mr. Huffman was not capable of transacting business' (interrupted)—

"Q. What did you tell her? A. I said, 'Mrs. Huffman, that is none of your fight. Your husband is competent; knows perfectly what he is doing. 'None of her fight' I think is what I said. Q. You are a lawyer, Mr. Rodes? A. Yes, sir. Q. And you told her that it was no concern of hers. Didn't you know that if she put her name to that deed, it would pass her interest? A. I knew if she deeded it correctly it would. Q. She knew you were a lawyer, did she? She knew you were practicing? A. I don't

know whether she knew it or not. I only met Mrs. Huffman three times. I met her once at home on the Dye farm, when I took her acknowledgment, and met her at the home of W. T. Huffman when I took her acknowledgment to a mortgage, and met her this third time at Wm. Huffman's. Q. Did she know you were practicing here in Paris, and practicing law? A. She did not hear it from me. I don't know what she knew, Mr. Boyd. Q. She had met you several times? A. Never been in my office. Q. Met you several times? A. Those three times. Q. You knew all the rest of this land was mortgaged? A. I did. Q. You are an attorney in this case, Mr. Rodes? A. Yes, sir. Q. And you have been the legal adviser of Wm. T. Huffman from the time this deed was executed until the present time? A. Have been the legal adviser of Mr. W. Huffman since the death of his father in connection with Mr. Whitecotton. Q. He paid you for your services in connection with the execution of this deed? A. I said he did. Q. At the time that Mrs. Huffman said her husband was not capable of making a deed, what did Mr. Huffman say? A. Which Mr. Huffman, the old gentleman? Q. Yes. A. The old gentleman did not say anything. Q. He heard it? A. Yes, sir; because the conversation was spoken no lower than the conversation between Wm. T. Huffman and his mother—he heard that—I suppose he heard this. I heard her words in that conversation. Q. You said he heard it? A. It was about in the same tone. I presume he did; he heard this other. I will say in that connection I think that the mind of Jacob F. Huffman was as usual at that time, and I was more particular from that time than I would have been had not Mrs. Huffman raised the point. Q. On account of that you instructed him to take it in his hand and deliver it. Why did you do that? A. I sometimes do it, because Mrs. Huffman had made objection, and I wanted to take all necessary steps. Q. In the interest of Wm. T. Huffman? A. In the interest of all parties concerned. Q. And it was in the interest of all parties concerned, no doubt, that you advised Mrs. Huffman that her objection was of no value, none of her affairs or concern? A. Draw your own inference. I have stated the conversation. Mr. Boyd, she was in the attitude of resisting in making the objection that she did, first that he was incompetent, and then about Eddie, and then about her husband's mind. Q. And you were there in the interest of Wm. T. Huffman? A. No more in the interest of Wm. T. Huffman, I suppose, when I went out there at the request of Jacob F. Huffman to make that deed. Q. It appeared that she knew nothing about it? A. She said she knew nothing about it. "They never talk business before me. I know nothing about this matter; it is all new to me."

With great care, and in my judgment with

perfect accuracy, I have selected and literally copied every word of the evidence, as disclosed by this record, bearing upon or tending to show the physical condition and the mental capacity of Jacob F. Huffman to make a deed on the date, and prior to the time, when the deed in question was executed.

When we strip the real issue involved in this case of all collateral matters, it resolves itself into the question, Was the mental capacity of Jacob F. Huffman on February 23, 1904, sufficient to enable him to execute a valid deed? That question is sharply drawn. Counsel for plaintiffs earnestly contend that Jacob F. Huffman upon that day did not possess sufficient mental capacity to make a valid deed, while counsel upon the other side, with equal earnestness, insist that he did possess that capacity. That question must be weighed and determined by all the facts and circumstances as shown by the evidence. The two main witnesses, as I conceive it, who testified in the cause were Rebecca Huffman, the widow of Jacob Huffman, and one of the plaintiffs in the case, and the other is T. T. Rodes, the attorney who drew the deed, and one of the attorneys for the defendant in this cause. We will first view her testimony in the light of the corroborative facts and circumstances, and then we will consider his testimony in view of the same light. We will first consider the evidence as it bears upon the grantor's physical condition, and then discuss its bearing and effect upon his mental capacity.

In brief Rebecca Huffman testified as follows: Jacob Huffman at the time of making the deed was 75 years of age. That for two or three years prior to his death his health had been very poor, and he had suffered greatly with rheumatism and was almost helpless; his hands were cramped, drawn up from its effects; his right eye was out, and he had been paralyzed since 1858, and he grew worse all the time. That she and her husband, Jacob Huffman, moved to the home of defendant in September, 1903, and he died February 29, 1904. That while residing there his health was very poor, suffering everything—asthma, heart trouble, rheumatism—and he grew worse every day. That during the last two weeks of his life his limbs were cold, he was very sick; could not eat; could not hold anything in his hands to eat. That she had to feed him, and waited on him during his weak condition the same as she would wait upon a baby. He could not lie down; could not sleep in bed, but had to be propped up in a chair, day and night. That he was not able to sit alone, but had to be propped up; could not walk across the floor nor move his feet. That his hands were all drawn and cramped up, and could not hold a spoon to feed himself. That when asked to describe his physical condition in detail, she broke down crying, and said she could not do so, as it would kill her. But when

pressed for an answer she said he was sick, his limbs were swollen and cold as ice. That one of them was sore, and that its condition was such that it was terribly offensive to dress and care for it. That he could not see. That he was totally blind in one eye, if not in both, and could scarcely hear any one speak to him. That he did not recognize any one in the room, and would forget that he had eaten his meals. That when she would go up to him and speak, he would ask who she was. His memory and eyesight had been in that condition for about two weeks prior to his death, and he had suffered from asthma for about 18 months; breathed with great difficulty—sometimes she would have to smoke the "asthma cure" for two hours before he could get relief. That on account of the asthma and his heart and kidney troubles he could not lie down and breathe. That she had to keep him propped up in a chair wrapped in blankets, with his feet resting upon a chair or cushion. That was his condition when Mr. Rodes came to draw the deed. That she had just gotten through dressing his limb when he came in.

Dr. McMurry, the family physician, gave testimony which was, briefly, as follows: That he had not visited Jacob Huffman since some time in August, or September, 1903, until the 26th of February, 1904, three days after the deed had been executed, and three days before his death, which occurred February 29th. That Huffman had been troubled for years with chronic rheumatism, affecting the joints; they were enlarged; his hands, feet, and toes were drawn. He had kidney trouble, chronic nephritis, and some sympathetic heart trouble—enlarged arteries. About a year prior to his death he began to be troubled with asthma, and gradually grew worse until he was unable to lie down to sleep in rest. In August, 1903, he visited him, and found that his eyes were swollen very much and red. However, he could see with one eye. That in September he visited him, and found his condition practically the same though more advanced. That his last visit was on February 26, 1904. That when he reached Mr. Huffman's room he found him sitting up in a chair with his elbows on his knees and his face resting in his hands. When he went in Mr. Huffman did not speak to him, and, after warming, the doctor went up and spoke to him and he spoke to the doctor, and that was all he said. That he would only speak when the latter would speak to him. That he asked him how he was feeling, and without changing his position, he said, "Very bad, Doctor, mighty bad." That at that time his limbs were cold up to his knees, and also discolored, purple up about two-thirds of the way to the knees. That he could feel no pulsation in the lower two-thirds of his legs, and in addition to that he was suffering with an attack of la grippe. That he examined his pulse, his heart action, which was not good, and his circulation was

poor. That his eyes were red and swollen, and he said "that he could not see." That he asked him how long it had been since he was unable to see, and he stated the time, but had forgotten what his answer was. His eyesight had been failing for a number of years, and the diseases he had would naturally impair his sight, as well as the general condition of his body. That the rheumatism caused the enlargement of the arteries, which prevents proper circulation through the tissues of the body, and produces malnutrition of the blood, tissue, and other portions of the body. He also had more or less uræmic poison, caused by his kidney trouble, but no uræmic convulsions or acute uræmic poison at that time. The foregoing is the pith and substance of plaintiffs' evidence regarding Jacob Huffman's physical condition at the time he executed the deed in question.

Now let us briefly state the testimony of defendant's witnesses upon that point. It is as follows:

T. T. Rodes testified as follows: That he was a practicing attorney at Paris, Mo., and knew William and Jacob Huffman, the latter since the summer of 1900, when he assisted him in negotiating a loan upon his farm. That he saw him but a few times after that. That the last time was on February 23, 1904, when he went to his home to draw the deed in question. That William Huffman said his father wanted him to go out and draw the deed, and that he went out in pursuance to that request and drew the deed. That Mr. Huffman was not physically able to sign the deed, and that he (Rodes) held the pen while Huffman touched the pen, and then the former signed and witnessed the latter's signature.

Jacob Schraeder testified that he had known Jacob Huffman five or six years. That he was at his home eight or nine days prior to his death. "Q. Tell the court what his condition was physically. A. He seemed to be suffering considerably with asthma. He said 'he was suffering with his eyes and head.' He had his elbows on his knees, and had his hands over his face. Q. Just go ahead and state what you saw of him. A. I saw he seemed to be suffering. I talked to him I don't know how long, maybe, perhaps, maybe in the room two hours, maybe more. I went on purpose to see him. Q. Tell the court what you talked about. A. Just talked about matters in general on the farm. One of the things we talked about was rats through the country eating up all our corn. He just remarked, 'Will is losing enough corn, rats eating it up, enough to feed 100 head of cattle'—conversation just at that time, just on the farm. Q. General topics? A. Yes, sir; nothing in particular at all." On cross-examination he testified that Huffman's hands were drawn up, and had to shake hands with him that way (indicating). He had his head in his hands, and "he was suffering with his head and eyes." He said

"rats were eating up enough corn to feed 100 head of cattle." That he did not know whether Mr. Huffman could have gotten out of the house or not, did not see him get up or do anything, but the Sunday prior to that, which was two weeks before the deed was made, he was able to be up and went out of the house.

Mrs. Cadle testified as follows: That she had known Mr. Huffman about six years, but had not seen him for some months prior to February, 1904. That she saw him during that month, and he was crippled up with rheumatism. He talked like he always did. That when she would ask him how he felt, he would reply, "Well, feeling badly," or "Feeling pretty bad." On cross-examination she said that she saw him Thursday, Friday, Saturday, and Sunday before his death. That when she would go in she would call him Uncle Jacob, and he would say, "Good morning, Mrs. Cadle," and I would ask him how he was feeling, and he would say, "Feeling poorly" or "Pretty bad." That she did not know, and could not tell, whether he was blind at that time or not. He held his head over, and his hands up this way (indicating), and sometimes over this way. His wife and all of them waited on him. That she had no conversation with him during any of those days, except go in and say "How do you do?" and ask him how he was, and never heard him carry on any conversation. That she never entered into a conversation with him.

Wm. B. Schraeder testified as follows: That he was at the home of Jacob Huffman on Saturday, and that he died the following Monday morning. That he sat up there that night. "Q. Tell the court there what his mental condition was at that time. A. Well, he was, seemed pretty feeble; sat up in a chair; did not have much to say. Only when Will Huffman would speak to him—ask him what he wanted—he would tell him what he wanted, or if he did not want anything, he would say 'No.'" On cross-examination he testified that he said nothing only when Will Huffman would ask him what he wanted, and in answer he would just say "Yes" or "No." That he had no conversation with Mr. Huffman nor speak to him. That he was sitting in his chair, seemingly asleep, with his head in his hands (showing the position).

All of this evidence conclusively shows that during the last two weeks of Jacob Huffman's earthly existence he was afflicted with most of the ills that the flesh of man is heir to, and there is no conflict whatever between the testimony of the witnesses who testified on behalf of plaintiffs and those who were called on behalf of defendant as to the extreme seriousness of his condition, and that life was suspended by a slender thread over the invisible line which separates life from death. The surprising part of this drama to me is how was it possible for him to thus linger so long at the very threshold of death. He was practically blind; his eyes red and

swollen; his hearing greatly impaired; his heart and kidneys had long ceased to properly perform their proper functions; a stroke of paralysis in 1858 struck and shattered his nervous system, and continued to grow worse until death relieved him; rheumatism was mistress of his muscles, sinews, and joints, and had drawn his hands, fingers, and toes into shapeless appendages, and his joints were swollen into irregular shapes and knots; the arterial system had become enlarged, thereby preventing proper circulation of the blood, and withheld nourishment from the various portions and tissues of the body; and asthma had taken possession of, and had long resided within, his bronchial tubes, and little by little, and day by day, choked off from him the breath of life. The combined effect of all of those ravages were, first, to deprive him of his rest and sleep, his food and nourishment, to fill his system with poisonous acids; and, secondly, to produce sickness, pain, immobility, and death. By these comments upon the evidence I have accentuated the seriousness of Mr. Huffman's sickness and the extremities in which he existed during the last two weeks of his life, but have in no manner exaggerated either. As before stated there is no conflict in the testimony regarding the foregoing matters. That given by the witnesses for defendant points to the same results as that given by those who testified for plaintiffs. The only difference consists in the amount of testimony given by the former, and not as to the direction in which it points, nor the facts which it tends to prove. That, however, was natural, and is explainable by the fact that the former witnesses, the wife and physician of Jacob Huffman, were closer in touch with him, administering unto his wants, thereby giving them better opportunities of observing and knowing his true condition than that possessed by the witnesses who testified for defendant.

Having pointed out, it seems to us, with a high degree of certainty what the physical condition of Jacob Huffman was on the day he executed the deed, and what it had been for some time prior thereto and up to the date of his death, we will now review and weigh the evidence, and see what his mental condition was during that same period of time, and by the light thereof try and determine whether or not he possessed sufficient mental capacity to execute the deed in question.

The evidence for plaintiffs upon that question as disclosed by the evidence is as follows:

Mrs. Rebecca Huffman testified as follows: That when Mr. Rodes came to draw the deed, Mr. Huffman's mental condition was very poor, and his mind was unbalanced, and he did not know any one in the room; he would forget he had eaten his meals, and ask who she was when she would go and speak to him. He had been in that mental condition



for about two weeks before he died. He could not remember anything scarcely at all. He never talked any that day, and if she asked him questions, he would not answer her, and all he wanted was a little milk. That he had not talked any for about a week before Mr. Rodes came. That when Mr. Rodes requested her to sign the deed, she at first refused to do so, and told him that her husband was not competent to make a deed, and that Mr. Rodes said "he was." That she told him her husband could not sign the deed, for he could not hold a pen, as she had to feed him, and that he cannot see. That in reply he said, "Well, I will hold his hand, and let him make a dot or his mark." That she then said to him, "It is illegal, and you know it is not legal to take a man's deed when he is not capable of making a deed." Mr. Rodes face flushed for a while, and then she looked at her husband and saw that he looked so poor and bad, sitting there not hearing or seeing anything, so she just thought she would sign it so as to have no trouble wrangling or fussing about it. He never read the deed to Mr. Huffman, but told him that he wanted him to sign it, but "I never heard Mr. Huffman say anything in reply." That he did not know or understand what was being done.

Dr. McMurry testified that on the last day, February 23d, he visited Mr. Huffman he would only talk when the latter would ask questions and would then give him very short answers, but seemed to understand what was said to him, and his answers were simply "Yes," or "No," or "Feeling very badly." That was the extent of the conversation held with him. He was in no shape to transact a general business. He was sufficiently rational to appreciate what he said to him, but he was not able to judge of the degree and strength of Mr. Huffman's mind.

The defendant introduced the following testimony regarding his mental condition upon that day:

Jacob Schraeder testified that he had known Mr. Huffman five or six years prior to his death, which occurred on Monday morning, February 29, 1904. That the last time he saw him before his death was the second Sunday prior thereto, and which was the Sunday before the deed was executed. That he was there about two hours, and Mr. Huffman was suffering considerably with asthma, and he said "he was suffering with his eyes and head," and he had his elbows on his knees and his head resting in his hands, and had his hands over his face. That he talked to Mr. Huffman about matters in general on the farm. One of the things talked about was the rats through the country eating up all the corn, and Mr. Huffman remarked, "Will is losing enough corn by rats eating it up to feed 100 head of cattle." That in his judgment Mr. Huffman's mental condition was as good as he had ever seen is, although suffering. Taking that in con-

sideration, he might not be so well, though he seemed to talk as rational as I had ever heard him talk. He seemed to be suffering with his eyes and head, and said "he was feeling badly." On cross-examination he testified that two weeks before his last visit to Mr. Huffman's he was at his home, and the latter was able to be up and walked around the house and went outdoors. That he did not know whether he could have gotten out or not during his last visit, but he was capable of transacting business in the house; but he did not attempt to get up from his chair during his last visit.

Mrs. Cadle testified that she knew Mr. Huffman about six years prior to his death, but had not seen him for some time prior thereto, as she had been living elsewhere, and did not move back to that neighborhood until the 1st of February, 1903, which was a year before Mr. Huffman died. That she saw Mr. Huffman on New Year's day before his death. That at that time he was crippled up with rheumatism, but his mind seemed to her to be all right. "Q. About his conversation; state about his conversation. A. Well he talked to me like he always did. Ask him 'How do you feel,' he would say 'Well feeling bad' or 'Feeling pretty bad.' That she also saw him Thursday, Friday, Saturday, and Sunday prior to his death. At those times his mind seemed to be all right, never noticed anything to indicate his mind was wrong, but had no conversation with him, only to say good morning when I would go in, and he would shake hands with me and call me 'Mrs. Cadle.' I asked him how he was feeling. He would say 'He was feeling pretty bad.'" On Sunday evening before she left, she went in and shook hands with him and said good-bye, and he said "Good-bye, Mrs. Cadle, come back soon." On cross-examination she testified that on Thursday, Friday, Saturday, and Sunday she had no conversation with him, except to say how do you do, and asked him how he was feeling. He would say "Pretty badly." Did not know whether he was blind or not. He would sit in his chair, leaning over with his head in his hands. All of them seemed to be waiting on him.

W. B. Schraeder testified that he knew Mr. Huffman before his death. That he was there the Saturday night before he died. "Q. Tell the court there what his mental condition was at that time. A. Well he was, seemed pretty feeble; sat up in a chair; did not have much to say. Only when Will Huffman would speak to him, ask him what he wanted, he would tell him what he wanted, or if he did not want anything he would say 'No.' He was sitting up in a chair when he saw him." On cross-examination he testified, that when Will Huffman would ask him questions, he would "just say yes or no."

T. T. Rodes testified that he went to the home of Jacob Huffman, and, after warming, he said to Jacob Huffman that it was late,

and they had better transact the business for which he was sent for, and then asked him what land it was he wanted to deed to William, and that in reply he said the uncumbered land. That in response to his question Mr. Huffman told him to state the consideration in the deed at \$40, just what the land cost him, and that he did not want to pay the taxes which were then assessed against it. That when Mr. Rodes asked Mrs. Huffman if she was willing to sign the deed she said, "No"; it was all new to her, and that after making several excuses for not signing it, said Eddie's rights had not been properly cared for. Whereupon Mr. Huffman said that Eddie had forfeited all claims on him by reason of his going to California. That after that remark of Mr. Huffman's, he (Rodes) again asked her if she was willing to sign the deed, to which she replied, "Mr. Rodes it ain't legal. My husband ain't able to make a deed." To that he (Rodes) replied, "Mrs. Huffman, that is no fight of yours. Your husband is competent, and knows what he is about; and, if you have any doubt in regard to it, I will hold a conversation with him in your presence." "I then moved my chair over there to where Mr. Huffman was sitting. I says to Mr. Huffman, 'Do you know who I am?' He says, 'Yes, Friend Rodes.' 'Do you know what I came out here for?' He says, 'Yes.' 'What was it?' 'To make a deed to William.' I says, 'Do you want that deed made?' 'I do.' I said to Mr. Huffman, 'Do you remember a conversation you had with me in my office in the fall of 1900, in which you told me that Wm. T. Huffman owned a half interest in this prairie farm?' He said, 'I do.' I said, 'Do you recall that you stated that you expected to make him a deed to said land?' He said, 'I do.' I says, 'Is it your wish that the deed now be made?' He says, 'It is.' I then turned to Mrs. Huffman. I said, 'Mrs. Huffman, Mr. Huffman is entirely rational and competent; knows what he is doing. Are you willing to sign this deed?' She says, 'Yes.' I asked him if he was able to sign his name. He said he was not. I wrote his name, and went to where he was, and had him to touch the end of the pen to make a cross. I asked him if that was his free act and deed for the uses and purposes therein mentioned. He said it was. I then again returned to Mrs. Huffman and asked if she was willing to sign the deed. She said she was. I then took the acknowledgment," etc. Mr. Rodes also testified that he had known Mr. Huffman by sight for three or four years, and had met him in business matters two or three times prior to his death.

The foregoing is a recapitulation of all of the evidence disclosed by this record, and hereinbefore set out in full, bearing upon the mental capacity of Jacob Huffman to make the deed in question.

It should be borne in mind that none of the witnesses who testified for defendant re-

garding the mental condition of Jacob Huffman were experts, and that they only gave their opinions as to his mental condition. They did not base their opinions upon their observations of his conduct and expressions, for the reason that they neither saw him do an act, nor heard him express any idea, upon which they could base an opinion after he was taken with his last illness. During that 15 or 16 days of his earthly existence his life was as barren of acts and deeds as the desert of Sahara is barren of vegetation. He sat propped up in his chair, wrapped up with blankets, with his feet resting upon a chair or cushion, and his head resting in his drawn hands, scarcely able to breathe, never speaking, except when spoken to, and only then in monosyllables, giving expression of his terrible pain and suffering, or to make known the internal cravings of an empty stomach. The law is well settled in this state that while a nonexpert witness may testify regarding the mental condition of a person, yet he must first testify as to the facts existing in his own knowledge which form the basis of his opinions. Such opinions must be based upon the conduct and expressions of the person whose mind is the subject of inquiry. *Sharp v. Railway Co.*, 114 Mo. 94, 20 S. W. 93; *State v. Williamson*, 106 Mo. 162, 17 S. W. 172; *State v. Erb*, 74 Mo., loc. cit. 204, 205. This court, in discussing this question in the case first cited, through Black, P. J., said, on pages 100 and 101 of 114 Mo., on page 94 of 20 S. W.: "A nonprofessional witness may give his opinion as to the mental condition of another in connection with a recital of the facts upon which he bases his conclusion. This is the well-settled law of this state. *Crow v. Peters*, 63 Mo. 429; *Moore v. Moore*, 67 Mo. 192; *Appleby v. Brock*, 76 Mo. 314. But the value of such opinion depends wholly upon the opportunity the witness had to observe the conduct of the person whose mind is in question, and upon the incidents actually observed. These circumstances should be stated, first, to make the opinion competent as evidence; and, second, to enable the jury to estimate the value of the opinion. Indeed a nonprofessional witness may relate the facts without expressing any opinion at all, leaving it to the jury to draw the conclusion, with or without the aid of experts." From these authorities it is seen that the facts upon which the nonexpert's opinion is based is the principal element of such testimony, and that the opinion of the witness is only a secondary matter; and, when such facts do not warrant such opinion, then the opinion should be excluded. *State v. Erb*, supra.

If we view the evidence in this case under the rules above enunciated, it is apparent that none of the witnesses who gave their opinion regarding the mental condition of Jacob Huffman were qualified to give such an opinion, for the reason that they did not possess sufficient knowledge of his conduct

and expressions upon which to base an intelligent opinion touching his mental condition, and for that reason their opinions in that regard should have been excluded, had timely objection been made to their admissions, but notwithstanding the admission of such opinions without objection, they were nevertheless absolutely without weight or probative force, and should not be considered in summing up the weight of the evidence. If we, therefore, strike out the opinions given by the nonexpert witnesses as worthless, and let stand all their testimony regarding what they said they saw Jacob Huffman do and heard him say during the last two weeks of his life, would any one for a moment contend that said acts and words would be evidence of his mental capacity to make a deed? I think not, for the reason that such acts and expressions we observe in dumb brutes and insane persons, and are not necessarily indicative of mentality. In this connection it might be suggested that Jacob Schraeder's opinion was based upon a conversation regarding business matters had with Mr. Huffman on February 21st, 8 days before he died. That is true, but what was the character of that conversation? It was to the effect that he heard Mr. Huffman say that the rats had eaten up enough of Will Huffman's corn to feed 100 head of cattle. That is a most remarkable story for a sane man to tell. If he said that to Mr. Schraeder, then if it points to anything, it is toward insanity or unbalanced mind, for the reason that it is common knowledge that an ordinary steer on feed will eat one-half bushel of corn per day, and at that rate 100 head would eat 50 bushels per day, and if fed only during the minimum period cattle are fed, which is 120 days, the amount they would consume would be 6,000 bushels. I must confess that that is quite a large quantity of corn for rats to destroy on one little farm. The effect of that evidence cannot be destroyed by saying that Mr. Huffman was speaking facetiously, or in a spirit of jocularity, for the reason the testimony of every witness who testified regarding his physical condition at that time showed he was suffering inexpressible pain from his physical ailments, which were more serious and deadly than were those of Job. His physical pain and mental anguish were such that it would be wholly unreasonable to believe he meant to be facetious or jocular at the time testified to by Mr. Schraeder; and, as we have no evidence upon which to question the credibility of Mrs. Schraeder's testimony, we must hold that if said testimony has any weight whatever, standing alone as it does, it would indicate a morbid or deranged mind.

But there is another view to be taken of the evidence in this case, and that is all of the physical facts of the case and all of the undisputed testimony are corroborative of the testimony of Mrs. Huffman and Dr. Mc-

Murry, which is to the effect that Jacob Huffman did not possess sufficient mental capacity to understand the nature of the business he was transacting when he authorized his name to be signed to the deed. We all know from personal experience and ordinary observation that sickness, physical pain, and suffering affect the mind, and the more serious the sickness, and the more severe the pain and suffering, the greater is the effect upon the mind; and if that rule is applied to Mr. Huffman at the time the deed was made, then he must have been a physical, nervous, and a mental wreck, and his conduct and expressions would indicate as much. All he did was to sit propped up in a chair, with head bowed in his hands, and every now and then give expressions of the pain and anguish he was suffering, and occasionally call for some milk to drink. It is a noteworthy fact that no witness who testified for plaintiffs or defendant regarding Mr. Huffman's condition during his last sickness ever saw him for one moment, day or night, when he was not sitting propped up in his chair, wrapped in blankets, with his elbows resting upon his knees, and head bowed in his hands, or heard a word escape his lips which was not expressive of physical pain and mental anguish, excepting what Mr. Schraeder testified to regarding the conversation he had with him regarding the rats, and what Mr. Rodes testified to regarding the answers given by him during the examination he put him through touching his capacity to make the deed, or pass the salutations of the days when spoken to. Did any sane man on earth ever act in that manner, or could a sane man so act? I think not.

The evidence in the case should also be weighed according to the following well-settled rule, and that is those witnesses who bear close family, social, or business relations to the person whose mind is under investigation, as well as the family physician, possess the most favorable opportunities for knowing his mental condition, and usually their testimony as to his mental capacity is entitled to greater weight. *Holton v. Cochran*, 208 Mo. 314, loc. cit. 417, 418, 106 S. W. 1035. According to this rule, what witnesses would be most likely to observe and know the changes, if any, in Mr. Huffman's conduct and expressions, his loving and dutiful wife, who was ever at his side, and diligently watched every move, and attentively listened for every word spoken, and tenderly administered to his every want; and his family physician, who diagnosed his case and treated him for his many ailments, or two or three neighbors, who called a few times to see Mr. Huffman in his last sickness? The answer must be in favor of the wife and family physician, according to all known rules of weighing evidence, and such is the common sense of the situation. They had no opportunity to observe and know of the changes that his wife and the doctor testified

to, and consequently the idea that his mind was unbalanced never entered their minds. They simply saw his physical changes and distress, without having their attention called to his mental changes.

But independent of the observations before made, this case possesses a few inherent infirmities which are worthy of note. First. The evidence of defendant tended to prove that the day before Jacob Huffman made the deed he sent for Mr. Rodas to come out and draw the deed. We do not doubt but what he was sent for by some one, but the strange part of the story is that Mr. Huffman, suffering as he was at the time, and being in the constant care and under the close observation of Mrs. Huffman, should send for Mr. Rodas to come and transact such an important matter of business without so much as mentioning the matter to her, which could not have been properly performed without her assent and signature. How did he know she would sign the deed? No one had ever before consulted her or obtained her views regarding the matter. And, again, it is passingly strange that such a message could have been sent to Mr. Rodas without Mrs. Huffman knowing something about it, without it was intentionally withheld from her, since she was his constant attendant during all his last sickness. If intentionally withheld from her, then that would indicate a fraud had been perpetrated upon her rights. The evidence also shows that after Mr. Rodas reached the room where Mr. Huffman was sitting, and began talking with Mrs. Huffman about the deed, the defendant continued to absent himself from the room, and, after being sent for twice, he was admonished to stay there until the matter was disposed of. That conduct was not in keeping with the ordinary affairs of life, nor indicative of upright and honest dealing. The old proverb, "The wicked flee when no man pursueth" seems to perfectly fit his case. If his father had sent him for Mr. Rodas to come and make the deed, why should he absent himself from the room where he was needed to give the information regarding the boundaries of the land to be conveyed, and where his interests demanded his presence? But, no; like the Arab of old, he quietly folded his tent, and silently stole away, and left his mother, in her distressed and helpless condition, to wage an unequal legal contest with his shrewd and able lawyer. Again it is conceded on both sides that Mrs. Huffman, not only objected to signing the deed herself, but she also earnestly objected to her husband doing so, and, among other reasons, she insisted at all times that he was not mentally capable of doing so. Under those conceded facts it is remarkably strange that an old and experienced lawyer would tell her that was not her fight when she was fighting to preserve her own valuable rights and those of her helpless husband. And still more strange, if true, that Mr. Rodas

should then and there, through his own volition, undertake to put Mr. Huffman through a mental examination to test his capacity to make the deed. Mrs. Huffman testified that nothing of the kind took place, and all the facts and circumstances in this case corroborate her in that statement and contradict the improbable story of Mr. Rodas.

But it is argued that the evidence shows that the defendant was really the owner of about one-half of the equitable interest in the "prairie farm," and that the deed was made by Jacob Huffman for the purpose of conveying to defendant that which in equity belonged to him. If that was true, then defendant would have been entitled to have the deed under which his father held the entire title reformed, so as to show the fact that he owned the one-half thereof; and, before this deed can be sustained upon that theory, the evidence should have been clear, strong, and convincing, leaving no doubt in the mind of the chancellor as to the justice and equity of his claim. But unfortunately for defendant there is no such evidence contained in this record. The only evidence bearing upon that question consists of two or three loose and disconnected declarations alleged to have been made by Jacob Huffman to some two or three different persons covering a period of three or four years. That evidence is not sufficient to warrant any court in upholding this deed upon the ground that defendant was the real owner of one-half of the equitable interest in said farm, and that this deed only conveyed to him that which he was in equity and justice entitled to. This court has many times held that loose declarations of deceased persons, regarding property standing in his name, as being that of some one else will not be sufficient to establish title in such person, and that all testimony of verbal admissions and statements of persons since dead is entitled to but small weight in establishing such a right. *Woodford v. Stephens*, 51 Mo. 443; *Ringo v. Richardson*, 53 Mo. 385; *Modrell v. Ridde*, 82 Mo. 36.

Let us take a bird's-eye view of this case. In September, 1903, we find the defendant, Wm. T. Huffman, a strong, vigorous young man, going over to the home of his aged father, who was sick and infirm, unable to attend to his farm and ordinary business affairs, and, in consequence thereof, he moved his father and mother to his own home, and there kept him until his death, which occurred on the 29th day of February, 1904. During those few months the son had charge of his father's business, looked after and rented his farm, and negotiated a loan for him, which was secured by mortgage on a portion of his farm. The uncontradicted evidence showed that the land conveyed to the son was worth \$5,000 or \$6,000, and was worth from \$1,000 to \$1,800 more than the interest the son claimed he owned in the farm. The physical condition of the father

was such that he could not lie down, but had for weeks sat propped up in a chair, wrapped in quilts and blankets; he was blind and deaf; he could not feed himself, or otherwise administer to his own wants and necessities, but those kindly offices were performed by his wife, the same as if he had been a baby; his hands and feet were drawn and twisted out of shape by the ravages of rheumatism; his joints were enlarged and swollen; he was unable to hold anything in his hands, not even a spoon with which to feed himself, or a pen with which to sign the deed in question; there was no circulation of the blood in the lower two-thirds of his lower limbs, and they were cold and blue, one of them having an offensive running sore on it; asthma had all but shut off his breath, and his kidney troubles had filled his system full of poisonous matters, which caused his blood vessels to thicken, retard his circulation, and thereby prevented proper nourishment of his body. In that condition he sat in his chair for two weeks before his death, and for 10 days before the deed was executed, complaining all the time of his suffering and misery. These facts are not disputed by any one, but are substantiated by the testimony of every witness who testified in the case regarding his physical condition—those for defendant as well as those for plaintiff.

In my judgment those facts do not point very strongly toward a mind sufficiently sound to execute a deed, especially when it involved the settlement of accounts between the grantor and the grantee, as was necessary in this case. When we briefly consider his mental condition from what he said and did during those same two weeks, it presents the same weak and shattered condition in which we found his body. According to all of the testimony, independent of that of Mr. Rodes' he uttered not a word, except in saying "Yes" or "No" in response to questions, or that he was feeling "Mighty badly" or "Very badly," or would occasionally say "Good morning" or "Good evening" when spoken to; also excepting upon one occasion, according to the testimony of one witness, Jacob Huffman invited her to call again, and according to that of another he said the rats upon the farm had destroyed sufficient corn to feed 100 head of cattle. Not another word that I can now recall fell from his tongue during the last two weeks of his earthly existence. And if one should gather together every word uttered by him upon all subjects during that time, I dare say that they would not cover the space occupied by 6 lines of the manuscript I am now writing. And should you add to those lines every word which Mr. Rodes testified that Jacob Huffman said while he was there, then I also venture the assertion that, all told, they would not fill the space occupied by 10 printed lines in one of the Missouri reports. I

have abridged this evidence to a very small compass, in order that the mind may grasp it at a glance, and comprehend without difficulty the abject mental and physical condition of Jacob Huffman at the time it is said he touched the pen which signed his name to the deed in question. Under those facts and conditions the deed was presented to Rebecca Huffman for her signature. For weeks she had been the constant attendant of her sick and diseased husband, caring for and administering unto his comfort and necessities, both day and night. Burdened with his care, and grieving over his sickness, suffering, and rapidly approaching death, she at the time opposed and battled, single-handed and alone, with respondent, her son, and his able and experienced lawyer, against the execution of the deed, insisting that she knew nothing of the proposed transaction, and that her poor, sick husband was mentally unsound and incapable of making the deed. But alas! when the battle had waxed warm, and she looked over and saw her poor sick husband, she gave up the fight, withdrew all objections, and signed the deed rather than to have a fuss and scene before her frail suffering husband.

These are the undisputed facts of the case, except as testified to by Mr. Rodes regarding Jacob Huffman's mentality. And in the light of those facts I ask, Is the deed which was executed by Jacob Huffman and Rebecca Huffman to Wm. T. Huffman, dated February 29, 1904, a valid and binding instrument? My learned Associates upon the bench, for whose ability and judgment I entertain the highest regard, answer in the affirmative, and base their opinion upon the testimony, as I gather it, of the nonexpert witnesses who testified in the case, who neither had sufficient opportunity to observe and judge of his sanity, and whose testimony was not sufficient upon which to base an opinion in that regard. The law of this state is well settled, as before shown, that nonexpert witnesses are incompetent to give opinions as to the sanity of a person, except where they first testify to the facts upon which they base their opinions, in order that the court or jury may determine from those facts what weight, if any, should be given to their opinions. In my judgment none of those witnesses testified to a state of facts which of themselves indicated a sound mind, or were sufficient upon which to base an opinion that Jacob Huffman was capable of executing the deed in question. Jacob Huffman would only speak to his physician when spoken to, and then he would only say he was feeling "Very bad, Doctor," or "Mighty bad." Upon those answers Dr. McMurry testified that he was unable to state the degree of his mental strength, that he answered intelligently the two or three questions asked him, but that he did not think he possessed sufficient mental strength to transact

general business. Such answers are made by children and imbeciles every day, and would no more indicate a capacity to make a deed in the one case than in the other; and Dr. McMurry so testified, and could not, in my judgment, have honestly testified to anything else, for the reason that he did not see him do anything, or hear him say anything, which was sufficient upon which to base an opinion touching his mental capacity. If his family physician was unable to base an opinion upon that meager evidence, how much more so would be the inability of the nonexpert witnesses to do so? The mere asking the question answers it in the negative. While the burden of proof rested upon appellants to show the incapacity of Jacob Huffman to make the deed, and that Rebecca Huffman, his wife, was induced to execute it through fraud and undue influence, yet, in my judgment, they proved both of those facts by the overwhelming weight of the evidence; and in my judgment the opinion of my Associates stands without a parallel to support it in equity jurisprudence. So, if we look at this case from any view point, we are unable to see any merit in defendant's case. The learned trial court took the opposite view of the case, and held the deed valid. While this court in equity cases where the witnesses have testified orally will defer somewhat to the findings of the chancellor, yet it will not be concluded by such findings where it is convinced that those findings are not supported by the weight of the evidence, but will proceed to make its own findings, and reverse and remand the cause, or enter here such judgment as justice and equity of the case may demand. *Benne v. Schencko*, 100 Mo. 250, 13 S. W. 82; *Gibbs v. Haughwout*, 207 Mo. 384, 105 S. W. 1067.

Entertaining the views I do regarding the law and facts of the case, in my opinion the findings should be for the plaintiffs, and a decree entered here setting aside and canceling the deed in question. I must therefore dissent from the conclusions reached by the majority opinion.

#### WHITE v. SPENCER.

(Supreme Court of Missouri. March 9, 1909.)

##### 1. EXECUTION (§ 115\*)—SALE—RELATION.

Where a judgment is a lien on land, a sale under execution thereon relates back to the date of the judgment lien and cuts out an intervening deed by the judgment debtor.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 257; Dec. Dig. § 115.\*]

##### 2. HOMESTEAD (§ 1\*)—DEFINITION.

The term "homestead," as used in the exemption statutes, means that tract of land which, being within the statutory limitations both as to quantity and value, is held, occupied,

and claimed as a homestead, as to which no judgment lien attaches.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3327-3336; vol. 8, pp. 7679, 7680.]

##### 3. HOMESTEAD (§ 103\*)—LIEN OF JUDGMENT—EXCESS LAND.

Rev. St. 1899, § 3751 (Ann. St. 1906, p. 2090), provides that judgments of courts of record, on the filing of a transcript in the office of the clerk of the circuit court of any other county, shall be a lien on the real estate of the judgment debtor situated in the latter county. Section 3618 (Ann. St. 1906, p. 2034) declares that the homestead, consisting of a dwelling house and appurtenances and the land, not exceeding 18 square rods, or a total value of \$3,000, in certain cities shall be exempt from attachment and execution, and section 3617 declares that, on the levy of an execution on real estate of which such homestead may be a part, the householder may choose the part to which the exemption shall apply, and, if he shall refuse to do so, it shall be set off by appraisers. *Held* that, where a debtor was occupying land in excess of his homestead exemption, a judgment rendered against him became a lien on the excess prior to the levy of an execution, which lien was superior to a conveyance of the excess by the debtor before levy.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 158; Dec. Dig. § 103.\*]

##### 4. HOMESTEAD (§ 196\*)—EXCESS LAND—SELECTION—EFFECT.

Where, after judgment, the debtor conveyed land in excess of his homestead on which the judgment was a lien, the debtor and the purchaser were bound by the selection thus made, so that a purchaser of the excess at an execution sale under such judgment was entitled to recover the land in ejectment.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 367; Dec. Dig. § 196.\*]

Appeal from Circuit Court, Buchanan County; Henry M. Ramey, Judge.

Action by William M. White against Richard L. Spencer. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

The following is the opinion in division, by GRAVES, J.:

"The facts pleaded and proven in this case can be stated in small compass, which, when considered, leaves but one sharp issue of law. William E. Gibson was the owner of the west 10 feet of lot 32, and all of lots 33 and 34, in block 6, in Carby's addition to the city of St. Joseph, Mo., which tract made a parallelogram 60 by 140 feet. The frontage of 60 feet was on Beattie street, and that of 120 on 20th street. Upon this tract was the residence of Gibson, and the whole was fenced as one tract, and held, used, and claimed by him as his homestead up to May 24, 1902, he being the head of a family. May 1, 1902, the plaintiff herein recovered judgment against Gibson in the circuit court of Carroll county, Mo., for \$3,217.83. On the 3d day of May following, a transcript of such judgment was filed with the clerk of the circuit court of Buchanan county, wherein was situated the property of Gibson, described as

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

aforesaid. On May 24, 1902, Gibson, being indebted to defendant for legal services in the sum of \$400, did, for and in consideration of that debt, deed to defendant the west 10 feet of lot 32 aforesaid, and 33 feet off of the north end of lots 33 and 34 aforesaid. On May 12, 1904, plaintiff in this cause had a general execution issued upon his transcript judgment, and the land previously conveyed to defendant Spencer was levied upon and sold to plaintiff, the consideration at the sheriff's sale being \$5. The record also shows that, prior to the deed to Spencer, Gibson's homestead had never been admeasured or set off to him out of the tract first described herein above. It also stands admitted that the tract remaining and at the time of trial held and claimed by Gibson as his homestead was a little in excess of 18 square rods.

"In describing the transaction when this deed was made, Mr. Gibson, as a witness, said: 'Q. You say that you owed Mr. Spencer at that time? A. Yes, sir. Q. And you made him this conveyance to pay his debt? A. I did. Q. State whether or not you figured up the size of the homestead which you would be allowed at that time and undertook to convey him the excess? A. I did not, but another man did. Q. That was your purpose? A. Yes, sir. Q. And what you undertook to retain there, what you did retain there, you now hold as your homestead? You undertook to release that? A. I did. Q. Now, Mr. Gibson, what is the value of that land which you retained there? A. The land I retained? Q. Yes, with your house and improvements on it. A. I suppose it is worth twenty-four or five hundred dollars. Q. Do you recall what you scheduled it at when you filed an application to be adjudged a bankrupt? A. I think it was three thousand dollars. Q. At that time you had already sold off this to Mr. Spencer? A. No, I think not. I don't recollect. Q. You remember you made your deed to Mr. Spencer in the same month the judgment was rendered against you down there? A. I guess I did. Q. You did not apply for a discharge in bankruptcy until some year or two afterwards? A. I don't recollect what I scheduled it at, but I never valued the place as a whole at \$3,000, and I will take to-day \$2,500 for what I have got there. Q. Now, at the time you made this deed to Mr. Spencer, you expected Mr. White to undertake to levy upon this excess, and have it set off? A. I suppose so. Q. And it was for the purpose of giving it to Mr. Spencer instead of him? A. For the purpose of paying a just debt instead of what I considered an unjust debt. Q. It was for the purpose of giving it to Mr. Spencer instead of letting Mr. White get it? A. The man I justly owed. Mr. Spencer: We object to that.' The Court: I don't see the relevancy of it. Q. You say it was for the purpose of paying a just debt instead of an unjust one? A. One I recognized as my debt. Q. Instead of one you thought was unjust? A. Yes, sir,

instead of one I thought then, and think now, and always will, was unjust. Q. The judgment Mr. White had? A. Yes, sir.'

"Direct examination by Mr. Spencer: 'Q. Was there anything done by you, or for you, towards setting out your homestead prior to the making of the deed by you and your wife to me of your homestead? (Objected to by plaintiff. Objection overruled.) Q. Was there anything done by you, or any one for you, towards setting out a homestead there prior to the making of the deed to Richard L. Spencer? A. No, sir. Q. What was done and said at the time of making the deed with reference to it? (Objection.) The Court: State what was done. (Plaintiff objects.) The Court: He is not undertaking to prove the contents of the deed; he is undertaking to find out when the homestead was set out. The Witness: It was set out immediately preceding the deed. The Court: Was it set out preceding the deed? The Witness: I said immediately— I mean before the making of the deed Mr. Spencer come to me and told me that I owed him justly, and that he would take the excess of my homestead for the fee, and he figured it out. The Court: What did you do about setting off your homestead before this deed was made? The Witness: Didn't do anything; only just at the time it was made, I made the deed immediately. The Court: Then what did you do? The Witness: Made the deed. Q. Were there any measurements staked off or division made of the property prior to the making of the deed? A. No, sir. Q. Was there anything done at the time of making the deed, except at the time of making the deed a measurement was made there of what you would grant me, and that there was a homestead and a little in excess left there to you? A. Yes, sir. Q. Was that all that was done? A. Yes, sir. Q. Up to the moment of making the deed was that all made under one inclosure, and held and claimed by you as a homestead? A. Yes, sir.'

"Cross-examination by Mr. Eastin: 'Q. I don't quite understand you. You said that just before the deed was made this ground that was to be conveyed to Mr. Spencer was inclosed? A. He came to me with the proposition; I told him to measure off and leave me the homestead, and I would deed him the balance. I done so. Mr. Spencer: Was the making of the deed and the doing of that one transaction? The Witness: Yes, sir. Q. But you had to get what was the homestead out before the deed was made? A. Yes, sir. Mr. Spencer: Was it all one transaction? The Witness: Yes, sir. The Court: You say he figured it out? The Witness: Yes, sir. The Court: Were there any stakes driven or anything there before the deed was made? The Witness: No, sir, never was a stake driven. Q. What did you do to mark out your homestead before this deed was made? A. Didn't do anything; when he came he couldn't get the excess on one side of the

house or the other side; that is the reason the 10 feet was taken off the east side of the property and the balance off the rear. Mr. Spencer: You wanted to retain your homestead? The Witness: Yes, sir. Didn't want somebody else jammed up against me. Mr. Spencer: Was the making of this deed and the cutting off of the excess all one transaction? The Witness: Yes, sir. Mr. Eastin: You didn't need any stakes? The Witness: No, sir, didn't need any stakes. Mr. Eastin: When you fixed this deed, or when you determined what should go in the deed, you had a clear idea how much you conveyed off on each side? The Witness: Yes, sir. Mr. Eastin: You had to have your idea before you made your deed? The Witness: I did have it. Mr. Eastin: And you didn't claim this that was conveyed away—didn't expect to claim it as your homestead? The Witness: No, sir. The Court: Did you claim it up to the time the deed was made? The Witness: Yes, sir. Mr. Spencer: You claimed that up to the time of making the deed as part of your homestead? The Witness: Yes, sir. Mr. Eastin: You know Mr. White had a judgment against you at that time? The Witness: Yes, sir. Mr. Eastin: And that he had the power to set this excess off? The Witness: That is a question. He didn't do it. Mr. Eastin: You knew he had the power to do it? Mr. Spencer: We object to that. The Court: He stated before that he made this conveyance, and did it for the purpose of preventing Mr. White from getting any judgment lien on this property.'

"The suit in hand is one in ejectment for the land conveyed by Gibson to Spencer.

"The answer pleads all the facts hereinabove set out, and closes with this prayer:

"Wherefore, defendant, having fully answered, asks to be discharged with his costs, and prays the court that said judgment and the sheriff's deed thereunder be declared a cloud upon defendant's title, and that the same be declared no lien or incumbrance against the title of defendant, and that the title of defendant as to said judgment and sale thereunder be declared to be in defendant, and for such other and further relief as may be proper and just in the premises.'

"By its judgment the court, nisi, found the issues for the defendant and against the plaintiff, and further decreed that the title to said property was in defendant and that plaintiff's sheriff's deed was a cloud upon such title, and that the same be declared null and void and to be no lien or incumbrance upon defendant's title. Costs were also adjudged against plaintiff. Timely motion for new trial proving of no avail, plaintiff brings the case here.

"We have quoted liberally from the testimony, and purposely so on account of the conceived importance of the case. Bolled down, the evidence of Gibson, the judgment debtor, is to the effect that he used and claimed the whole tract as a homestead up to

the time of making the deed to defendant; that he and defendant agreed that there was a surplus in quantity, and for that reason the whole tract could not be held as a homestead; that he preferred to pay defendant, whose debt he recognized as an honest obligation, rather than the judgment debt, which he did not so recognize; that they estimated the amount of the surplus, and he immediately made the deed thereto; that thereafter he held and claimed the remainder as his homestead; that, whilst such remainder might be a few feet in excess of the quantity allowed in cities having a population of 40,000 inhabitants, it was less in value than \$3,000, the prescribed limit in value. Under this testimony and the other facts heretofore narrated, we conceive the real questions raised to be these: (1) Was this transcript judgment a lien upon the amount of this tract of land which was in excess of the homestead? (2) Under the facts, was there or could there be an abandonment of this part in such a way as would make plaintiff's judgment effective?

"But after all, an answer to the first question practically settles the controversy, for, if there was no judgment lien, a deed for a valuable consideration, made prior to an execution levy, as in this case, would be good. We mention the question of abandonment because it is urged in the briefs. To our mind the case turns upon the sole question, as to whether this judgment was a lien against the surplus in quantity. If it was a lien, then the sale under execution relates back to the date of the judgment lien and cuts out the deed of defendant. If it was not a lien of some kind, the land was clear, and a bona fide deed to all or any portion thereof is good, if made before actual levy, as in this case. This question we propose to discuss, but with some diffidence, in the light of the broad language of some of our previous decisions. As against a homestead proper, under the rule in this state, there is no such thing as a dormant lien. By homestead proper we mean that tract of land which, being within the statutory limitations both as to quantity and value, is held, occupied, and claimed as a homestead. As to such a tract of land, no judgment lien attaches. To be explicit and to make an application in the case at bar, if Gibson had owned a tract of land 18 square rods in dimensions or less, and in value \$3,000 or less, then in no event could a judgment lien attach. This for the reason that the real purpose of the law is to secure so much property as absolutely exempt from attachment and execution, and leave it in a shape so that it may be sold and the proceeds thereof invested in another homestead. Such is the spirit of our homestead act, as by this court construed. But should this broad rule apply in a case where there is a judgment and at the date of the judgment the judgment creditor has a tract of land in excess of a



homestead, either in value or quantity? Confining it to the case at bar, should the doctrine apply where the judgment debtor owns property in excess of the quantity allowed by statute? In such case is there no lien, which could and does attach to the surplus, until after execution and levy? This is the vital question in the case at bar.

"Following the broad language of the case of *Macke v. Byrd*, 131 Mo. 682, 33 S. W. 448, 52 Am. St. Rep. 649, no judgment lien attaches to any part of a tract owned, occupied, and claimed as a homestead until after execution, levy, and admeasurement of the homestead, at which time the surplus may be sold, not by virtue of a judgment lien, but by virtue of the levy and subsequent proceedings thereunder. Is this doctrine correct? If so, we may have a judgment debtor who owns 1,000 acres of land in one body, under one inclosure, and used and occupied as a homestead. Such tract would of course exceed the statutory limitation as to quantity. Yet if no lien attached to the tract prior to levy and notice, he could sell off tract after tract until he reduced his possessions to 160 acres in quantity, or, if shrewd enough, until he reduced it to \$1,500 in valuation, and thus defeat a judgment which, under the general statute, is a valid lien upon all property, except his limited homestead, for a period of three years. Under the general statute the creditor is not compelled to push his lien under three years, the life of the lien, and, if properly renewed, until the life of the renewal or renewals. The case of *Macke v. Byrd* is substantially this: Under two executions in 1876 there was set off to Ranney in the manner prescribed by law 105 acres of land as his homestead. In August, 1885, Ranney conveyed by deed to Mrs. Byrd. Prior thereto—that is to say, in 1883—Macke obtained judgment against Ranney for \$737.80. The sale price between Ranney and Mrs. Byrd was \$1,100 in excess of the homestead limit. It also appears that in July, 1885, Ranney had a contract with Mrs. Byrd's husband to sell the land to him for \$2,600. Whereupon Macke sued out his execution and garnished Byrd. Ranney refused to make Byrd the deed, and Mrs. Byrd purchased later. Byrd was discharged as garnishee. He and his wife moved onto the property, and in 1886 Macke sued out scire facias to revive his judgment, making Mr. and Mrs. Byrd parties. They, however, were discharged by the court. Then in 1888 Macke brought suit against Mr. and Mrs. Byrd to cause the homestead to be re-assigned, and that part in excess of \$1,500 to be subjected to the payment of the plaintiff's judgment demand. The court, nisi, found for Macke, appointed appraisers to re-assign the homestead, and the Byrds brought the case here. In the discussion of that case the learned judge writing the opinion propounds this question: 'But does the lien

touch or hold the surplus of size or value of the homestead?'

"The opinion then proceeds to answer the query thus put, portions of which answer are in this language:

"This right of selection (as well as other provisions of the homestead law, mentioned later) cannot be reconciled with the idea that, as against the debtor, the judgment lien reaches the excess of quantity or value of the homestead beyond the statutory maximum, before an ascertainment, and setting out, of the part to which the exemption shall apply. \* \* \* The right of selection and exchange of homesteads, as given to judgment debtors by sections 5436 and 5442 (Rev. St. 1889), could not be fully enjoyed, if it were held that the lien of a judgment reached, and secured to the creditor, an uncertain part of the homestead property, without an ascertainment of the surplus to which the lien could attach, as provided by law. The Missouri homestead may be moved about, under the protection of section 5442. It cannot be fastened to one spot by a judgment lien, which would be the consequence of permitting it to be sold on execution subject to the homestead right. In contemplation of section 5436, the surplus, above the statutory measure, is not available on execution until ascertained and determined by location of the true homestead itself in the manner prescribed. The homestead in dispute in the present case was fixed and defined by the action of appraisers, the sheriff and the court, under the Houck executions in 1876, and the debtor had the right to all the privileges of a homestead owner as to that property so set off (including the right to sell it), until some creditor should by proper steps attack the former allotment of the homestead as to quantity or value. This might be done at any time by proceeding under sections 5436 or 5444; but until that course was taken by some one, the debtor was entitled to the full enjoyment of all his rights in and to the homestead property, including the power of disposal, of which he took advantage in this case. The fact that Ranney realized by his sale more than the statutory amount to which the homestead is limited is of no concern, as against the purchaser of it from him, in such an action as this by the judgment creditor. If, as we hold, the lien of judgment did not attach to the surplus in value until ascertained by an admeasurement of the proper homestead, then the lien of judgment was no impediment to a sale of the homestead by the debtor as the statute permits.'

"The purport of this broad language in the *Macke-Byrd Case* is, in our judgment, to the effect that if a tract of land is held, used, and claimed as a homestead, then, although there may be a surplus either in quantity or value, no judgment lien attaches until levy is made and an admeasurement of the homestead is had under the execution

and levy, and this, too, in the face of the fact that judgment liens attach for three years as against all property, save the homestead, which homestead, by law, has fixed limitations both as to quantity and value. This is the construction which Valliant, J., placed on the Macke-Byrd Case, in *Smith v. Thompson*, 169 Mo., loc. cit. 561, 69 S. W. 1042, whereat he said: 'We have construed our statute to mean that the judgment lien does not attach to such land either as against the homesteader or his vendee, so as to render the land in the hands of the vendee liable for the excess in value above the amount allowed as exempt, in a case where the homesteader had sold the land for more than the exempt value. *Macke v. Byrd*, 131 Mo. 682, 33 S. W. 448, 52 Am. St. Rep. 649. In that case it was pointed out that our statute attached the lien of a judgment only to "lands, tenements and hereditaments liable to be sold upon execution" (section 3750, Rev. St. 1899 [Ann. St. 1906, p. 2090]), which was not the condition of lands occupied as a homestead. And it was further shown that, if more land in quantity or value was so held, the excess could only be reached under execution by following the procedure marked out in the statute for setting out the homestead.'

"In our opinion, taking the broad language of the Macke-Byrd Case, it in effect holds that there is no lien against the surplus, whether such surplus in the homestead tract is the result of either quantity or value, until such time as there has been an appraisal and admeasurement of the homestead. If it so holds, in our humble judgment it is wrong. We have read the full text of the Vermont case cited therein, and we do not feel that it furnishes a basis for the broad conclusions reached. These conclusions say that the surplus, whether occasioned by the excess of quantity or excess of value, is not impressed with the judgment lien. In this the opinion goes beyond the facts of the case in hand. The real issue in the Macke-Byrd Case was whether or not, where there had been a previous ascertainment of a homestead in the manner prescribed by statute, and there was an increase in value after such ascertainment, and whilst still held by the original homesteader, could such surplus, occasioned by the increase in value, be the subject of a judgment lien of a judgment procured after the first ascertainment of the homestead? Had the Macke v. Byrd opinion strictly conformed to this issue, it would have been correct. It is correct in the conclusions reached upon the real facts therein at issue. We can see that where a homestead has been once ascertained there might be a presumption of its continuance until such time as there might be a different ascertainment under the statute, and in our judgment the Macke-Byrd Case should have been confined to this one issue, and when so confined it is correct.

"We have in this state the following statute (section 3751, Rev. St. 1899 [Ann. St. 1906, p. 2090]): 'Judgments and decrees obtained in any court of record in this state shall, upon the filing of a transcript thereof in the office of the clerk of the circuit court of any other county, be a lien upon the real estate of the person against whom such judgment or decree is rendered, situate in the county in which such transcript is filed.'

"Now, opposed to the broad provisions of this statute, we have the homestead act. This first-named statute makes such judgment a lien upon all real estate owned by the judgment creditor. But with it we must read the homestead act. This act, so far as applicable, reads: 'The homestead of every housekeeper or head of a family consisting of a dwelling house and appurtenances, and the land used in connection therewith, not exceeding the amount and value herein limited, which is or shall be used by such housekeeper or head of a family as such homestead, shall, together, with the rents, issues and products thereof, be exempt from attachment and execution, except as herein provided; such homestead in the county shall not include more than one hundred and sixty acres of land, or exceed the total value of fifteen hundred dollars; and in cities having a population of forty thousand or more, such homestead shall not include more than eighteen square rods of ground, or exceed the total value of three thousand dollars.' Rev. St. 1899, § 3616 (Ann. St. 1906, p. 2034).

"Following this is section 3617, which reads: 'Whenever an execution shall be levied upon the real estate of such housekeeper or head of a family, of which such homestead may be a part, or upon such part of any homestead as may be in excess of the limitation of the value thereof created in section 3616, such housekeeper or head of a family shall have the right to designate and choose the part thereof to which the exemption created in section 3616 shall apply, not exceeding the limited value; and upon such designation and choice, or in case of a refusal to designate or choose, the sheriff levying the execution shall appoint three disinterested appraisers, who shall, first, being sworn to a faithful discharge of their duties, fix the location and boundaries of such homestead, and the sheriff shall then proceed with the levy of such execution upon the residue of such real estate, as in other cases; and such proceedings in respect to the homestead shall be stated in return upon such execution.'

"When these several statutes are read together, we are of opinion that a reasonable construction thereof will give the creditor a judgment lien against all surplus of quantity, and this is the only question before us. Under the first section quoted a lien is created as against all real estate, which lien under another section has a life of three years.

The homestead act says, however, that no levy can be made upon the homestead. The word 'homestead' as here used means a tract of land falling within the statutory limitations as to quantity, and, we might add, value, although not herein involved. We have properly construed the homestead act to mean that no lien attaches to a homestead proper, i. e., to the tract owned, occupied, and claimed as a homestead, when it falls within the statutory limitations as to quantity and value. But, in our judgment it will not do to say that, if the judgment debtor owns 1,000 acres of land, no lien is created by the rendition of the judgment as to all the excess over and above the 160 which might be selected for the homestead. To so construe the statute is to give no lien from judgments secured until levy is made and the homestead selected, appraised, and admeasured, and would be but to encourage fraudulent conveyances between the time of the judgment and the actual setting aside of the homestead. Or, as in this case, there would be a race between the judgment creditor and the nonjudgment creditors as to which could first secure title, and this, too, in face of the statute making the judgment a lien upon all real estate for three years. As we read these several statutes, a judgment is a lien for three years against all real estate held by the judgment creditor save and except his homestead, and his homestead means a tract of land coming within the statutory limitations as to value and quantity. Pending this lien, one who buys by private sale from the owner the homestead tract, greater in either value or quantity than the limits fixed by the statute, takes the surplus subject to the lien. Of course, there could not be a sale of the surplus and thereby an enforcement of the judgment lien until the homestead had been selected and admeasured. In other words, in our judgment, wherever there is a surplus in the homestead tract, either in value or quantity, there is a judgment lien as to such surplus, leaving it to a future selection and admeasurement to determine the exact dimensions of the said surplus.

"In the case at bar, which is one in ejectment for the surplus tract, which was sold under execution without the statutory admeasurement of the homestead, the question arises as to whether or not such action should prevail. Under the statute, when the officer comes with his execution the judgment creditor has the right to select the portion of the tract which he may desire for his homestead. In this case it appears that he and the defendant discussed the fact that he had more land than he could hold under the statute; that he then selected the 18 square rods, or thereabouts, which he could hold, and deeded away the surplus. In a case of this kind, where the matter of sur-

plus is dependent solely upon quantity rather than value, we are of opinion that the judgment creditor, as well as the purchaser from him, are bound by this selection thus made, as fully as if it had been made under an execution. The debtor was at the trial claiming the remainder as a homestead, and admits that he was deeding the surplus to defendant with knowledge of all the facts. By deeding the surplus, if execution had been issued and the statutory proceeding followed, the judgment creditor could not have done other than claim the property selected and held by him because of his conveyance.

"Considering this case from its four corners, the judgment of the circuit court is wrong, and the same should be reversed and remanded, with directions to find for the plaintiff and enter judgment in accordance with such finding, after having ascertained the reasonable value of the rents and profits. This being our judgment, such will be the order.

"But as these views are in conflict with our construction of the broad and unnecessary holding in the Macke-Byrd Case, and as that is a case in which the whole court participated, we think this cause should be certified to the court in banc for its final determination, to the end that the broad language used may again pass under review."

Eastin, Corby & Eastin, for appellant. R. L. Spencer, for respondent.

PER CURIAM. Upon a consideration of this case by the court in banc, the opinion in division was slightly modified in language, and adopted as the opinion of the court in banc; all the Judges concurring therein.

#### STATE ex rel. McMANUS v. MUENCH, Circuit Judge.

(Supreme Court of Missouri. March 9, 1909.)

#### 1. COURTS (§ 21\*)—JURISDICTION—HOW ACQUIRED.

In Missouri, jurisdiction of the subject-matter of a concrete case in equity or law is only acquired by a court through pleadings filed, process issued, or appearance entered, and decrees entered within the lines of the issues framed by pleadings.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 69; Dec. Dig. § 21.\*]

#### 2. JUDGMENT (§ 1\*)—DEFINITION.

A judgment is the sentence of the law upon the record; the application of the law to the facts and pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1, 3; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 8, pp. 7695, 7696.]

#### 3. TRUSTS (§ 169\*)—ADMINISTRATION—COURTS—JURISDICTION.

Where the only issue in a suit by the beneficiary under a trust estate created by a will was the appointment of a new trustee in place

\*For other cases see same topic and section NUMBER in Dec. & An. Digs. 1907 to date, & Reporter Indexes

of the original trustee, who had died, and the vesting him with title to the trust property, the power of the court over the subject-matter of the suit was exhausted after appointing a new trustee, providing for his bond, and investing him with title, and the court could not retain jurisdiction to administer the details of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 224; Dec. Dig. § 169.\*]

4. TRUSTS (§ 287\*)—CREATION BY WILL—ADMINISTRATION UNDER ORDERS OF COURT.

That a will creating a trust estate gave the trustee power, with the approval of a court, to sell the trust property, did not show that testator intended that the trust should be administered through the orders of the court.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 407; Dec. Dig. § 287.\*]

5. JUDGMENT (§ 505\*)—COLLATERAL ATTACK.

Where the chancellor, in rendering a decree by consent, exercised a jurisdiction not within the issues, the part of the decree outside the issues was void, and subject to collateral attack, no appeal being necessary.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 948; Dec. Dig. § 505.\*]

6. ATTORNEY AND CLIENT (§ 88\*)—AUTHORITY OF ATTORNEY—SCOPE OF LITIGATION.

Counsel employed merely in the matter of the appointment of a new trustee to administer a trust estate on the death of the original trustee, and of the investing such new trustee with title to the estate, were not authorized to confer jurisdiction on the court to administer the whole trust after the appointment of the new trustee.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 161; Dec. Dig. § 88.\*]

Burgess, J., dissenting.

Prohibition by the State, on the relation of Thomas Ward McManus, against Hugo Muench, Judge of the Circuit Court of the City of St. Louis, Mo., Division 1. Preliminary rule made absolute.

T. J. Rowe, Thos. J. Rowe, Jr., and Henry Rowe, for relator. Shields & Orthwein, for respondent.

LAMM, J. This is an original proceeding on the suggestion of relator for the state's writ of prohibition directed to the Hon. Hugo Muench, circuit judge, the suggestion being within section 4448, Rev. St. 1899 (Ann. St. 1906, p. 2436) (q. v.). Passing a rule that respondent show cause, we let a preliminary writ go. On return coming in, relator moves for judgment on the pleadings, and that the preliminary rule be made absolute. Such is the issue at law up for determination.

The motion confesses the averments of the return. On the other hand, the return practically confesses the averments of fact in the petition. In this condition of things, borrowing from both, we make the following statement of the case:

Camilla S. W. McManus died testate, seised of a great estate in realty in St. Louis, in November, 1905, making her granddaughter, Camilla S. W. Burrows, and her son, Thomas Ward McManus (relator), devisees under her will. To Thomas Ward, one-half of the estate was devised absolutely. One-third of

the remainder went to the granddaughter, Camilla, absolutely, we infer. However that be, two-thirds of the remainder was devised to William F. Crow in trust, said trustee to manage it, give bond, and pay the net income over to the granddaughter, Camilla, during her life. If she died before Thomas Ward, then the trust estate became his absolute property. If he died before her, it became absolutely hers.

The will being probated, Crow qualified as trustee and took possession of the trust estate, with the burden of administering it under the will. Among other provisions of the will was this: "I hereby give said trustee, or his successors in this trust, full power with the approval of the St. Louis circuit court, to sell any of the property subject to this trust." In that connection it provides that the trustee is authorized and directed to invest all moneys and the proceeds of all sales of the trust property in ways pointed out.

Mr. Crow died on December 3, 1907, leaving a brother of the half blood, and certain descendants of a brother of the full blood and sisters of the half blood, as his heirs.

The will nominating no successor to the trust, the cestui que trust, Camilla, thereupon brought suit in the circuit court of St. Louis against Thomas Ward McManus as devisee, and said heirs at law of the said trustee. Her petition made averments only pertinent to the following relief and no other: First, the appointment of a trustee in place and stead of William F. Crow, deceased; and, second, to divest out of his said heirs the legal title to the trust estate, cast on them by the death of their ancestor, and to vest the same in the court's appointee.

Camilla pointed out in her petition that the live duties of trustee called for not only fine integrity and business capacity, but personal friendship towards her, as cestui que trust, that she was primarily interested in the selection of a new trustee acceptable to her from such standpoints, and that Mr. Crow was selected by her grandmother for that fiduciary relation because he ideally filled the office of trustee. She suggested Henry F. Hafner as Mr. Crow's successor, he possessing the qualifications alleged by her to be incident and necessary to administering the trust.

Thomas Ward admitted by answer all allegations of the petition material to the appointment of a new trustee and the divesting and vesting of the legal title to the trust estate. He joined issue only on those averments relating to the appointment of Mr. Hafner because of his alleged marked friendship to Camilla, averring that the trustee should stand neutral in that particular and be an impartial person as between him and her.

The adult defendants (heirs of Crow) answered, confessing the allegations of the petition and consenting to the appointment of a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

successor in trust. A minor defendant (one of Crow's heirs) answered through his guardian ad litem, averring ignorance of the facts, pleading his tender years, asking that strict proof be made, and praying the court to protect his rights.

Such other proceedings were had in that cause that it came to judgment on May 4, 1908. At the trial, evidence was put in, and admissions additional to those in the pleadings were made. Thereupon the court made a finding of facts substantially in accord with the allegations of the petition, and spread its finding of record in its decree. Based on such findings, it was ordered, adjudged, and decreed that Matthew Park, Esq., be appointed trustee as successor to William F. Crow, deceased, that the title to the trust estate vested in him by the will be divested out of his heirs at law and vested into the new trustee, who should thereafter have the rights and powers and be subject to the duties and obligations defined in the grandmother's will. The court fixed the trustee's bond at the penal sum of \$10,000, and provided for additional bond in certain contingencies. Adjudging costs, etc., the decree contains the following clause (Note: This clause lies at the root of this controversy): "It is further ordered, adjudged and decreed that this cause shall be retained in this court, as to the plaintiff and defendant, Thomas Ward McManus, and as to said trustee, Matthew Park, until the further order of this court in respect to all matters connected with the qualifications of said Matthew Park, as trustee, and his administration of said trust."

In that proceeding, Sim T. Price and R. M. Nichols were attorneys for Thomas Ward McManus; John B. Denvir, Jr., for the heirs of William F. Crow; and James P. Maginn, for the granddaughter, Camilla. It seems a draft of the decree was prepared, and that such draft bears the following earmarks: "O. K. [Signed] Sim T. Price, R. M. Nichols, Attys. for Thomas Ward McManus. O. K. [Signed] John B. Denvir, Jr."

On the 24th of July, 1908, the trustee filed a motion in the aforesaid cause, calling the court's attention to the fact that it had retained jurisdiction "on all matters pertaining to the administration of the trust herein," and showing to the court that the trustee had retained counsel, and, in and about the performance of legal services as such, they had rendered services for which they claimed a certain sum, and an order was prayed to allow and pay. Accompanying this motion was an itemized account of length and particularity, stating the dates on which services were rendered, and their character and extent. Notice was given of the filing of this motion, and on a day later in July, the parties appeared by counsel. The court having indicated that the attorneys' fees should be paid out of the income and not out of the corpus of the trust estate, Thomas Ward McManus withdrew from the hearing, deem-

ing that, on that view, he had no concern in it. Thereupon the court adjudged and decreed that the trustee pay a certain sum to his attorneys out of the income of the trust estate. It seems that the form of this decree was also drafted and bears the following: "O. K. [Signed] R. M. Nichols, Attorney for Thomas Ward McManus."

Neither the last judgment nor the original decree, divesting the title of the trust estate out of the heirs of the deceased trustee and appointing Mr. Park as successor in trust and vesting the title in him, was appealed from.

So matters stood until October, 1908. On the 9th day of that month a notice was served, entitled in the cause aforesaid, and directed to Thomas Ward and Camilla, notifying them and each of them that the trustee would on the 12th day of October, 1908, present a petition in said cause requesting the court to empower him to borrow on the trust property a sum of money sufficient to pay off charges against the estate, praying that directions be given as to the terms and manner of making the loan, and that an order be made determining whether said charges against the trust estate in whole or in part should be paid out of its corpus or income. This notice was served on Thomas Ward on October 9, 1908. As we grasp it, the petition foreshadowed by such notice was filed in the principal cause on the 13th instead of the 12th of October. It sets forth that jurisdiction of the trust estate was retained by the court by its original decree. On such postulate it proceeds to show that notice was given to Camilla and Thomas Ward. It then sets forth a description of the trust property (which we omit), and the appraisal of certain parts of it, and avers it was allotted to the trustee by a judgment in a partition suit in the circuit court of St. Louis; that it was there adjudged that the trustee should pay one-third of the taxes, general and special, existing as charges against the entire estate of Camilla S. W. McManus, testatrix; that said taxes had accrued to a large amount, and were running at a punitive rate of interest; that the trustee had no funds to pay them; that the costs in said partition suit (inclusive of commissioners' and attorneys' fees), one-third of which was taxed against the trust estate, aggregated \$33,614.45, which the trustee was unable to pay for lack of funds; that he had made efforts to sell the unimproved real estate, but that stringency in the money market and the weak demand for that kind of property had prevented a sale; that the trustee believed the financial sky would brighten, and that, say in a year, he could obtain a reasonable price largely in excess of that now offered; that a present sale would result in waste and loss to the trust estate; that the attorneys and commissioners in the partition suit would wait no longer for their costs and fees, but proposed at once to sue out

an execution on the partition judgment and knock off the property at sheriff's vendue to satisfy it; that such sale, because of the prevailing money market, would work a great hardship on the trust estate by sacrificing it. Wherefore, he prayed for power to borrow \$20,000 to pay his pro rata of said costs and accrued taxes, to be secured by a trust deed on the corpus of the estate, due two years from date, with current interest, and to pay commissioners for securing the loan, "and that the court make such orders and grant him such relief as may appear proper in the premises." Continuing, the petition avers that certain attorneys have unliquidated charges against the trust estate for legal services rendered in the partition suit during the trusteeship of Mr. Crow; that part of the back taxes accrued in the lifetime of testatrix, part of them are special tax bills for street sprinkling and street improvement; that there is a controversy whether certain items should be charged against the corpus or income of the trust estate. Wherefore, petitioner prayed the judgment and direction of the court in that behalf.

To the foregoing notice Thomas Ward McManus paid no attention, and to that petition he remained mute, answering not.

Presently, on the 23d day of October, 1908, the matter coming on for a hearing, the following decree was entered:

"The above matter coming on to be heard this day, upon the application of Matthew Park, trustee under the will of Camilla S. McManus, deceased, for permission, pursuant to the last will of Camilla S. McManus, deceased, to alienate part of the trust estate herein by mortgage or in such other manner as to the court might seem meet and proper in the premises, in order that said trustee may pay charges against said trust estate duly allowed by the St. Louis circuit court in a cause in partition, being numbered 43,345, in division No. 4 thereof, and such other proper costs, expenses, and liens as this court may by proper order direct to be discharged therefrom, and the court having been fully and duly advised in the premises by counsel for trustee and other parties in interest, all of whom have been duly notified of said application as shown by the evidence, and this court having reserved the power in the original decree herein to make such orders in the administration of the trust as might be necessary, it is hereby ordered by this court by virtue of the power conferred by the will of Camilla S. McManus, deceased, that said trustee sell at public auction to the highest bidder the following described real estate lying and being situate in the city of St. Louis, in lieu and stead of the tract of land in the petition described, belonging to and being part of the trust estate of which said Matthew Park now stands seised as such trustee, to wit: [Here follows a description of the real estate to be sold, which we omit.]

"It is further ordered that said sale shall

be either for cash, or at the option of the purchaser for one-third cash and remaining two-thirds payable in 1 and 2 years from date of sale, with interest from date at 6% per annum deferred payments to be secured by customary mortgage upon the property sold; said sale to be conducted at the east front door of the courthouse in the city of St. Louis, Missouri, at 12 o'clock noon on Monday, the 16th day of November, 1908; and that said trustee shall give public notice of said sale by advertisement thereof for 20 days in a daily newspaper printed in the English language in the city of St. Louis, the last insertion to be not more than two days previous to the day of sale.

"It is further ordered that said trustee shall further advertise said sale by erecting suitable signboards on the above-described property and by printed handbills regarding the same, and that he be authorized to spend a reasonable sum in whatever methods of advertising as to him may seem necessary.

"It is further ordered that successful bidders for said property shall be required to deposit with said trustee, as earnest money, a certified check for at least 10% of the amount to be paid for said property; residue to be paid or secured as aforesaid immediately upon approval of said sale by this court.

"It is further ordered that said sales shall be subject to the approval of this court, and that said trustee upon conducting same shall forthwith report said sales to this court for its approval.

"Said trustee is authorized to employ an auctioneer to conduct said sales, and shall upon approval of court make and execute such conveyance or conveyances as may be necessary to fully invest title to all said real estate in said purchasers."

On November 4, 1908, relator filed an affidavit for an appeal from the decree, and his appeal was denied. By virtue of the decree the trustee presently advertised the described real estate, putting the sale on November 16, 1908; and on November 12th relator filed here his suggestion for prohibition, challenging the jurisdiction of the circuit court to render the decree ordering a sale.

The first and main proposition discussed by counsel is the right (affirmed on the one side, and denied on the other) of the circuit court of the city of St. Louis to retain jurisdiction of the administration of the trust estate by its original decree entered on the pleadings in the principal case. It will be observed there was a clause in that decree pointedly retaining such jurisdiction. The trial court evidently held that by virtue of that clause the administration of the whole trust was held in chancery. Accordingly, all subsequent proceedings are entitled as in that case, and are by way of supplemental motions and petitions filed therein—hearings proceeding on mere notice without summons. The argument of respondent runs, first, that the cir-

cuit court on its equity side had inherent jurisdiction over the subject-matter of trusts, therefore (they argue) the decree was well enough; second, that the will of the grandmother (witness the clause heretofore quoted) contemplated that the trust, in so far as power was given to the trustee to sell real estate, should be administered under the supervision of a chancellor; third, that the original decree was entered by consent; and, fourth, that it was not appealed from. Hence, on one or all said grounds, it is immune from collateral attack.

But we are of opinion that learned counsel, through inadvertence, argue unsoundly in that behalf, and that the preliminary rule in prohibition should be made absolute. This, because:

1. (a) Conceding that trusts and their administration are an ancient head of equity jurisdiction, yet in Missouri jurisdiction of the subject-matter of a concrete case in equity or law is only acquired by a court through pleadings filed, process issued or appearance entered, and decrees entered within the lines of the issues framed by pleadings. At the very old common law, pleadings were oral, and some court officer framed issues from these oral complaints. So, when Samuel judged Israel, or some Jewish king sat in judgment at the gates of Jerusalem, no form of pleadings were necessary to the hearing of a controversy, and questions of jurisdiction were scarce and of little or no bother. But in modern jurisprudence, a court remains passive until issues are framed in accordance with written law, and their judgment must respond to such issues. A judgment is "the sentence of the law upon the record." It is the application of the law to the facts and pleadings. Any other view would be illogical and tend to confusion and chaos in the administration of justice. *Black v. Early*, 208 Mo., loc. cit. 313, 106 S. W. 1014, and cases cited. Speaking to the point, we quote with approval from a sound authority: "The judicial power can be set in motion in civil matters only by some person—using the word in its broadest sense—in a case against another person. The courts cannot, *ex mero motu*, set themselves in motion, nor have they power to decide questions except such as are presented by the parties in their pleadings. The parties, by their attorneys, make the record, and what is decided within the issue is *res adjudicata*; anything beyond is *coram non iudice* and void." *Andrews' Stephen's Pleading* (2d Ed.) p. 34. See, also, *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464.

To the same effect are our own cases. "The subject-matter of a suit," says *McFarlane, J.*, in *Hope v. Blair*, 105 Mo., loc. cit. 93, 16 S. W. 597 (24 Am. St. Rep. 386), "when reference is made to questions of jurisdiction, is defined to mean 'the nature of the cause of

action and of the relief sought.' *Cooper v. Reynolds*, 10 Wall. 316, 19 L. Ed. 931. 'Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in a given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which one adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue.' *Munday v. Vail*, 34 N. J. Law, 422. A court may be said to have jurisdiction of the subject-matter of a suit when it has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed. What the controversy or issue, in any case, is, can only be determined from the pleadings. When the court has cognizance of the controversy as it appears from the pleadings, and has the parties before it, then the judgment or order, which is authorized by the pleadings, however erroneous, irregular, or informal it may be, is valid until set aside or reversed upon appeal or writ of error."

Referring to the foregoing, let it be admitted, also, for the purposes of the case at bar, that "the question of jurisdiction must be tried by the whole record." *Hope v. Blair*, 105 Mo., loc. cit. 94, 16 S. W. 597 (24 Am. St. Rep. 386); *Adams v. Cowles*, 95 Mo. 506, 8 S. W. 711, 6 Am. St. Rep. 74. Let it be furthermore admitted, arguendo, that the scope of the pleadings and issues in a lawsuit may now and then be somewhat enlarged beyond the strict letter of the pleadings by the construction put upon them by court and counsel at the hearing, and that such theory will bind parties litigant not only on appeal, but on a question of *res adjudicata*. *Bragg v. Metro. St. Ry. Co.*, 192 Mo., loc. cit. 358, 91 S. W. 527; *Donnell v. Wright*, 147 Mo., loc. cit. 646, 647, 49 S. W. 874. Yet none of these admissions aid respondent in this case. There has been presented to us the admissions of fact and a running colloquy between court and counsel at the hearing of the principal case. It is claimed that said admissions and colloquy are part of "the whole record." Conceding (without determining) that fact, yet we find the admissions and observations made in the colloquy are strictly responsive to the plain issues framed by the pleadings in the original case, and nothing else. Those issues we have stated. Briefly, they are the appointment of a new trustee and putting that trustee in the shoes of the old one; i. e., vesting him with the title to the real estate devised in trust by the grandmother's will. Such being the simple, sharp, and only issues, the decree invoked thereby should have contented itself with deciding them, and having set them at rest by the appointment of a new trustee and providing for his bond, and having invested him with title, the power of the court in the subject-matter of

that particular suit was exhausted and at end. This certainly is so unless we adopt the heresy that a court, sua sponte, may hold a trust estate in its grasp for all purposes of administration under some droll notion that, once in chancery for any purpose whatsoever, a trust estate is always in chancery for all purposes whatsoever.

A general doctrine in point is thus stated: "Upon the entry of a final order, or one which becomes final by operation of law, the jurisdiction of the court in the suit in which such order is entered is exhausted, and further proceedings therein may be prohibited." 16 Ency. Pl. & Pr. p. 1115.

(b) It is argued that the will of the grandmother contemplated that a court of equity might be invoked to approve a sale of real estate by the trustee under the powers donated to him. But in this connection, it must also be remembered that the grandmother's will, *ex vi termini*, contemplated that a person, not a court, should manage the trust. The finger can be put on nothing in that will even squinting at a wish on the grandmother's part that the execution of the trust raised should be subjected to the traditional delays and expenses of an administration in a court of chancery. The direction in that will that a sale of any of the trust real estate should not be effectual without the approval of a court falls very far short of bespeaking the general judicial exercise of the large power of administering the trust through orders and directions of court. Not only so, but the subject-matter of the corpus of the trust estate, the subject-matter of the powers donated by the will, and the subject-matter of the administration of the estate under those powers, were not brought into court in the original proceeding for the purpose of administration then or thereafter; so that we are not called upon to decide whether the administration of that trust could be taken from the shoulders of a trustee selected by testatrix, or his successor named by the court, and put upon the shoulders of a chancellor in a direct proceeding leveled at that end.

(c) It is next argued that the original decree was by consent, and, finally, that no appeal was taken; therefore the decree was effectual to hold the trust estate in administration. But if the chancellor, as we have held, reached out his arm too far and grasped a jurisdiction not within the issues, then that part of the decree outside the issues became *coram non iudice* and void. In that view of the case no appeal was necessary, and the void part of the judgment is subject to collateral attack.

Moreover, while it seems that counsel "O. K.'d" the decree, whatever that may mean, yet we cannot agree to the doctrine that counsel, ostensibly merely employed in the matter of an appointment of a new trustee

to administer the trust estate and to invest that new trustee with title to the estate, thereby and without more held a warrant of attorney from their client to confer jurisdiction on the court to administer the whole trust after the appointment of the new trustee, and all this by placing the hieroglyphic cryptogram "O. K." on a decree prepared for entry presumably by counsel, whether in court or out does not appear. To put jurisdiction on counsel's "O. K." is to stand it on an apex instead of a base, to rest it on a sign or symbol rather than on the pleadings, the issues, and the evidence.

2. The decree of sale, singularly enough, is based on a direction directed to the avoidance of any sale whatever, through the expedient of borrowing money to tide over the pressing emergency confronting the trustee in his stewardship. That decree, in any event, is so foreign to the application made that it could only stand on the broad ground that the whole trust estate and its administration were already held in the hollow of the hand of the chancellor by force of the original decree, and that he could proceed, of his own motion, to administer the details of the trust. As we have already held that the chancellor had no such jurisdiction in this case, it would be unprofitable to consider the decree of sale from the viewpoint of standing on its own legs, because, the jurisdiction to order that sale being referred back to the clause in the original decree retaining jurisdiction of the whole trust, therefore, as that is the stem on which it grew, when that stem is cut down, its support is taken away and it falls to the ground.

Other questions are discussed with vigor and learning by counsel for respondent, but we deem them not vital to the deciding question in the case.

Let the preliminary rule in prohibition be made absolute and the final writ go. We will not adjudge costs against Judge Muench. Let the relator pay them. It is so ordered.

VALLIANT, C. J., and GANTT, FOX, WOODSON, and GRAVES, JJ., concur. BURGESS, J., dissents.

#### STATE v. COOK.

(Supreme Court of Missouri, Division No. 2.  
March 9, 1909.)

#### 1. COURTS (§ 231\*)—APPELLATE JURISDICTION—CONSTITUTIONAL QUESTIONS.

The mere statement, in a motion for a new trial, that the statutes (specifying them) on which a prosecution is based "are unconstitutional and void" is insufficient to raise any constitutional question, so as to confer on the Supreme Court, rather than the Court of Appeals, jurisdiction of the cause on review.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 658; Dec. Dig. § 231.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



## 2. COURTS (§ 231\*)—REVIEW—CONSTITUTIONAL QUESTION—HOW RAISED

Where the record on review does not present any constitutional question, as to confer on the Supreme Court jurisdiction of the appeal, such question cannot be raised by statements of counsel in presenting the case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 658; Dec. Dig. § 231.\*]

## 3. COURTS (§ 231\*)—REVIEW—APPELLATE JURISDICTION.

On review of a criminal conviction, the question whether defendant, who was charged as "manager" of a building, was subject to the penalty imposed by Act March 24, 1901 (Laws 1901, p. 219), for failure to provide proper fire escapes, which by the amendment of March 24, 1903 (Laws 1903, p. 251 [Ann. St. 1906, §§ 9053-1-9053-3]), is imposed on owners, proprietors, lessees, or keepers" of certain buildings, is one within the jurisdiction of the Court of Appeals, rather than that of the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 658; Dec. Dig. § 231.\*]

Appeal from St. Louis Court of Criminal Correction; Wilson A. Taylor, Judge.

Isaac T. Cook was convicted of violating the statute requiring fire escapes on certain buildings, and appeals. Transferred to the St. Louis Court of Appeals.

T. J. Rowe, Thos J. Rowe, Jr., and Henry Rowe, for appellant. Elliott W. Major, Atty. Gen., for the State.

FOX, J. This cause is brought to this court by appeal, on the part of the defendant, from a judgment of conviction in the St. Louis Court of Criminal Correction. Upon March 6, 1908, the assistant prosecuting attorney of the St. Louis Court of Criminal Correction filed an information in said court against defendant, charging him with failing to provide fire escapes upon the Chemical Building, a building more than three stories high of which he was charged to be the manager. The defendant was duly arraigned, and entered his plea of not guilty, and the case came on for trial on April 11, 1908, before the court sitting as a jury. With the view we entertain of this case it is unnecessary to set out in detail the testimony developed upon the trial. At the very threshold of the consideration of this cause we are confronted with the proposition as to whether or not this court has jurisdiction of this case. This prosecution is predicated upon the provisions of the amended law of 1903, enacted by the General Assembly of 1903. See Laws 1903, p. 251 (Ann. St. 1906, §§ 9053-1, 9053-3). The amended law of 1903 imposes certain duties upon the owner, proprietor, lessee, or keeper of all buildings of a certain height, requiring a certain character of fire escapes to be attached to such buildings. Laws 1901, p. 220 (Ann. St. 1906, §§ 9053-1, 9053-6), enacted by the General Assembly of this state, provided for the penalties to be imposed upon the owner, proprietor, lessee, or manager of a building which, under the

terms of the act, was required to have one or more fire escapes, who neglected or refused, for a period of 60 days after the law went into force, to comply with its provisions, and made such failure a misdemeanor, and designated the punishment at a fine not less than \$50 nor more than \$200, or by imprisonment in a county or city jail for not more than three months, or by both such fine and imprisonment. As before stated, this cause was submitted to the court without the aid of a jury, and at the close of the testimony the court found the defendant guilty, and assessed the punishment of the defendant at a fine of \$50. A timely motion for new trial was filed and by the court overruled. Judgment was rendered in accordance with the finding of the court, and from that judgment, an appeal was prosecuted to this court.

Manifestly the offense of which the defendant was convicted, as heretofore indicated, was a misdemeanor; and, unless there was a constitutional question properly raised in the trial court, this court has no jurisdiction to dispose of this case. An examination of the record before us fails to disclose that any constitutional question was presented to the trial court for its determination during the progress of the trial, nor was there any such question presented by the instructions requested by the defendant and refused or given by the court. The only portion of the record which discloses that the defendant sought to raise a constitutional question is in the motion for a new trial, and the question is presented in this language: "Now comes defendant and moves the court to grant him a new trial for the reasons following: First, the statute law upon which defendant was convicted, namely, the act approved March 24, 1903 (Laws 1903, p. 251), is unconstitutional and void; second, the act of March 27, 1901 (Laws 1901, p. 219), is unconstitutional and void."

It has uniformly been held by this court that the allegations, as contained in the motion for new trial in this cause, by which it was sought to present to the court a constitutional question, were insufficient to properly present such question, and did not confer jurisdiction by appeal upon this court. In *Ash v. Independence*, 169 Mo., loc. cit. 79, 68 S. W. 888, it was expressly ruled by this court that a general claim in the trial court that a law or ordinance was unconstitutional, without pointing out the precise provision of the Constitution which it offended against, was not a proper or sufficient way to raise a constitutional question so as to give this court jurisdiction of the appeal. The rule, as announced in that case, was unqualifiedly approved in the case of *St. Joseph v. Metropolitan Life Insurance Company*, 183 Mo. 1, 81 S. W. 1080. To the same effect is the case of *Excelsior Springs v. Ettenson*, 188 Mo. 129,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

86 S. W. 255. In *Hulett v. Railroad*, 145 Mo. 35, 46 S. W. 951, the following instruction was requested: "To hold the defendant liable in this case would violate its rights guaranteed by the Constitution of the state of Missouri and of the United States, and would deprive the defendant of its property and rights without due process of law." This instruction was held insufficient to properly raise a constitutional question so as to give this court jurisdiction. Judge Sherwood, speaking for this court, in commenting upon that instruction, used this language: "As to the generalities contained in the instruction mentioned relative to the Constitution of this state and of the United States, it suffices to say that neither the court below nor this court has any call to search through the respective organic laws of the state or Union in order to find out in what particular either of them may have been supposed to be violated." In *Kirkwood v. Meramec Highlands Company*, 160 Mo. 111, 60 S. W. 1072, the plea in that case was that a certain act of the General Assembly "is unconstitutional, null, and void, and is no law of the state of Missouri binding upon the plaintiff." That plea was held insufficient to raise a constitutional question. This subject was exhaustively reviewed by Judge Burgess in the recent case of *State v. Gamma* (not yet officially reported) 114 S. W. 619, decided December 15, 1908, and the same conclusion was reached in that case as in the prior cases herein indicated. If these cases are to be followed, and we see no valid legal reason for departing from them, we see no escape from the conclusion that this court has no jurisdiction of this cause.

The grounds assigned in the motion for new trial simply state that the acts of the General Assembly, upon which this prosecution is predicated, are unconstitutional and void. There is no indication as to what provision of the Constitution was offended against. While it is true that learned counsel for appellant, in his presentation of this case in the court, insists that the acts of the General Assembly of 1901 and 1903 are *ex post facto* laws, and therefore void, but the argument of counsel is not a part of the record, nor can this court give it a place in the motion for a new trial. Hence we would not be warranted in considering this indication in the argument as adding anything to the assignments made in the motion for new trial. This case, upon the disclosures of the record before us, is properly within the jurisdiction of the St. Louis Court of Appeals. Learned counsel for appellant very ably presents the questions involved in this record. It is carefully pointed out that the duty of providing fire escapes in hotels, boarding or lodging houses, and other buildings of great height, is imposed, under the amended laws of 1903, upon the owners, proprietors,

lessees, or keepers of the houses designated. Attention is then earnestly directed to the provisions of the law of 1901, which impose penalties for a failure to perform the duties provided in the amended law of 1903. The penalties seem to be directed against the owner, proprietor, lessee, or manager. Therefore it is apparent that the question is sharply presented as to whether or not the defendant in this cause, who is charged as manager of the building, is subject to the penalty imposed under the provision of the law of 1901 for a failure to perform the duty which is imposed by the amended law of 1903 upon owners, proprietary, lessees, or keepers of certain buildings. We shall not discuss this question, as we have herein indicated that this court is without jurisdiction. It is one that the St. Louis Court of Appeals can as readily and as satisfactorily dispose of as this court. In fact, as heretofore stated, it is the only court, upon the record presented, which possesses jurisdiction to determine that question.

Entertaining the views as herein indicated, it results in the conclusion that this cause should be transferred to the St. Louis Court of Appeals for final determination, and it is so ordered. All concur.

#### SKELTON et al. v. ULEN.

(Supreme Court of Missouri, Division No. 2.  
March 9, 1909.)

##### 1. ELECTIONS (§ 227\*)—IRREGULARITIES—EFFECT.

Irregularities in an election, not shown to have been fraudulent nor to have increased a successful candidate's vote, nor to have been instigated by him or committed in his interest, afford no ground for contest.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 197; Dec. Dig. § 227.\*]

##### 2. ELECTIONS (§ 229\*)—ILLEGAL VOTES—EFFECT.

Though votes by nonresidents of the precinct were illegal and fraudulent, they do not affect the election of a candidate, where the votes were not shown to have been cast for him, and where, if they should be rejected, he would still have a majority.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 201; Dec. Dig. § 229.\*]

Appeal from Circuit Court, Stoddard County; J. L. Fort, Judge.

Election contest by R. A. Skelton and another against Samuel Ulen. From a judgment for contestee, contestants appeal. Affirmed.

N. A. Mozley and Wammack & Welborn, for appellants. Geo. W. Munger and Wilson Cramer, for respondent.

BURGESS, J. This is an action, begun in the circuit court of Stoddard county, to contest the election of Samuel Ulen to the office of collector of the revenue of said

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

county at the general election held on November 8, 1904. At said general election the contestants, R. A. Skelton and F. A. Brannock, were the nominees respectively of the Socialist and Democratic parties, and the contestee, Samuel Ulen, the nominee of the Republican party, for said office. According to the returns from said county, Brannock received 2,115 votes, Skelton, 183 votes, and Ulen, 2,271 votes. Upon these returns, the certificate of election was issued to Ulen, who qualified and assumed charge of the office. In due time after the election, Skelton and Brannock jointly instituted this proceeding, and at the September term, 1905, of said court the matter was heard, and judgment rendered in favor of the contestee, from which judgment, after an ineffectual motion for a new trial, the contestants appealed.

The election of Ulen is contested on the ground of alleged irregularities at Dexter precinct, in Liberty township, said county, where 252 votes were cast and counted for Brannock, 36 for Skelton, and 448 for Ulen, a total of 734; and the effort is made to have the entire vote of this precinct rejected, in which event Brannock would be entitled to the office as being the recipient of the largest number of legal votes cast in said county for said office.

The grounds of contest as set up by the contestants are, in substance, as follows:

(1) That the election judges at Dexter precinct willfully and fraudulently admitted persons other than the judges and clerks of election into the room where the ballots were being counted, at the time the count was in progress, in violation of section 6996, Rev. St. 1899 (Ann. St. 1906, p. 8411), which provides: "No person or persons shall be admitted into the room or office where such ballots are being counted except the judges and clerks of election; provided, that any political party may select a representative man who may be admitted as a witness of such counting."

(2) That the election judges fraudulently refused to allow C. D. Bailey, who had been selected by the Socialist party to witness the count of the ballots, to remain in the polling place to watch the counting of the ballots, and that said Bailey was, "with the knowledge and consent of the election judges," forcibly ejected from the room, in violation of the proviso contained in said section 6996.

(3) That said judges fraudulently suffered voters, whom they knew were not entitled to vote at Dexter precinct, to vote at that place.

(4) That the judges of election "fraudulently failed and refused to furnish the electors who presented themselves to vote for said office of collector of the revenue of said county, and for other offices to be filled at said election, with ballots as provided and required by section 7104 of said Revised Statutes (Ann. St. 1906, p. 8437)," and furnished said electors with one ballot only, instead of

one ballot for each political party voted for at said election, unless express demand was made by the elector for said ballots.

(5) That no screens were provided for the booths at said polling place, nor guard rails to prevent persons having no authority from coming nearer than five feet of the ballot boxes and booths, and that "divers persons, having no right or authority whatsoever, were in and about the ballot boxes and the booths or compartments, and within less than five feet thereof, while the electors were preparing their ballots, and while the ballots were being exposed for counting by said judges."

(6) That the election judges, in violation of the statute, "electioneered with the electors who came into said voting place to cast their ballots."

(7) That said judges absented themselves from the polls of said precinct, so that at times less than a majority thereof was present.

(8) That the ballots were not taken out of the ballot boxes one at a time to be counted, as provided by section 6996, Rev. St. 1899, but were "by said counting judges taken from said ballot boxes in bulk, and by them sorted out and arranged in piles or lots of ten cast for each political party voted for, and in such piles or lots pretendingly counted ten at a time, and thus entered upon the poll books."

The evidence shows that the polling place was in a large room, 80 feet long and 25 feet wide, and which had been used for the same purpose at previous elections. The table of the distributing judges was in front, near the door; the table of the receiving judges near the center of the room, and that of the counting judges at the further end, some 20 feet back of the voting booths, which were arranged on both sides of the room, near the center. The voters were admitted at the front door, and, after voting, retired from the room by the same door. There were seven or eight booths, some of which were without screens, and there was no guard rail provided, as required by section 7103, Rev. St. 1899.

The only person in the polling place other than the judges and clerks of election, and the voters who came in, voted, and retired from the room, was Noah Fields, constable, who kept the door at the solicitation of the judges. He was not at the counting table till after the polls were closed and the ballots nearly all counted, and he learned nothing about the ballot then. There was no evidence whatever that any of the judges of election electioneered with the voters, or attempted to influence any voter in any way; nor was there any evidence that any person, other than the judges and clerks of election, overheard the count or obtained any information as to the state of the vote until the same was formally announced; nor was it shown that there was less than a majority of the

judges present at the polling place at any time that day. The evidence also shows that the distributing judges tried to get the electors who presented themselves for voting to take one ballot of each political party voted for, but that in some instances the voter asked for or selected one ticket only, which he prepared and voted as he chose; but it is not of record that any elector was refused any or all of the ballots to which he was entitled.

The record shows that C. D. Bailey was appointed as a watcher for the Socialist party at Dexter precinct. He first appeared at the polls in the morning of the day of election, and voted, and then, after electioneering outside of the polls for the Socialist ticket, he left. He did not again appear at the polling place until after the polls were closed, when he presented himself in the capacity of a watcher, and was admitted. After he had witnessed the counting of the ballots for some time, some of the judges objected to his remaining longer, for the reason that he had not been sworn. He then left, went to the office of a justice of the peace, who administered the oath, but he did not return to the polling place until the ballots were nearly all counted, when he tried to get in, and was refused admittance by the constable who kept the door inside. According to Bailey's own evidence, he did not give his name at that time or state what he was there for. He did not state that he had been sworn as a watcher, but tried to force the door. It was then about 9 o'clock, and quite dark. While he was at the door, two of the judges of election who had been out came back to the polling place at different times, and were admitted; but, according to Bailey's testimony, he did not speak to either judge, nor tell either that he had been sworn as a watcher and wanted to get in.

As to the method used in counting the ballots, Joseph Winchester, one of the counting judges, testified as follows: "Mr. Clodfelter took all these ballots out of the boxes himself, and he handed them to me, and I called them off to the clerks; he would take them out, one at a time, and count them and hand them to me; and in the beginning—we began about 8 o'clock—and possibly the first 15 or 20 I called off one ballot in my hand at a time, and some one—I believe Mr. Jeffers—thought they could tally as many as 5 at a time, that the leaves was troublesome to turn, and that may be they could get along better and faster; and so Mr. Clodfelter would hand them to me assorted up, so there would be 5 straight Democratic ballots and 5 straight Republican ballots. He would count them 1 at a time, and I would recount them and compare them, and see that they was exactly alike. I would take them and count them off and call each name, 5 for so and so, and would go on down to the collector's office, and would say, 'Five for Ulen,' or 'Five for Brannock,' or whatever it was. And after we had counted a

while, I says to the tally clerks, 'If you can count 5 at a time you can put down 10 at a time,' and then took 10 on the same method. Q. While you counted 1 at a time, you had 9 below that one? A. Yes, sir, I called them off that way to the tally clerks, but they was counted 1 at a time."

The testimony of the other counting judge and of the tally clerks was to the same effect, and all testified that the ballots were counted correctly. It appears from the testimony that the ballots cast for the nominees of the Socialist party, of which there were 41 cast in that precinct, were placed by the counting judges in an empty box by themselves as they happened to be extracted from the ballot box, and that such ballots were not counted until the judges were through with counting the votes for the Republican and Democratic nominees. There was no evidence whatever of any fraud or mistake in the counting of the ballots. It was shown by the evidence that five men who lived in Caster township, and who should not, therefore, have been allowed to vote in Dexter precinct, did vote there.

On behalf of the contestants, the court gave the following declarations of law:

"(1) The court declares the law to be that the election alleged to have been held at the voting precinct of Dexter, in Stoddard county, Mo., on the 8th day of November, 1904, for the purpose of electing a collector of the revenue of county, to be legal and valid must have been held and conducted in compliance with the provisions and requirements of articles 1 and 2, c. 102, §§ 6981-7118, of the Revised Statutes of 1899 (Ann. St. 1906, pp. 3407-3440), of this state, and, if the court believe from the testimony in the case that said election was not so held and conducted, it will declare the same absolutely void as a matter of law, and the finding will be for the contestants.

"(2) The court declares the law to be that the primary object of the election laws of this state, under which the alleged election at the voting precinct at Dexter, in Stoddard county, Mo., on the 8th day of November, 1904, for the purpose of electing a collector of the revenue of said county, was required to be held, is to preserve the freedom and independence of the electors in the preparation of, and depositing, their ballots in the ballot boxes, and to maintain inviolate the secrecy thereof, and if the court finds from the evidence that said primary objects of said election law were not maintained and preserved as contemplated by said election law, then the court will find as a matter of law that no legal and valid election was held at said time and place. And in this connection the court declares the law to be that the freedom and independence of the electors and the secrecy of the ballots meant by said election law is the right of the electors to enter the booths and prepare their ballots free from observation and outside influence, and to deliver them to the receiving judges and have

them deposited in the ballot box and counted and certified as cast, without exposing or disclosing their contents to others, except those entitled by law to knowledge thereof."

The plaintiff further asked the court to give the following declarations of law, to wit:

"(3) The court declares the law to be that the following provisions and requirements of section 6996 of the Revised Statutes of 1899, to wit: 'After the delivery of ballot-box number 1 to the counting judges, the same shall be immediately opened by them, and the tickets shall be taken out, one at a time, by one of the counting judges, who shall read distinctly, while the ticket remains in his hand, the name or names written or printed thereon, also the office that is intended to be filled by such person voted for, and deliver the same to the other counting judge, who shall string the same on a thread or string, as provided by law. The same method shall be observed with each ticket, and the counting shall continue thus until all the ballots in the box are counted, \* \* \* and so on in the same manner until the polls are closed and all the ballots are counted'—are imperative and mandatory, and that no legal and valid count of the ballot cast at said alleged election, at the voting precinct at Dexter, in Stoddard county, Mo., on the 8th day of November, 1904, for the office of collector of the revenue of said county, was had, unless said ballots were counted by the judges of said election as said statute requires; and if the court finds from the evidence that said judges of election, or any other person or persons, pretended to count said ballots in blocks of 10 each, at a time, for each political party voted for at said election, or employed any other means or method to count said ballots which was a substantial disregard of said statute, it will declare as a matter of law that said ballots have never been legally counted, and could not, therefore, be legally certified and returned as having been cast for the parties hereto, and the finding will be for contestants.

"(4) The court declares the law to be that the following provision and requirement of section 6996 of the Revised Statutes of 1899, to wit, 'No person or persons shall be admitted into the room or office where such ballots are being counted, except the judges and clerks of election,' is imperative and mandatory, and is designed and is intended to protect and preserve the secrecy of the ballot as defined in these instructions; and, if the court finds from the evidence in the case that, while the ballots cast at said election at the voting precinct of Dexter, Stoddard county, Mo., on the 8th day of November, 1904, for the office of collector of the revenue of said county, were being exposed (for that purpose) and counted, parties, other than the judges and clerks of said election, were permitted to be in the room or office where said count was being had and while the same was in progress,

it will declare as a matter of law that the secrecy of said ballots was thereby destroyed, and that the pretended count thereof under such circumstances was and is illegal and void, and the finding will be for contestants. And in this connection the court further declares the law to be that, if such parties were admitted into the room or office where said ballots were being counted and permitted to remain therein while said ballots were being counted, and thereby given the opportunity to witness said count and to obtain a knowledge of the contents of said ballots, or any portion of them, then and in that event the court will presume that such parties did witness said count and did acquire knowledge of the contents of said ballots or some portion thereof."

To the action of the court in refusing to give said last two declarations of law, the contestants, by counsel, duly excepted.

While in their notice and specification of facts, a number of irregularities are specified by the plaintiffs or contestants, it is not shown that any of such were fraudulent, or that the defendant was in any wise connected therewith or derived any benefit therefrom, or that his vote was thereby increased. There were irregularities committed during the election, it is true, but it is not shown that they were instigated by the defendant, or that they, or any of them, were committed in his interest.

It is charged in the notice of contest, and was shown upon the trial, that several voters, perhaps as many as 11, who lived in another township in the county, voted at Dexter precinct. These votes were illegal and fraudulent, but it was not shown for whom they voted; but even if the entire number be rejected, the contestee would still have a majority of 12 votes in the county over both contestants.

There is no merit in the appeal. Besides, the term of office has long since expired.

The judgment is affirmed. All concur.

#### BURKARD v. A. LESCHEN & SONS ROPE CO.

(Supreme Court of Missouri, Division No. 2.  
March 9, 1909.)

##### 1. MASTER AND SERVANT (§ 205\*)—ASSUMPTION OF RISK—COMPLAINT TO MASTER—ASSURANCE OF SAFETY.

Where a servant apprehends that his place of work is unsafe, but relies upon the master's assurance that it is safe, and is thereafter injured because of its unsafe condition, without contributory negligence, the master is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 548; Dec. Dig. § 205.\*]

##### 2. MASTER AND SERVANT (§ 125\*)—MASTER'S NEGLIGENCE—PLACE OF WORK—KNOWLEDGE BY MASTER OF DEFECTS.

Where a servant, engaged in piling wire, told his foreman that a leaning column of wire looked dangerous, the foreman was negligent in assuring the servant that there was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

no danger, without first ascertaining whether the column should be braced, particularly after his attention was called to it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 243; Dec. Dig. § 125.\*]

**3. MASTER AND SERVANT (§ 190\*)—FELLOW SERVANTS—VICE PRINCIPALS—SUPERIOR SERVANT ASSISTING IN WORK.**

Where plaintiff was under the control and direction of another in piling wire, they were not fellow servants though they worked together at the same time and place, the other being a vice principal.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 452; Dec. Dig. § 190.\*]

**4. MASTER AND SERVANT (§ 288\*)—INJURIES TO SERVANT—ACTIONS—JURY QUESTION.**

In a servant's action for injuries sustained in piling wire by wire falling upon him, whether plaintiff called his foreman's attention to the leaning of the column and was assured that there was no danger therefrom, and continued work in reliance upon such assurance, held a jury question.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1068; Dec. Dig. § 288.\*]

**5. MASTER AND SERVANT (§ 264\*)—INJURIES TO SERVANT—PLEADING—ISSUES.**

Where the petition in a servant's action was based upon defendant's negligence in failing to furnish a safe place of work, and the answer alleged contributory negligence, whether plaintiff knew the danger was not an issue, the danger not being so imminent as to require plaintiff to quit work when his foreman assured him that the place was safe.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 869; Dec. Dig. § 264.\*]

**6. MASTER AND SERVANT (§ 102\*)—MASTER'S DUTY—SAFE PLACE OF WORK.**

A master must use ordinary care to furnish a reasonably safe place of work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 173; Dec. Dig. § 102.\*]

**7. MASTER AND SERVANT (§ 264\*)—INJURIES TO SERVANT—PLEADING—PROOF—UNSAFE PLACE OF WORK.**

In a servant's action for injuries caused by the master's failure to furnish a safe place of work, defendant may, under a plea of contributory negligence, show the servant's knowledge of the unsafe condition of his place of work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 869; Dec. Dig. § 264.\*]

**8. MASTER AND SERVANT (§ 220\*)—ASSUMED RISK—NOTICE TO MASTER—CONTINUING WORK AFTER NOTICE.**

Where the master, on the servant's complaint as to a dangerous condition in the place of work, assures the servant that the place is safe, the servant's knowledge of its dangerous condition will only preclude a recovery for injuries resulting therefrom, where the danger was so obvious that a man of ordinary prudence would have refused to continue work at the master's bidding.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 646; Dec. Dig. § 220.\*]

**9. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—CONTINUING WORK WITH KNOWLEDGE OF DANGER—QUESTION FOR JURY.**

Whether a danger was so obvious and imminent as to make it contributory negligence for a servant to continue work after the master had assured him that the situation was not dangerous is generally a jury question.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1063; Dec. Dig. § 239.\*]

**10. MASTER AND SERVANT (§ 281\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.**

In a servant's action for injuries sustained by a column of wire falling upon him, evidence held not to show that the danger from the leaning column of wire was so obvious and imminent as to make it contributory negligence for plaintiff to continue work after his foreman had told him there was no danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 989; Dec. Dig. § 281.\*]

**11. MASTER AND SERVANT (§ 248\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—INJURY AVOIDABLE BY MASTER.**

That the danger to a servant from a leaning column of wire was so obvious and imminent as to make the servant negligent in continuing work after his foreman had told him that there was no danger would not absolve the foreman from the duty of bracing the columns when his attention was called to their leaning position.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 801; Dec. Dig. § 248.\*]

**12. MASTER AND SERVANT (§ 90\*)—INJURIES TO SERVANT—PROTECTION OF SERVANT.**

A master must exercise reasonable care to protect his servants from the hazards incident to their employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 139; Dec. Dig. § 90.\*]

**13. MASTER AND SERVANT (§ 196\*)—"FELLOW SERVANTS"—WHO ARE.**

Those under the direction and management of a master, or of a servant placed over them by him, and engaged in the same common work, without dependence upon or relation to each other, are fellow servants.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 375, 486; Dec. Dig. § 196.\*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2716-2730; vol. 8, p. 7662.]

**14. MASTER AND SERVANT (§ 187\*)—FELLOW SERVANTS—"VICE PRINCIPAL."**

A vice principal is one intrusted by the master with power to superintend, direct, or control workmen.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 422; Dec. Dig. § 187.\*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 7313-7316; vol. 8, p. 7827.]

**15. MASTER AND SERVANT (§ 187\*)—FELLOW SERVANTS—NEGLIGENCE OF VICE PRINCIPAL.**

A master is liable for injuries to a servant caused by the negligence of his vice principal in the superintendence or direction of the work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 422; Dec. Dig. § 187.\*]

**16. APPEAL AND ERROR (§ 1062\*)—HARMLESS ERROR—SUBMISSION OF ISSUES TO JURY.**

In a servant's action for injuries caused by a column of wire which he was stacking falling upon him after he had called his foreman's attention to its leaning condition, error in submitting to the jury the question of the foreman's authority and duty to brace the columns was not prejudicial or reversible.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4212, 4215; Dec. Dig. § 1062.\*]

**17. MASTER AND SERVANT (§ 291\*)—INJURIES TO SERVANT—INSTRUCTIONS—CONFORMITY TO ISSUES.**

A petition alleged that plaintiff, told his foreman that he thought a column of wire which he was stacking looked dangerous and should be braced, and that the foreman said that there was no danger, and directed plaintiff

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to go ahead, and, in obedience to the order, and relying upon such assurance, plaintiff continued the work, and was injured by the wire falling upon him; that the foreman knew or should have known that the place was dangerous, and could have been made reasonably safe by bracing the columns, but negligently failed to do so. *Held* to substantially allege that the place was dangerous because the columns were not braced, so as to warrant an instruction to that effect, especially where evidence was admitted thereunder without objection, and defendant failed to object to the petition, and the other instructions were correct.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1136; Dec. Dig. § 291.\*]

Appeal from Circuit Court, St. Louis County; Jno. McElhinney, Judge.

Action by John Burkard against the A. Leschen & Sons Rope Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. F. Broadhead, Percy Werner, and Jones, Jones, Hocker & Davis, for appellant. Sterling P. Bond and R. L. Shackelford, for respondent.

BURGESS, J. Plaintiff recovered judgment in the court below for \$5,000 damages for personal injuries alleged to have been caused by the negligence and carelessness of the defendant and its foreman, from which judgment defendant appeals.

The record shows that plaintiff was a laborer employed by the defendant company in its bonded warehouse in the city of St. Louis, and had been in the employ of the company about five months at the time of the injury, November 11, 1904. The company worked about 200 men in its warehouse, and had a general foreman named Henry Peterson, under whom were foremen or bosses in control of different gangs of men, two of said foremen being William A. Akin and Henry J. Schleuter.

The plaintiff's testimony was, in substance, as follows: On the day in question he, with three other men, was ordered by Foreman Akin to assist in removing wire bundles from one place in defendant's bonded warehouse to another. After working a while removing the bundles, Akin took three of the men to another part of the warehouse and showed them how to pile the wire, and then returned and assisted the plaintiff in removing the wire coils, placing them on trucks and hauling them to the place where the other men were stacking them up. The coils of wire weighed between 100 and 125 pounds each, and before being removed had been piled up in the form of columns. They had removed over 300 of these coils, and plaintiff was coming back with an empty truck, and while in the aisle, about 10 feet away, he noticed the columns which later fell on him, leaning over. He called the attention of the foreman to them, and told him to have them braced up, as they were getting dangerous.

Akin replied, "Just go ahead; there is no danger; come on with your wagon." In obedience to the foreman's order, and relying upon his assurance that there was no danger, plaintiff continued his work. After they had removed two more loads of wire, the columns in question, which were 10 or 12 feet high, fell on plaintiff, breaking both his legs. His left ankle was dislocated and the small bone broken, and his right leg was broken and mashed. He was confined to his bed for about five months, under the care of physicians, and had been unable to do any work from the time he was injured. Plaintiff was not an experienced man, and had not been in the warehouse more than a dozen times during the five months he was in the employ of the company. He had seen the wire columns braced under the orders of different foremen, whose custom it was to give orders to have the columns braced when they deemed it necessary. Among those whom he had heard give such orders were Foremen Akin and Schleuter, and General Foreman Peterson.

Dr. William Baker testified as to plaintiff's injuries, stating that he was permanently injured; that he attended to plaintiff's injuries from November 30, 1904, to March 2, 1905, and that his bill for his services was \$75.

Besides plaintiff, the only eyewitnesses to the accident were William A. Akin and C. M. McKenzie, the latter being government inspector, United States customs. Akin testified that he was foreman, and directed the plaintiff and the other men under his control in their work; that he was himself injured by the fall of the wire columns in question, and was laid up for over four weeks. He, however, denied that plaintiff said anything as to the dangerous condition of the columns, or that he told plaintiff there was no danger. McKenzie, the government inspector, testified that he was standing 10 or 15 feet away from the men at the time the columns fell, and that he heard no remarks made such as testified to by plaintiff.

General Foreman Henry Peterson testified, for the defendant, that Akin did not occupy the position of foreman, and had no authority over the men with whom he was working at the time, but that John H. Schleuter was then foreman. This testimony, however, was controverted by that of Akin, Schleuter, and Burkard.

The court, at the request of plaintiff, instructed the jury as follows:

"(1) The court instructs the jury that it was the duty of the defendant to furnish the plaintiff a reasonably safe place to work. If the jury believe and find from the evidence that William Akin was intrusted by the defendant with authority to superintend, control, and command over the plaintiff, and was managing and controlling the work in question and the plaintiff, as defendant's

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

agent; and if you further believe and find from the evidence that at the time of the plaintiff's injuries the wire columns were in a leaning condition, and were thereby rendered dangerous and unsafe to work about, and that said Akin had authority to brace said columns so as to prevent them from being dangerous, and that it was a part of his duty to so brace them, and that said Akin either knew, or by the exercise of ordinary care would have known, that said wire columns were dangerous and unsafe by reason of the same being in a leaning condition in time so that by the exercise of ordinary care he might have put or caused the same to be put in a reasonably safe condition by so bracing the same before the injuries of the plaintiff, and that the said Burkard at the time of the injuries exercised ordinary care, and while in the exercise of such care the wire columns fell on him in consequence of them being in a leaning condition, and thereby dangerous and unsafe, and he was thereby injured, then your verdict must be for the plaintiff.

"(2) By the words 'ordinary care,' as used in these instructions, is meant that degree of care and caution usually exercised by reasonably prudent men under the same or similar circumstances, and by the word 'negligence' is meant a failure to exercise ordinary care.

"(3) If the jury find from the evidence that one William Akin was foreman of the defendant, A. Leschen & Sons Rope Company, and as such foreman was superintendent for the defendant of the plaintiff and of the place where plaintiff was required to work, if you find plaintiff was required to work at such place, and superintendent for the defendant of the work of removing the wire columns, and had entire superintendence, charge, and control thereof, and had power and authority to provide material to brace the wire columns in question, and that this was a part of his duty, and that said Akin was the representative of the defendant directing the work in question, and the plaintiff was subject to his orders and directions, then the jury are instructed that said Akin's acts and conduct in connection with said wire columns and the bracing thereof were the acts and conduct of the defendant so far as this case is concerned, and in respect to said acts he was not a fellow servant with the plaintiff.

"(4) The court instructs the jury that defendant must show by greater weight of the evidence that plaintiff has been guilty of contributory negligence in order to prevent his recovery on that ground.

"(5) If you find a verdict in favor of the plaintiff, you will assess his damages at such sum as will reasonably compensate him for whatever injuries you believe from the evidence he has sustained, if any, and in estimating such damages you will take into consideration: First. The nature, character,

and extent of such injuries, if any. Second. The pain of body and mind, if any, which he has suffered from said injuries, and directly caused thereby. Third. The pain of body and mind, if any, which plaintiff will suffer from said injuries in the future therefrom, and directly caused thereby. Fourth. The amount and value of time, if any, lost to plaintiff in consequence of said injuries, and directly caused thereby. Fifth. The impairment in his earning capacity, if any, and directly caused by such injuries."

To the giving of said instructions the defendant duly excepted.

At the request of the defendant, the court further instructed the jury as follows:

"(6) The court instructs the jury that the employer's obligation towards an employe does not oblige him to keep a working place in condition at every moment of the work so far as the safety of the place depends upon the due performance of the work in hand by fellow servants.

"(7) The court instructs the jury that a man, upon entering any employment, agrees to assume all the ordinary risks incident to the service in which he engages, and if you find from the evidence in this case that plaintiff was injured not by reason of any negligence on the part of the defendant or any of its representatives, as explained in others of these instructions, but as the result of one of the ordinary risks of the work in which he was engaged, or as the result of a mere accident, then your verdict should be for the defendant.

"(8) The court instructs the jury that if you find from the evidence that the plaintiff, John Burkard, and the man who was working with him, William Akin, at the time in question, were both directly co-operating in the work of removing wire columns from the room in question, and were so consociated with each other that each was in a position to observe the work of the other, and exercise a care promotive of mutual caution, and that each was at full liberty to use such methods, in performing the work in hand, as to him seemed proper in the exercise of ordinary care, and that neither had control over the other in the matter of the selection of appliances or the method of doing the work in hand, then the said plaintiff and the said William Akin were fellow servants in the performance of such work, and the defendant would not be responsible for any assurance which said Akin may have given that plaintiff could safely continue the work of removing the wire after he observed the danger, even if you believe from the evidence that said Akin did give such assurance.

"(9) The court instructs the jury that if you find from the evidence that William Akin, who was at work with plaintiff removing the columns in question, assisted in the manual work of removing the said columns, doing the same work that plaintiff did, and



the evidence falls to show that he was empowered by the defendant to exercise any control over plaintiff, or that he had any power to hire or discharge men, or to select and provide instrumentalities for their work, or to decide for other employes what method should be pursued in performing work, then the said William Akin was a mere fellow servant of the plaintiff, and any assurance of safety, which the evidence may show he may have given to plaintiff, would not result in any liability on the part of the defendant.

"(10) The court instructs the jury that the duty of the master to provide a safe place for his employes in which to do their work does not extend to conditions which the employes create in the performance of and as a detail of such work; and if you find from the evidence that the instability of the columns of wire, which fell and injured plaintiff, was brought about by the previous work which had been done by plaintiff and the man at work in the removal of such columns with him, just prior to the accident, and that the said plaintiff and the said William Akin so at work with him were fellow servants, as explained in others of these instructions, then no recovery can be had in this case, and your verdict should be for the defendant.

"(11) The court instructs the jury that even if you believe from the evidence that the said William Akin, who was at work with plaintiff at the time in question, was a vice principal, empowered, on behalf of the defendant, to decide for other of the employes as to the methods which should be adopted in doing the work in question, and that he did give plaintiff an assurance of his safety in doing the said work, and that plaintiff so received and understood and relied upon such assurance, yet, if you believe from the evidence that said assurance was not negligently given, and that there was nothing at the time in question to have warned a reasonably prudent man of the danger of said columns falling, then no recovery can be had by plaintiff against the defendant based on any such assurance.

"(12) The court instructs the jury that if you find and believe from the evidence that whatever, if anything, passed between plaintiff and William Akin with reference to the safety of the columns of wire in question, was the mere interchange of opinions, and that whatever may have been said by the said William Akin was understood by the said plaintiff as a mere expression of opinion, and was not regarded by plaintiff otherwise than as such, and that he voluntarily continued at the work in question in reliance upon his own opinion as to his safety, then your verdict should be for the defendant.

"(13) The court instructs the jury that if they believe and find from the evidence that plaintiff did not complain to any one that there was any danger of the wires fall-

ing, and that no one gave him any assurance that there was no danger, then the plaintiff cannot recover.

"(14) The court instructs the jury that there is no evidence in this case that the columns of wire were piled to an unusual height in the wareroom at the time and place in question."

Defendant further asked the court to give the following instructions:

"(1) The court instructs the jury that, under the pleadings and the evidence which has been adduced, your verdict should be for the defendant.

"(2) The court instructs the jury that the plaintiff and the workman, William Akin, were at the time and place, and in the matter of the work in which they were engaged at such time and place, fellow servants within the rule of law which exempts the master from liability for injuries sustained by one servant through the negligence of a fellow servant.

"(3) The court instructs the jury that there is no complaint made by plaintiff in his petition that the defendant was guilty of any negligence in failing to furnish all the necessary props which would have been required to prevent the columns of wire from falling, and you are instructed the defendant was not bound to supervise the mere details of the work in handling and removing the columns of wire in question, and that for the negligence of plaintiff or any other of its servants engaged in doing this work, in failing to use props, they were so negligent, there would be no liability therefor on the part of the defendant.

"(4) The court instructs the jury that if the place at which plaintiff was at work became dangerous at the time he was injured only by reason of the negligence of plaintiff's fellow workman in the manner in which the columns of wire in question were originally piled, or the manner in which those which had been taken away were removed, then plaintiff must be held to have assumed the risk of such danger, and no recovery can be had by him for injuries resulting from such negligence.

"(5) The court instructs the jury that, in this case, plaintiff seeks to recover damages from the defendant on the ground that he was required to work in a place which was unsafe by reason of the fact that the columns of wire, which he was assisting in removing, were piled up to an unusual height, and that he, having observed that they looked dangerous, attracted the attention of William Akin, a servant of the defendant, who was working with him, to such danger, and that said Akin assured him that there was no danger, whereas he knew, or might by the exercise of ordinary care have known, that the said columns were dangerous, and could have braced same to have prevented their falling, and negligently failed to do so; and you are instructed that if you find from

the evidence that whatever of danger there was to plaintiff, to be apprehended from the falling of the said columns of wire, was just as open and apparent and as readily understood by the plaintiff as by the said Akin, and that plaintiff's knowledge or means of knowledge of apprehending and understanding the danger were fully equal to that of the said Akin, and that plaintiff voluntarily continued to work about said columns after his observation of the danger, then he must be held to have assumed the risks of working thereabouts, and your verdict should be for the defendant."

To the action of the court in refusing to give the above instructions, the defendant duly excepted.

At the close of plaintiff's evidence, and again at the close of the whole case, the defendant asked for an instruction in the nature of a demurrer to the evidence, which the court refused to give, and defendant claims this was error. The argument is that plaintiff's injury was the result of pure accident, for which no one was responsible, and that plaintiff was fully advised of the particular risk incident to his employment, and assumed that risk.

It is true that plaintiff knew the dangerous condition of the columns of coiled wire, one of which afterwards fell on him, and that he called the attention of Foreman Akin thereto. Akin, upon whose experience and superior judgment plaintiff had a right to rely, assured plaintiff that there was no danger, and said, "Come on with your wagon." In obedience to this command, and being assured that there was no danger, plaintiff proceeded with his wagon, and one of the leaning columns of wire soon afterwards fell on him, causing the injuries complained of. That Akin was at the time of the injury one of defendant's foreman, and had charge and control of plaintiff in and about the work in which he was then engaged, was found by the jury to be the fact; and it has uniformly been ruled by this court that where a servant is apprehensive that the place in which he is required to work is dangerous and unsafe, but relies, as the evidence in this case shows plaintiff did rely, upon the assurance of the foreman in charge of the work and in charge of the servant that it is safe, and the servant is injured without any negligence upon his own part, the master is liable. *Brothers v. Carter et al.*, 52 Mo. 372, 14 Am. Rep. 424; *Lewis v. R. R.*, 59 Mo. 495, 21 Am. Rep. 385; *Gormley v. Vulcan Iron Works*, 61 Mo. 492; *Cook v. R. R.*, 63 Mo. 397; *Moore v. R. R. Co.*, 85 Mo. 588; *Russ v. Wabash Ry. Co.*, 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823; *O'Mella v. R. R. Co.*, 115 Mo. 205, 21 S. W. 503; *Cole v. St. Louis Transit Co.*, 183 Mo. 81, 81 S. W. 1138; *Edge v. Electric Ry. Co.*, 206 Mo. 471, 104 S. W. 90; *Garard v. Coal & Coke Co.*, 207 Mo. 242, 105 S. W. 767.

But defendant contends that no negligence

was shown on the part of Akin, and that his remark that the column of wire which subsequently fell upon plaintiff was not dangerous was the mere expression of an opinion on the part of a fellow servant of plaintiff as to a matter regarding which plaintiff had equal means of knowledge with him; that the language, "Come on with your wagon," was in no sense an order; that plaintiff had no right to rely on what Akin said, and that there was no evidence that he did rely upon it. We are unable to agree to this. It was negligence for Akin to say to plaintiff, in effect, that there was no danger to be apprehended from the leaning column of wire, without first taking the precaution to ascertain whether it needed to be braced or not, particularly after plaintiff called his attention to its condition. Akin and plaintiff were not fellow servants. While they worked together at the same time and place, plaintiff was under the control and direction of Akin, who was his superior while engaged in this work. As already stated, plaintiff had the right to rely upon what Akin, his superior, told him, and the evidence shows that he did so. But defendant insists that plaintiff's testimony in this regard is overcome by other testimony. It is only necessary to say as to this that it was a question for the consideration of the jury, who found otherwise.

The plaintiff's first instruction is criticised upon the ground that it bases plaintiff's right to recover upon the duty of Akin to brace the columns, if he knew, or by the exercise of due care could have known, that they were unsafe, and that it ignores the fact that plaintiff knew the danger and so testified, and that Akin honestly believed the wire piles were safe. With respect to the insistence that the instruction is bad because it ignores the fact that plaintiff knew the danger, it need only be said that there is no such issue in the pleadings. The petition is based upon the alleged negligence of defendant in failing to furnish plaintiff a reasonably safe place to work, and the answer alleges contributory negligence on the part of the plaintiff. It is the duty of the master to use ordinary care in furnishing his servant a reasonably safe place to work, and where, as in this case, the defense is a plea of contributory negligence, the servant's knowledge of its unsafe condition may be shown in evidence, but such knowledge precludes a recovery only where the danger is so obvious that a man of ordinary prudence would, under the circumstances, refuse to do his master's bidding; and the question of whether the danger was so obvious and imminent as to make it contributory negligence for the servant to continue in his master's service is a question for the jury. *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167; *Wendler v. House Furnishing Co.*, 165 Mo. 527, 65 S. W. 737; *Fogarty v. St. Louis Transfer Co.*, 180 Mo. 551, 79 S. W. 664;

Dodge v. Mfrs. Coal & Coke Co., 115 Mo. App. 501, 91 S. W. 1007; Kleity v. Construction Co., 121 Mo. App. 58, 97 S. W. 998. While the evidence is not sufficient to show that the danger was so obvious and imminent as to make it contributory negligence on the part of plaintiff to continue working under the circumstances, that fact did not absolve Foreman Akin from the duty of bracing the wire columns after his attention was called to their leaning attitude.

It is said for defendant that Akin had nothing to do with the wire columns which fell, and that there is nothing in the evidence from which a jury could properly infer that he had any duty regarding them. This evidently is a mistake. Plaintiff testified that he had seen and heard Akin and other foremen of the defendant give orders to brace other wire columns which were in a leaning attitude, as these were. Akin represented the defendant, was a vice principal, and had power to superintend, control, and direct the plaintiff in the performance of his work. For his negligent act in commanding the plaintiff to "come on," and in failing to take any precaution to see that the leaning columns were rendered safe and steady, after his attention was called thereto by plaintiff, the master is liable. *Miller v. Mo. Pac. Ry. Co.*, 109 Mo. 350, 19 S. W. 58, 32 Am. St. Rep. 673, and authorities cited. It is the duty of the master to exercise reasonable care to protect his servant from the hazards incident to his employment.

In *Moore v. Wabash, St. Louis & Pacific Ry. Co.*, 85 Mo. 588, it is ruled that they are fellow servants who, under the direction and management of the master himself, or by some servant placed by the latter over them, are engaged in the prosecution of the same common work, and without any dependence upon or relation to each other except as co-laborers without rank, and that he is a vice principal who is intrusted by the master with power to superintend, direct, or control the workman in his work, and that for negligence in such superintendence, direction or control, the master is liable. That case has been many times cited with approval by this court. *Hoke v. Railroad*, 88 Mo. 360; *Stephens v. Railroad*, 88 Mo. 221; *Smith v. Railroad*, 92 Mo. 359, 4 S. W. 129, 1 Am. St. Rep. 729; *Tabler v. Railroad*, 93 Mo. 79, 5 S. W. 810; *Russ v. Wabash R. R. Co.*, 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823. In *La Salle v. Kostka*, 190 Ill. 130, 60 N. E. 72, quoted in *Sambos v. Cleveland, C. & St. L. R. Co.* (Mo. App.) 114 S. W. 589, it is said: "Where a master confers authority upon one of his employes to take charge and control of a certain class of workmen in carrying on some particular branch of his business, such employe, in governing and directing the movements of the men under his charge with respect to that branch of the business, is the direct representative of the master, and not a mere fellow servant, and

all commands given by him within the scope of his authority are, in law, the commands of the master." From these authorities, it is entirely clear that Akin and plaintiff were not fellow servants at the time of the injury, but that plaintiff was a servant, and Akin a vice principal.

The first instruction for plaintiff is also objected to on the ground that it leaves to the jury the question of Akin's authority and duty to brace the columns, which it is insisted was a question of law. This objection seems to us very technical; it does not go to the merits of the case, and is, we think, nonprejudicial. At any rate, the judgment should not be reversed upon that ground.

Said first instruction is criticised upon the further ground that it is broader than the petition, and authorizes a recovery upon a ground not alleged in the petition; that is, upon the ground that the wire columns were in a leaning condition, and thereby rendered dangerous and unsafe to work about. This we do not regard as the proper construction to be placed upon the petition. In the first place, no objection was taken to it before trial, nor afterwards by motion in arrest. Again, while the petition must be considered as inartistically drawn, and does not in so many words allege that the wire columns were in a leaning condition and were thereby rendered dangerous and unsafe to work about it does allege that, when plaintiff was ordered to work by Foreman Akin on the day he was injured by the falling of the wire columns, he said to Akin: "'I think the wire columns ought to be braced; they look kinder of dangerous,' whereupon said foreman said to the plaintiff, 'There is no danger; just go ahead,' and plaintiff, in obedience to the order and direction and relying upon the assurance of said foreman that it was safe to work at said place, undertook to perform the work as directed and ordered by said foreman of the defendant, and while engaged thereat said columns of wire fell upon, crushed, and broke both legs of the plaintiff, dislocated his ankle, wrenched his knee, and otherwise bruised and injured his body. That the defendant and its said foreman knew, or by the exercise of reasonable care might have known, that said place in which plaintiff was ordered to work was dangerous, and could have made said place a reasonably safe place to work by bracing or causing the wire columns which fell upon the plaintiff to be braced and rendered secure and safe, but negligently and carelessly failed to do so."

We have, then, the substantial allegation, though inartistically stated, that the place was dangerous because the wire columns were not braced; that a request was made by plaintiff to have them braced; and that the foreman assured plaintiff that there was no danger, and ordered him to go ahead.

The testimony of the plaintiff in explanation of the dangerous condition of the place

was as follows: "I noticed them kind of lean over, and I told Billie Akin (the foreman) to get them braced; they were getting dangerous." No objection was made to this testimony. In the very nature of things, the allegation of the dangerous condition of the wire columns and of the request by plaintiff for braces or props fully notified the defendant of the negligence upon which plaintiff would rely, even though the petition did not allege in so many words that the columns were "in a leaning condition." Defendant's counsel himself asked plaintiff these questions: "Now, what were you doing when you say you noticed a column that looked as if it were tottering?" "How near to this pile were you standing when you attracted Billie's attention to it?" "What did you say to Billie?" Ans. "I said, 'This column is looking dangerous. It ought to be braced.'" Q. "Did you ever notice these piles in a tottering condition before, and, if so, what would be done to brace them up?" Ans. "Take a block and brace them up."

This sufficiently indicates that the proof that the wire columns were tottering or leaning, and that they were in a dangerous condition for want of bracing, was made without objection, and the defendant was advised by the allegations of the petition that such would be the proof. The instruction, in using the words, "If you further believe and find from the evidence that at the time of the plaintiff's injuries the wire columns were in a leaning condition, and were thereby rendered dangerous and unsafe to work about," etc., merely applied the law to the concrete facts in evidence, and that evidence was within the scope of the charge of negligence in allowing the wire columns to remain in a dangerous condition for want of propping. We think, in view of the fact that the evidence was received without objection, that this instruction, when read in connection with all the others, was not such a departure from the allegations of the petition as to call for a reversal. The defendant should not be permitted to stand quietly by, make no objection to the petition, or to the admission of evidence tending to sustain its allegations and the theory upon which the instructions were given, and in this way take advantage of his adversary.

Finding no reversible error in the record, the judgment is affirmed. All concur.

#### HIMMELBERGER-HARRISON LUMBER CO. v. KEENER et al.

(Supreme Court of Missouri, Division No. 2.  
March 9, 1909.)

#### 1. PROCESS (§ 98\*) — PUBLICATION — ORDER — "VACATION."

Rev. St. 1879, c. 59, art. 4, § 3494, provides that in certain actions, if plaintiff shall allege in his petition or file an affidavit that any

of the defendants are nonresidents, the court, or in vacation the clerk thereof, shall make an order for service by publication. *Held*, that the term "vacation" was not there used in its common-law sense as the time elapsing between the end of one term and the beginning of another, but included an adjournment from March 20, 1884, to June 16th following, both under Act March 15, 1883, p. 111, declaring that the words "in vacation" shall include any adjournment of court for more than one day, and independent thereof.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 98.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7264, 7265.]

#### 2. TAXATION (§ 634\*)—LIEN—ACTIONS TO ESTABLISH — AFFIDAVIT FOR PUBLICATION — FILING.

Where an affidavit of nonresidence for an order for the publication of process in a suit to foreclose a tax lien was made before a notary public, and alleged defendant's nonresidence, the fact that it was mistakenly first filed with a justice of the peace, who had no jurisdiction of the action, and was then withdrawn and filed in the circuit court, did not render it ineffective to sustain the order of publication.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1294; Dec. Dig. § 634.\*]

#### 3. JUSTICES OF THE PEACE (§ 106\*)—PROCEEDINGS—JURISDICTION—DISMISSAL.

Where a justice of the peace had no jurisdiction of a suit filed before him, he could not prevent its dismissal and a withdrawal of the petition and an affidavit for publication.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 349; Dec. Dig. § 106.\*]

#### 4. PROCESS (§ 96\*)—PUBLICATION—AFFIDAVIT — FILING.

An order for the publication of process was not void because the affidavit of nonresidence on which the order was based was made eight days prior to the order for publication.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 96.\*]

Appeal from Circuit Court, Stoddard County; J. L. Fort, Judge.

Action by the Himmelberger-Harrison Lumber Company against James Keener and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Ralph Wammack and Oliver & Oliver, for appellant. Henry B. Shaw and J. F. Blankenship, for respondents.

GANTT, P. J. This is a suit to quiet title to 430 acres of land situated in Stoddard county, Mo.

In its petition the plaintiff asserts ownership in this land, and open, notorious, hostile, continuous, and adverse possession of it under a bona fide claim of title for more than 10 years prior to the bringing of this suit, and states that during all that time it and its grantors exercised all the acts of ownership and dominion over said land of which it was susceptible. The defendants are the children and heirs at law of James Keener, deceased, and in their answer denied plaintiff's title and possession in and to the lands described, and aver ownership of the said

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lands in James Keener up to the time of his death in June, 1892, and their right to the said lands by reason of descent as children and heirs at law of said James Keener. On the trial it was agreed that James Keener was the common source of title. The plaintiff then offered a sheriff's deed from N. M. Cobb, sheriff of Stoddard county, to William P. Renner, dated September 15, 1885, and recorded September 22, 1885, conveying the lands in controversy to satisfy a judgment for taxes against said land for the year 1882. The defendants objected to the introduction of this deed, for the reason that they insisted that the judgment under which it was rendered was void, the defendant being a non-resident, and there was no affidavit that the defendant was a nonresident of the state of Missouri or had absconded or had absented himself from his usual place of abode in this state; that there was no affidavit justifying the order of publication, and the affidavit did not allege that ordinary process of law could not be served upon him in this state, and the notice to the defendant was not published for four weeks, but only for four times, or 21 days instead of 28 days; and for the further reason that there was no order of record in the case or otherwise authorizing the publication, and the clerk had no authority to make the order of publication. The court admitted the deed in evidence subject to the objections. Among these objections, the chief reason assigned, and the one finally sustained by the trial court, was that the clerk of the circuit court of Stoddard county had no authority to issue an order of publication at the time this order of publication was issued, to wit, on June 12, 1884. The defendant contended that the circuit court of Stoddard county was in session on that date, and the clerk was only authorized to issue orders of publication in the vacation of the court. In support of these objections, the defendants offered the following testimony: First, the order of publication made by the clerk on the 12th day of June, 1884, which was in the ordinary and usual form of such orders made by clerks in the vacation of the court. Second, the affidavit of C. L. Keaton, the attorney for the collector in the tax suit, which was in the following words: "The State of Missouri, at the Relation and to the Use of William C. Harty, Collector of the Revenue of Stoddard County, State of Missouri, vs. James Keener, Defendant. Before Moses Harvey, a Justice of the Peace for Stoddard County, Missouri. C. L. Keaton, attorney for and in behalf of the above-named plaintiff, makes oath and says, that the above-named defendant in the above-entitled cause is a nonresident and does not reside in the state of Missouri. C. L. Keaton. Subscribed and sworn to before me this 4th day of June, 1884. My term of office expires January 12th, 1887. Emil M. Weber, Notary Public." This affidavit was indorsed

as follows: "State of Missouri vs. James Keener. Filed June 12th, 1884. C. H. Barham, Clerk. Filed June 4th, 1884. Moses Harvey, Justice of the Peace." Third, the proof of the publication was attested by the affidavit of the publisher of the newspaper, and showed that it was published as follows: The first insertion June 14, 1884, the second June 21, 1884, the third June 28, 1884, and the fourth July 5, 1884. Defendant then introduced Thomas H. Ezell, who testified he was clerk of the circuit court and the custodian of the records of the said court, and that the records of the said court which he produced in evidence showed that the said court by its order adjourned the March term, 1884, on March 20 to June 16, 1884, on which day it met again. The sheriff's deed was in the ordinary form of a sheriff's deed, and recited that on the 17th day of December, 1884, judgment was rendered in the circuit court of Stoddard county in favor of the state of Missouri, at the relation and to the use of William C. Harty, collector of the revenue of Stoddard county, for the state of Missouri, and against James Keener, for the sum of \$12.55 for certain delinquent state, county, and special taxes, and interest assessed and found by the said court to be due and unpaid upon the southeast quarter and west half of section 33, township 25, range 11, and that said taxes and interest found due upon said real estate for the year 1882 amounted to \$12.55, and certain costs which had been taxed at \$23.75, which were declared a lien in favor of the state of Missouri upon the said above-described tracts; and then recited the issue of a special execution, the receipt of the same by the sheriff, and his levy upon said real estate, and his sale of the same at public vendue, and that William P. Renner was the highest and best bidder for the same at and for the price and sum of \$32, in consideration of which he sold, transferred, and conveyed the same to the said Renner. This deed was duly acknowledged in open court and recorded. The plaintiff then offered in evidence other conveyances regular in form down to the plaintiff, and then offered in evidence, also, testimony tending to prove title in plaintiff by adverse possession for more than 10 years prior to the bringing of this suit.

As indicating the court's view of the law upon the facts, the court gave the following two instructions:

"(1) The court declares the law to be that plaintiff has not adduced any evidence in this cause to justify a finding for plaintiff to title to the lands in controversy by adverse possession, and the finding will be for the defendants.

"(2) That if the court finds and believes from the evidence in the cause that on the 20th day of March, 1884, the circuit court of Stoddard county, Mo., was adjourned to sit again on the 16th day of June, 1884, and

said adjournment was not a final adjournment of the March term, 1884, of said court until the next regular term in course, but was merely an adjournment of said March term, 1884, until a fixed date on which said March term continued to be held until the 17th day of June, 1884, on which date said term was adjourned until court in course, and that on the 12th day of June, 1884, and pending the temporary adjournment of said March term, 1884, the clerk of said court issued an order of publication against one James Keener in a cause entitled 'The State of Missouri, to the Use of W. C. Harty, vs. James Keener,' then pending in said court, for the reason that said James Keener was a nonresident of the state of Missouri, and caused notice to be served upon said Keener by publication, and that said cause came on to be heard at the September term, 1884, of said circuit court of said Stoddard county, and judgment rendered upon said service upon and notice to said James Keener, and that the lands of said Keener were sold to satisfy said judgment, and a deed executed to W. P. Renner upon a prior levy and sale of said lands under said judgment, and that plaintiff in this cause claims under said deed, then and in that event said order of publication and all proceedings based thereon, including said deed, were void for want of authority in said clerk to make or issue order of publication, or the process and notice based thereon, and the finding of the court will be for the defendants."

To the giving of such declarations the plaintiff duly excepted. The court refused other declarations of law asked by the plaintiff. Thereupon the court entered judgment for the defendant, and by its decree dismissed the plaintiff's bill, and vested title to the lands in controversy in the defendants, and in due form and after proper steps the plaintiff appealed to this court.

1. The first vital proposition in this case is whether the circuit court erred in holding that the circuit court of Stoddard county was not in vacation from and after March 20, 1884, to June 16, 1884, and consequently that the clerk of said court during said interim was without legal power to make an order of publication. The Revised Statutes of 1879 (chapter 59, art. 4, § 3494), under which the tax proceeding involved in this suit was prosecuted, provided: "That in suits for the enforcement of liens against either real or personal property and in all actions at law or in equity, which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the court if the plaintiff or other person for him shall allege in his petition, or file an affidavit stating that part or all of the defendants are nonresidents of the state, \* \* \* the court in which said suit is brought, or in vacation the clerk thereof, shall make an order

directed to the nonresident or absentees notifying them of the commencement of the suit," etc.

In *Schell v. Leland*, 45 Mo. 289, it was held by this court that under the statute allowing service and notice to nonresidents by orders of publication and the publication thereof, when the facts authorizing publication are neither stated in plaintiff's petition nor in the affidavit filed at the commencement of the suit, no order was allowable in vacation; *Wagner, J.*, speaking for the court, saying: "The above section is the only one where provision is made for the court or clerk, in vacation, issuing an order of publication. The order can only be made by strictly complying with the statute, for in all cases where constructive service is substituted for actual notice strict compliance is required." This case has often been approved by this court. *State ex rel. v. Field*, 107 Mo., loc. cit. 451, 17 S. W. 896; *Quigley v. Bank*, 80 Mo. 289, 50 Am. Rep. 503; *Hiles v. Rule*, 121 Mo., loc. cit. 255, 25 S. W. 959; *Williams v. Monroe*, 125 Mo., loc. cit. 586, 28 S. W. 853; *Harness v. Cravens*, 126 Mo., loc. cit. 240, 28 S. W. 971; *Charles v. Morrow*, 89 Mo. 638, 12 S. W. 903; *Sutton v. Cole*, 155 Mo., loc. cit. 213, 55 S. W. 1052; *Parker v. Burton*, 172 Mo. 91, 92, 72 S. W. 663.

Adopting this as the settled law of this state, the record presents the question clear and sharp, was there a vacation of the circuit court of Stoddard county in the interim caused by the adjournment of that court on March 20, 1884, to June 16, 1884, when it again convened, so as to authorize the clerk of said court to make an order of publication on June 12, 1884? In *Jacob's Law Dictionary*, vacation is defined as being "all the time between the end of one term and the beginning of another; it begins the last day of every term as soon as the court rises." But in *Brown v. Hume*, 16 Grat. (Va.) 466, it was said: "Thus, whether we look to its own appropriate definition, or seek to deduce its meaning from the use made of its correlative by the law-writers, it would seem that there is not attached to the word 'vacation' a well ascertained, fixed, single, unvarying, technical meaning which is to control the interpretation of a statute in which the word has been employed, but that on the contrary there are several well received meanings of the word." The opinion in that case is well reasoned, and its conclusion well sustained.

In *Thompson v. Benepe*, 67 Iowa, 79, 24 N. W. 601, the Supreme Court, while recognizing the common-law definition, said: "But whether this meaning should be given to the word in any particular instance depends upon the subject-matter and the necessity which exists that some other meaning be adopted."

In *Conkling v. Ridgely*, 112 Ill. 36, 1 N. E. 261, 54 Am. Rep. 204, the validity of a confession of judgment before a clerk of the circuit court in vacation was challenged.

The regular October term under the law commenced October 2, 1882, and remained in session until December 27th, at which time it adjourned until January 29, 1883, at which day it reconvened and finally adjourned February 3, 1883. On January 12, 1883, the judgment was confessed before the clerk. During term time the law required judgments by confession to be entered in open court. The question was whether there was a vacation, so that the clerk could enter the confession, and it was held that there was a vacation, the court saying, "We think the term 'vacation' may well be given a different meaning from what it had at common-law," but did not mean the ordinary daily recess of the court. See, also, *Furniture Co. v. Mattox*, 13 Ind. App. 221, 40 N. E. 545. In other jurisdictions, notably Massachusetts, it has been ruled that authority to a clerk to take a recognizance, in vacation did not authorize him to take one on Saturday, where the court had adjourned from Friday to Monday, and the court adhered to the English rule as to terms and vacations.

*Brayman v. Whitcomb*, 134 Mass. 525. Up to the act of March 7, 1883, there was a diversity of opinion as to what adjournment or recess of a court constituted a vacation within the meaning of our statutes permitting or authorizing various acts to be done by the judge or clerk in vacation. By that act it was provided: "Whenever any act is authorized to be done by, or any power is given, to a court, or judge thereof in vacation, the words 'in vacation' shall be construed to include any adjournment of court for more than one day." Laws Mo. 1883, p. 112. Afterwards this clause of the act of 1883 was amended by adding the words "or whenever any act is authorized to be done by, or any power given to, a clerk of any court in vacation, the words 'in vacation,' shall be construed to include any adjournment of court for more than one day." Laws Mo. March 7, 1885, p. 25.

In *State v. Derkum*, 27 Mo. App. 628, the Kansas City Court of Appeals had occasion to construe the act of 1885 in connection with sections 1762 and 1769, c. 24, art. 14, Rev. St. 1879, in respect to the filing of informations in misdemeanor cases. In that case it appeared that the circuit court of Cole county convened December 7, 1885, and on December 23d adjourned to January 11, 1886, and on January 4, 1886, the prosecuting attorney filed an information against the defendant for selling liquor without a license. There was no entry of record of the filing of this information. The defendant filed his motion to quash the information for the reason that it did not appear to have been filed in court, and, as the court was not in vacation on January 4th, the contention was that it was not filed in any place contemplated by law. In construing the act of 1885 the court called attention to the fact

that the section 3126, of which the act of 1885 was amendatory, provided that: "The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the Legislature or of the context of the same statute." By section 1769 it was provided: "If such warrant be issued in term, it shall be made returnable forthwith; but if issued in vacation, it shall be made returnable to the next term thereafter and if defendant be arrested during the term he shall be brought into court, but if he be arrested in vacation of the court, the officer shall bail him," etc. And the court held that the vacation spoken of in section 1769 clearly referred to the vacation between courts—that is, between a term and the next term thereafter—and that it could not be supposed that the Legislature meant one thing by the term "in vacation" in section 1762, and a different thing by the same term in section 1769, and therefore construed the information in that case to have been filed in term time. We see no occasion for discussing whether that decision was correct or not, in view of the several statutory provisions considered by the court.

In *Hadley v. Bernero*, 97 Mo. App. 314, 71 S. W. 451, the question arose as to whether an appeal from a judgment in an unlawful detainer case had been taken within six days after its rendition; it being the contention of the respondent that the St. Louis circuit court was holding its regular term, and therefore that the appeal must have been taken within six days under the statute. Section 3370, Rev. St. 1899 (Ann. St. 1906, p. 1895). No proof was offered to show that the court was not in vacation when the judgment of the justice was rendered. Speaking to the general question now under consideration, the court said: "As to the meaning of the sections of the statutes bearing on this question, we think they used the word 'term' to signify the entire period from the first day of a term as fixed by law to its final close, and the word 'vacation' to signify the period between the adjournment of any term and the beginning of another, not merely an interval when the court is not in session from having adjourned for more than a day, but not to court in course. *Brayman v. Whitcomb*, 134 Mass. 526; *Bronson v. Schulten*, 104 U. S. 415, 28 L. Ed. 797; *State v. Derkum*, 27 Mo. App. 628. By this construction a temporary adjournment of the St. Louis circuit court would not have relieved the appellants of the duty to perfect their appeal from the judgment of the justice of the peace if given in term inside of six days after its rendition."

That case was followed by the St. Louis Court of Appeals in *Warner v. Donahue*, 99 Mo. App. 87, 72 S. W. 492. In that case the circuit court of St. Louis county had adjourned its September term from November 30th to December 30th, in order to hold

court in the other counties in the circuit, and it was held that this adjournment did not terminate the September term of the St. Louis county circuit court so as to exonerate the appellant from taking his appeal within six days from the rendition of the judgment in this interim.

These three cases are the only ones which we have been able to find in the decisions of the Courts of Appeal. In *St. Louis & S. F. Ry. Co. v. Evans & Howard Brick Co.*, 85 Mo. 307, it appears that a writ of error and an order of supersedeas was obtained from one of the judges of this court pending the adjournment of this court for more than one day. On a motion to vacate the order of supersedeas and to dismiss the writ of error, among other things it was said: "And the Laws of 1883, p. 111, amending section 3128, c. 46, art. 2, Rev. St. 1879, when considered in connection with other statutory provisions already noticed, fully authorize a judge of this court, when it has adjourned for more than one day, to inspect the record in a cause and to allow a writ of error to stay execution upon the usual terms. The order in this cause made by the circuit court was a final order from which an appeal or writ of error would lie."

While the St. Louis Court of Appeals in the two cases just cited adopt the common-law definition of the term "vacation," it is to be observed that they make no citation of the decision in *Brown v. Hume*, 16 Grat. (Va.) 466, or *Thompson v. Benepe*, 67 Iowa, 79, 24 N. W. 601, or *Conkling v. Ridgely*, 112 Ill. 36, 1 N. E. 261, 54 Am. Rep. 204, but their decision rests in the main upon the common-law definition of the word and *Brayman v. Whitcomb*, 134 Mass. 526. We have no doubt whatever of the correctness of the decision in *Hadley v. Bernero*, 97 Mo. App. 314, 71 S. W. 451, on the ground that there was no evidence in that case to show that the court was not in vacation on the day when the judgment of the justice of the peace was rendered. And the presumption was properly indulged that, as the circuit court retained and decided the cause, it found the appeal was taken in vacation. *Bauer v. Cabanne*, 11 Mo. App. 114. The general statement of the law as to the meaning of the word "vacation" was not essential to the decision of the cause. In the *Case of Santee*, 2 Va. Cas. 363, in delivering the opinion of the judges, Dade, J., said, in speaking of the definition of the word "term" in *Jacob's Law Dictionary*: "It cannot be denied that in common parlance in some of the statutes and amongst the law-writers, the word has been often indiscriminately used to express the actual session of the court, and the stated time when it should sit. This gives room for construction, and imposes the necessity of inquiring into the reason of this law or considering the word in the context and comparing the relative provisions of

the section, so as to ascertain the sense in which the word was used by the Legislature in this particular law; and upon the result of this inquiry the decision of this question turns." Proceeding to examine and comment on the several clauses of the section, he came to the conclusion, "that in each of the passages in which the word was used it was intended to denote not the time appointed for the holding of the court, but the actual sitting of the court."

In *Brown v. Hume*, supra, Judge Daniel, in the further discussion of the meaning of the word "vacation," said: "In view of the evil sought to be cured by the act of 1819, to wit, the useless and unnecessary imprisonment of debtors, we can see no reason for supposing that the Legislature in framing the Laws of 1819 intended to leave an interval in which a party detained for want of bail could not confess judgment either in the clerk's office or in court. And as the language of the statute readily admits of an interpretation extending the period, during which the clerk may take confession in his office, to the commencement of the actual sitting of the court, no reason is perceived why we should not adopt that interpretation." Accordingly it was held in that case that the Code of Virginia (1860) p. 713, c. 171, § 41, which only authorized a confession of judgment in the clerk's office in vacation, permitted the confession of a judgment in the clerk's office on the morning of the first day of the term of the court before the hour for the opening of the court for that term.

And we have seen the Supreme Court of Illinois in *Conkling v. Ridgely*, 112 Ill. 36, 1 N. E. 261, 54 Am. Rep. 204, sustained a confession of a judgment in an interval between the adjournment of the circuit court from December 27th to January 29th, and held that to hold otherwise would be to adopt a legal fiction and give it effect over what was the real condition to the denial of the enlarged remedy which was intended to be given by the statute. Said the court: "We think that under this act the term 'vacation' may well be given a different meaning from what it had at common law, as above given. Under the earlier organization of courts of England, 'terms' of the court were four periods in each year. They commenced on fixed days, and had a fixed time of termination, and they aggregated 91 days. The vacations embraced all the days in the year not included in the 'terms.' Any such a period of recess of a court of more than a month's duration, as we find in this case, was unknown in that system. The early laws of this state, prior to December 9, 1871, provided for dividing the state into judicial circuits, and fixed the times for the commencement of the terms of the circuit court in each county. In no case did the statutes in express terms fix the duration of the terms of such courts, though as the judges were required to hold terms in



different counties on fixed days, and had no authority to hold court in one county at a time the law required them to hold court in another, and only one term of a circuit court could be held or be open at any one time in a circuit, it followed, as a necessary construction of the statute, that, upon the occurrence of the time fixed by law for the opening of the court in any one county in a circuit, the circuit courts in every other county stood adjourned until court in course. *Archer v. Ross*, 2 Scam. (Ill.) 303." The court then comments upon the change of the statutes of Illinois, which provided that terms of the circuit court might be held in two or more counties in the same circuit at the same time, and that it should not be necessary to close any term in any county before the business of that term was disposed of, in order to begin a term in any other county in the same circuit, if any circuit judge of the state could be had to preside over either of said terms. The act of February 22, 1872, of that state conferred upon the circuit courts, when in session, the power to adjourn to any day not beyond the first day of the next term of the court in that county fixed by law. The effect of these statutes was to change the law in respect to the peremptory adjournments made necessary by the laws in force before, and to leave the duration of the terms of the courts practically at the discretion of the judges. The striking similarity of that judicial system and our own in regard to the power of courts to adjourn their terms to any day not beyond the beginning of the first day of the next regular term, it seems to us, makes the decision of the court in that case very persuasive in the determination of the point now under consideration as to the effect of the adjournment of the Stoddard county circuit court from March 20 to June 16, 1884, and we think calls for the application of the principles therein stated to the facts of this case. After the circuit court had adjourned from March 20, 1884, up to June 16, 1884, we are clearly of the opinion that it could not make an order of publication during the interval between those dates, and, if the defendants' contention be true, the clerk of that court was without power to make any order of publication in any case for a period of 88 days. We think, independently of the act of 1883, that after the adjournment on the 20th of March there was a vacation until the 16th of June, when the court reconvened according to its adjournment, and such we think has been the construction placed upon section 3494, c. 59, art. 4, Rev. St. 1879, and the subsequent revisions to the same effect by the power of this state and the courts generally. And in our opinion this has been the proper construction of that provision of our law in regard to the power of clerk in vacation to make orders of publication to nonresidents or absentees. A dif-

ferent construction would in many cases result in a needless delay in the commencement of actions, and would be unreasonable. The act of March 15, 1883, p. 111, and the subsequent act of 1885, were clearly enacted to set this question at rest forever, and to confirm the prevailing view taken by the courts and the legislative power of this state as to what constituted a vacation within the meaning of the several acts of this state in which a judge or clerk in vacation were empowered to do certain acts. The act of 1883 was clearly in force at the time the suit was brought to enforce the lien of the state for the delinquent taxes of the year 1882, and while by its terms it refers to any act authorized to be done by or any power given to a court or a judge in vacation, and provides that the words "in vacation" shall be construed to include any adjournment of court for more than one day, it is hard to understand, if the court was in vacation for the purpose of permitting the judge to do an act authorized to be done by him in vacation, why the court would not also be in vacation so as to authorize the clerk also to act, even prior to the act of 1885, which included the clerks specifically.

In our opinion, the clerk of the Stoddard county circuit court was authorized to make an order of publication in that suit, for the reason that there was a vacation of the circuit court of that county at the time he made the same.

2. This brings us to the other contention, that the affidavit itself which was filed with the clerk and which has been set out in the statement of the case was utterly insufficient to sustain the order of publication. The objection that the affidavit was not made in this case, but in a justice's court, is wholly untenable. The affidavit was made before a notary public, who was fully authorized to administer the same, and stated the essential fact that James Keener, the defendant, was a nonresident of the state. The fact that it was first filed before Moses Harvey, a justice of the peace, did not affect its validity. As said by defendant, the justice had no jurisdiction of the suit, as was decided by this court in *State ex rel. v. Hopkins*, 87 Mo. 519. Presumably discovering that the justice had no jurisdiction, the plaintiff withdrew it and filed it with his petition in the tax suit, and it was none the less an affidavit filed with the petition at the commencement of the suit than if it had never been filed with the justice and had been originally filed with the clerk of the circuit court. Every presumption will be indulged that the affidavit was withdrawn from the justice by his consent, but, as he had no jurisdiction of the case, he could not have prevented the dismissal of the cause and the withdrawal of the petition and affidavit.

3. As to the other insistence, that because the affidavit was made on the 4th of June,

1884, and was not filed until the 12th of June, 1884, in the circuit court, the circuit court obtained no jurisdiction, it is to be said that the statute should be given a reasonable construction. In a direct proceeding in *Campbell v. McCahan*, 41 Ill. 45, it was held that an affidavit made 20 days before the filing of the bill was not a reasonable time and failed to confer jurisdiction. In *Armstrong v. Middlestadt*, 22 Neb. 711, 38 N. W. 151, an affidavit made one day and filed the next was held sufficient, but the court remarked, obiter, that "in sustaining the affidavit we do not wish to go beyond the facts of this case and to hold an affidavit made several days before the commencement of an action would be sustained." In *New York Baptist Union v. Atwell*, 95 Mich. 239, 54 N. W. 760, a drastic construction was given the statute, and "where an affidavit for publication was made on the 15th of the month, and the order of publication was not made until the 20th," it was held the service was insufficient, in a collateral suit in ejectment, to confer jurisdiction. On the other hand, this court in *Graham v. Bradbury*, 7 Mo. 281, held that "the objection that there was an interval of nine or ten days betwixt the making of the affidavit and the issuing of the writ and the state of facts might have changed during the interval" was untenable. Judge Scott said: "The party must take advantage of this by plea. Some time must necessarily in many cases intervene between the making of the affidavit and the issuing of the writ." In view of the various utterances on this subject, our opinion is that, although there was a delay of eight days between the making of the affidavit and the filing of the suit, it did not render the order of publication void. If the making of the affidavit and the filing of the petition must both occur on the same day, it would in actual practice work great inconvenience in many instances, and in some great injustice. We can conceive of cases where the delay would be so great that it would be wholly unreasonable and should be held ground for holding the order insufficient, but we are unwilling to say that the delay of seven or eight days in this case rendered the whole proceeding void, and this is the view taken by Van Fleet on *Collateral Attack on Judicial Proceedings*, § 330. Our courts have not, we think, applied the drastic rule adopted by the Michigan court on this subject.

It follows that in our opinion the judgment cannot be held void because the order of publication was not based upon a sufficient affidavit. As the sheriff's deed was based upon a valid judgment and the plaintiff has acquired by regular mesne conveyances the title of defendant's ancestor, James Keener, the circuit court erred in decreeing title in defendants as his heirs at law, and accordingly the decree of the circuit court is re-

versed and the cause remanded, with directions to enter a decree vesting the title in plaintiff.

BURGESS and FOX, JJ., concur.

WINN et al. v. GRIER et al.

(Supreme Court of Missouri, Division No. 2.  
March 9, 1909.)

1. WILLS (§ 386\*)—CONTEST OF WILL—REVIEW—QUESTIONS OF FACT.

While a suit to contest a will is an action at law, and the appellate court cannot weigh conflicting evidence, still the court may examine the record to see if there is any substantial testimony to authorize the submission of the cause to the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 859; Dec. Dig. § 386.\*]

2. WILLS (§ 31\*)—TESTAMENTARY CAPACITY—DETERMINATION.

The standard of mental capacity required to sustain a will is that the testator must have had sufficient understanding to comprehend the nature of the transaction that he was engaged in, the nature and extent of his property, and whom he desired to give it to, and to whom he was giving it, without the aid of any other person.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 66-68; Dec. Dig. § 31.\*]

3. WILLS (§ 55\*)—TESTAMENTARY CAPACITY—EVIDENCE.

Evidence that testator exhibited numerous eccentricities, such as unbounded belief in a patent medicine as a cure for all ills, wanting to make political speeches, getting up in the night, singing psalms in his room, taking the house dogs hunting and returning without any game, the exhibition of live stock at church meetings, failure to recognize acquaintances, a roaring in the head and disconnected conversations, is insufficient to show want of testamentary capacity, where it is shown that at all times he was able to carry on his business and that when he made his will he understood all that was said and done.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.\*]

4. WILLS (§ 324\*)—TESTAMENTARY CAPACITY—EVIDENCE—QUESTION FOR JURY.

Where, on an issue of testamentary capacity, a medical expert witness did not claim that the testator was suffering from any well-defined form of insanity, and, in answer to the hypothetical question propounded to him, stated, "Without seeing the man and judging from the man himself, I would think that he was mentally inefficient—mentally deficient to perform those acts in a reasonable way," and the hypothetical question does not embrace testimony of witnesses that testator was fully capable of transacting business, such evidence is insufficient to take the question of mental capacity to the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 768; Dec. Dig. § 324.\*]

5. WILLS (§ 55\*)—TESTAMENTARY CAPACITY—EVIDENCE.

On an issue of testamentary capacity, evidence that testator devised to his daughter land to which she already had a warranty deed is not evidence of mental incapacity, where it is shown that the money with which the land was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

bought was furnished by testator, since he might have had a trust interest in the land.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 55.\*]

**6. WILLS (§ 155\*) — "UNDUE INFLUENCE" — WHAT CONSTITUTES.**

Influence exercised on a testator sufficient to invalidate his will must be such as amounts to overpersuasion, coercion, or force, destroying his free agency or will power, as contradistinguished from merely the influence of affection or attachment, or the desire of gratifying the wishes of one beloved, respected, and trusted by the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375-381; Dec. Dig. § 155.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172; vol. 8, pp. 7823, 7824.]

**7. WILLS (§ 166\*)—UNDUE INFLUENCE—EVIDENCE.**

On an issue of undue influence invalidating a will, evidence that testator's son attended to a part of the testator's business, undertook to aid him in the management of his large estate, that defendant's daughter nursed testator during his last sickness, and that the will did not equally distribute the property, is insufficient to show undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

**8. NEW TRIAL (§ 124\*)—MOTIONS—SUFFICIENCY OF APPLICATION.**

A motion for a new trial for newly discovered evidence, which does not set out such evidence, or the names and addresses of the witnesses who would testify thereto, is fatally defective.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 252; Dec. Dig. § 124.\*]

Appeal from Circuit Court, Buchanan County.

Will contest by Jennie Winn and others against Mary E. Grier and others. From a judgment for defendants entered on a directed verdict, plaintiffs appeal. Affirmed.

From a judgment and decree of the circuit court of Buchanan county in favor of defendants, plaintiffs appeal.

This is a proceeding to contest the validity of the will of George S. Karnes, who died in Buchanan county, Mo., on the — day of March, 1904, at the age of 82. Mrs. Jennie Winn and Mrs. Elizabeth Jeffries are daughters of George S. Karnes, deceased, and Leroy Jeffries, the husband of Mrs. Jeffries. The defendants or proponents of the will are children of the deceased, Edward Gilpin (husband of Carrie Gilpin) and John N. Karnes, being executors of the will. On January 8, 1901, deceased made, executed, and published what purported to be his last will and testament, and said will was duly admitted to probate by the probate court of Buchanan county, Mo., on March 18, 1904, and the defendants, Edward Gilpin and John N. Karnes, appointed therein as executors, duly qualified as such and took charge of the estate.

The petition alleges that for many years prior to the time of his death, and prior to the time of the execution of the alleged last will and testament of said George S. Karnes,

said George S. Karnes was decrepit and infirm both in mind and body; that prior to the date of the execution of the alleged will, and for some years before said date, said George S. Karnes had languished both in mind and body, and had been entirely unable to manage his own affairs and transact his own business; and that at the time of the execution of the alleged last will and testament deceased did not have sufficient mental capacity to make a will, and did not have sufficient mental capacity to know or understand the nature of said instrument or the effect thereof, and that said alleged last will was not the free and voluntary act of said George S. Karnes; that at the time of the execution of the will Margaret Tull, one of the children of said George S. Karnes, and the principal beneficiary under the terms of said will, was residing with and was caring for said George S. Karnes, was nursing and ministering unto him during his sickness at said time, and exercised complete control and dominion over the mind of said George S. Karnes; that John N. Karnes, one of the defendants herein, for many years prior to the death of said George S. Karnes, managed the affairs of said George S. Karnes and transacted almost all of his business, and that in the management and transaction of his business said George S. Karnes relied for guidance and assistance entirely upon the said John N. Karnes; that said John N. Karnes resided within a short distance of George S. Karnes, and almost daily, and frequently often during the same day, was at the place of said George S. Karnes, exercising complete dominion, control, and authority, not only over the affairs of said George S. Karnes, but also over said George S. Karnes himself. The petition further alleges that the defendants conspired together for the purpose of prejudicing the mind of said George S. Karnes against the plaintiffs, and for the purpose of procuring the disinheriting of the plaintiffs by said George S. Karnes; that said defendants conspiring together and using their influence upon said George S. Karnes, caused him to acquire a dislike for plaintiffs, which said dislike was without cause or excuse, and was the result of the conduct of defendants and by their influence over said George S. Karnes; that until George S. Karnes became old, decrepit, and infirm, and until his mind became impaired, he had great affection for plaintiffs, and that the aforesaid dislike of said George S. Karnes for the plaintiffs was the result of long and persistent deceit and fraud on the part of defendants, especially of Maggie Tull and John Karnes; that said Maggie Tull and John Karnes, well knowing that George S. Karnes had become infirm both in mind and body, and well knowing that he was unable to withstand their influence, both jointly and singly set

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

about to procure the execution of the alleged last will and testament, and to that end continually misrepresented the conduct and actions of the plaintiffs toward their father, and falsely represented to said George S. Karnes and made him believe that these plaintiffs were devoid of affection toward him, and said Maggie Tull and John Karnes so completely dominated the failing mind of said George S. Karnes as to make him falsely believe that the plaintiffs were in collusion against him for the purpose both of securing his property and destroying his happiness during his declining years, and made him falsely believe that he had already given to the plaintiffs more than their just share of his estate, which was well known to said Maggie Tull and John Karnes to be false. The petition further alleges that defendants Maggie Tull and John Karnes, particularly during the last few years of the life of said George S. Karnes, and especially at the time of the execution of the alleged will by said George S. Karnes, were his confidential advisers, and in the execution of the alleged will Maggie Tull and John Karnes substituted their will and wish for the wish of George S. Karnes, and that the alleged will was the direct result of undue influence, fraud, and deceit practiced upon said George S. Karnes by each of the defendants, especially by Maggie Tull and John Karnes.

The answer of the defendants admits the death of George S. Karnes, and that at the time of his death he was a resident of Buchanan county, Mo.; admits that plaintiffs are daughters of the said George S. Karnes, deceased, and that the defendants are also children of George S. Karnes, deceased; admits that George S. Karnes did not leave surviving him a widow, and that he left no children except the parties to this suit, and that there are and were no children of deceased children, and, after admitting the execution of the will and affirming its validity, denies all other allegations of the petition.

The cause was tried at the regular January term, 1906, of the circuit court of Buchanan county. The testimony introduced upon the trial tended to show that George S. Karnes, commonly called Sampson Karnes, resided in Buchanan county, Mo., for more than 60 years prior to the execution of the will introduced in evidence, and during the greater part of that time was a man of large means, carried on an extensive business in farming and stock raising, transacted business with the banks of the city of St. Joseph, and at the time of his death had on time deposit with the Tootle-Lemon National Bank \$4,500. He left a will dated January 8, 1901. The will was drawn by Mr. Henry M. Ramey, who was at that time practicing law in the city of St. Joseph, and was attested by John S. Lemon, president of the Tootle-Lemon National Bank, J. C. Wyatt, merchant, and John F. Imel, attorney at law. At the trial of the cause Mr. John S. Lemon was

unable to be present in court on account of the condition of his health.

On the part of the proponents of the will the evidence was substantially as follows:

J. C. Wyatt, one of the subscribing witnesses, testified that he was engaged in the mercantile business in the city of St. Joseph, and that he had known Mr. Karnes for about 35 years. In substance this witness testified as follows: "When I first knew Mr. Karnes he was very strong mentally and physically; in my opinion he was a man of rather more than average intelligence; a man with a good mind, strong memory, I think; that condition existed as far as I know up to three or four years ago; I saw him frequently; customer of ours, and I talked a great deal with him personally in a business way; I think I saw him on an average of once a week up to the last four or five years previous to his death. Mr. Karnes was a very positive man, a man of positive opinions, and a man that understood his business thoroughly. About four years ago Mr. Karnes asked me to witness his will. I was sent for at the store; I found him in Judge Ramey's office; I don't remember all the little details that occurred there; however, he asked me to witness his will; asked some other gentlemen—two others also. The will was read; it struck me as being an unusual occurrence; I had witnessed a number of wills, and I never knew of one previous to that being read. After the will was read and before he signed it, he said it was just as he had requested being made. Mr. Karnes signed the will in the presence of Mr. Imel, Mr. Lemon, Judge Ramey, and myself. At the time of the execution of his will he was changed a little in his physical condition, probably on account of his age, but with reference to his mental condition I saw nothing that caused me to question it. In the transaction of his business his family bought the goods—Mr. Karnes sometimes would buy them, and often would not—whatever his family might purchase, probably within a month or less or more, he would come in and pay the bill. I have no recollection of any one else having paid the bills up to three or four years ago. As a rule, when people come into the store to pay their bills they pay them to the cashier, but Mr. Karnes either wanted Mr. Townsend or myself to attend to that for him; he seemed to be that peculiar about it."

John F. Imel, another one of the subscribing witnesses, testified that he was engaged in the practice of law, and at the request of Judge Ramey he called at his office to witness the execution of this will. This witness testified that he was not acquainted with George S. Karnes prior to the meeting on January 8, 1901. He further stated: "Some statement was made in the presence of Mr. Karnes that he was close to 80 years of age. Judging from his actions, his talk, and his conduct, and just from looking at him and talking to him, I would judge him to

have been about 60 years of age. Judge Ramey read the will over to him, and we moved around a little in signing it. Mr. Karnes got up, as I remember it, and went up to the desk and signed it. He said that was his will, and he asked us parties that were there to act as witnesses for him, and declared it to be his will, and then we signed it as witnesses. After the will was read over, just before I signed it, I says, 'Mr. Karnes, do you think of any change that you want in that since hearing it read over?' and he said, 'None at all. That is exactly right; that is the way I want it.' He seemed to understand fully the subject he was discussing. He was apparently a well man." In answer to a question as to whether or not in his opinion George S. Karnes was at that time mentally capable of making, executing, and publishing this paper as his last will and testament, the witness answered: "I think he was capable of doing it; as much so as any other man." Witness identified his signature as a witness to the paper, also the signature of George S. Karnes, and testified that the will was signed in his presence.

Over the objection of the plaintiffs, proponents then offered the will itself in evidence, which is in words and figures as follows:

"Know All Men by These Presents, that I, George S. Karnes, of the county of Buchanan, in the state of Missouri, being of sound mind and disposing memory, do make and publish this my last will and testament, hereby revoking all former wills by me made:

"First. Upon my death and the probate of this my last will I desire and direct my executors to take out letters of administration and take charge of all my estate, both real, personal and mixed, except the real estate hereinafter given to my daughter, Sarah J. Winn, which they are not to take into their possession except to turn over to her, unless the same is necessary to pay my debts or the legacies hereinafter bequeathed.

"Second. I have now eight (8) children living. First: Mary E. Grier, wife of William Grier; Elizabeth Anna Jeffries, wife of Leroy Jeffries; Sarah J. Winn, intermarried with Furman S. Winn; Pascal W. Karnes, Abigail Gilpin, wife of William Gilpin; John N. Karnes, Carrie Gilpin, wife of Edward Gilpin, and Margaret E. Tull, wife of Charles Tull. My beloved wife is dead and the above named are all of my living children and heirs at law.

"I have from time to time given to each of my said children, property and money in such amounts as to me seemed proper and just.

"The land I have given to my daughters was deeded to their husbands.

"To my daughter Mary Grier I have given land and personal property.

"To my daughter, Elizabeth Anna Jeffries, I gave land and personal property.

"To my daughter, Sarah J. Winn, I gave

money and other personal property, and paid out large sums for her and her husband which I estimate at six thousand five hundred (\$6,500.00) dollars.

"To my son, Pascal W. Karnes, I gave some land and money and other personal property.

"To my daughter, Abigail Gilpin, I gave land and personal property.

"To my son, John N. Karnes, I gave land.

"To my daughter, Carrie Gilpin, I gave money and other personal property, and to my daughter, Margaret E. Tull, I gave money and other personal property.

"The money, personal property and land that I have heretofore given to my children were not in equal amounts. To some I have given more than to others.

"I gave more to my son, John N. Karnes, than I have given to any other child, but he worked for me many years after he became twenty-one (21) years of age, without pay, and I desired in some measure to compensate him for his services.

"The gifts above referred to were made by me to my children from time to time, after fully considering all the facts and surrounding circumstances, and it is my desire and will that none of the land, money or personal property be brought into hotch-pot or accounted for by any one of my said children, but that each and every one of them retain as his or her respective property, all that I have heretofore given to them and each of them.

"Third. I give and bequeath to each of my daughters, Elizabeth Anna Jeffries and Sarah J. Winn, five (\$5.00) dollars, to be paid to each of them by my executors within the time and in the manner hereinafter provided.

"Fourth. I give and bequeath to my daughter Margaret E. Tull, her heirs and assigns forever two thousand five hundred (\$2,500.00) dollars to be paid to her by my executors, in the manner and within the time herein-after specified.

"Fifth. I give and devise to my daughter, Sarah J. Winn, the north sixty (60) feet of lots one (1), two (2), three (3), four (4), and five (5), in block two (2) in Rogers' Second addition, an addition to the city of St. Joseph, Buchanan county, Missouri, together with all the hereditaments and appurtenances thereto belonging, or in any wise appertaining to have and to hold unto her, her heirs and assigns forever.

"Sixth. After the payment of the legacies given to my daughters by paragraphs three (3) and four (4) of this will, I give, devise and bequeath all the rest, residue and remainder of my property, real, personal and mixed, of every nature and kind, and wherever situate, to my sons and daughters, Mary E. Grier, Pascal W. Karnes, Abigail Gilpin, John N. Karnes, Carrie Gilpin and Margaret Tull, share and share alike, to have and to hold unto them, their heirs and assigns forever.

"Seventh. Should either of my sons or daughters named in paragraph six (6) of this will, die without issue of his or her body or direct descendants in blood, then the share of said deceased shall go to the brothers and sisters named in said paragraph six (6), share and share alike.

"Eighth. Should my daughters, Elizabeth Anna Jeffries and Sarah J. Winn, or either of them de cease before I do, then I direct that the legacies directed by paragraph three (3) of this will to be paid them respectively shall not be paid to the heirs of said deceased daughter, but shall go to my children named in paragraph six (6) of this my will, share and share alike.

"Ninth. Having the most implicit confidence in the honesty and fidelity of my son-in-law, Edward Gilpin, and my son, John N. Karnes, I hereby name and appoint them executors of this my last will and testament.

"Tenth. My executors are hereby directed to take charge of all my estate and to first pay all my debts and next to pay the legacies provided for in this will, the legacies to be paid to the respective parties within the shortest time possible, under the administration laws of the state.

"Eleventh. If in the opinion of my said executors it becomes necessary to sell any of my real estate to pay my debts or to pay the legacies herein provided for, then in that event they are hereby directed and empowered to sell said real estate or so much thereof as in their judgment is necessary for said purposes, provided that the real estate given to my daughter, Sarah J. Winn, shall not be sold to pay debts or legacies until after all my other real estate has been sold and the proceeds applied to the payment of said debts and legacies.

"Twelfth. Upon taking charge of my estate my said executors shall immediately turn over to my said daughter, Sarah J. Winn, the real estate devised to her by paragraph five (5) of this will unless in their judgment such real estate is necessary to pay my said debts or the legacies herein provided for.

"Thirteenth. On the first day of April, 1897, I conveyed by deed duly executed to John N. and Pascal W. Karnes, about one-fourth (¼) of an acre of ground in the northwest corner of the southwest quarter of section five (5) in township fifty-six (56) of range thirty-four (34), being the family cemetery in trust, as in said deed provided, and I hereby direct and empower my said executors to turn over to said trustees from time to time sufficient money to enable them to keep said cemetery in order and proper repair.

"Fourteenth. After fully administering my estate the payment of all just debts and the legacies herein provided for, all the rest and residue of my property, real, personal and mixed, shall be turned over to my sons and daughters named in paragraph six (6) of this will.

"In witness whereof, I have hereunto set my hand this 8th day of January, 1901.

"George S. Karnes.

"We, the undersigned, attest the above and foregoing will by subscribing our names hereto as witnesses in the presence and at the request of George S. Karnes, the testator, this 8th day of January, 1901.

"John C. Wyatt.

"John S. Lemon.

"John I. Imel."

On behalf of the plaintiffs 18 or 19 witnesses were introduced, and the record is quite voluminous. We do not deem it essential to a correct determination of the legal propositions involved to burden this opinion with a reproduction in detail of their testimony. It is sufficient to say that we have carefully read in detail the entire disclosures of this record. The witnesses testifying on behalf of the plaintiff were the plaintiffs, their two children, a nephew of testator, and neighbors and acquaintances of George S. Karnes.

Witness Evans testified that Mr. Karnes failed to recognize him on two occasions, and that when he, witness, told him his name was "Evans," testator inquired "What Evans?" to which witness replied, "Louis"; that testator then remarked that he was growing old pretty fast; he didn't know everybody. That was in 1900; that later on meeting him in the cemetery he had to again tell him who he was; on other occasions Mr. Karnes always recognized him. This witness further testified that he noticed a change in Mr. Karnes four years ago last November; that he was physically running down. On the two occasions referred to, witness testified that testator looked wild out of his eyes—excited.

Other witnesses testified that at times testator failed to recognize acquaintances, and, when told who they were, would express surprise, and say, "Oh, yes; that is so," or that he was absent-minded, or words to that effect. Witnesses testified that at times Mr. Karnes talked incoherently and disconnectedly, and that in the discussion of politics he would become very much excited, and say that certain men ought not to be allowed to run for office. The testator was a strong Republican. He condemned William J. Bryan; said he wasn't honest, and that he ought not to be allowed to run; that he was as able a man as McKinley; that McKinley was not a good Republican; and expressed the opinion that he (testator) could have been President had he devoted his time and energy in that direction, and that he would have made a better president than McKinley.

The testimony further tends to show that Mr. Karnes would get up at all hours of the night, take the house dogs with him, and go off into the woods by himself, and would come back and say that he had been hunting, but that he was never known to bring in game; that in his earlier life he had nev-

er been disposed to be a hunter; that he would sing hymns and psalms and make political speeches in the night, either in his room or in the yard. One of the witnesses testified that on one occasion, in discussing the subject of wills, Mr. Karnes stated that he was opposed to wills, and that the law could make a better will than he could.

The evidence further tended to show that for many years he had been affected with kidney trouble, and that he had taken large quantities of Warner's Safe Cure; that he recommended Warner's Safe Cure to his sick neighbors, irrespective of their ailments. The evidence further tended to show that he had a large wen upon his head; that he said he had reduced the wen in size by the use of alum; that this was a discovery unknown to the medical world, and that he thought he would make a name for himself and family on account of such discovery. The testimony further tended to prove that the testator complained of a rumbling in his ears, and that he undertook to cure his deafness by putting coal oil in his ears; that at another time he applied coal oil to a number of trees; the trees died, and, when talked to about the matter, he said that he did not have any sense anyway. On one occasion a short time before making his will, he took his stallion and some colts to the neighborhood church meeting for the purpose of exhibiting them. At another time when he attended church meeting he became dissatisfied because the preacher whom he expected to hear did not preach; he talked out loud to himself, and said, "I wanted this other gentleman to speak because I wanted to hear him." One afternoon at a neighbor's house, where a number of neighbors were assembled, the testator insisted on making political speeches off and on during the meeting, and those present at the time testified that they thought him of unsound mind; that during election years he would make political speeches. One of the witnesses testified that at the age of 79 he rode a young wild horse to his place of business, and, when the witness tried to induce him to trade with him for a gentle horse, testator replied that he had as much right to own a good horse as witness. Some of the witnesses testified that the testator was childish, physically weak, and wobbled when he walked.

On cross-examination, one of the witnesses, Mr. Howard, a nephew of testator, testified that in November or December, 1900, while on a visit at the home of his uncle, testator talked with witness about his children and the advancements he had made to them; about his horses, cattle, and farm; and in 1900, while showing witness a fine horse, called his attention to the fact that when witness visited him in 1899 he had a different horse. This witness further admitted that he borrowed money from the testator in 1899 or 1900, and that Mr. Karnes exerted himself to secure for witness a place

to work. This witness further stated that in 1899, on a visit to his uncle, testator remembered his (witness') mother, although it had been 35 years or more since he had seen her. On cross-examination Mrs. Winn testified that hands were employed on the farm of her father from time to time, and, while she thought John Karnes paid them most of the time, she would not state that her father had not paid them. This witness further stated that her father took stock to market very often, accompanied by his son. Witness Greenard testified on cross-examination that he had been transacting business with Mr. Karnes for a number of years, and that Mr. Karnes continued to buy merchandise from him up to a short time prior to his death in reasonably large quantities, and that he carried on these transactions personally. Another witness, Mr. Saxton, upon cross-examination testified that on two occasions in the fall of 1900 Mr. Karnes visited him to have apples ground into cider, and that he transacted the business as any other man would. Another witness for plaintiffs, Mr. Modrell, testified that he saw Mr. Karnes in the fall of 1900, and that he was greatly troubled and worried, and had had a serious trouble, and at that particular time, in his opinion, Mr. Karnes did not have sufficient mind and memory to execute a will, but that after that time he met Mr. Karnes frequently, prior to the execution of the will, and up to the time of his death, and that after the one time spoken of by the witness Mr. Karnes was the same Sampson Karnes that he had known from infancy, both in mind and body, except a slight physical weakness from age. Leroy Jeffries, husband of Mrs. Jeffries, testified that he transacted business with George S. Karnes up to the time of the general "bust up" in 1900, and that after that time he did not visit the home place or rent land from Mr. Karnes, as had been his habit in years past. Although this witness testified that in his opinion the testator did not have sufficient mental capacity to dispose of his property intelligently at the time of the making of his will, on cross-examination he stated that after the trouble referred to he had no social or business relations with Mr. Karnes.

Dr. Johnson Densmore testified, on behalf of plaintiffs, that in his practice he confined himself to mental diseases and diseases of the nervous system generally; that he was familiar with the ingredients used in the preparation of Warner's Safe Cure, and knew its effects, and that the taking of this medicine in large quantities had an injurious effect upon the mind and nervous system. In answer to a hypothetical question asked him, he said: "Without seeing the man and judging from the man himself, I would say, from your question, that he was mentally inefficient—mentally deficient to perform those acts in a reasonable way."

It was also shown in evidence that there was trouble in the Karnes family, and that the testator had instituted suit against Clarence Winn, son of Mrs. Winn, and Sam Jeffries, son of Mr. and Mrs. Jeffries, plaintiffs in this cause, for the sum of \$2,500.

The evidence further disclosed that the testator had accumulated sufficient property to give his son John N. Karnes 320 acres of land, worth \$90 per acre; his son Pascal Karnes 240 acres of land, worth approximately the same amount per acre; that he had given each of his daughters land and money in large amounts, none of whom had received less than \$2,000; that he had on hand at the time of his death \$6,261.70 personal property, and was the owner in fee of about 500 acres of land worth \$100 per acre, and the city property devised to Mrs. Winn.

Plaintiffs offered in evidence a warranty deed dated July 9, 1885, from Thomas W. Rogers to Jennie Winn, conveying certain real estate which the testator had sought by his will to devise to Mrs. Winn. This evidence doubtless was introduced for the purpose of indicating that the testator was not fully aware of the property that he owned. The record further discloses that the testator furnished the money to Mrs. Winn to purchase the land embraced in the Rogers deed. It is further disclosed by the record that the witnesses Joseph H. Stock and G. Robert Heger, appointed to accompany and aid the executors in opening and examining the papers, moneys, and other property of George S. Karnes, deceased, and make an inventory of them, embraced the land conveyed by Rogers to Mrs. Winn in the inventory, and certified that they performed the duty assigned to them, and that the inventory was full and complete.

While the foregoing does not give all the testimony in detail developed upon the trial, we repeat that we have read in detail all of the testimony as disclosed by the record, and this statement sufficiently indicates the nature and character of the evidence which confronted the court when the demurrer to such evidence was interposed.

At the close of the evidence the defendants requested the court to instruct the jury that under the law and evidence in this case their verdict must be for the defendants. To this instruction the plaintiffs interposed objections, which objections were overruled, and the instruction as requested given to the jury. Whereupon the plaintiffs properly preserved their exceptions to the action and ruling of the court in giving such instruction. In obedience to this instruction, the jury returned a verdict finding that the paper read in evidence was the last will and testament of George S. Karnes.

A timely motion to set aside the verdict and for a new trial in this cause was filed, and by the court taken up and overruled. Judgment was entered in accordance with

the verdict returned by the jury, and from this judgment the plaintiffs prosecuted this appeal, and the record is now before us for consideration.

C. F. Strop, James W. Boyd, and Eugene Silverman, for appellants. Neville & Grier and Mytton & Parkinson & Crow, for respondents.

FOX, J. (after stating the facts as above). The record before us in this case presents to our consideration but one legal proposition; that is, did the court commit error in giving the instruction to the jury at the close of the evidence in the nature of a demurrer to such evidence directing the jury to return a verdict for the defendants?

While our attention is directed to numerous complaints of error in the exhaustive briefs of learned counsel for appellants, yet such complaints in their last analysis are embraced in the main and overshadowing complaint that the court committed error in giving the instruction to which we have made reference. The grounds upon which the correctness of the instruction indicated is challenged may thus be briefly stated: First, that the testimony developed upon the trial of this cause respecting the capacity and competency of the testator to make a will fully authorized the submission of that issue to the jury. Second, that the testimony disclosed by the record sufficiently indicated that the will involved in this controversy was procured by the undue influence of certain beneficiaries in said will to warrant the trial court in submitting that question to the jury. Finally, the complaint is made, though not directed to the propriety of the instruction referred to, that the court committed error in ignoring the ground alleged in the motion for new trial of newly discovered evidence. We will give to these complaints, in the order designated, such attention as their importance demands.

1. At the very threshold of the consideration of the proposition involved in this contest, predicated upon the charge in the petition that the testator was not possessed of sufficient testamentary capacity to validly execute the will indicated in the statement, it is well that we keep in view the usual tests of capacity to make a will disposing of property possessed by the testator at the date of his death. Judge MacFarlane, in *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734, thus in a very practical way treated of this proposition, and directed attention to what had been held by this court in other cases. He said: "A witness was asked whether in his judgment, from his knowledge and observation of the testator, he was in November preceding his death 'competent to engage in or understand any complicated business matter or transaction.' An objection to the question was urged on the ground that such competency was not a prop-



er test of mental capacity requisite to make a will. The objection being overruled, the witness answered: 'If I had any complicated matter at that time, I would not have been willing to intrust it to him to settle or manage for me.' It is clear that the test here made of testamentary capacity goes beyond what has ever been required under the decisions of this court. It is said in *Brinkman v. Rueggesick*, 71 Mo. 556, by Napton, J., that 'it is conceded in most of the cases that a man may be capable of making a will, and yet incapable of making a contract or managing his estate'; and in the case of *Couch v. Gentry*, 113 Mo. 248, 20 S. W. 890, it is said: 'If the testator understood the business about which he was engaged when he prepared and executed his will, the persons who were the natural objects of his bounty, and the manner in which he desired the disposition to take effect, he was capable of making a will.' Competency 'to engage or understand any complicated business matter or transaction' requires too high a grade of capacity when compared with what is required under these decisions. Under that test a majority of men would be incapable of making a will."

Again we find the rule as to the test of capacity sufficient to make a will announced in *Sehr v. Lindemann*, 153 Mo., loc. cit. 288, 54 S. W. 540. It was ruled in that case that, upon making out a prima facie case by the proponents of the will, it then devolved upon the contestants to establish incompetency or undue influence. The court, in announcing the rule in that case, used this language: "By competency is meant intelligence sufficient to understand the act he is performing, the property he possesses, the disposition he is making of it, and the persons or objects he makes the beneficiaries of his bounty. Imperfect memory of persons he has known, idle questions or requiring a repetition of information, will not be sufficient to establish incompetency, if he has sufficient intelligence remaining to fulfill the above definition. Mere opinions of witnesses that the testator was 'childish,' or acted 'funny,' or was 'worse than a child,' or that there were 'inequalities in the will,' unaccompanied by any testimony showing any particular act or fact evidencing incompetency, do not make out a case of incompetency when the testimony shows that the testator 'knew what he was doing and to whom he was giving his property.'"

This court in a long and unbroken line of decisions has unqualifiedly approved the test of capacity as indicated in the foregoing cases. *Riley v. Sherwood*, 144 Mo. 354, 45 S. W. 1077; *Berberet v. Berberet*, 131 Mo. 390, 33 S. W. 61, 52 Am. St. Rep. 634; *Defoe v. Defoe*, 144 Mo. 458, 46 S. W. 433; *McFadin v. Catron*, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *Fulbright v. Perry County*, 145 Mo. 432, 46 S. W. 955; *Aylward v. Briggs*, 145 Mo. 604, 47 S. W. 510; *Hughes*,

*Adm'r, et al. v. Rader et al.*, 183 Mo. 630, 82 S. W. 32; *Sayre v. Trustees of Princeton University*, 192 Mo. 95, 90 S. W. 787.

The cases above cited have firmly settled the question as to the requisite test of mental capacity sufficient to execute a valid will. As was said by Gantt, J., in speaking for this court in *Sayre v. Trustees of Princeton University*, supra, that "the standard of mental capacity required to sustain a will has been fixed so far as judicial utterances can settle a principle, and it is that the testator must have 'had sufficient understanding to comprehend the nature of the transaction that he was engaged in, the nature and extent of his property, and to whom he desired to give it, and was giving it without the aid of any other person';" citing in support of such rule *Crossan v. Crossan*, 169 Mo. 641, 70 S. W. 136; *Brinkman v. Rueggesick*, 71 Mo. 553; *Couch v. Gentry*, 113 Mo. 248, 20 S. W. 890.

We have indicated the well-settled rule applicable to the test of testamentary capacity to validly execute a will, and the solution of the first proposition concerning the sufficiency of the mental capacity of the testator in the case now in hand to execute the will involved in this contest must be sought by a fair and impartial application of the testimony developed upon the trial to that question. In treating of the complaint of appellants embraced in the first proposition, that the court committed error in its mandatory instruction directing the jury to return a verdict for the defendants, we are not unmindful of the well-settled rule in this state that a suit to contest a will is an action at law under our system, and that it is not within the province of this court to weigh conflicting evidence to determine whether the jury found against the weight of evidence. But on the other hand, we must not be unmindful that it has been uniformly held by this court that it is its province to examine the record to see if there is any substantial testimony to authorize the submission of the cause to the jury. *Young v. Ridenbaugh*, 67 Mo. 574; *Appleby v. Brock et al.*, 76 Mo. 314; *McFadin v. Catron*, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *State ex rel. v. Guinotte*, 156 Mo. 520, 521, 57 S. W. 281, 50 L. R. A. 787; *Crossan v. Crossan*, 169 Mo. 631, 70 S. W. 136; *Hamon et al. v. Hamon et al.*, 180 Mo. 685, 79 S. W. 422.

Directing our attention to the testimony applicable to the first contention of the appellants—that is, that the testimony sufficiently indicated the mental incapacity of the testator, Mr. Karnes, to execute this will—to authorize the submission of that question to the jury, it is well to keep in mind the issue tendered by the pleadings to which the testimony was applicable. The issue tendered concerning the proposition now under consideration, upon the allegations in the petition of the contestants, was that at the

time of the execution of the alleged last will and testament deceased did not have sufficient mental capacity to make a will, and did not have sufficient mental capacity to know or understand the nature of said instrument, or the effect thereof. It is earnestly insisted by learned counsel for appellants that the evidence as disclosed by the record now before us made a case for the jury, and that the trial court committed error in giving the instruction heretofore mentioned, directing the jury to find the issues for the defendants. We shall not undertake to again repeat the testimony developed upon the trial of this cause. It is sufficient to say that we have carefully read in detail the testimony of all the witnesses embraced in the record before us, and have briefly indicated the nature and character of that testimony, and after a most careful consideration of it we are unable to give our assent to the insistence of counsel for appellants. It is true that some 18 or 19 witnesses testified in behalf of the plaintiffs, and recited numerous instances where the testator some time prior to the execution of this will exhibited numerous eccentricities. It seems that Mr. Karnes had unbounded faith in the medical virtues of Warner's Safe Cure, used it to an excessive degree, and recommended it to others with whom he came in contact, regardless of what their complaints consisted of.

It is not uncommon with men or women as they advance in years that their habits and mannerisms frequently change, and it is but common knowledge that eccentricities often develop at an advanced age, but this falls far short of a showing of mental unsoundness sufficient to invalidate the execution of a will. While the excessive use of Warner's Safe Cure might have been injurious both to the mind and body of Mr. Karnes, yet there is nothing strange or remarkable that he should have implicit confidence in its medicinal values, and make the recommendations of its curative properties as has been suggested. Upon due inquiry there would be no difficulty in finding a great many people of strong character and high order of intelligence who entertain the same views as to Warner's Safe Cure as the testator in this case did. His recommendations, doubtless, were in harmony with certificates of numerous persons as to its curative properties which were to be found in the advertising matter which was contained in the wrappers around each bottle of the medicine. Numerous other witnesses testified to eccentricities of the testator, such as his always wanting to make political speeches, getting up in the night singing psalms in his room, taking the house dogs and going hunting and returning without any game, the exhibition of his stock at some church meeting, his failure to recognize acquaintances, a roaring in the head and disconnected conversations,

and others which we deem it unnecessary to repeat. Conceding, for the purposes of this case, that the testator exhibited on various occasions the eccentricities as disclosed by the record, yet in our opinion, if the comparatively recent well-considered cases by this court correctly announce the law as applicable to such state of facts, and are to be longer followed, then it must be held that such state of facts are not recognized by the law as showing a want of capacity to make a will, and it logically follows, if such eccentricities as testified to by the witnesses are insufficient to show a want of capacity, then the mere fact that the witnesses predicated an opinion upon such a state of facts that the testator was of unsound mind gives no additional force to such facts.

In *Von De Veld v. Judy*, 143 Mo. 348, 44 S. W. 1117, it was conceded that the record disclosed a competition of evidence on the point whether Judy was of sufficient mental capacity to make a will. Manifestly the showing on the part of the contestants in that case was equally as strong as the one in the case at bar. It appeared in evidence that Judy was filthy in person and habits; exposed his person before a lady; was forgetful of old friends; falling in memory; made frequent repetitions in his conversations; would get lost; was physically weak, which arose from long-continued sickness; impaired eyesight; extreme old age; together with other facts concerning his mental condition. In the discussion of the facts developed in that case, this court said that "the testimony introduced by the contestants was of a character not at all calculated to favorably impress the impartial mind with a very great or abiding sense of its probative force." Emphasizing the views of this court upon the character of testimony as introduced in that case, which is similar in some respects to the testimony of the contestants in the case at bar, in further treating of such testimony the court used this language: "But even if the testimony on behalf of the contestants were much stronger than it is, much stronger indeed than that of the proponents of the will, still that would not be decisive of this case, and for these reasons: In the first place, the single issue tendered by the contestants in the will was, as heretofore stated: 'That at the time of its execution the said Resin S. Judy was not of sound and disposing mind and memory, and was, by reason of his mental infirmities, incapable of devising his property.' On this charge, by their general denial, the proponents of the will joined issue. Although, when a charge of insanity or imbecility is made against a testator, evidence is competent to show the condition of his mind long prior to and closely approaching the time of the will's execution, as well as the condition of his mind shortly subsequent to such execution, yet the purpose of such prior and

subsequent testimony is only to indicate the state of his mind at the very time the execution of the will took place. That is the true time to try his mind. The fact of competency is to be decided by the state of the testator's mind at the time the will was made, and although evidence is always admissible of prior and subsequent occurrences as tending to shed light on the question of the state of his mental faculties and of his bodily health on the day of the will's execution, yet such evidence is only receivable for that purpose alone, and is not otherwise to be regarded. *Saxon v. Whitaker's Ex'r*, 30 Ala. 237, *Harrison v. Rowan*, 3 Wash. C. C. 586, Fed. Cas. No. 6,141, and other cases cited in that first mentioned." It was expressly ruled in that case, under the facts developed upon the trial, that a demurrer to the evidence should have been sustained.

Our attention is directed to the testimony of the expert, Dr. Densmore, and great stress is laid upon his testimony as furnishing a sufficient ground to submit this case to the jury. After a most careful consideration of this expert testimony, we are of the opinion that it falls far short of furnishing any satisfactory or substantial proof of the want of sufficient capacity in the testator at the time of the execution of this will to validly execute the instrument disposing of the property that he possessed. It will be observed that the doctor did not claim, under the facts in this case, that the testator was suffering from any well-defined form of insanity, and it is significant how guarded he was in answering the hypothetical question propounded to him. He did not say that upon that state of fact the testator was insane, but his answer was simply this: "Without seeing the man and judging from the man himself, I would say, from your question, that he was mentally inefficient—mentally deficient to perform those acts in a reasonable way." It will further be observed that the hypothetical question does not embrace testimony of other witnesses who testified as to his transacting business. It may be that the doctor's conclusion, assuming the facts to be true that the testator was mentally inefficient in some respects, was correct, yet it must not be overlooked that the testator's mental capacity might have been inefficient to the extent even of being incapable of making a contract or managing his estate, yet, as expressly ruled by this court in *Brinkman v. Rueggelick*, and *Couch v. Gentry*, supra, it is conceded in most of the cases that a man may be capable of making his will and yet incapable of making a contract or managing his estate. If the testator understood the business about which he was engaged at the time of the preparation and execution of his will, the persons who were the natural objects of his bounty, and the manner in which he desired to dispose of his property, he was capable of making a will, and the fact that he was unable to engage in or un-

derstand any complicated business matter or transaction would not be sufficient to invalidate such will.

The case of *Sayre v. Trustees of Princeton University*, in many of its features, presented a much stronger showing on the part of the contestants than in the case at bar. In that case there were four expert witnesses who testified as to the mental unsoundness of Dr. Sayre, and what was said by Judge Gantt in the discussion of the expert testimony is so applicable to the expert testimony of Dr. Densmore which is now under consideration, and so clearly expresses our views upon the proposition, that we here quote his discussion concerning such testimony: "Medical men of great learning maintain that a mind diseased on one subject must be classed as unsound, but the law of this state is too well settled to be gainsaid that a man's mind may be impaired on one faculty and practically unimpaired in all others. Derangement of mental faculties does not incapacitate one under our laws from making a will, if it does not render him unable to transact his ordinary business, and incapable of understanding the extent of his property, and of appreciating the extent of his property, and of appreciating the natural objects of his bounty. We have incorporated the principal hypothetical question propounded to the experts, and it is apparent that many, if not all, of the facts assumed, are entirely consistent with mental soundness. Those that tended in the least to show aberration were wholly detached from the more pertinent and important evidence, which completely negatived the evidence of eccentricity or any mental unsoundness. It did not include the principal and controlling facts, but we are not bound to accept an opinion based upon facts which the law will not and does not recognize as showing a want of capacity to make a will. Conceding, as already said, that an expert might hold the view that Dr. Sayre was of unsound mind in some respects, the question and answer both fell short of the legal test of capacity to make a valid will in this state." One of the strong features in the *Sayre Case* was that Dr. Sayre had some years previous to the execution of his will been suffering from a well-defined form of insanity, melancholia. In that case the hypothetical question, which was very full, was propounded to the four expert witnesses, and each of them answered that in their opinion, assuming the facts embraced in the hypothetical question to be true, the testator was not capable of making a will.

We have again reconsidered the *Sayre Case*, and obviously it presents, as heretofore stated, in many of the leading features, a much stronger case to go to the jury than the case at bar, and in our opinion that case correctly announced the rules of law applicable to the subject under consideration, and

there is no valid legal reason why it should be departed from.

In *Archambault v. Blanchard*, 198 Mo. 384, 95 S. W. 834, it was sought to annul the last will and testament of an old gentleman residing in Kansas City by the name of Benoist. Numerous witnesses were introduced who detailed many eccentricities which had developed in this old gentleman, and this court in the discussion of the case conceded that after the date of the street car accident, February 20, 1899, which happened to befall Mr. Benoist, there was evidence to establish certain eccentricities and peculiarities, and some of them were pointed out by the court in passing upon the case. Speaking of Mr. Benoist, it seems "he was inclined to be agnostic in his religious opinions; that he was addicted to drinking intoxicating liquors, and would get under their influence to such an extent that in the afternoon he would be incapable of transacting business, and would refuse to do any business in the afternoon; that he would on various occasions scold and drive away the negro man who served about his premises, the evidence showing that the negro himself was often drunk; that his general physical health declined and his memory failed, and he would be given to fits of temper that witnesses had not observed in former years. There was evidence also that in the year before his death he had erected a monument on his lot in the cemetery in Baxter Springs, and had his grave dug and lined with granitoid, and said that when he was dead he wanted his body cemented in this grave; that he also had the carpenter make his coffin, and directed there should be no nickel-plated handles put on it. \* \* \*

All these eccentricities and peculiarities, in connection with the evidence as to his indulgence in intoxicating liquors to an excess in the last days of his life, were submitted to an expert witness, and he testified upon that hypothetical question that he would say that the testator was insane at the time of the execution of the will in contest." In that case, as in the *Sayre Case*, notwithstanding the testimony of the expert witnesses and the many eccentricities and peculiarities of the testator as testified to by the witnesses, it was held that there was no substantial evidence upon which to authorize a submission of the case to the jury.

Our attention is also directed to the fact that the testator in his will devised certain land to his daughter Mrs. Winn that she had had a warranty deed to since 1885. It is argued from this fact that at least it is a strong indication that the testator did not have knowledge of the property he owned. This fact is of but little significance when the entire disclosures of the record are considered. The testator furnished Mrs. Winn the money with which to buy this land, and it may be by reason of the fact of having furnished the money to purchase the land thought he had an interest in it, therefore

doubtless he thought that, having given the money to his daughter to make the purchase, there was nothing inappropriate in making sure that there would be no claim of this land by any of his children; that he would simply devise it to her in his will. Moreover, the two witnesses who accompanied the executor evidently considered the land as belonging to the testator, for they placed it in the inventory, and certified that it was a full and complete inventory of his property, and that they had fully discharged their duty as such witnesses. This occurrence concerning this piece of land clearly has but very little to do with the question as to the capacity of the testator to execute a will.

Our conclusion, after a very careful consideration of all the evidence in detail disclosed by the record, is that Mr. Karnes at the time he executed this will was entirely capable of making a valid will. He went to the office of Judge Ramey, without being accompanied by any one, and had his will prepared. The provisions of the will speak for themselves, and indicate very clearly that he had the business about which he was then concerned fully in hand. He seems to have not forgotten the names of any of his children, and clearly recalled what he had done for them in the past, and made mention of the fact in his will that he gave more to his son John for the reason that he had worked for him many years after he became 21 years of age without pay, and that he desired in some measure to compensate him for his services. He had this will witnessed, and two of those witnesses testified very clearly as to their observations of his mental capacity to execute the will. One of them had known him for 35 years; the testator and his family had purchased goods at his mercantile house; and while the other witness had had no acquaintance with him, yet he observed him, and at the time that he executed the will positively stated that he was entirely rational. In addition to this, we find some of the witnesses for the plaintiffs, who upon their examination in chief expressed the opinion that the testator was not of sound mind, upon their cross-examination, in answer to questions propounded, testified to a state of facts which would indicate that he was of sound and disposing mind. Witness Mr. Howard, a nephew of the testator, testified that in November or December, 1900, while on a visit at the home of his uncle, testator talked with witness about his children and the advancements he had made to them; about his horses, cattle, and farm; and in 1900, while showing witness a fine horse, called his attention to the fact that when witness visited him in 1899 he had a different horse. It was further admitted by this witness that he borrowed money from the testator in 1899 or 1900, and that Mr. Karnes exerted

himself to secure for witness a place to work. It seems that, whatever the opinion of this witness may have been as to the mental capacity of Mr. Karnes, he evidently thought that the testator had sufficient capacity to at least contract with him for the loan of over \$500. This witness further stated that, while on a visit to his uncle in 1899, testator remembered his (witness') mother, although he had not seen her for 35 years or more. Another witness, Mrs. Winn, testified on cross-examination that hands were employed on the farm of her father from time to time, and, while she thought John Karnes paid most of them most of the time, she would not state that her father had not paid them. This witness further stated that her father took stock to the market very often, accompanied by his son. Witness Greenard testified on cross-examination that he had been transacting business with Mr. Karnes for a number of years, and that Mr. Karnes continued to buy merchandise from him up to a short time prior to his death, in reasonably large quantities, and that he carried on these transactions personally. Mr. Saxton upon cross-examination also testified that on two occasions, in the fall of 1900, Mr. Karnes visited him to have apples ground into cider, and that he transacted the business as any other man would. Another witness for plaintiffs, Mr. Modrell, testified that he saw Mr. Karnes in the fall of 1900, and that he appeared to be greatly troubled and worried, and he had had a serious trouble, and at that particular time, in his opinion, Mr. Karnes did not have sufficient mind and memory to execute a will; but after that time he met Mr. Karnes frequently, prior to the execution of the will, and up to the time of his death, and after the one time spoken of by the witness Mr. Karnes was the same Sampson Karnes that he had known from infancy, both in mind and body, except a slight physical weakness from age. Another witness for the plaintiffs, a son-in-law of the testator, Leroy Jeffries, testified that he transacted business with George S. Karnes up to the time of the general "bust up" in 1900, and after that time he did not visit the home place or rent land from Mr. Karnes, as had been his habit in years past. This witness gave it as his opinion that the testator did not have sufficient mental capacity to dispose of his property intelligently at the time of the making of his will; however, on cross-examination he stated that after the trouble referred to he had no social or business relations with Mr. Karnes.

In conclusion, upon this proposition, we are of the opinion that there is an entire absence of satisfactory and substantial testimony tending to show the want of sufficient mental capacity at the time of the execution of the will in controversy as would au-

thorize the court to submit that issue to the jury. While it may be conceded that the testator was eccentric and peculiar in many respects, and that these eccentricities and peculiarities were made manifest in the manner and at the times and places designated by the witnesses, however, we must not overlook the settled rule as applicable to this subject, as was said in *Sehr v. Lindemann*, 153 Mo., loc. cit. 288, 54 S. W. 540: "By competency is meant intelligence sufficient to understand the act he is performing, the property he possesses, the disposition he is making of it, and the persons or objects he makes the beneficiaries of his bounty. Imperfect memory caused by sickness or old age, forgetfulness of the names of persons he has known, idle questions, or requiring a repetition of information, will not be sufficient to establish incompetency, if he has sufficient intelligence remaining to fulfill the above definition. Mere opinions of witnesses that the testator was 'childish,' or acted 'funny,' or was 'worse than a child,' or that there were 'inequalities in the will,' unaccompanied by any testimony showing any particular act or fact evidencing incompetency, do not make out a case of incompetency, when the testimony shows that the testator 'knew what he was doing and to whom he was giving his property.'"

2. This brings us to the second proposition presented to our consideration in this case; that is, the sufficiency of the testimony disclosed by the record to authorize the court to submit the issue tendered in the pleadings as to whether or not this will was procured by undue influence. The rules of law applicable to this proposition are well settled by a long line of decisions in this court. The expression of opinion has been uniform that the influence exercised upon a testator sufficient to invalidate his will must be of such a nature and character as amounts to overpersuasion, coercion, or force, destroying the free agency or will power, as contradistinguished from merely the influence of affection or attachment, or the desire of gratifying the wishes of one beloved, respected, and trusted by the testator. It is sufficient to say upon this contention that there is an entire absence of any testimony which would authorize the court to submit that issue to the jury. The testimony directed to that question is simply this: that John N. Karnes, son of the testator, attended to part of the testator's business; undertook to aid him in the management of his large estate. Mrs. Tull, daughter of the testator, was simply giving to her father such attention and care as any kind and dutiful daughter would under the circumstances have done. The record discloses, and it must be conceded, that the testator did not equally distribute his property under this will. Mrs. Winn and Mrs. Jeffries received at the hands of their

father a very small share of his estate remaining at the time of his death. It is true, however, that during his lifetime he had made advancements to all of his children. This unequal distribution is not sufficient to establish undue influence. It was expressly ruled in *McFadin v. Catron*, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771, that inequalities in the disposition of the property by the testator, giving to one child or children more than to another, are not sufficient grounds for setting aside a will, even though the testator gives nearly all of a very large estate to one of the children. There is nothing significant from the fact that John Karnes attended to a great deal of the testator's business, and was intimately associated with him. Those were but the natural acts of a son who represents his father, and should not be distorted into sufficient evidence of an exercise of undue influence. The same may be said as to Maggie Tull, the daughter of the testator. She was kind to her father and nursed him in sickness, and that is no more than what she or any other daughter would be expected to do under the conditions existing. The record discloses that there was some trouble in the family of the testator. As to what that trouble was we know not, nor do we care to know. It may, however, at least shed some light upon the unequal distribution of the property of the testator by his will.

There is no necessity for further discussing this proposition. The testimony was insufficient to authorize the submission of that issue to the jury. Inequality alone in the disposition of the testator's property is not sufficient to establish that the will was procured by undue influence. In order to authorize the submission of that question to the jury, there should be at least some substantial and satisfactory proof that the will was procured by coercion or by importunity that could not be resisted, and that by such coercion and importunity the execution of the will was procured. The testimony upon this proposition did not tend to make any such showing as is required under the law, hence the ruling upon this contention must be adverse to the appellants.

3. This brings us to the final contention, that the trial court erred in overruling the plaintiffs' motion for a new trial upon the ground of newly discovered evidence. It will suffice to say upon this contention that the record discloses that the plaintiffs in their motion for new trial did not embrace the newly discovered evidence, or the names and addresses of the witnesses who would testify to such newly discovered evidence. It is further disclosed by the record that the motion

for new trial was not sworn to. The allegations in the motion for new trial respecting the newly discovered evidence clearly do not conform to the well-settled rules announced by this court upon that subject. The rule applicable to the requisite allegations in a motion for new trial upon the ground of newly discovered evidence is firmly settled in this state, and, applying this rule to the allegations in the motion for new trial in the case at bar, manifestly the question of the propriety or impropriety of granting or denying a motion for new trial upon that ground is not properly preserved for review by this court. In the recent case of *King et al. v. Gilson*, 206 Mo. 264, 104 S. W. 52, this proposition was exhaustively reviewed by Judge Woodson, and it was expressly held that the question of newly discovered evidence, under the disclosures of the record, which was substantially similar to the record in the case at bar, was not preserved for review by this court, hence was not before the court for consideration. *State v. Norman*, 159 Mo., loc. cit. 535, 60 S. W. 1036; *State v. Welsor*, 117 Mo. 582, 21 S. W. 443; *State v. Ray*, 53 Mo. 349; *State v. McLaughlin*, 27 Mo. 111; *State v. Rockett*, 87 Mo. 666; *State v. Butler*, 67 Mo. 63.

We have herein given expression to our views upon the main propositions disclosed by the record. The testator had by a life of energy and industry accumulated the property of which he died possessed, and, unless we are willing to absolutely ignore the statute concerning wills, we see no escape from the conclusion that he had the right to dispose of such property in such manner as he saw proper.

A review of the comparatively recent cases by this court demonstrates that the right guaranteed to every property owner by the laws of this state to dispose of his property as he may deem proper is no longer to be considered a mere idle legislative expression, but that the statute means what it says and is full of force and vitality. It is plainly made manifest in the numerous well-considered cases by this court that the right of the owner to dispose of his property by will is fully recognized, and, if it be found that he is of sufficient testamentary capacity, his disposition of the property he owns will be upheld, and the interference by others with the exercise of this right, with whose views the disposition made by the testator did not happen to accord, will not meet with the approval or sanction of this court.

Entertaining the views as herein indicated, the judgment of the trial court should be affirmed, and it is so ordered. All concur.

# REIGART v. MANUFACTURERS' COAL & COKE CO.

(Supreme Court of Missouri. Nov. 25, 1908.  
Rehearing Denied March 9, 1909.)

## 1. FRAUDS, STATUTE OF (§ 44\*)—ORAL CONTRACT—TIME FOR PERFORMANCE.

A contract merely giving plaintiff, without any expressed consideration therefor, the option of buying from defendant a specified amount of coal on certain terms during a period of three years, cannot be made valid and enforceable by showing a contemporaneous oral agreement requiring plaintiff to go out and create a market for defendant's coal, as such oral agreement is void under the statute of frauds (Rev. St. 1899, § 3418 [Ann. St. 1906, p. 1951]), requiring all agreements not to be performed within one year to be in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 66; Dec. Dig. § 44.\*]

## 2. FRAUDS, STATUTE OF (§ 84\*)—SALE OF GOODS—NECESSITY FOR WRITING.

A contract giving plaintiff the option of buying from defendant a large amount of coal on terms specified without requiring plaintiff to buy any amount of coal cannot be made enforceable by a contemporaneous oral agreement by which plaintiff was to work up a market for defendant's coal, as such oral contract is void under the statute of frauds (Rev. St. 1899, § 3419 [Ann. St. 1906, p. 1963]), requiring all contracts for the sale of goods for the price of \$30 and upwards to be in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 154-161; Dec. Dig. § 84.\*]

## 3. EVIDENCE (§ 397\*)—VARYING WRITING BY PAROL.

Where a written contract is complete on its face, parol evidence is not admissible to alter or add to its provisions.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1756-1765; Dec. Dig. § 397.\*]

## 4. EVIDENCE (§ 411\*)—PAROL EVIDENCE—INCOMPLETE WRITING.

Where a writing not within the statute of frauds shows on its face that all the terms agreed on are not embraced therein, parol evidence is admissible to show the omitted part.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1874-1899; Dec. Dig. § 411.\*]

Lamm and Graves, JJ., dissenting.

In Banc. Appeal from Circuit Court, Adair County; Nat. M. Shelton, Judge.

Action by H. P. Reigart against the Manufacturers' Coal & Coke Company for breach of contract. From a judgment for defendant, plaintiff appeals. Affirmed.

This suit originated in the circuit court of Adair county, and was instituted by plaintiff against the defendant to recover approximately \$1,000,000 for the breach of the contract hereinafter set forth. The trial resulted in a verdict and judgment in favor of the defendant, and, after taking the proper preliminary steps, he appealed the cause to this court.

The cause was assigned to Division No. 1, and was there argued and submitted for adjudication, which resulted in a divided court, and, in pursuance to the mandate of the Constitution, the cause was transferred to court in banc. The contract sued upon

is in words and figures as follows: "This agreement made this twentieth day of November, A. D. 1902, between the Manufacturers' Coal & Coke Company, party of the first part, and H. P. Reigart, of St. Joseph, Missouri, party of the second part, witnesseth: The party of the first part shall furnish and the party of the second part shall receive such coal as the party of the second part shall make requisition for, but not exceeding twenty-five hundred tons per working day. The coal shall be furnished from the mines of the party of the first part in Missouri and Iowa, and shall be free from stone, slate, dirt, bone, sulphur, and black jack, and shall be screened over bar or perforated shaker screens to remove slack and nut coal. The coal shall be subject to the inspection and acceptance of the party of the second part at the mines and subject to the weight of the Western Railway Weighing Association at the mines, the actual tare weight of cars to be ascertained by weighing the cars empty before they are loaded. The party of the second part shall pay and the party of the first part shall receive as full compensation for said coal furnished hereunder one dollar and seventy-five cents (\$1.75) per net ton f. o. b. cars St. Joseph, Missouri; and the same price shall apply on coal delivered f. o. b. cars to connecting lines at any junction point on the Iowa and St. Louis Railway between Mystic, Iowa, and Macon, Missouri, both inclusive, less the prevailing rate per ton on coal from said junction point to St. Joseph, Missouri. Payments for coal shall be made by the party of the second part on or about the twentieth of each month for coal furnished during the previous month. The party of the first part shall make shipments of coal in such quantity and manner as the party of the second part shall from time to time direct, but the party of the first part shall not be held liable for damages on account of failure to make shipments when such failure shall be due to strikes, fires, floods, mine accidents or other causes wholly beyond the control of the party of the first part. This agreement shall take effect January first, nineteen hundred and three (1903) and shall continue in effect until December thirty-first, nineteen hundred and seven (1907), and shall bind and inure to the benefits of the successors and assigns of the party of the first part, and the heirs, administrators and assigns of the party of the second part as fully as if the said successors, assigns, heirs and administrators had been specifically mentioned in each instance. In witness whereof, the parties hereto have executed this agreement, in duplicates on the day and year first above written. Manufacturers' Coal & Coke Company, by H. F. Redding, President. H. P. Reigart. Witnesses: W. H. Marshall. C. H. Varnon." The petition, in addition to the ordinary allegations of the breach of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

contract, stated, in substance, that prior to and independent of the contract mentioned in the petition there was an oral contract by and between plaintiff and defendant to the effect that the former would go out and endeavor to sell this coal and make a market therefor, and that said contract and understanding on his part with the coal company was a moving motive or inducing cause or consideration which induced the coal company to enter into the contract sued upon, and he went out to make a market for the company's coal, and that, in pursuance to same, he did so, and sent to it the orders mentioned in the petition as the result of his efforts. The answer was a general denial, and, among other things, there was a plea of the statutes of frauds, and that the contract sued on was unilateral and not binding on defendant.

It will be unnecessary to set out the pleadings and evidence in full, as the questions presented for determination are questions of law which will sufficiently appear in the opinion for a proper understanding the legal propositions involved.

Higbee & Mills and Harlan & Harlan, for appellant. O. M. Spencer and Campbell & Elison, for respondent.

WOODSON, J. (after stating the facts as above). It is conceded by counsel for appellant that the contract at its inception was unilateral, a mere option, given to Reigart, and that no consideration for the option is expressed therein. In order to escape the effects of that concession, they contend that the consideration passing from appellant to respondent and supporting the option may rest in parol and may be shown allunde of the option or the written contract. In pursuance to that contention, counsel for appellant offered to prove by parol evidence that, independent of the option sued on, there was an oral contract entered into between them to the effect that he would go out and endeavor to make a market for, and sell, the coal of respondent, and that the option given by the latter to appellant and the undertaking on his part to create a market and sell the coal was a motive or inducing cause or consideration which induced the coal company to enter into the so-called contract sued on, and that, when he went out and sold the coal in pursuance to the option and his undertaking to create a market for the coal, this changed the contract from a unilateral or an optional contract, without a consideration to support it, into a bilateral contract based upon a valuable consideration, and, when broken, the company was liable for the damages which flowed from that breach. While, upon the other hand, the respondent contends that the option sued on is unilateral and is therefore nudum pactum, because appellant does not thereby bind himself to purchase any of the coal mentioned in the option,

nor is there any consideration to support the option expressed therein. The respondent also contends that parol evidence is not admissible to show such a consideration, for the reason that, if such consideration existed in fact, it was one of the terms of the contract, and should have been included in the terms of the written memorandum thereof, otherwise it is void under the statutes of frauds. These various contentions of the appellant and respondent present the main legal proposition we are called upon to decide.

Sections 3418, 3419, Rev. St. 1899 (Ann. St. 1906, pp. 1951-1963), are two of the sections of the statutes commonly called the "Statute of Frauds," and they read as follows:

"Sec. 3418. No action shall be brought to charge any person \* \* \* upon any agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action shall be brought or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some person by him thereto lawfully authorized," etc.

"Sec. 3419. No contract for the sale of goods, wares and merchandise for the price of thirty dollars or upwards shall be allowed to be good, unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing be made of the bargain and signed by the parties to be charged with such contract, or their agents lawfully authorized."

In order to fully understand these statutes, we should bear in mind that at common law contracts of this character were not required to be in writing, and that, if the contract was incomplete on its face, oral evidence was admissible to supply the defects, because the oral contract was good without being reduced to writing, and, the presumption that all the agreement was in writing being negatived on its face, no principle of law was violated by admitting the parol evidence to piece out omitted parts. *Ringer v. Holtzclaw*, 112 Mo., loc. cit. 523, 20 S. W. 800; *Standard Fire Proofing Co. v. St. Louis Fire Proofing Co.*, 177 Mo., loc. cit. 571, 76 S. W. 1008. In order to prevent fraud and perjury, which were so prevalent under the common law, these statutes were enacted, requiring all such contracts to be reduced to writing, etc. This contract bears date November 20, 1902; and the last clause thereof, in express terms, provides that "this agreement shall take effect January first, nineteen hundred and three (1903) and shall continue in effect until December thirty-first, nineteen hundred and seven (1907)." According to this provision of the contract, it had five years to run after it took effect, which brings it within not only the spirit, but the very letter, of said section 3418, which provides that "no action shall be



brought to charge any person \* \* \* upon any agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith." This section says that no action shall be maintained without the contract is reduced to writing—not a part of the contract, but the contract shall be reduced to writing before the action can be maintained. The word "contract," as used in the statute, includes all of the terms and provisions of the agreement entered into between the parties, and not a part of them only, but all of them. If the statute had provided, or if it was the meaning thereof, that only a part of the terms of the contract should be reduced to writing and not all of them, then the statute would be without force or meaning, for the reason that at common law the same thing could have been done; that is, as before stated, at common law, if the contract was incomplete on its face, oral evidence was admissible to supply the omissions. The statute was not declaratory of the common law, but was highly remedial, intending to prevent fraud and perjury by changing the common law in that regard by requiring that all of the terms of the contract should be reduced to writing before an action could be maintained thereon. And what has been here said is reinforced and made clearer by reverting to the common law, which conclusively presumes that the written contract is the receptacle for and contains all the terms of the agreement, and which prevents the introduction of parol evidence in any manner to change, add to, or take from the written contract, except where the written contract itself showed upon its face that parts of it were omitted therefrom. *Koons v. St. Louis Car Co.*, 203 Mo., loc. cit. 255, 101 S. W. 49; *Standard Fire Proofing Co. v. St. Louis Fire Proofing Co.*, 177 Mo. 571, 78 S. W. 1008; *Ringer v. Holtzclaw*, 112 Mo. 523, 20 S. W. 800. The Legislature, by this statute, intended to wipe out that exception and prevent an action from being maintained, even though the omission appeared on the face of the contract. That was its very object and purpose, and none other. If what I have stated is correct, then it necessarily follows that the contract price and the consideration of the contract must be stated in the written contract along with all the other terms thereof, and it cannot be shown by parol evidence.

I am fully aware and not unmindful of the fact that some of the cases cited by the learned counsel for appellant hold that, under the statute of frauds, it was not necessary that the consideration of the agreement should be stated in writing; nor am I unmindful that some of the opinions so holding were written by some of the greatest jurists and brightest minds that ever adorned this

bench. Among those cases are the following: *Bean v. Valle*, 2 Mo. 128, written by Chief Justice McGurk. *Halsa v. Halsa*, 8 Mo. 303, written by Judge Scott. *Ivory v. Murphy*, 36 Mo. 534, written by Wagner, Judge. The same ruling was had in the case of *O'Neill v. Crain*, 87 Mo. 250, written by Judge Norton, and to the same effect *Ellis v. Bray*, 79 Mo. 227, written by Judge Ray. In the *O'Neill-Crain Case* was a suit for damages for a breach of the following contract: "Brookfield, September 10th, 1874. William O'Neill, you will please get us 360 hogs instead of 250, if you can, so as to make three car loads at your place. Be careful about the weights. [Signed] I. L. Crain Bro. & Co." It was contended by the defendants that the contract was void because it came within the provisions of the statute of frauds. In discussing that question, Norton, J., said: "It is also argued that the written memorandum of the contract offered in evidence was not sufficient to take the case from the operation of the statute of frauds, and that parol evidence could not be received to supply any of its terms. Parol evidence is clearly inadmissible to contradict, alter, or vary a written contract, but when a written memorandum of a contract does not purport to be a complete expression of the entire contract, or a part of it only is reduced to writing, the matter thus omitted may be supplied by parol evidence. *Rollins v. Claybrook*, 22 Mo. 407; *Moss v. Green*, 41 Mo. 389; *Briggs v. Munchon*, 56 Mo. 467; 1 Green, Ev. § 284a. The memorandum is silent as to the price to be paid, and does not purport to express the entire contract, and the evidence offered to explain it in this particular, being in no wise contradictory of the writing, was, under the authorities cited, properly admitted." Notwithstanding the great ability and learning of all of these distinguished jurists, I respectfully submit that they, and each of them, either overlooked the provision of the statute before quoted, and the evils that existed at common law, which the statute was intended to remedy, and applied the common-law rule instead of the statute; or, if the statute was considered in those cases, then they so interpreted it as to make it declaratory of the common law in its fullest sense without changing a word, dotting an "i," or crossing a "t," and thereby left existing in full force the very evils the statutes intended to abolish. The foregoing cases have been many times overruled by the later adjudications of this court—some of them in express terms and all of them by necessary implication. Among those so overruling them are the following: The case of *Ringer v. Holtzclaw*, supra, was a suit to enforce specific performance of an alleged contract for the sale and purchase of lots 7, 8, 9, and 10, in block 184, in the town of Marceline, Mo. Plaintiff alleged that the defendant had paid \$25 on the trade and owed \$975, and that a memorandum of the agreement was

reduced to writing and signed by defendant. The defense was a general denial, statute of frauds, and a verbal contract, where defendant averred he had an option on said lots to be taken or declined on April 2, 1888; that, if he accepted them, plaintiff was to furnish a satisfactory abstract and deliver a good and sufficient warranty deed, conveying a perfect title thereto; that plaintiff did not furnish a perfect abstract, and refused to make the deed. On the trial the following memorandum of the contract was read in evidence: "Marceline, Mo. March 16th, 1888. It is agreed by and between E. M. Randolph, R. M. Ringer, and T. A. Smedley that each of them have the liberty to sell lots 7, 8, 9 and 10, block 184, and whichever sells to have all the commission, and each party has the privilege to sell each lot at \$250.00, which shall satisfy Mr. Ringer in full for said lots, and if sale is not made within sixteen days from this date, Mr. Holtzclaw to pay to Mr. Ringer the original price agreed upon between them. T. A. Smedley. E. M. Randolph. R. M. Ringer. R. Holtzclaw." The defendant never took possession of the lots. Plaintiff never offered defendant a deed to the lots, and testified that the agreement with defendant was verbal, and by it he was to assign defendant four several contracts for said lots. In discussing this question, Gantt, P. J., said: "The circuit court committed no error in refusing the specific performance. The case comes within the letter and spirit of the statute of frauds. The memorandum is wholly insufficient as evidence of a contract. It does not purport to be a memorandum of a contract. It merely refers in a vague and indistinct way to an agreement made about a price at another time. Whether that other agreement would be good must depend on whether it met the requirements of the law. When it appeared to be entirely verbal, of course, it had no effect in law. All the authorities are agreed that the memorandum must state the contract with reasonable certainty, so that its essential terms can be ascertained from the writing itself without a resort to parol evidence. *Browne on Statute of Frauds*, § 384; *Benjamin on Sales* (Bennett's Ed.) §§ 249, 250; *Smith v. Shell*, 82 Mo. 215, 52 Am. Rep. 365; *North & Co. v. Mendel*, 73 Ga. 400, 54 Am. Rep. 879; *Fry v. Platt*, 32 Kan. 62, 3 Pac. 781; *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352; *Lee v. Hills*, 66 Ind. 474; *Banks v. Mfg. Co. (O. C.)* 20 Fed. 667; *Williams v. Morris*, 95 U. S. 444, 24 L. Ed. 360; *Grafton v. Cummings*, 99 U. S. 100, 25 L. Ed. 366.

The appellant invokes the doctrine that, where a contract upon its face is incomplete, resort may be had to parol evidence to supply the omitted stipulations. But, to admit the application of that doctrine in this case, we must go to the extent of permitting plaintiff to establish not a part, but the whole

contract, by parol, and thus deny the authority of the statute, and, in effect, permit parties to agree that the statute of frauds shall not affect their contracts, and then invoke the aid of the courts of the state to enforce agreements made in defiance of its laws. The rule relied upon by appellant has long existed at common law in cases unaffected by the statute of frauds. At common law contemporaneous parol evidence was not permitted to change the written contract, because the law conclusively presumed that prior negotiations and agreements were merged in the writing, and that it contained the entire agreement. By the statute of frauds, on the contrary, the parol evidence is rejected because it is the policy of the law to regard it as untrustworthy. At common law, if the contract was incomplete on its face, oral evidence was admissible to supply the defects, because the oral contract was good without the writing, and, the presumption that all the agreement was in the writing being negated on its face, no principle of law was violated in admitting the parol evidence. But under the statute of frauds, if the subject-matter of the contract is within the statute, and the contract or memorandum is deficient in some one or more of those essentials required by the statute, parol evidence cannot be received to supply the defects, for this were to do the very thing prohibited by the statute. This must be obvious upon the slightest reflection. This distinction was made by Lowrie, C. J., in *Musselman v. Stoner*, 31 Pa. 265 (*Glass v. Hilbert*, 102 Mass. 24, 3 Am. Rep. 418; *Moulding v. Prussing*, 70 Ill. 151; *Osborn v. Phelps*, 19 Conn. 63, 48 Am. Dec. 133; 1 Story on Equity Jurisprudence, § 770a; 1 Greenleaf on Evidence [14th Ed.] § 86), but was overlooked in *O'Neil v. Crain*, 67 Mo. 250, and *Lash v. Parlin*, 78 Mo. 391. We freely concur in the statement of the rule made in those cases when applied to a case not falling within the statute, but, as to a case the subject-matter of which is within the statute, we think such a rule must inevitably become subversive of a plain statute, and it is our province to uphold and enforce the statutes, not to nullify them. Nor have we any inclination to add another exception to the statute, since, as said by Jackson, C. J., in *Smith v. Jones*, 66 Ga. 338, 42 Am. Rep. 72: "The flood gates are open wide as to the competency of witnesses, and the only breakwater left is the requisition to put this class of contracts and others of similar character in writing." Accordingly, we hold that parol evidence was not admissible to supplement the memorandum offered in this case because the law demanded the contract should be in writing, and the trial court ruled correctly in so holding. The memorandum does not support plaintiff's evidence. If there was such an agreement as plaintiff's evidence would prove, then the memorandum

was utterly deficient in not stating it, and, of course, he cannot recover because the statute required a memorandum of that contract, not a memorandum from which all its essentials were omitted. *Hilliard on Sales*, p. 232; *Smith v. Shell*, 82 Me. 215, 52 Am. Rep. 363.

In the case of *Boyd v. Paul*, 125 Mo. 13, 14, 28 S. W. 172, *Sherwood, J.*, used this language: "In the first place, it is one of the fundamentals of the law of evidence that all precedent as well as all contemporaneous negotiations in relation to a contract afterwards reduced to writing are, in the absence of accident, etc., conclusively presumed to have been swallowed up by, and entirely merged and expressed in, the written instrument, which thenceforth becomes the sole expression of the will and agreement of the contracting parties. This rule has been unvaryingly observed and announced by this court from its earliest to its more recent decisions. *State ex rel. v. Hoshaw*, 98 Mo. 353, 11 S. W. 759, and cases cited; *Tracy v. Iron Works Co.*, 104 Mo. 193, 16 S. W. 203, and cases cited; *Jones v. Shepley*, 90 Mo. 307, 2 S. W. 400, and cases cited. In the second place, that portion of the contract which was dehors the written assignment of the lease rested in parol, and could not be introduced in evidence without acting in plain contravention of the statute of frauds. Where your memorandum under the statute is scant in measure, you cannot piece it out by verbal additions. This subject has been so recently and satisfactorily discussed in *Ringer v. Holtzclaw*, 112 Mo. 519, 20 S. W. 800, per *Gantt, P. J.*, and the heresy of the contrary view as contained in *O'Neill v. Crain*, 67 Mo. 250, so well combated, both on reason and authority, that it is unnecessary to do more than to refer in terms of approval to *Ringer's Case*."

In the case of *Kelly v. Thuey*, 143 Mo. 435, 436, 45 S. W. 303, *Sherwood, J.*, said: "Sec. 148. II. The Price. In all contracts of sale, assignment, and the like the price is, of course, a material term. It must either be fixed by the agreement itself or means must be therein provided for ascertaining it with certainty. In the absence of such provision, either stating it or furnishing a mode for fixing it, the agreement would be plainly incomplete, and could not be enforced; and, if the contract is written, this term must appear in the memorandum or written instrument." *Pomeroy's Spec. Perf.* (2d Ed.) § 148. See, also, *Grafton v. Cummings*, 99 U. S. 100, 106, 25 L. Ed. 366; 8 Am. & Eng. Ency. of Law, 726; *Browne, Stat. Frauds* (5th Ed.) § 376; 1 *Warvelle on Vendors*, p. 105, § 10; *Fry, Spec. Perf.* § 335; *Waterman, Spec. Perf.* § 146; 1 *Reed, Stat. Frauds*, § 417; *Williams v. Morris*, 95 U. S. 444, 453, 24 L. Ed. 360. In this case the contract neither states the price nor furnishes the means or data whereby that price can be computed

or ascertained, and is therefore an invalid contract and wholly incapable of enforcement. The memorandum being repaired to be complete in and of itself, parol evidence cannot be admitted to piece out the incomplete writing and make it a complete instrument. At one time in this court the heresy was announced that parol testimony was admissible for the purposes indicated. *O'Neill v. Crain*, 67 Mo. 250. The last erroneous adjudication on this subject is found in *Ellis v. Bray*, 79 Mo. 227; but the contrary and correct ruling was declared in *Ringer v. Holtzclaw*, 112 Mo. 519, 20 S. W. 800, and followed in *Boyd v. Paul*, 125 Mo. 9, 28 S. W. 171. We hold, therefore, that there is no contract in the case at bar; that is, such an one as satisfies the requirements of the statutes of frauds."

And as was said by *Marshall, J.*, in *Johnson v. Fecht*, 185 Mo., loc. cit. 345, 83 S. W. 1079: "The written authority was wholly insufficient to identify the 40 acres intended to be sold. And, although both the principal and agent may have understood that it was the 40 acres of the principal's farm that lay south of the road, that fact lies wholly outside of the written authority, and cannot be added to it by parol. As was said by *Sherwood, J.*, in *Boyd v. Paul*, 125 Mo., loc. cit. 14, 28 S. W. 172: 'Where your memorandum under the statute is scant in measure, you cannot piece it out by verbal additions.' To the same effect is *Koons v. St. Louis Car Co.*, supra.

It will be observed by reading the opinions which hold that parol evidence is admissible to piece out and supplement the written contract that most of them were based upon contracts which were not covered by the statute of frauds at all, or were predicated upon contracts governed by the three first clauses of section 3419, which do not require the contract of sale to be in writing; that is, where he accepts a part of the goods sold and actually receives the same, or where he gives something in earnest to bind the bargain, or where he pays part of the purchase money. All such contracts can be proven by parol; but, if no part of the goods purchased were accepted, or nothing was given in earnest to bind the bargain, or no part of the purchase price paid, then by the last clause of the section no action can be maintained "unless some note or memorandum in writing be made of the bargain and signed by the parties." And the memorandum under the last clause of this section must embrace all the terms of the contract, as fully and completely as those governed by section 3418. In fact, I do not understand counsel for appellant to contend that the contract sued on complies with the provisions of section 3418, which requires the contract to be in writing and signed by the party sought to be charged therewith, but they base his

right of recovery upon the second clause of section 3419, above mentioned, which takes a contract for the sale of goods, wares, and merchandise out of the statute of frauds, where something is given in earnest to bind the bargain, and illustrate their position by propounding substantially the following question: Suppose I own a fine dog worth \$500, which has been lost or stolen; and suppose I should state to John Jones, "If you will find my dog, I will sell him to you for \$100"; and suppose John Jones should go forth and find the dog, and then come and offer me the \$100 and demand the dog—would not that be a binding and valid contract? Had the offer contained the further provision that it should have been performed in one year, then I would answer unquestionably in the affirmative; but if it was not to be performed in one year, but within three years from and after the date of the offer, then I would answer with equal emphasis in the negative. The reason is clear in each instance. If the contract was to be performed within one year, then it would clearly fall within the second clause of section 3419, for the reason that the time and labor expended in finding the dog would be something given in earnest to bind the bargain within the meaning of the statute; but, if John Jones had been given three years in which to find the dog, then clearly the contract would have violated section 3418, and the last clause of section 3419.

That exact question came before this court in the case of *Self v. Cardell*, 45 Mo. 345. It was there held that, where the purchaser of a carding machine by verbal agreement bound himself not to use any other carding machine in the vicinity of the one sold for a period of five years, although the contract could not be fully performed within one year, yet, having been completely executed by the vendor, the vendee could not interpose the statute of frauds. The same question again came before this court in the case of *Nally v. Reading*, 107 Mo. 350, 17 S. W. 978. It was there reiterated that the contract fell within the statute of frauds, and overruled so much of the *Self-Cardell* Case which held that the full performance of the contract would take the case out of the statute of frauds. In that case there was an assignment or sale of a lessee's interest in a term exceeding one year, and which, of course, could not be performed within one year from its making. The court held that the contract of assignment was within the statute of frauds, and was for that reason void, and the fact that the defendant took possession of the land and paid a portion of the rent to the original lessor did not take the contract out of the statute of frauds. And in so holding the court, on page 355 of 107 Mo., page 979 of 17 S. W., used this language: "And said contract also infracts the

latter section inasmuch as the contract is not to be performed, and cannot be performed, according to its terms, within one year from the time of its making. These views are readily seen to be supported by an examination of the following authorities: *Browne*, Stat. Frauds, §§ 230, 231, 272, 281; *Taylor on Land. & Ten.* § 427; *Durand v. Curtis*, 57 N. Y. 7; *Pierce v. Estate*, 28 Vt. 34. And the fact that the defendant took possession under the verbal contract, and made one payment, cuts no figure in the case. Whatever may be the rule in equity as to the doctrine of part performance, the rule has no place in an action at law, as in the present instance. 3 Pass. on Cont. (7th Ed.) 60; *Sharp v. Rhlel*, 55 Mo. 97. It is unnecessary to review the authorities in this state. That has been well done by *Rombauer, P. J.*, in *Johnson v. Reading*, 36 Mo. App. 306. If there are any authorities in conflict with the views here announced, we overrule them."

It should also be borne in mind that the contract in suit was "for the sale of goods, wares, and merchandise for the price of thirty dollars or upwards," and that no part of the same was delivered to or accepted by the appellant, nor was any earnest money paid or other valuable things given to bind the bargain, nor was any of the purchase price paid by him, and that the agreement was not to be performed within one year from the making thereof. These two elements of the contract bring it within the letter and spirit of said section 3418 and the last clauses of section 3419; neither of which permits parol evidence to alter or change, add to, or take from the contracts which are embraced within their provisions. Under those facts, all the authorities, however much they may disagree where the question of performance is involved, agree in holding the contract void, because it violates the statute of frauds. *Standard Fire Proofing Co. v. St. Louis Fire Proofing Co.*, supra; *State v. Cunningham*, 154 Mo., loc. cit. 172, 55 S. W. 282; *Koons v. St. Louis Car Co.*, supra. Most of the confusion of the courts is attributable to their failure to observe the distinctions before mentioned; that is, all contracts embraced in section 3418, and all of them governed by the last clause of section 3419 must be in writing, while all of those embraced in the first three clauses of section 3419 may or may not be in writing. If, however, they are reduced to writing, and the writing is complete on its face, then parol evidence is not admissible to alter or add to it; but, if the writing is incomplete, and it shows upon its face that all the terms of the contract are not embraced in the writing, then parol evidence is admissible to piece out the omitted parts. *Browning v. Walbrun*, 45 Mo., loc. cit. 478; *Standard Fire Proofing Co. v. St. Louis Fire Proofing Co.*, 177 Mo. 571, 76 S. W. 1008; *State v. Cun-*

ningham, 154 Mo. 172, 55 S. W. 282; Koons v. St. Louis Car Co., 203 Mo. 255, 101 S. W. 49; Ringer v. Holtzclaw, 112 Mo. 523, 20 S. W. 800; Boyd v. Paul, 125 Mo. 14, 28 S. W. 171; Warren v. Mayer Mfg. Co., 161 Mo. 112, 61 S. W. 644. There are numerous other cases in this state announcing the same rule, and it is supported by the great weight of authority, both in this country and in England.

The rule is well stated in the case of Standard Fire Proofing Co. v. St. Louis Fire Proofing Co., 177 Mo., loc. cit. 571, 76 S. W. 1010, by Gantt, P. J., in the following language: "At common law parol evidence of prior and contemporaneous agreements was not permitted to change the written contract, because the law conclusively presumed that all prior and contemporaneous negotiations were merged in the writing, and that it contained the entire agreement. An exception to this rule was that, if the contract was incompetent on its face, oral testimony was admissible to supply the defects, and, the presumption that all the agreement was in the writing being negatived on its face, no principle of law was violated in admitting the parol evidence. But under the statute of frauds, if the subject-matter of the contract is within the statute and the contract or memorandum is deficient in some one or more of the essentials required by the statute, parol evidence cannot be received to supply the defects, for this were to do the very thing prohibited by the statute. Ringer v. Holtzclaw, 112 Mo., loc. cit. 523, 20 S. W. 800; Boyd v. Paul, 125 Mo. 9, 28 S. W. 171; Warren v. Mayer Mfg. Co., 161 Mo. 112, 61 S. W. 644. In this case the written contract was complete on its face, and it was clearly not allowable to permit defendant to contradict its plain terms by proof of a parol agreement made prior to its execution. Neither does part performance in any manner affect the contract."

An inspection of the cases cited therein will show that most of them are based upon contracts which were reduced to writing, but which were not required to be by the statute of frauds; and they properly hold that, where the contract shows upon its face that there are parts of the contract omitted from the writing, then oral evidence was admissible to prove the omitted parts, and the remainder of those cases have been overruled.

The contract, therefore, being void upon its face, I am of the opinion that the judgment should be affirmed.

GANTT, C. J., and BURGESS, VALLIANT, and FOX, JJ., concur. LAMM and GRAVES, JJ., dissent.

# GLASCOCK et al. v. GLASCOCK et al.

(Supreme Court of Missouri, Division No. 2  
March 9, 1909.)

## 1. HUSBAND AND WIFE (§ 48\*)—CONVEYANCE BY WIFE TO HUSBAND.

A wife may convey her land directly to her husband, without the intervention of a third person.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 242, 243; Dec. Dig. § 48.\*]

## 2. DOWER (§ 12\*)—PROPERTY SUBJECT.

A wife having by deed vested title to her land in her husband, it is immaterial whether her joinder with him in a subsequent deed thereof was under duress; the grantee having at the same time deeded it back to the husband, so that it was subject to dower.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 12.\*]

## 3. BILLS AND NOTES (§ 493\*)—CONSIDERATION—EVIDENCE.

The presumption, under Rev. St. 1899, §§ 457, 894 (Ann. St. 1903, pp. 516, 830), that defendant had furnished the consideration of the note of plaintiff and her husband to defendant cannot be overcome by plaintiff's testimony merely that she did not know anything about it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1661; Dec. Dig. § 493.\*]

## 4. APPEAL AND ERROR (§ 1009\*)—REVIEW OF FINDINGS IN CHANCERY CASES.

The Supreme Court may review the findings of fact of the circuit court in chancery cases, though it is inclined to defer to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3974; Dec. Dig. § 1009.\*]

## 5. DEEDS (§ 211\*)—DURESS IN PROCUREMENT—EVIDENCE.

Evidence, in an action to cancel a deed of trust and note secured for duress in procurement, held insufficient to show duress.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 646; Dec. Dig. § 211.\*]

## 6. DOWER (§ 46\*)—RIGHT TO DOWER.

Where plaintiff and her husband gave a valid deed of trust on land, she is not entitled to a decree for dower in it, as against defendant, who bought at the foreclosure, though he agreed to buy for her; her right being only to redeem.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 92, 145, 153; Dec. Dig. § 46.\*]

Appeal from Circuit Court, Stoddard County; J. L. Fort, Judge.

Suit by Gillie Glascock and another against Melvin Glascock and another. Decree for plaintiffs. Defendants appeal. Reversed, with directions to dismiss.

Wammack & Welborn, for appellants. Keaton & Keaton, for respondents.

GANTT, P. J. This is a suit in equity, by the widow and minor son of Dr. L. O. Glascock, deceased, against Melvin Glascock and G. M. Glascock, his brothers, to have certain deeds and conveyances executed by her deceased husband and herself declared fraudulent and void, on account of the alleged fraudulent acts of the defendants, and on account of duress by threats, and to divest the title out of the defendant Melvin Glascock

in and to certain real estate, and vest the same in plaintiffs. The petition alleges that said L. O. Glascock and plaintiff Gillie were at the time of his death husband and wife, and the plaintiff Emmet their only son, and that at that time Dr. Glascock and the plaintiff Gillie were the owners in fee of all of lots Nos. 1, 4, and 6, and outlot 3 in block 26, and of lot No. 10 in block 2 of Deal & Boughton's addition to the city of Dexter, and lot No. 1 of the N. W.  $\frac{1}{4}$  of section 4, and all of the land west of Bess slough in the northwest corner of section 3, all in township 24, range 11, and all in Stoddard county, Mo.; that the plaintiff Gillie Glascock was the owner in her own right of all of lots 1, 4, and 6 in block 26, in the city of Dexter, and that plaintiff earned money by her separate labor, and from time to time furnished her said husband sums of money; that the said L. O. Glascock was a practicing physician, and earned good money, and that their joint means purchased their property; that the above real estate of the plaintiffs, and the property purchased by the said L. O. Glascock by and with the means aforesaid, was of the value of \$4,500, and that the same was fully paid for, and free of all incumbrances; that about and prior to 1895, Dr. Glascock began to lose his mind, and was finally adjudged insane and incapable of transacting business, and confined in the insane asylum at Fulton on the 17th of November, 1901, where he died on June 17, 1903. It is further alleged that when Dr. Glascock began to lose his mind, he became dangerous and threatening towards the plaintiff Gillie, and he seemed to be seized with an unnatural design to strip the plaintiffs of their property, and bestow it upon the brother Melvin Glascock, and when his wife remonstrated with him, he said to her, "You will sign all papers I want you to, or I will kill you." It is then alleged that Dr. Glascock colluded with the defendant Melvin to enable the latter to obtain deeds of conveyance of all the property of the plaintiff Gillie and the doctor. The petition then alleges specifically that, in pursuance of the said collusion and design, on November 27, 1895, Melvin Glascock came from Tennessee to Missouri, and soon after a conference with Dr. Glascock, Dr. Glascock executed a warranty deed conveying lot 10 in block 2, Deal & Boughton's addition to the city of Dexter, to the defendant Melvin for the alleged consideration of \$300, and represented the same to be a mortgage to secure a certain sum of money; that plaintiff Gillie refused to sign and execute the same, and thereupon the doctor declared and threatened that if she did not sign and execute the same, he would kill her; that under fear of this threat she executed the said deed, which she afterwards learned was a warranty deed, for which she received no consideration, and that the same was procured by duress for the purpose of investing the title in Melvin. It is then alleged that on November 27, 1895,

by like fraudulent representations, and by like means and the same threats, and without consideration, another warranty deed was procured from Dr. Glascock and plaintiff Gillie to Melvin, conveying lot No. 1 of the N. W.  $\frac{1}{4}$  of section 4, township 24, range 11, for the pretended consideration of \$500; that on July 8, 1897, by the same means of duress, a warranty deed was obtained from the plaintiff Gillie directly to her husband, Dr. L. O. Glascock, for the pretended consideration of \$1, which was never paid, purporting to convey all of lots Nos. 1, 4, and 6 in block 26, in the city of Dexter. For practically the same causes the following other conveyances were assailed in the bill: A deed of trust from plaintiff Gillie and L. O. Glascock to Melvin Glascock, dated November 8, 1897, conveying lots 1, 4, and 6, and outlot 3 in Dexter, and purporting to be given to secure a note of \$725, due two years after date, a warranty deed from plaintiff Gillie and her husband to defendant G. M. Glascock of date December 10, 1900, and a deed of the same date from G. M. Glascock to L. O. Glascock to lots 1, 4, and 6, and outlot 3 in block 26 in Dexter. It is then alleged that at the time of Dr. Glascock's death the premises, including all west of Bess slough in the northwest corner of lot 2 of the N. W.  $\frac{1}{4}$  of section 3, township 24, range 11, and known as "mill property," was incumbered by a deed of trust of \$125, and, plaintiff Gillie desiring that the same should be sold, the defendant Melvin agreed to have it advertised and sold under the deed of trust, and to buy it in for her, but, instead of so doing, Melvin bought in the property in his own name for \$25, and afterwards sold the same for \$200, and never accounted for the overplus, and appropriated to his own use the rents of the property after June 8, 1902. It is then alleged that Doctor Glascock's office, situated on lot 1 in Dexter, was insured, and the premiums on this insurance were paid out of plaintiff Gillie's money, and that this office has since burned, and that the defendant Melvin was about to collect the insurance. There is also a charge that the defendant Melvin has collected all the rents on lot 1 of the N. W.  $\frac{1}{4}$  of section 4, and has never accounted for the same.

The answer of G. M. Glascock was a general denial. Defendant Melvin admitted that he obtained the title to lot 10, block 2, Deal & Boughton's addition to Dexter, and to lot No. 1 of the N. W.  $\frac{1}{4}$  of section 4, township 24, range 11, by the deeds set out in plaintiff's bill, and that on November 8, 1897, Dr. L. O. Glascock and plaintiff Gillie executed their joint promissory note to defendant for \$725, and secured the same by their deed of trust on lots 1, 4, and 6, and outlot 3, block 26, in Dexter. Further answering, defendant Melvin stated that his dealings with the said L. O. and Gillie Glascock in and about the property mentioned in the bill were all in the utmost good faith on the part of the de-

defendant, and at the urgent request and solicitation of said L. O. and Gillie Glascock, and defendant paid the \$900 mentioned in the two deeds of November 27, 1895, and also the \$725 mentioned in the said deed of trust of November 8, 1897, and that since the execution of the deeds of November 27, 1895, L. O. and Gillie Glascock have had possession of and collected all the rents on said lot down in Dexter, under an agreement that they would pay the taxes and keep up the insurance, which they failed to pay, and defendant was forced to pay the same, amounting to \$53.18, and there was the same agreement as to lot 1 of the N. W.  $\frac{1}{4}$  of section 4, township 24, range 11, which they also failed to observe, whereby defendant was compelled to pay \$16.67 taxes on said land. Defendant also alleged that he had been forced to pay all the taxes and insurance on lots 1, 4, and 6 and outlot 3 in Dexter, since the execution of the deed of trust of November 8, 1897, in order to protect his lien thereon. In relation to the property described as that west of Bess slough in the northwest corner of lot 2 of the N. W.  $\frac{1}{4}$  of section 3, township 24, range 11, and known as "mill property," defendant alleged that plaintiff Gillie and L. O. Glascock executed a deed of trust thereon on December 29, 1899, to secure a debt of \$125 to A. H. Carter and J. N. Miller, that this debt became due, and said L. O. and Gillie were unable to pay the same, and at their request defendant took an assignment of the same, and paid said debt; that afterwards Dr. Glascock was sent to the asylum, and it became necessary to foreclose this deed of trust in order to get the title in a condition in which it could be handled to the best interest of all concerned, and accordingly said property was advertised according to the terms of the deed of trust, and defendant Melvin became the purchaser of the same for \$75, and afterwards sold the same for \$200. And as showing his relation to the said mill property he rendered the following:

	Dr.	Cr.
To amount sale of mill.....	\$200 00	
To rent collected on property.....	26 00	
By note and deed of trust.....		\$130 00
By taxes, cost of sale, repairs.....		74 81
By cash, paid funeral expenses of Dr. Glascock .....		131 80
By taxes and insurance on lot 1.....		53 18
By taxes on 80 acres aforesaid.....		16 67
	\$226 00	\$406 26

The defendant stated that he charged the last two items to this mill account for the reason that they were justly due for moneys paid for and on behalf of plaintiff and her said husband, and he has no lien or security therefor. Defendant Melvin further states that there is still due him on said property the sum of \$180.26, and although he purchased the said property in open competition with the world, yet upon the payment to him of the said sum by plaintiffs he will

gladly reconvey said land to them, or either of them.

In reply the plaintiffs denied all the new matter in the answer, and alleged that the charges on the mill property of \$74.31, \$53.18, and \$16.67 are not proper charges on said property, and were made for the purpose of burdening the same so as to prevent redemption by plaintiffs. They further state that the payment of Dr. Glascock's funeral expenses by defendant was wholly voluntary. The cause was tried at the March term, 1905, of the circuit court of Stoddard county, and resulted in a decree for the plaintiffs, by which the title to lots 1, 4, and 6 in block 26 in the city of Dexter, was vested in plaintiff Gillie Glascock, and the deed of conveyance made by her and her husband, Dr. Glascock, on the 8th of July, 1897, canceled, on the ground that said deed was procured by fraud by Dr. L. O. Glascock from his wife, and also canceling the deed of conveyance to said lot made by L. O. Glascock and Gillie Glascock to defendant G. M. Glascock on the 10th of December, 1900, and the deed to the same lots by G. M. Glascock to L. O. Glascock on the same day, and canceling the deed of trust given on said lots by L. O. Glascock and Gillie Glascock to the defendant Melvin Glascock on the 8th of November, 1897, on the ground that the said deed of trust was executed under the duress of Dr. L. O. Glascock of which duress the defendant Melvin had knowledge at the time.

The court further found that the plaintiff Gillie A. Glascock was entitled to the insurance on the property which was located on one of said lots, which property had been destroyed by fire. The court further found that plaintiff Gillie was entitled to dower in outlot 3, block 26, in the city of Dexter, and in the mill property. The court further found that Melvin Glascock had a mortgage lien on outlot 3 in block 26 in Dexter subject to the dower interest of Gillie Glascock therein. The court further found that the defendant Melvin had the title to the two acres known as the mill property subject to the dower interest of Gillie Glascock. The court then found that the defendant Melvin was the owner in fee of lot No. 10 in block 2 in Deal & Boughton's addition to Dexter, and also of lot No. 1 of the N. W.  $\frac{1}{4}$  of section 4 in township 24, range 11, in Stoddard county. The cost of the suit was adjudged against defendants, and defendant Melvin was enjoined from foreclosing his deed of trust on lots 1, 4, and 6 of block 26 in the city of Dexter. After unsuccessful motions for a new trial and in arrest of judgment, the defendants appealed to this court. To maintain the allegations of her petition the plaintiff Mrs. Glascock offered in evidence a warranty deed from herself to her husband, L. O. Glascock, dated July 8, 1897, conveying lots 1, 4, and 6 in block 26 in the city of Dexter for the alleged consideration of \$1, and a deed dated December 10, 1900, by L. O.

Glascock and herself to G. M. Glascock, conveying the same lots for an alleged consideration of \$1. When offering this deed plaintiff called special attention to the acknowledgment of the deed, which was in these words: "State of Missouri, County of Stoddard—ss.: On this 13th day of December, 1900, before me personally appeared L. O. Glascock and Gillie A. Glascock, 'said she signed that was enough,' his wife, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed. In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Essex, Missouri, the day and year first above written. My term of office, as a notary public, will expire October 9, 1901. William T. Arnold, Notary Public." Plaintiff then offered in evidence a warranty deed of the same date from G. M. Glascock, a single man, to L. O. Glascock, conveying the same lots, which deed was recorded December 13, 1900.

In regard to the mill property, Mrs. Glascock testified that Melvin Glascock paid off a mortgage on this property amounting to \$130, and afterwards wrote from Tennessee that "when he came out here he would make it secure." But he never did anything with it, but left it an open account. After Dr. Glascock died, both she and Melvin wanted the property sold, and Melvin advertised it for sale, telling her that he would buy it in, and have it put in her name; that he bought it in his own name, and told her that whenever they put up \$200 in the bank, she could give up the keys; that after that she was advised that the \$200 was in the bank, and she gave up the keys; that defendant got the full \$200, and upon being asked by her what he did with it, he said he paid insurance with it. She further stated that she did not go to Bloomfield and bid on this Frisco property because she believed Melvin would buy it in for her. In relation to the execution of the other deeds she testified, in substance as follows: First. As to the deed of December 10, 1900, from herself and husband to G. M. Glascock, conveying the lots 1, 4, 6, and outlot 3 in Dexter, she stated that at first she would not sign it, but the doctor told her if she did not, he would kill her, and from his actions and looks she knew he would do so, so she signed it. She told G. M. Glascock what the doctor had done to get her to sign the deed. She never knew that there was a deed given with the consideration of \$1, and she never got the dollar. Upon the morning that this deed was made she, Melvin, G. M. and Dr. Glascock were at her home at Pinhook, and went from there to Essex, where she signed the deed. At the time she signed the deed, G. M. and the doctor were standing in the door of the notary's office. Melvin was somewhere in town, but she did not know where. After the deed was signed, the others went to

Bloomfield to get the deed recorded, and she returned to Pinhook. Second. In regard to the deed to the lots in Dexter, known as the "home place," from herself and the doctor, she testified, in response to a question as to why that deed was executed, as follows: "The deed to the home place in Dexter was in my name, and the doctor told me that, it being in my name, if we should both die, the place would go to all my folks, and I said it was not fair. We had no children at that time, and he said for me to make this deed over to him in his name, and so I did, and I made the deed over to him in order that if we both died that way, that it would not be all in one." Third. As to the deed of trust of November 8, 1897, on this home place for \$725, she testified this was given without any consideration. She did not know anything about Melvin having the deed. They told her they were mortgages. She never knew there was any deed given except to G. M. Glascock, and they told her that was a mortgage. She signed this deed through fear of Dr. Glascock. He told her, "If you do not sign that mortgage, I will kill you." And she told his brother this. "The doctor looked wild out of his eyes, and showed that his mind was not right." "Q. Who was present at the time the doctor told you he would kill you if you did not sign your name to this deed of trust on the home place—nobody there besides you and he? A. No, sir; there wasn't. They would not let me know anything about their business. They kept it away from me for about eight weeks. Q. When did you tell the defendant here (Melvin Glascock) that you had signed this deed of trust under threats from your husband? A. At the time of the first deed I told him more than I did any one else. I told him all about the doctor losing his mind, and how he talked to me, and I told him that at the garden gate that he told me, if I didn't sign this mortgage—he never told me it was a deed—I told him that he said, if I didn't sign this, that he would kill me—and I signed them through fear, or I would not have signed them. Q. How long after you signed the deed until you told Melvin Glascock about your husband threatening you? A. I don't remember whether or not it was before or afterwards. Q. It wasn't far from the time you had told him—about that or probably before that—that your husband wasn't in his right mind? A. Yes, sir; that I didn't think the doctor was in his right mind; that if he was, he would not have tried to get me to do anything like that, and I don't think the doctor had his right mind—I know there was times, even when he bought that mill, that he didn't have his right mind. Q. What did Melvin Glascock say when you told him about signing that deed? A. He said, 'Oh, Gillie, surely not,' and I says, 'Teeney, I believe he is going crazy—his eyes fairly sparkled.' Q. What did he say? A. He said 'Surely not.'"



On cross-examination, she testified to the following effect: She lived with Dr. Glascock as his wife from 1866 to the time he was taken away. Melvin Glascock visited their home frequently, was always agreeable in his conduct, and always showed a disposition to see her and the doctor get along in the world. At the time the doctor was taken away to the asylum, she was living with him at Pinhook. Melvin Glascock came over, but she did not remember of sending for him. She was not afraid of the doctor at the time he was taken away, so long as she could keep him in a good humor, but was afraid of him when he was angry. If she ever told her neighbors that she was not afraid of him, and that there was no need of sending him away, she didn't remember it. She testified that at this time (1901) she had all the confidence in the world in Melvin Glascock, and that she always thought that he would befriend her, and did not think that he would take a penny in the world away from her under any circumstances. She continued to have this same regard for him until he took the Pinhook place away from her. The doctor told her if she did not sign the mortgage he would kill her. He told her that when she signed the first one. When she signed the deed at Essex, he had already told her that if she did not sign these mortgages, he would kill her. He told her that morning to get herself ready to go to Essex to sign this deed, and she knew she had to do it. Being asked if the doctor ever told her more than once that if she did not sign the deed, he would kill her, she answered that he told her that if she did not sign the mortgage on the home place at Dexter, he would kill her. She further stated that he did not come right out and tell her that she had to sign the deed at Essex (with the peculiar acknowledgment), but he told her to get herself ready to go to Essex and sign that deed, and she did. The deed from herself to L. O. Glascock, dated July 8, 1897, conveying the lots 1, 4, and 6 in Dexter she signed voluntarily because "if he died, it would come back to me." That was "way back yonder." "Q. The morning before you went to Essex to sign the deed, did he tell you that morning that he would kill you, if you didn't sign the deed? A. He did not come right out and tell me, but he told me to get ready to go to Essex and sign that deed, and I did. \* \* \* Q. Now, Mrs. Glascock, you stated that you made a deed to L. O. Glascock before you made those other deeds. He did not threaten to kill you to make you do that, did he? A. No, sir; that was away back yonder, when the deed was made. Q. And you voluntarily made that deed? A. Yes, sir; because, if he died, it would have to come back to me. Q. There were no threats made to make you make that deed? A. No, sir." She testified, further, that she never signed a deed to the 80 acres. They told her it was a mortgage,

though she did not know that Melvin ever told her it was a mortgage. She did not know whether her husband went to Tennessee to borrow money or get Melvin to buy the land. She signed the deed of trust for \$725 because she had to. She was afraid of the doctor. Every paper she signed was because she was afraid not to sign. Melvin never told her he would kill her, and never intimidated her in any way to get her to sign it, and if he was present she did not know it. She never wrote him to let her have money on the home place or she would lose it. She could not say whether defendant Melvin let the doctor have money from time to time, because she never saw it, or saw him get it. She had no recollection of giving a deed of trust on the home place to Thomas Ulen. The doctor did not threaten her to get her to sign the Ulen deed of trust. She testified that she and her husband kept possession of the 80 acres until the doctor's death. They had the use of it after the doctor's death. Defendant Melvin got the rents. She and her husband also had possession and got the rents from the home place in Dexter. Sometimes the doctor paid the taxes, and sometimes Melvin.

The notary testified that when the deed was made by Dr. and Mrs. Glascock to G. M. Glascock, the doctor and G. M. were up at the door, or had just stepped out. He asked her if she understood the nature of the deed. She signed it. She would not say whether she signed it as her own free act and deed. She simply said she had signed it, and that was sufficient. Mr. Langford testified he knew Dr. Glascock for 10 years, and worked for him; never noticed anything wrong with him until about 1 year before he was taken to the asylum. The doctor had transacted all his business right up to the time he was sent to the asylum.

Mrs. Mentz testified: Thought the doctor acted strangely about 8 years before the trial. On the part of the defendants there were eight witnesses, who were well acquainted with the doctor up to the time he was sent to the asylum, and there was nothing wrong with his mind up to about 1 year before he was sent away. He attended to all of his affairs.

The evidence on the part of the defendants tended to fully sustain the answer of the defendant Melvin Glascock, and other facts will be noted in the course of the opinion. The case can only be disposed of intelligently by a consideration of the charges separately and the decree of the court as to the separate tracts of land.

1. The circuit court decreed a cancellation of the deed executed by the plaintiff Gillie to her husband, Dr. Glascock, of lots 1, 4, and 6, in block 26, in Dexter, of date of July 8, 1897, on the ground that it was obtained by fraud on the part of Dr. Glascock, and also canceled the two deeds made to confirm that deed, on December 10, 1900. This was

the home place in Dexter. The averment as to the procuring of this deed of July 8, 1897, is that it was obtained by the same means of duress, for \$1, which was never paid. The only testimony as to the procurement of this deed was given by the plaintiff. She testified: "The deed to the home place in Dexter was in my name, and the doctor told me that, it being in my name, if we both should die, the place would all go to my folks, and I said it was not fair. We had no children at that time, and he said for me to make this over to him in his name, and so I did; and I made the deed over to him in order that, if we both died that way, it would not all be in one." She testified that she made the deed voluntarily, and without any duress whatever. There is no charge of fraud in the obtaining of this deed by Dr. Glascock, and plaintiff's own testimony negatives the charge of duress and every semblance of fraud as to this deed. The conveyance was regular on its face, and there is not a scintilla of evidence that the defendant Melvin Glascock had any notice of duress or fraud in procuring the same. That plaintiff Mrs. Glascock was legally competent to convey this realty to her husband without the intervention of a third party was established by this court in *banc* in *Rice, Stix & Co. v. Sally*, 176 Mo. 107, 75 S. W. 398, and followed in *Grimes v. Reynolds*, 184 Mo., loc. cit. 692, 68 S. W. 588, 83 S. W. 1132, and 184 Mo. 694, 83 S. W. 1133; *Oday v. Meadows*, 194 Mo., loc. cit. 614, 92 S. W. 637, 112 Am. St. Rep. 542; *Bower v. Daniel*, 198 Mo., loc. cit. 320, 95 S. W. 347; *Rice, Stix & Co. v. Sally*, 198 Mo., loc. cit. 687, 96 S. W. 1030; *Rossier v. Ry. Co.*, 115 Mo. App., loc. cit. 520, 91 S. W. 1018.

2. In natural and logical sequence this brings us to the decree of the court also canceling the two deeds of December 10, 1900, whereby Dr. Glascock and plaintiff Gillie conveyed the title to this home place, first, to G. M. Glascock, his brother, and by the latter back to Dr. Glascock. Obviously these conveyances were conceived and executed by Dr. Glascock on account of the opinion theretofore held by many members of the bar, and by both Courts of Appeals, that the conveyance of July, 1897, did not have the effect of vesting the legal title in Dr. Glascock to this real estate, and it was sought to cure this supposed defect by reconveying the property to G. M. Glascock, and have him convey to Dr. Glascock. The circuit court found that the conveyance by Dr. and Mrs. Glascock was invalid, but does not state in its decree upon what ground it based its decree. The ground alleged in the petition is that this deed was procured by violent and furious threats and by duress. The testimony of Mrs. Glascock alone sustains this charge. She testified in chief that the doctor told her, if she did not sign the deed, he would kill her, but in her cross-examination she stated: "He did not come right out and

tell me, but he told me to get myself ready to go to Essex, and sign that deed, and I did." There is evidence of the notary that when he propounded the usual questions as to executing the same voluntarily, she said she had signed it, and that was sufficient. But Melvin Glascock did not know of any duress, if such there was; and, whether there was or not, those transactions, if invalid, left the title in Dr. Glascock just as it was, under the deed of July 8, 1897, with an inchoate right of dower in plaintiff Gillie. In so far as the decree might affect the rights of Melvin Glascock, we think it was not supported by the evidence of plaintiff herself, independent of the testimony on the part of the defendants, which positively denies all knowledge of insanity on the part of Glascock, and of any threats or duress or involuntary execution of the deed.

3. But even if we are wrong in our construction of the evidence as to the deeds of December 10, 1900, it is obvious they cannot affect defendant Melvin's security obtained by the deed of trust of November 8, 1897, executed three years before the deeds of December 10, 1900. As already stated, the deed of July 8, 1897, had vested the title to the home place, lots 1, 4, and 6 in block 26 in Dexter, in Dr. Glascock, by the wholly voluntary act of plaintiff Gillie. This deed of trust was given to secure a note of \$725, signed by both Dr. and Mrs. Gillie Glascock, payable two years after date, and bearing 6 per cent interest. The circuit court found this deed of trust was procured by duress of Dr. Glascock, of which defendant Melvin had knowledge at the time: That defendant Melvin loaned Dr. Glascock the \$725 at the date of the note and deed of trust is evidenced by the genuine signatures of Dr. and Mrs. Glascock, and the possession of the note and deed of trust by Melvin at the time of the trial. By positive statute in this state this note imported that Melvin Glascock had furnished the consideration therein named, and the burden was on plaintiff to show lack thereof. *Rev. St. 1890, §§ 457, 804 (Ann. St. 1906, pp. 516, 830)*; *County of Montgomery v. Auchley*, 92 Mo., loc. cit. 129, 4 S. W. 425; *Taylor v. Newman*, 77 Mo. 237. But Mrs. Glascock simply testified she did not know anything about it. She could not say whether the doctor got the money or not. But the matter was not left to presumption or doubt by defendant's testimony. He testified that in the fall of 1897 his brother wrote him that he was involved, and desired defendant to come over to Missouri and let him have some money, if I could; and Mrs. Glascock wrote in the letter that the ownership of the three lots were in her name, and for defendant to come and she would give the mortgage; that the lots would be sold unless she could get some help; that thereupon he came to Missouri, and the doctor and Mrs. Glascock summed up their debts, and at first thought \$700 would cover all the debts, but found out that would not be enough, and

defendant told them to make it \$725, and they said that would be ample, and thereupon he let them have the \$725, and took their note and this deed of trust. Moreover, Melvin's testimony is strongly corroborated by the fact that Ulen had a mortgage on these lots, and that was paid off about this time, although Mrs. Glascock also testified she knew nothing of the Ulen mortgage. The testimony of Mozley and G. M. Glascock and Jeffers sustained defendant as to the furnishing of this money. Over and against this array of evidence we have merely the general statement of Mrs. Glascock that all the deeds were executed under duress. While this court is inclined to defer to the finding of the circuit court, it has never abdicated its right to review the findings of the circuit court in chancery cases. *Kinney v. Murray*, 170 Mo., loc. cit. 707, 71 S. W. 197; *State ex rel. v. Jarrott*, 183 Mo., loc. cit. 219, 81 S. W. 876. Bearing in mind that this is a bill to cancel a solemn written instrument on the ground of duress, and that courts of equity require clear, cogent, and convincing evidence in such cases, we are unable to concur in the finding of the circuit court that this note and deed of trust were obtained by duress. The plaintiff's evidence is entirely too meager and unsupported to justify such a decree, whereas that of defendant showed that Melvin, not only furnished the money, and that the deed of trust was freely executed by plaintiff, but that it was the result, in part, of her own request, and was an act, on the part of Melvin, prompted by brotherly affection, and the whole transaction consists with the utmost good faith and fair and liberal dealing, and at a time when plaintiff's own evidence shows the doctor was entirely sane.

4. Having reached this conclusion as to the deed of trust, it must needs be held that so much of the decree as awards plaintiff Gillie the insurance money arising out of the destruction of the property on one of the lots could not be upheld, even if there had been proof that a building had been destroyed by fire, which there is not in this record.

5. The court decreed dower in the mill property bought by Melvin, the defendant, under foreclosure of the deed of trust, given by Dr. Glascock and plaintiff Gillie to secure Miller and Carter for \$125. There is no claim that this deed of trust was invalid in any degree, but plaintiff insisted that Melvin agreed to buy it for her. The decree is illogical. If Mrs. Glascock was entitled to anything under her petition as to this property, it was a right to redeem the whole title by paying defendant Melvin his outlay in acquiring the title at the trustee sale, but the court evidently did not so find, but simply decreed her dower in the mill property of two acres. The deed of trust being entirely valid, and defendant having bought the note to protect Dr. and Mrs. Glascock, no doubt can exist of his right

to buy the property at the trustee sale, especially as this was plaintiff's desire. Moreover, defendant waived all questions of this kind by offering to let her redeem upon paying his charges thereon, and this was all that the court could have decreed. We think the court erred in decreeing dower in this land to plaintiff Gillie. The circuit court found for defendant Melvin as to lot 10 in block 2 in Deal & Boughton's addition to Dexter, and as to the 80 acres in lot No. 4, township 24, range 11, in Stoddard county, and we think rightly. We have carefully read the whole of this record, and have conceded the advantage which the circuit court had in seeing and hearing the testimony, but, weighing the plaintiff's own testimony, it falls far short of that cogent and satisfactory evidence which a court of equity requires to set aside and cancel solemn written instruments and conveyances, and certainly fails to show any of the collusion and fraud alleged against the defendant Melvin Glascock to strike down and destroy his securities for loans made by him to aid and assist his brother.

The decree of the circuit court is reversed, with directions to dismiss the bill.

BURGESS and FOX, JJ., concur.

#### STATE v. NIEUHAUS.

(Supreme Court of Missouri, Division No. 2.  
Feb. 2, 1909. Rehearing Denied March,  
3, 1909.)

#### 1. ASSAULT AND BATTERY (§ 74\*)—MAIMING AND DISFIGURING—SUFFICIENCY OF INDICTMENT.

In a prosecution for violation of Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), providing that if a person shall be maimed, disfigured, or receive great bodily harm, and his life be endangered by the act, procurement, or culpable negligence of another under circumstances which would constitute murder or manslaughter if death ensued, the person by whose act, etc., the injury is occasioned shall, in cases not otherwise provided for, be punished, etc., the indictment need not allege that the act was done willfully, intentionally, with malice, with a deadly or dangerous weapon, or under circumstances which, had death ensued, would have constituted murder or manslaughter.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 120, 121, 122; Dec. Dig. § 74.\*]

#### 2. INDICTMENT AND INFORMATION (§ 125\*)—MAIMING AND DISFIGURING—DUPLICITY.

Where an offense charged may be committed in different ways, its commission by different means may be charged in one count of an indictment, and hence an indictment under section 1849 (page 1279) was not duplicitous because charging the offense to be committed by assaulting with a whip and burning with a hot iron stove-lid lifter, both acts constituting the single offense of wounding and disfiguring under the statute, though either alone would also constitute an offense thereunder.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 350-371; Dec. Dig. § 125.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

### 3. INDICTMENT AND INFORMATION (§ 125\*) — MAIMING AND DISFIGURING—DUPLICITY.

The indictment would not be duplicitous as charging two assaults in one count because a period of time elapsed between the assault with the whip and the burning with the stove-lid lifter sufficient for accused to go to the kitchen and return with the lifter, such a lapse of time being not sufficient to render the affair other than a single transaction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334, 335; Dec. Dig. § 125.\*]

### 4. INDICTMENT AND INFORMATION (§ 202\*) — DUPLICITY—AIDER BY VERDICT.

Where accused did not demur to the indictment as duplicitous, and did not move to quash it or ask that the state be required to elect upon which offense alleged therein, if more than one, it would proceed to trial, duplicity, if any, was cured by the verdict.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 648; Dec. Dig. § 202.\*]

### 5. ASSAULT AND BATTERY (§ 58\*)—WOUNDING AND DISFIGURING—"WOUNDING."

Inflicting wounds on another by means of a rawhide whip and a hot stove-lid lifter constitutes a "wounding" within Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), providing that where one shall be maimed, wounded, or disfigured, etc., by act of another under circumstances which would constitute murder or manslaughter if death ensued, the person occasioning the injury shall be punished, though the whip and stove-lid lifter were not deadly or dangerous weapons.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 84; Dec. Dig. § 58.\*]

### 6. ASSAULT AND BATTERY (§ 75\*)—WOUNDING AND DISFIGURING—INDICTMENT.

In a prosecution for wounding and disfiguring under Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), providing that where one shall be maimed, wounded, or disfigured, etc., by act of another under circumstances which would constitute murder or manslaughter if death ensued, the person occasioning the injury shall be punished, etc., it is not necessary to allege in the indictment that the assault was made with intent to kill.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 115; Dec. Dig. § 75.\*]

### 7. ASSAULT AND BATTERY (§ 58\*)—"DISFIGURE."

Burning a person with a hot stove-lid lifter, thereby causing sores and lacerations, constitutes a disfigurement within Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), the word "disfigure," as it has no technical meaning, being considered in its ordinary sense as meaning to mar the figure and to render less perfect or beautiful in appearance.

[Ed. Note.—For other cases, see Assault and Battery, Dec. Dig. § 58.\*]

For other definitions, see Words and Phrases, vol. 3, p. 2101.]

### 8. CRIMINAL LAW (§ 1169\*)—APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for wounding and disfiguring under Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), the admission of testimony of the wounded person as to whether accused had ever put anything on the sores produced or done anything relative thereto, if improper, was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.\*]

### 9. ASSAULT AND BATTERY (§ 86\*)—EVIDENCE—MATERIALITY.

In a prosecution for wounding and disfiguring under Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), where accused claimed that she whipped prosecutrix to cure her of lying, evidence as to prosecutrix's habit of lying previous to the punishment in question and of punishment which accused had inflicted upon her for that habit before that time was properly excluded.

[Ed. Note.—For other cases, see Assault and Battery, Dec. Dig. § 86.\*]

### 10. ASSAULT AND BATTERY (§ 96\*)—WOUNDING AND DISFIGURING—INSTRUCTIONS.

In a prosecution for wounding and maiming under Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), where accused testified that she had whipped prosecutrix, a 13 year old girl, for lying, and the court charged fully submitting accused's right to administer reasonable discipline under the claim that she stood in the position of parent to prosecutrix, accused having testified to the facts upon which the charge was based, and having given her version of the cause for the whipping, and prosecutrix being allowed only to state what she was whipped for on the day in question and not to tell what had occurred previously, accused had the full benefit of her explanation as to the cause for administering the whipping.

[Ed. Note.—For other cases, see Assault and Battery, Dec. Dig. § 96.\*]

### 11. CRIMINAL LAW (§ 463\*)—OPINION EVIDENCE—COMPETENCY—CAUSE OF BURNS.

A middle-aged woman with a family of four children who testified that she had often seen burns, and that she and her children have been burned, was competent to testify that wounds observed by her on a child and described were caused by burns, and that it looked like they had been caused by an iron point scraped on the body, though she was not an expert witness, such an opinion being within the range of common experience and observation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1052; Dec. Dig. § 463.\*]

### 12. CRIMINAL LAW (§ 463\*)—OPINION EVIDENCE—CAUSE OF BURNS.

A married woman 48 years old, who had examined a person's body and had described wounds thereon, was competent to testify that in her opinion the wounds were caused by burns from a hot iron and not by acid, where it appeared that she had seen burns and had burned herself with hot irons as well as with carbolic acid.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1052; Dec. Dig. § 463.\*]

### 13. WITNESSES (§ 363\*)—CREDIBILITY—ANIMOSITY OF ADVERSE WITNESS.

It is competent in a criminal case to show the motive and animosity of an adverse witness, so that the jury may know what credit to give his statements.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1177; Dec. Dig. § 363.\*]

### 14. CRIMINAL LAW (§ 1170\*)—APPEAL—REVIEW—HARMLESS ERROR—EXCLUSION OF TESTIMONY.

The exclusion of testimony as to animosity existing between accused and an adverse witness was not prejudicial, where the animosity was fully shown by other witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3146; Dec. Dig. § 1170.\*]

### 15. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—LESSER OFFENSE.

Though, in a prosecution for assault, if the evidence is doubtful as to the grade of the as-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sault committed, the court may charge for simple assault, yet where the state's evidence in a prosecution for feloniously wounding and disfiguring if true, establishes a felonious assault, and accused's evidence, if true, entitled her to an acquittal, a charge on simple assault was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1923, 1924; Dec. Dig. § 814.\*]

Appeal from Circuit Court, Perry County; Jos. J. Williams, Judge.

Olive M. Nieuhaus was convicted of feloniously and willfully assaulting and disfiguring another, in violation of Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), and she appeals. Affirmed.

John V. Noell, for appellant. Herbert S. Hadley, Atty. Gen., and F. G. Ferris, Asst. Atty. Gen., for the State.

GANTT, P. J. At the April term, 1907, of the circuit court of Perry county, an indictment was returned charging that the defendant at said county, on January 11, 1907, feloniously and willfully assaulted one Maggie Shine, and with a rawhide whip of the length of three feet, of the diameter of three-fourths of an inch at the large end thereof, and of the diameter of one-fourth of an inch at the small end of said whip, and with a hot iron stove-lid lifter of the length of nine inches, of the thickness of one inch, and of the weight of one pound, willfully and feloniously, by the act and procurement of the said Olive Nieuhaus, did strike, wound, maim, disfigure, cut, and stab her, the said Maggie Shine, then and there with said rawhide whip, and with the said hot iron stove-lid lifter, in and upon the face, neck, breast, abdomen, arms, hips, legs, and body of her, the said Maggie Shine, and did feloniously beat, bruise, maim, burn, and wound her, the said Maggie Shine, and the said Maggie Shine then and there in manner and form aforesaid was greatly maimed, wounded, and disfigured, against the peace and dignity of the state. At the same term of court, the defendant applied for and was granted a change of venue from the regular judge of said court, and, it appearing that the defendant and the prosecuting attorney could not agree upon any attorney as a special judge, the cause was set down for the 8th of July, 1907, and the Honorable Joseph J. Williams, judge of the Twenty-First judicial circuit, was called and requested by Judge Killian to hold said court, and on the 8th of July, 1907, Judge Williams appeared in response to said request and assumed the direction of the said cause. The defendant then made another application for a change of venue from said county on the ground that the inhabitants thereof were prejudiced against her. This application was heard and overruled, and the cause was then continued until the October term, 1907. On the 21st

of October, 1907, the defendant was arraigned, and her plea of not guilty was entered. A jury was impaneled and the cause heard, and resulted in a verdict of guilty of wounding and disfiguring Maggie Shine both by whipping her with a whip and by burning her with a hot stove-lid lifter as charged in the indictment, and assessing her punishment at imprisonment in the penitentiary for two years. In due time, the defendant filed her motions for a new trial, and in arrest of judgment, which were by the court overruled. Sentence was then pronounced against the defendant, and from that sentence she has appealed to this court.

The evidence on the part of the state tended to prove that on the 11th day of January, 1907, Maggie Shine was a girl not quite 13 years old. On that date she was living with Joseph Nieuhaus and his wife, the defendant, at their home at Point Rest, in Perry county. She had lived with them two or three years. She was an orphan, her mother and father both having been dead a number of years. Mr. Nieuhaus conducted a store at Point Rest, and used the second story of his store building for a residence. On the 11th of January, 1907, which was Friday, in the afternoon Mrs. Nieuhaus left her baby in Maggie's care, and directed her to put some ironed clothes away, and then went downstairs. Upon returning upstairs and finding that her clothes had not been put away, she inquired of Maggie why it had not been done. Maggie explained that the baby had been cross and required her whole attention, whereupon the defendant said, "Now I am going to whip you and burn you; you know that work was to do." Defendant went downstairs, where she remained for a short time, and until her husband left the store and went to the willows, several hundred yards distance. Returning upstairs, the defendant sent her little boy, Henry, downstairs to watch the store. She then took Maggie into a room, required her to strip off her clothes, and put her across the bed face downward. From her drawer she took a cowhide whip, and with it beat Maggie's bare flesh. Maggie screamed, whereupon the defendant, sitting upon her head to smother the screams, continued to belabor her with the whip, and threatened her with a burn for every time she screamed. Letting Maggie up, the defendant then went to the kitchen and procured a hot stove-lid lifter, with which she inflicted burns upon Maggie's chest and abdomen. Defendant then sent Maggie to the corner near by to fetch some corn cobs. Mary Moraville, a little schoolgirl friend of Maggie's passing at the time on her way home from school, heard Maggie crying and sobbing at the crib. She went to the crib and learned of Maggie's mistreatment. She went home and told her sister and her mother what she had learned. On the next Monday, it was the 14th of Jan-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

uary, Maggie was at school, and there in the closet Emma Moranville made an examination of the burns on Maggie's body, observing that some of them had scabs, and some of them were raw and stuck to her clothing. On Wednesday, the 16th of January, Mrs. Theresa Moranville met Maggie in a field between Point Rest and the schoolhouse, and examined the upper part of Maggie's body, where she found four or five wounds on the fore part of her body and many welts on her back. She saw evidence in several places that blood had been drawn by a whip. She also found bruises and green places on her body as large as a half dollar. When Maggie returned to school on Monday, January 14th, Miss Codenbach noticed that Maggie appeared to be ill, as she did not play with the pupils as usual, and seemed to be trying to keep her clothes away from her person. At the instance of Miss Codenbach, some five or six of the neighbors gathered at the home of Mrs. Theresa Moranville on the 22d of January and made a thorough examination of Maggie's clothing and injuries. On the 29th of January Dr. Frank M. Vessels examined her injuries, and about the same time, also, Dr. J. F. Morton examined her. From the testimony of these neighbors and physicians, it appeared that there were seven principal burns and four smaller ones on Maggie's chest and abdomen, all of which appear to have been made by the scraping of a hot iron or the use of some blunt instrument. One burn, near the collar bone, was in form and size like that of the end of the stove-lid lifter described as the instrument by means of which the burns were inflicted. There was the appearance of a continuous burn started on the left breast, passing down the left side and across the abdomen, as if made by one stroke with a blunt iron instrument, which touched heavier and burned deeper as it passed across and over the ribs and over the prominent places of the abdomen, leaving severe wounds at the prominent points and merely a red streak across the depressions in her body. The marks of this stroke between the prominent places varied in width from one-half an inch to three-fourths of an inch, and its whole length was about 18 inches. The large and deep burns at the prominent places, one of which was as large as a dollar, and several of which were of the size of a half dollar, were, at the time of the examination by the physicians, running sores, and the marks of the stroke connecting them was indicated by the redness of the skin. Both of the physicians were of the opinion that these burns were made by a blunt iron instrument, and could not have been made by a hot liquid or by the spilling of acid. On Maggie's shoulders, back, thighs, and legs were found many welts as if made by a whip. Dr. Vessels counted 32 welts, which were prominent and distinct. In some places the welts were so thick that they ran into one another and

made a continuous bruise. In some places the whip had broken the skin. The individual whip welts were about the width of a lead pencil. There were also other bruises on her body. Mrs. Moranville and the two physicians examined Maggie's person on the day of the trial, and found scars at the places where on the previous examination they had found the burns and whip wounds. Both of these physicians testified that some of the burns and whip wounds had penetrated both layers of the skin, and the scars would remain as permanent disfigurements.

The defendant in her own behalf testified that she had never burned Maggie at any time, and had no idea as to the cause of the burns, unless it was the fact that Maggie had knocked down a bottle of carbolic acid while dusting off a shelf. She remembered that some of the acid had spilled on Maggie's arm. She admitted that she had whipped Maggie some time in January, the exact date she had forgotten, with a small riding whip, but the whipping was not severe. She testified she whipped her in order to break her of the habit of lying; the immediate cause of the whipping being that Maggie had poured coal oil in the stove in order to kindle the fire, and denied that she had done so when accused by the defendant of having done so. She explained the cut of Maggie's fingers by saying it was done while cutting kindling, and that Maggie had told her that she made the bump on her head by running against a tree at school. She admitted, also, that one time she had paddled Maggie with a stick, which she described as a little piece of pine about a quarter of an inch thick and about an inch wide and about a half yard long. She said that she did not examine Maggie after she had whipped her, and Maggie had never complained to her of having wounds or sores or scars or of anything hurting her. She explained her failure to have the whip at the trial by saying that no one had requested her to bring it. She denied that she had whipped Maggie because she had not put away the ironed clothes, and averred that Maggie had been in the habit of lying, and on the occasion that she whipped her admitted she had lied about putting the coal oil into the stove. She said she had taken Maggie to raise and was very fond of her, and had always treated her with kindness and gave her the same motherly care and treatment which she accorded to her own children; and that she had never had occasion to whip her own children with that whip, as her children did not lie. She testified that, on the Sunday afternoon following the Friday on which it was alleged that she had whipped Maggie, Maggie was playing and singing with Esther Hagar, and in this she was corroborated by Esther. She also testified that she and Mrs. Moranville had not been on speaking terms for more than a year, for the reason that she would not allow Mag-

gie to play with Mrs. Moranville's little girl, who was a very bad child.

Several witnesses testified to the good reputation of the defendant, and several were introduced to contradict Maggie Shine on important matters. The testimony of two of the witnesses tended to show that Mr. Nieuhaus did not go to the willows January 11th. Mrs. Moranville, however, in rebuttal, testified that he did. Maggie Shine testified that the occasion of her playing and singing with Esther Hagar was on the Sunday before she was whipped, and not on the Sunday afterwards. As to the spilling of the carbolic acid, Maggie explained that the acid bottle fell upon the wood box, under the shelf, where it spilled, and that none of the acid struck her. Mr. Nieuhaus corroborated the testimony of his wife as to the spilling of the bottle of carbolic acid by Maggie, and as to Maggie being whipped for putting coal oil in the stove and then lying about it, and as to the treatment of Maggie by the defendant.

1. This prosecution is for violation of section 1849, Rev. St. 1899 (Ann. St. 1906, p. 1279), which provides, "If any person shall be maimed, wounded or disfigured or receive great bodily harm and life endangered by act, procurement or culpable negligence of another in cases and under circumstances which would constitute murder or manslaughter if death ensued, the person by whose act, procurement or negligence such injury or danger of life shall be occasioned shall, in cases not otherwise provided for, be punished," etc. This section has often been considered by this court, and it has been uniformly ruled that it is unnecessary for the indictment to state that the act was done willfully, intentionally, with malice, with a deadly or dangerous weapon, or under circumstances which, had death ensued, would have constituted murder or manslaughter. *State v. Moore*, 65 Mo. 606; *Jennings v. State*, 9 Mo. 862; *State v. Bohannon*, 21 Mo. 490; *State v. Bailey*, 21 Mo. 484.

As to the specific complaint that the indictment is fatally defective in that two separate and distinct felonies are charged in one count, we think that but one single offense is charged, for, while either maiming, wounding, or disfiguring may by itself constitute an offense, all of them together in this indictment charges but the single offense of wounding and disfiguring the prosecutrix. The allegations are not repugnant, and the count is not double. As said in *State v. Myers*, 193 Mo. 225, 94 S. W. 242, "It is well settled in this state that an assault may be charged to be made with different weapons." Joyce on Indictments, §§ 399, 400, 401, says: "Where an offense charged may be committed by two different means, its commission by both means may be charged in one count of an indictment, and proof of either will sustain the allegation. In such case it is said that proof that any of the means were used proves the offense, and that proof that all the means

described were used proves no more, the penalty also being the same." And Bishop in his *Criminal Procedure* (4th Ed.) §§ 434, 438, says: "Some single offenses are of a nature to be committed by many means, or in one or another of several varying ways. Thereupon a count is not double which charges as many means as the pleader chooses, if not repugnant." And such was the ruling of this court in *State v. Van Zant*, 71 Mo. 541. Nor do we agree with the learned counsel for the defendant that the punishment testified to by the prosecutrix formed two distinct assaults. In *State v. McDonald*, 67 Mo. 13, the assault began in a blacksmith shop with a hammer or a pair of tongs, and this was interrupted by other parties, and after the prosecutor had left the shop the defendant went out and procured an ax handle and pursued the prosecutor some 75 yards from the shop, and struck the prosecutor with the ax handle, breaking his arm below the elbow. Speaking of this assault, Judge Henry said: "The difficulty in the shop and the final conflict were one and the same transaction, one continuous assault from the beginning, until with an ax handle he shattered Cockrum's arm; and the charge that the assault was made with a hammer and an ax handle was literally true. It was not charging two assaults to one count, but one continuous assault with several weapons, which was neither impossible nor improbable, as the evidence clearly demonstrates." *Johnston v. State*, 7 Mo. 183. So in this case, we do not think that the assault became two different offenses from the mere lapse of time which intervened between the whipping with the cowhide and the time taken to go to the kitchen and return with the stove-lid lifter, and the continuation thereof immediately upon the return of the defendant from the kitchen. In our opinion it was one continuous assault, if the evidence of the prosecutrix is to be believed. Moreover, duplicity in an indictment is a defect which is cured by verdict. The defendant did not demur to the indictment, and did not move to quash it, nor did she ask the court to require the state to elect upon which one of the offenses alleged therein, if more than one, it would proceed to trial. *State v. Fox*, 148 Mo. 517, 50 S. W. 98, and cases therein cited. *State v. Nagel*, 136 Mo., loc. cit. 49, 37 S. W. 821; 1 Bishop, *Crim. Proc.* § 443, and cases cited.

2. In the first instruction the court instructed the jury that: "If you believe and find from the evidence that the defendant, Olive M. Nieuhaus, in Perry county, and state of Missouri, within three years next before the 9th day of April, 1907, did willfully and feloniously whip Maggie Shine with a whip, by which said Maggie Shine was wounded, or disfigured, then you will find the defendant guilty, as she is charged in the indictment, of wounding, or disfiguring, said Maggie Shine by said whipping, as

you, from the evidence, shall believe her to have been so wounded or disfigured. And if you shall believe and find from the evidence, Olive M. Nieuhaus, at said time and place, and upon such whipping, by her, of said Maggie Shine, and in continuance by her of the punishment so inflicted upon said Maggie Shine by said whipping, did willfully and feloniously burn said Maggie Shine with a hot iron stove-lid lifter, by which said Maggie Shine was wounded or disfigured, then you will find the defendant guilty, as she is charged in the indictment, of wounding or disfiguring said Maggie Shine by said burning, as from the evidence you shall believe and find her to have been so wounded or disfigured. If you find the defendant guilty of either wounding or disfiguring said Maggie Shine by either said whipping or burning, you will fix her punishment therefor at imprisonment in the penitentiary not less than two years nor more than five years, or at imprisonment in the county jail not less than six months, or at both a fine not less than one hundred dollars, and imprisonment in county jail not less than three months, or at a fine of not less than one hundred dollars." And in the next instruction the court instructed the jury that if defendant struck Maggie with a whip, or burned her with the hot stove-lid lifter with such severity as to break, cut, or burn entirely through the skin upon her body and to her flesh, then said Maggie was wounded within the meaning of the other instruction; and if the lick of the whip or the burns left a scar or scars, then she was disfigured within the meaning of the instructions." It is insisted the court erred in giving these instructions, for the reason that the evidence conclusively showed there was neither felonious wounding nor disfiguring of the prosecutrix.

This court, in *State v. Leonard*, 22 Mo. 449 (1856), defined what would constitute a wounding under the section on which this prosecution is based, in the following words: "As to what constitutes a wounding under this statute, we may suppose from the evidence that the prosecutrix was wounded in the legal sense of the term; for she says that 'there is a scar left still' made by the wound. In *Rex v. Payne et al.* [4 Car. & P. 558] it was held, if a person strike another with a bludgeon and break the skin and draw blood, it was a sufficient wounding to be within the statute 9 Geo. IV, c. 31, § 13. Under this act it is not at all material what the instrument is with which the party is wounded. The punishment under the statute of 9 Geo. IV, c. 31, § 12, was in some cases death; a wound from a kick with a shoe on will be within the same statute. *Rex v. Biggs*, 1 Moody's Cr. Cas. 318. In criminal cases, the definition of a wound is an injury to the person by which the skin is broken. *Moriarty v. Brooks*, 6 Car. & P. 684; *Rex v. Withers*, 4 Car. & P. 446.

Dr. Johnson defines a wound to be 'a hurt by violence.' In the case before us, the instrument was a stone about the size of the fist of a woman, for thus the witness described it, and it was thrown with such violence as to knock the woman down; and when she was afterwards examined on the trial as a witness, about a year after she received the blow, she said, 'It bruised me severely; there is a scar there yet.' There can be no doubt, then, of this being a wound, under the thirty-eighth section of the act aforementioned."

But the contention of the defendant is that there was no evidence that the whip with which the prosecutrix was wounded, or the stove-lid lifter with which the evidence tended to show she was burned, was a deadly or dangerous weapon, and, for this reason, the said instructions above noted were erroneous. As already said, this court has uniformly ruled that it was unnecessary to charge that the assault was made with a deadly weapon, or with malice aforethought, or that the indictment should state that if death had ensued it would have been murder or manslaughter. In this case the pleader has stated with particularity the weapons used and the circumstances, and the court in these instructions left it to the jury to say whether the wounding and disfiguring was unlawfully and feloniously done. In our opinion, the statute does not require that the wounding should have been done with a deadly weapon, nor in this case, where the charge is the wounding and disfiguring, that it should have been charged that the assault was made with intent to kill. And the jury found that the defendant had feloniously wounded and disfigured the prosecutrix by the use of a whip and the hot stove-lid lifter. It goes without saying that, had death ensued from these acts of the defendant, the homicide would have been either murder or manslaughter, but it was not necessary for the jury to so say, because it was not necessary to allege the same. To hold that the wounding and disfiguring with the instruments alleged and proven in this case is not within the statute would be to nullify its plain provisions. We think the instructions were not erroneous, and this ground of appeal is not tenable.

3. As to the assignment that the evidence did not show any disfiguring of the prosecutrix, we are wholly unable to agree. The word "disfigure" has no technical meaning, and must be considered in its plain and ordinary sense. Thus used, it means to mar the figure and to render less perfect or beautiful in appearance. And such was the effect of the burning and lacerating of the flesh of the prosecutrix in this case.

4. The prosecutrix, after testifying that the defendant had whipped her, was asked, "Did she [meaning the defendant] ever put anything on your sores or do anything relative to your burns?" to which the defendant's



counsel objected in these words: "The effect, if any, has nothing to do with this case." The objection was overruled, and the defendant excepted. This action of the court is assigned as error. We are unable to see the ground upon which the exception was taken; certainly the language of the counsel does not indicate any legal ground for excluding it. Of course the offense was committed, if at all, irrespective of what the defendant afterwards did, but we cannot see how this question and answer could have had any material effect upon the verdict of the jury; certainly it is not sufficient to reverse the judgment.

5. It is next insisted that the court erred in refusing to permit defendant's counsel to cross-examine the prosecutrix as to her habit of lying, and as to her being whipped on the occasion complained of for lying. The court permitted the counsel to interrogate the witness fully as to the reason given by the defendant for whipping her on the day of the assault, but the counsel desired or offered to prove that previous to the time the prosecutrix had an inveterate habit of lying, and the court ruled that whatever her habit may have been before that time, and whatever punishment the defendant had inflicted on her for that habit, had nothing to do with the case before the jury, and we think the court correctly ruled. The defendant herself was a witness on the stand, and testified she had whipped the prosecutrix for lying to her that day about putting coal oil in the stove; she made no pretense of having inflicted the wounds upon the prosecutrix on account of her previous habit of lying if such was the case. The claim that the defendant stood in the position of parent to the prosecutrix, and therefore had the right to administer to her reasonable discipline, was fully submitted to the jury in the eighth instruction, given by the court in these words: "If the jury find from the evidence that the defendant at the time she whipped the prosecutrix, Maggie Shine, with a riding whip, had the charge, custody, and control of said Maggie Shine, for the purpose of rearing, training, and educating her, and shall further find that the punishment administered with said riding whip was reasonable and moderate, and that such punishment was administered for the purpose of correcting the faults of said Maggie Shine, and not to gratify feelings of malice or revenge, then such whipping was justifiable, and the jury cannot find defendant guilty of any offense under the law for or on account of such whipping." The defendant testified to the facts upon which this instruction was based, and gave her version of the cause for the whipping. The prosecutrix testified that the cause alleged by the defendant at that time was because she had not put away the ironed clothes. The court ruled that the defense would be allowed to ask the prosecutrix what she was whipped

for that day, but would not permit proof of what had occurred previous to that time. We think the defendant had the full benefit of her explanation as to the cause for administering the whipping, and the instruction given by the court was as favorable as she had any right to demand.

6. It is next assigned as error that Mrs. Moranville and Martina Tucker were permitted to testify, over the objection of the defendant, as to the probable instruments with which the welts and sores on Maggie Shine were inflicted, when neither of them had qualified as experts. Mrs. Moranville in her direct examination testified that on the 16th of January, five days after the alleged whipping and burning, she examined the body of the prosecutrix and found burns and marks, and counted some seven burns on that day. Objection was made at that time that she was not an expert on the question of burns, but this objection is not insisted upon now, nor do we think it would be tenable, inasmuch as Mrs. Moranville was a woman of middle age and had a family of four children, and we think it was perfectly competent for her to testify that a wound that she had observed upon the body of the prosecutrix was caused by a burn, as such an opinion would be within the range of common experience and observation. Besides, she only testified that they looked like burns to her. She was then asked to state her opinion how these burns were produced—that is, how the instrument which inflicted the burns had been used—and she answered that it looked like, whoever had done it had taken an iron point and scraped it on the body. The objection was that she could state how the wounds ranged, but could not give her opinion how the instrument was used. Afterwards she stated just how the wounds or burns ranged with reference to each other, and gave their dimensions. We think this also was within the range of common experience. Having examined the wounds and their relations to each other, we think that a witness of ordinary intelligence could state that it looked to her as if they had been inflicted by an instrument which was applied in a continuous stroke or application, and not in separate and detached wounds or by distinct strokes. On cross-examination she testified that she had often seen burns; the children had been burned by accident, and she herself had. She had never made a scientific investigation of burns.

Mrs. Martina Tucker, a married woman of some 48 years, testified that she also made an examination of the prosecutrix on or about the 22d of January, in connection with several other ladies, and that she found six or seven places that she called burns on Maggie's body, and found bruises and welts from a whip or switch, whichever it was. Mrs. Tucker testified that these wounds

which she called burns were kind of bound together. When she saw them they had healed, some of them more than others, and just one was an inch and a half or two inches in length and about an inch wide. They had scabs on them. She had seen burns; had been burned herself on the stove or with hot irons. She said that she thought that these burns on Maggie's body looked like the burns that she had seen which had been caused by being burned by a hot iron; that is, she thought they looked like burns to her. The witness gave a full description of the size and appearance of the various burns or wounds that she saw. She also testified that she had burned herself accidentally with carbolic acid, and these burns did not look like those she had seen caused by the acid. This is about the substance of the testimony.

Dr. Vessels examined these wounds, and fully corroborated all that Mrs. Moranville and Mrs. Tucker had said in regard to them, and also testified that a wound made by an acid left a different effect on the body than an ordinary burn, and testified, further, that he did not believe that it was possible to pour liquid on the girl and cause the shape and condition of these scars that he found on her body. Dr. Morton fully corroborated Dr. Vessels and the other witnesses, and gave it as his opinion that these wounds had not been occasioned by scalding or done with an acid or liquid.

We think that the testimony of Mrs. Tucker was competent. She had merely given her opinion that the scars were burns as the result of her ordinary observation and experience, and, as we have said in regard to Mrs. Moranville's evidence, we think that her experience and observation was sufficient to entitle her to give her opinion as to what had caused these wounds. Certainly we think there was no reversible error occasioned by the admission of this testimony, when it was so fully corroborated by the expert evidence of both Drs. Morton and Vessels.

7. Error is also alleged as to the exclusion of testimony of Emanuel Lash. This witness was called to show the unfriendly feeling existing between Mrs. Moranville and Mrs. Nieuhaus and their respective husbands. And he testified without objection that they were at outs, and that the trouble seemed to have arisen in regard to a binder that Mr. Nieuhaus had sold to Mr. Moranville. The objection on the part of the state was that the witness was detailing a trouble between another Moranville and the defendant, and the court excluded it as immaterial. When Mrs. Moranville was on the stand she was asked if she had been on speaking terms with Mrs. Nieuhaus for about five or six months, and she answered, "No, sir, not since this trouble commenced," and she stated that prior to that time she and Mrs. Nieuhaus exchanged visits; that Mrs. Nieu-

haus had been to her home twice since Moranville had moved out of Mr. Nieuhaus' property. She admitted that she had signed an affidavit charging Mrs. Nieuhaus with this assault, but that the prosecution was begun in another court, and nothing came of the proceedings commenced by her. The defendant testified that she and Mrs. Moranville had not been on speaking terms for a year from last August; that in August, the year before, the defendant's mother visited her, and, as Mrs. Moranville was some way related to her mother, the defendant went with her mother to visit Mrs. Moranville, but that the latter never spoke to her during the visit, and that there was an ill feeling between them for six months before the trouble came up. Taking into consideration that the witness Lash was permitted to state that the defendant and Mrs. Moranville were "at outs" and to detail the cause of the trouble between their husbands, and that Mrs. Moranville had admitted that they were not on speaking terms and had not been since this trouble came up, and that the defendant had corroborated that statement as to the ill feeling existing between them, we think it is perfectly apparent that the ill feeling between these parties was made apparent to the jury. And whatever effect it could have upon the fairness and truthfulness of Mrs. Moranville's testimony was secured to the defendant by the testimony, while it is true, as defendant insists, that it is perfectly competent to show the motive and animosity of an adverse witness in order that the jury may know what credit to give the statement of such a witness; but when this animosity was so fully shown as it was in this case, it is clear to our minds that the ruling of the court did not deprive the defendant of the benefit of that principle of law, and does not offer any substantial ground for the reversal or the judgment in this case.

8. Finally, it is insisted that the court erred in failing and refusing to instruct the jury upon a common assault. The defendant requested an instruction to this effect, which the court refused. It is to be noted in the first place that the indictment in this case is for felonious wounding and disfiguring, and is not an indictment for an assault with intent to kill, either with or without malice aforethought. While there are numerous cases which hold that, where the evidence is doubtful as to the grade of the assault, it is proper for the court to instruct for simple assault and battery, and the jury may so find, it is also equally well settled in this state that where the evidence on behalf of the state, if true, establishes a felonious assault, the court should not give an instruction for common assault. *State v. Barton*, 142 Mo., loc. cit. 455, 456, 44 S. W. 239; *State v. Duncan*, 142 Mo., loc. cit. 461, 462, 44 S. W. 263; *State v. Higginson*, 157 Mo., loc. cit. 402, 57 S. W. 1014; *State v. Musick*, 101 Mo.,

loc. cit. 270, 14 S. W. 212. If the jury in this case had believed the defendant's testimony under the instruction of the court, she was entitled to go acquit of any offense, but if, as they evidently did, they believed the evidence on behalf of the state, it was a felonious wounding and disfiguring of the prosecutrix, and the court properly refused to instruct upon common assault.

We have thus endeavored to carefully consider every proposition advanced on behalf of the defendant, and have reached the conclusion that there is no reversible error in the record, and that the judgment should be, and it is therefore, affirmed. All of this Division concur.

### DAY et al. v. CONSOLIDATED LIGHT, POWER & ICE CO.

(Kansas City Court of Appeals. Missouri. March 1, 1909.)

#### 1. APPEAL AND ERROR (§ 997\*)—OVERBULGING DEMURRER TO EVIDENCE—REVIEW.

The court, on reviewing the ruling on a demurrer to plaintiff's evidence, must consider the facts in their aspect most favorable to the cause of action asserted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4023, 4024; Dec. Dig. § 997.\*]

#### 2. ELECTRICITY (§ 16\*)—INJURIES INCIDENT TO PRODUCTION AND USE—INSULATION.

One making merchandise of electricity and transmitting it along public thoroughfares of populous communities must prevent its escape, and where an ordinarily prudent person, observing the highest degree of care, would anticipate that persons in the exercise of their lawful right might be brought in contact with electrically charged wires, he must insulate the wires and maintain them in a proper state of repair.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.\*]

#### 3. ELECTRICITY (§ 14\*)—INJURIES INCIDENT TO PRODUCTION AND USE—CARE REQUIRED.

Where one making merchandise of electricity and transmitting it along the public thoroughfares, observing the highest degree of care, ought to anticipate that persons rightfully on the flat roof of a building might come into contact with wires maintained in an alley in the rear of the building, he must exercise the highest degree of care to replace defective wires, and a breach thereof is actionable negligence.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. § 14.\*]

#### 4. ELECTRICITY (§ 16\*)—INJURIES INCIDENT TO PRODUCTION AND USE—CARE REQUIRED.

Where a company engaged in manufacturing and vending electricity for light and power maintained wires at the rear of the flat roof of a building with constructive knowledge that the occupants of the adjoining building used such roof with the acquiescence of the owner thereof, the company was required to maintain its wires in a safe condition and was liable for the death of a child, playing on the roof, by contact with a defectively insulated wire.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.\*]

#### 5. DEATH (§ 103\*)—OF CHILD—CONTRIBUTORY NEGLIGENCE OF PARENT — QUESTION FOR JURY.

Whether the mother of a child, six years old, was negligent in permitting the child to play on the flat roof of an adjacent building, precluding recovery by her for the death of the child by contact with a live wire negligently maintained near the roof, held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 141; Dec. Dig. § 103.\*]

#### 6. ELECTRICITY (§ 18\*)—CONTRIBUTORY NEGLIGENCE OF CHILDREN.

A child, six years old, playing on the flat roof of a building and coming in contact with a live electric wire maintained near the roof, is not chargeable with contributory negligence.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 10; Dec. Dig. § 18.\*]

#### 7. DEATH (§ 104\*)—OF CHILD—CONTRIBUTORY NEGLIGENCE OF PARENTS—INSTRUCTIONS.

An instruction, in an action by parents for the death of a minor child, that the burden was on defendant to establish that the child was killed by his own negligence or the negligence of his mother contributing thereto, "and not by the negligence of the defendant," etc., was erroneous for imposing on defendant the burden of proving its freedom from negligence, while plaintiffs had the burden to show affirmatively that defendant's negligence was the proximate cause of the injury.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 104.\*]

Appeal from Circuit Court, Jasper County; Hugh C. Dabbs, Judge.

Action by I. D. Day and another against the Consolidated Light, Power & Ice Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

A. E. Spencer, John A. Eaton, and E. H. McVey, for appellant. Perkins & Blair and Walden & Andrews, for respondents.

JOHNSON, J. Plaintiffs were the parents of Shelton Day Moody, a boy six years old at the time of his death, which occurred February 14, 1907. Defendant is a corporation engaged in the business of manufacturing and vending electricity for light and power in the city of Joplin. The death of the child was caused by an electric shock which he received by coming in contact with one of defendant's highly charged wires, and it is alleged in the petition that defendant was negligent: First, in placing the wire; and, second, in permitting it to remain in a defective and dangerous condition caused by the decay and consequent removal of a part of the insulation. The answer is voluminous, but in effect the main defenses interposed are a general denial and a plea of contributory negligence. Verdict and judgment were for plaintiffs in the sum of \$2,000, and the cause is here on the appeal of defendant.

First we shall dispose of the questions raised by the contention of defendant that its request for an instruction peremptorily directing a verdict in its favor should have been granted. Material facts disclosed by the evidence of plaintiffs are as follows: At

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the time of his death, the boy was living with his mother (now Mrs. Moody), who kept a rooming house on the third floor of a business house in Joplin at No. 413 Main street. Adjoining this building on the south was a two-story store building with a flat tin roof. Windows in Mrs. Moody's apartments afforded easy access to this roof, and the evidence tends to show that the roof was used as a back yard by Mrs. Moody, her family, and tenants. A clothesline was stretched across it. In the summer tenants sometimes slept there, and at times children used it as a playground. We are stating the facts in their aspect most favorable to the cause of action asserted—a thing we should do in ruling on the demurrer to the evidence. The owner of the adjoining building was not Mrs. Moody's landlord, and there is evidence that he complained about the roof being littered with trash and refuse; but he made no complaint to Mrs. Moody, and it is fair to say that for a long period he tacitly acquiesced in the use of the roof by her and her tenants. Early in the afternoon of February 14, 1907, the boy was playing with a return rubber ball in one of the rooms of his mother's apartments. The weather being pleasant, the window was open, and the ball accidentally bounded out onto the roof. The boy went after the ball, and had been on the roof but a few moments when his mother, who was at work in one of the rooms, observed him and called him to come in. He replied that he would obey as soon as he could get his ball. At this time a woman lodger asked him to hand her a shirtwaist which was on the clothesline. He did so, and then started towards the alley end of the roof. In a short time his mother called again to him, and, receiving no response, she looked out and saw him lying on the roof near the end. It was discovered that the ball had rolled off into the alley, and the position of the body (the boy was dead) indicated that the child had crept to the end of the roof and looked over into the alley to see where the ball had fallen. Evidently he had grasped the metal gutter with his hands and protruded his head far enough to bring his forehead into contact with the electric light wire owned by defendant, which, at the time, was charged with a deadly current of electricity, and from which the insulation had worn off at the place of contact. A downspout, in all likelihood, served to complete the new circuit afforded the current by the contact of the boy's head with the wire. The wire was on a line which defendant had built along that side of the public alley. At the rear end of the building, the wire ran parallel to the end of the roof and was about six inches out from the edge of the gutter and about the same distance above it. There is evidence to the effect that defendant had received actual knowledge of the defective and dangerous condition of the insulation a long time before the injury occurred.

The highly dangerous and subtle nature of electricity has compelled the courts of this state to require of persons who make merchandise of it, and who transmit it along the public thoroughfares of populous communities, the exercise of the highest degree of care to prevent its escape from appointed channels. Where it reasonably may be said that an ordinarily careful and prudent person observing the highest degree of care would anticipate that persons in the exercise of lawful right might be brought into contact with wires carrying powerful currents of electricity, the law charges the owner of such wires to insulate them and to maintain them in a proper state of repair. This is on the broad and fundamental principle "that in all cases in which any person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons known or unknown, the law ipso facto imposes as a public duty the obligation to exercise such care and skill." *Van Winkle v. Insurance Co.*, 52 N. J. Law, 240, 19 Atl. 472. In *Gelsmann v. Electric Co.*, 173 Mo. 674, 73 S. W. 659, the Supreme Court said: "Electricity is one of the most dangerous agencies ever discovered by human science, and owing to that fact it was the duty of the electric light company to use every protection which was accessible to insulate its wires at all points where people have the right to go, and to use the utmost care to keep them so; and for personal injuries to a person in a place where he has a right to be without negligence upon his part contributing directly thereto, it is liable in damages." *McLaughlin v. Electric Light Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812. In *Winkelman v. Electric Light Co.*, 110 Mo. App. 184, 85 S. W. 99, we said: "Considering the noiseless, hidden, and destructive power of electricity, a reasonable effort to control it is nothing short of the utmost effort—nothing less than the utmost would be a reasonable effort." And later, in *Byerly v. Light, Power & Ice Co.*, 130 Mo. App., loc. cit. 601, 109 S. W. 1066, we reiterated the rule in the following language: "The utility of this agency is fully appreciated by the courts, and no desire is entertained to restrict its use; but the fact that, when it is not kept closely confined within appointed channels, its tendency to break loose and its capacity for evil are so great, impels the courts to lay down the rule that persons who engage in the business of transmitting highly destructive currents of electricity must exercise the highest degree of care to prevent their escape from the carrying wires." This rule impels us to declare that if defendant, at any time before the injury, had reason to anticipate, while employing the highest degree of care, that persons rightfully on the roof of the building might come into contact with the wire, it became its duty to exercise the highest degree of care to repair

or replace the defective wire, and a breach of such duty would constitute negligence.

It is argued by defendant that the boy was a trespasser on the roof, or, at any rate, was a mere licensee, and that in either case defendant had no reason to anticipate his presence there, and therefore was under no duty to guard against injuring him. The evidence of plaintiff shows that, if defendant did not have actual, it did have constructive, knowledge of the fact that the occupants of the adjoining building—children among them—were in the habit of using the roof, and we think an ordinarily prudent person in the situation of defendant should have anticipated that such usage likely would result in some person being brought into contact with a wire in such close proximity to the end of the roof. Children will play, and they will give rein to natural curiosity. It was to be expected that playthings, such as balls or marbles, might fall into the alley, and in such case it would be in accordance with the impulses of child nature for the owner to attempt, as this boy did, to discover his lost plaything from the end of the roof; and, further, it would have been a very natural act in a child to take hold of a wire so close from no other motive than that of mere idle curiosity or playfulness. A reasonable person in defendant's situation should have known that the wire in its defective condition was a menace to the safety of children in the habit of using the roof as a playground.

The precise nature of the relationship of the boy to the owner of the premises is not important. It is enough to know that he and the other persons who used the roof were not trespassers. The usage being with the permission of the owner, express or implied, the child was rightfully there so far as defendant was concerned. This case differs from those where the plaintiff was a trespasser on the property or a mere licensee of the defendant. No such relation existed between defendant and the boy, but, as we have intimated, the boy, as to all persons except the owner of the building, was using the roof as rightfully as though he owned the premises himself. There is not sufficient ground in the facts before us for declaring the mother of the child guilty in law of negligence. Under the facts disclosed, the characterization of her conduct was an issue for the jury to solve. There is no merit in the suggestion that this child, only six years old, was guilty of contributory negligence. The demurrer to the evidence was properly overruled.

On behalf of plaintiffs, the court gave the following instruction: "The court instructs the jury that one of the defenses in this case is contributory negligence, and that the burden is on the defendant to establish to the satisfaction of the jury by the greater weight

or preponderance of the evidence that plaintiff's son, Shelton Day, was killed by his own negligence, or the negligence of his mother, contributing thereto, and *not by the negligence of the defendant*, and unless the jury so believe they will find against the defendant on the question of the contributory negligence of said Shelton Day and his mother; but, in passing upon the question of the contributory negligence of said Shelton Day, the jury will have the right to take into consideration the age of plaintiffs' said son, Shelton Day." The clause italicized imposed on defendant the burden of satisfying the jury that the injury was not caused by the negligence of defendant. This was palpable error. The burden remained on plaintiffs to the end of the case to show affirmatively that negligence of defendant charged in the petition was the proximate cause of the injury. The error was prejudicial and was not cured by the instructions of defendant. We answer the suggestion that there was no evidence on which to base a finding that the mother of the child was negligent by saying that the facts and circumstances in evidence would support an inference of negligence on her part. She said she did not know that the wire carried a dangerous current of electricity, but that statement is not conclusive. A reasonable person well might think that an ordinarily careful and prudent mother would not suffer her child of such tender years to play on the roof, or even to go there. We are going as far as we should go when we declare that the mother's conduct was an issue of fact for the jury to determine.

We find no other error in the record, but for that just considered the judgment is reversed, and the cause remanded. All concur.

#### WINFREY v. RAGAN et ux.

(Kansas City Court of Appeals. Missouri.  
March 1, 1909.)

#### 1. BILLS AND NOTES (§§ 492, 493\*)—SUIT ON—BURDEN OF PROOF.

In an action on notes the burden was on the makers to show that the notes were not delivered to plaintiff and were wrongfully obtained by him from the bank, where they were placed in escrow, and that they were unsupported by a sufficient consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1649, 1654; Dec. Dig. §§ 492, 493.\*]

#### 2. TRIAL (§ 136\*)—PROVINCE OF JURY—QUESTIONS OF FACT.

It is for the jury to settle issues of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 320; Dec. Dig. § 136.\*]

#### 3. APPEAL AND ERROR (§ 1001\*)—REVIEW—VERDICTS—CONCLUSIVENESS.

A verdict, supported by substantial evidence, under proper instructions, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3928; Dec. Dig. § 1001.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**Appeal from Circuit Court, Jackson County; Thos. H. Reynolds, Special Judge.**

**Action by Caleb Winfrey against Alexander Ragan and wife. From a judgment for plaintiff, defendants appeal. Affirmed.**

Thos. H. & Verne D. Edwards, for appellants. Borland, Goodwin & Pew, for respondent.

JOHNSON, J. Action on two negotiable promissory notes, each dated July 19, 1897, and payable on or before six months after date at the Bank of Grand Avenue, Kansas City. The principal of the note pleaded in the first count is \$340; that of the note pleaded in the second count \$240. Both are signed by defendants, Etha Ragan and Alexander Ragan, who are husband and wife. The first note is made payable to the order of plaintiff, the second to his son, N. B. Winfrey, who indorsed and transferred it to plaintiff before the bringing of the suit. In the answer defendants admit the execution of the notes, but deny that plaintiff is the legal owner and holder of them. Further defendants allege: "That no consideration ever passed from plaintiff to defendants for said notes or either of said notes. That said notes were executed by defendants and placed in escrow (with a contract between plaintiff and defendants simultaneously executed), in the Bank of Grand Avenue, southeast corner of Fourteenth street and Grand avenue, Kansas City, Mo.; said notes and contract to be left in escrow until the performance by plaintiff of the conditions, acts, and things mentioned and described in said contract. That plaintiff never performed any act or thing mentioned in said contract as the consideration for said notes, and that said notes have never been delivered to plaintiff by defendants or any one authorized by defendants to deliver same to plaintiff, and plaintiff illegally and upon misrepresentation of facts to the officers of said bank obtained said notes and contract without the knowledge or consent of the defendants." The reply is a general denial. The evidence of plaintiff tends to show that the notes were executed and delivered to him in payment of money borrowed of him by defendants, and that he deposited the notes in the Bank of Grand Avenue for collection. The evidence of defendants is to the effect that the notes were not delivered to plaintiff, but were executed for the purpose of paying the purchase price of quitclaim deeds which plaintiff was to execute in favor of defendants to two lots in Kansas City, that the notes were deposited in the bank under the terms of a written agreement signed by the parties, which required them to be delivered

to plaintiff on the delivery by him to the bank of the quitclaim deeds, and that plaintiff failed to deliver the deeds. Verdict and judgment were for plaintiff on both counts of the petition.

The principal contention of defendants is that the judgment is not supported by substantial evidence, but we find that it is. The written contract made by the parties the day after the notes were executed is consistent with the theory of each. It is as follows: "Kansas City, Mo., July 20, 1897. It is hereby agreed by and between Caleb Winfrey, and Etha Ragan and Alexander Ragan, that the deeds made and executed on this date to lots 39 and 40, block 5, Mount Auburn, are to be placed in the Bank of Grand Avenue, together with this contract, and neither party is to receive them without the consent of both parties, or if a certain note given this date by Etha Ragan and Alexander Ragan is fully paid, amounting to \$240.00, given this date, said bank is authorized to deliver the deed to lot 39, block 5, Mount Auburn, to said Etha or Alexander Ragan, or their order, and that under like conditions the note of \$340.00 also given this date, being paid in full, the deed to lot 40, block 5, Mount Auburn, shall be delivered in like manner, and said bank is authorized to deliver same under such conditions. Caleb Winfrey. Etha Ragan. Alexander Ragan."

It appears that defendants owned the lots described, subject to a deed of trust for \$2,800, which the holder, a stranger to this suit, was entitled to foreclose as default had occurred, and that plaintiff held tax deeds to the lots. Plaintiff testified that the deeds referred to in the contract were deeds conveying the equity of redemption which defendants agreed to execute and deposit as security for the notes, and that defendants failed to perform that agreement. Afterwards the lots were sold under the deed of trust. It is conceded that, though N. B. Winfrey was made the payee of the second note, he had no real interest in the transaction, but was acting for plaintiff. The burden of proof was on the defendants to show that the notes were not delivered to plaintiff, but were wrongfully obtained by him from the bank, and that they were unsupported by a sufficient consideration. The evidence adduced by defendants on these issues is substantial, but by no means conclusive. It sufficed only to raise issues of fact which it was the province of the triers of fact to settle. The instruction properly submitted these issues to the jury, and, since the verdict rests on substantial evidence, we find no occasion to interfere.

The judgment is affirmed. All concur.

## STATE v. KESSLER et al.

(Kansas City Court of Appeals. Missouri.  
March 1, 1909.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 72\*)—  
SCHOOLHOUSES—USE FOR LITERARY ENTERTAINMENTS.

Under Rev. St. 1899, § 9763 (Ann. St. 1906, p. 4477), authorizing the use of schoolhouses for literary, etc., purposes on demand by a majority of the voters at an annual meeting, and providing that, if the persons so using a schoolhouse fail to keep it clean, etc., the directors may refuse further use, etc., where such use was voted, the members of a literary society could unlock the door and enter the building, though the key used was not procured from one authorized by the board to deliver it; the board being authorized to interfere with the use only for the society's failure to keep the house clean, etc.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 72.\*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 57\*)—  
BOARDS—MEETINGS—VALIDITY.

Rev. St. 1899, § 9761 (Ann. St. 1906, p. 4476), requiring meetings for the organization of school boards to be held within the district, requires all meetings to be so held, and a resolution under section 9763 (page 4477) to close the schoolhouse against a literary society, adopted at a meeting held outside the district, was void.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 57.\*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 55\*)—  
DIRECTORS—AUTHORITY.

A school board can discharge only such functions as are expressly prescribed by statute, or fairly arise by necessary implication from those conferred.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 137, 138; Dec. Dig. § 55.\*]

Appeal from Circuit Court, Vernon County;  
B. G. Thurman, Judge.

Charlie Kessler and others were convicted of unlawfully entering a schoolhouse, and they appeal. Reversed.

A. J. King and D. M. Gibson, for appellants. J. N. Coll, Pros. Atty., and M. T. January, for the State.

JOHNSON, J. On information of the prosecuting attorney of Vernon county, defendants were tried and convicted for the commission of an offense in violation of section 1899, Rev. St. 1899 (page 1294, Ann. St. 1906). The charge is that on January 8, 1908, defendants unlawfully entered the Stanton schoolhouse, located in district No. 30, Badger township, Vernon county. Defendants were members of a literary society which had been using the schoolhouse for its meetings and entertainments pursuant to a resolution passed by a majority of the voters of the school district at an annual meeting. Section 9763, Rev. St. 1899 (page 4477, Ann. St. 1906), authorizes the use of schoolhouses "for religious, literary or other public purposes \* \* \* when such use shall be demanded by a majority of the voters of such

districts voting at any annual or special meeting where such question was submitted." But the statute requires "that where the use of the schoolhouse is allowed for the above-named purposes, it shall be the duty of the party or parties using it to keep it clean and in good repair and to leave it in as good condition as it was when they took charge of it," and provides "that should the party or parties so using the said schoolhouse fail to comply with the provisions of this section, the directors of such district may refuse them further use of it until said provisions are complied with." On December 28, 1907 the board of directors of the school district met in a store in the city of Nevada, a place outside the boundaries of the district, and made an order which was recorded by the clerk as follows: "Proceedings of Board of Directors: Board met December 28, 1907, and voted to close the schoolhouse against the literary entertainment on account of not having left it in good condition and was a detriment to the school." In the evening of January 8, 1908, members of the literary society—defendants among them—appeared at the schoolhouse to hold their meeting, and found the building locked. There is no direct evidence to show how it was entered, but it is evident from the facts and circumstances adduced that some one unlocked the door with a key which he had procured somewhere. After the building was entered and the lamps lighted, the members of the board appeared, took the names of defendants, and withdrew. The next morning they made complaint to the prosecuting attorney, and this prosecution followed. The evidence shows beyond question that the meetings of the society had been orderly, and that the house had been left in good repair and condition; but, in the view we take of the action of the board in voting to forbid the society the use of the building, these facts are of little consequence. Should we find that the meeting of the board at which the resolution was adopted was illegal and consequently that the resolution was void, the members of the society under the authority conferred on them by the voters of the district had the right to unlock the door and enter the building, regardless of the fact that they did not procure the key they used from the janitor or from some one authorized by the board to deliver it to them. They derived their right to use the building from the people of the district, not from the board, and the latter body was without authority to interfere with such use except on the statutory ground that the society had failed to leave the house in good repair and in a clean condition.

We think the meeting held by the board in Nevada was not a legal meeting, and that the action there taken to deprive the society

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the use of the schoolhouse was of no effect. The board of directors of the school district is a body clothed with authority to discharge such functions of a public nature as are expressly prescribed by statute. It can exercise no power not expressly conferred or fairly arising by necessary implication from those conferred. It can act only as a body and at meetings called or held in the manner and place provided or authorized by statute. *Pugh v. School District*, 114 Mo. App. 688, 91 S. W. 471, and cases cited. A fair construction of section 9761, Rev. St. 1899 (page 4476, Ann. St. 1906), leads us to say that the Legislature intended to require all meetings of the board to be held in the school district. Without any statutory enactment on the subject, it is obvious that considerations of public policy demand that the official meetings of public bodies be held within the limits of their territorial jurisdiction; otherwise, public servants might do in secret that which they would not attempt to do under public scrutiny, and thereby much injury might be done to the public welfare. It would be just as proper for the state Legislature to hold its sessions outside of the state or for a county court to meet and transact business in another county as it was for these school directors to attempt to hold a meeting outside their school district. The action of the board was void, and the literary society in using the schoolhouse was acting within the right conferred on it by the voters of the district.

It follows that the judgment must be reversed. All concur.

**TUTTLE et al. v. BRACEY-HOWARD  
CONST. CO. et al.**

(Kansas City Court of Appeals. Missouri.  
March 1, 1909.)

**1. CORPORATIONS (§ 432\*)—AGENTS—AUTHORITY—EVIDENCE—SUFFICIENCY.**

Evidence held to show that one placing an order for wire for a corporation had authority to do so.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1737; Dec. Dig. § 432.\*]

**2. CORPORATIONS (§ 432\*)—PRESIDENT—AUTHORITY.**

In the absence of a contrary regulation of a construction company, it will be presumed that its president was authorized to act in buying wire for construction work.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1726; Dec. Dig. § 432.\*]

**3. SALES (§ 35\*)—CONTRACTS—VALIDITY.**

There was a meeting of minds on a contract to sell wire, where the quantity, price, and terms were understood.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 62; Dec. Dig. § 35.\*]

**4. SALES (§ 201\*)—WHEN COMPLETE.**

Title, under a sale of wire f. o. b. place of shipment, without reservation of title until

payment of the price, passed on delivery to the carrier.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 535; Dec. Dig. § 201.\*]

**5. SALES (§ 92\*)—RESCISSION—CONSIDERATION.**

A buyer's failure to pay for goods supports an agreement for a rescission of the contract of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 259; Dec. Dig. § 92.\*]

**6. FRAUDULENT CONVEYANCES (§ 34\*)—FORM OF TRANSFER—RESCISSION OF SALE.**

A rescission of a contract of sale after delivery to the buyer, there having been no fraud on his part, must be treated as an ordinary sale to the original seller, and being unaccompanied by delivery to him within a reasonable time, and not in writing, acknowledged, and recorded as required by Rev. St. 1899, § 3410 (Ann. St. 1906, p. 1940), is void as to the original buyer's creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 34.\*]

**7. FRAUDULENT CONVEYANCES (§ 308\*)—SALES—DELIVERY—TIME—REASONABLENESS—LAW QUESTION.**

Where attached wire was claimed by intervener under a rescission of a sale amounting to a resale to it, it was a question of law whether intervener took possession within a reasonable time within Rev. St. 1899, § 3410 (Ann. St. 1906, p. 1940), making sales unaccompanied by possession within a reasonable time void as to the seller's creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 930; Dec. Dig. § 308.\*]

Appeal from Circuit Court, Jackson County; Andrew F. Evans, Special Judge.

Action by F. W. Tuttle and another, partners as Tuttle & Pike, against the Bracey-Howard Construction Company. The John A. Roebeling's Sons Company interpleaded. From a judgment for plaintiffs, interpleader appeals. Affirmed.

House & Maynard, for appellant. Sebree, Conrad & Wendorff and Thad B. Landon, for respondents.

**BROADDUS, P. J.** Interplea. The plaintiffs instituted suit against defendant, and caused writ of attachment to be issued, under which was seized, as property of defendant, six spools of copper wire which was found in a warehouse situated in Kansas City. The appellant filed its interplea in the cause, claiming ownership of the property attached, and afterwards executed its bond to the sheriff in the sum of \$3,024, and obtained possession of the wire. By agreement the cause was tried before the Hon. Andrew F. Evans as special judge. The judgment was in favor of the plaintiffs, and the interpleader appealed.

The facts are as follows: During the year 1903 defendant was engaged in the construction of what was known as the "Kansas City & Olathe Electric Railway." On September 4th, the B-R Electric & Telephone Manufacturing Company, in behalf of defendant, wrote to interpleader at Chicago,

\*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes



where it had an office for the transaction of business, asking for quotation of prices for material. On September 8th interpleader replied, quoting prices. On September 9th, the B-R Company telegraphed that the prices were satisfactory if interpleader would take "acceptance of Bracey-Howard Construction Company, Chicago, 90 days from date." On September 10th interpleader replied that they would accept the terms on the condition that the B-R Company would indorse the acceptance of the defendant. The B-R Company refused to agree to the arrangement, and stated that it was not to be held liable for the wire. The interpleader then required that defendant furnish a financial statement of its condition. This statement was furnished on the 14th of October, 1903. Previously, the interpleader, on September 17, 1903, wrote the B-R Company that it was willing to furnish the material on defendant's credit, taking notes and waiving the indorsement of the B-R Company, and asking for an order direct from the defendant, which was furnished on September 24th by the B-R Company. On September 26th the interpleader, by letter to defendant, acknowledged receipt of the order for the wire, which was to be delivered f. o. b. Trenton, N. J., and in settlement thereof agreed to accept defendant's 90 days' acceptance, to bear 6 per cent. after 30 days. This order was sent from the Chicago office to interpleader's office at Trenton to be filled. After this there was much correspondence as to the routing of the material, and some changes were made in the kind and grade of the material to be furnished. On October 27th interpleader shipped, f. o. b. Trenton, \$11,984.50 worth of wire consigned to defendant at Kansas City. On the 28th another shipment of the value of \$4,991.51 was made consigned as the first shipment. On November 19th interpleader sent to defendant at Chicago a monthly statement of account, including the two shipments. The wire arrived in Kansas City some time about the 19th day of November, and was stored in a warehouse under the charge and control of defendant. It remained in the warehouse until December 23d, when the six spools mentioned were seized by the sheriff under the writ of attachment issued in this case.

After the shipment of the wire, a difficulty arose between interpleader and defendant with reference to the execution by defendant of the notes to be given for the material, and the further shipment of wire was withheld by interpleader until the matter could be adjusted. The interpleader and defendant by correspondence entered into an agreement by which the wire was to remain in defendant's warehouse subject to its order, but before interpleader could take possession it was attached as stated. The following stipulation was entered into by the parties at the trial, viz.: "That the wire attached in this case and claimed in the interplea was

a part of the wire referred to in the correspondence in evidence, and was shipped to Kansas City by the interpleader consigned to defendant. That upon its arrival at Kansas City it was taken possession of by James E. Tryon, as engineer of said defendant, Bracey-Howard Construction Company, and was by him stored in a warehouse, where it was attached, which warehouse had been rented by the defendant through its agent, James E. Tryon, and which warehouse was used by the defendant for storing said wire, as well as the tools, implements, and other property of defendant." The defendant in the transaction acted through its president, Mr. Bracey.

The position of interpleader in the trial court and in this is as follows: That the title to the wire attached never vested in the defendant; and that, if there was a sale of the wire, it was rescinded, and the title thereby reverted in the interpleader. The court declared the law to be that there was such a transfer of the possession and right of property in the wire from the interpleader to the defendant as to vest title in the defendant, and that the attempted retransfer of the property to the interpleader by defendant, so far as the plaintiff's right of attachment was concerned, was void.

The interpleader insists that there is no evidence going to show that any one with authority upon the part of defendant made the order for the wire. The financial statement made by the defendant upon request of interpleader through the intermediation of the B-R Company goes to show that the latter was acting in the capacity of agent for defendant; and the letter of interpleader of September 26th to defendant, acknowledging receipt of the order for the wire made by the B-R Company, shows conclusively, in our opinion, that there was a perfect understanding that the latter company had full authority to act for the defendant. The interpleader undoubtedly believed that such was the case, and was induced thereby to ship the wire. But it is insisted that it was not shown that Mr. Bracey, who purported to act in behalf of defendant, had authority for that purpose. He was president of defendant, and as such was its chief officer, and, in the absence of any regulation of the defendant company, it will be presumed that he had full authority to act in the premises. The act in question was not one that required the consent or direction of the board of directors of the defendant.

It is claimed that the minds of the parties did not meet, and therefore there was no sale. In the face of the testimony, we do not see how this contention can be sustained, in view of the fact that the order for the wire was made with the knowledge of defendant and as such accepted by interpleader, and the wire shipped as stated. The amount of wire to be delivered, the price and the terms of payment, were all specifically provided for

and understood by all parties. The goods were first to be delivered at the price stipulated, upon which defendant was to make payment by executing the acceptances. It was a sale on 90 days' time. The sale itself was complete on delivery of the material f. o. b. Trenton. The title passed upon the shipment of the wire. There was no reservation of title in the interpleader until the wire was paid for. The delivery to the carrier as its agent or bailee vested the title in the defendant. *Scharff v. Meyer*, 133 Mo. 423, 34 S. W. 858, 54 Am. St. Rep. 672; *Comstock v. Affolter*, 50 Mo. 411.

The interpleader contends that whatever arrangement it had with the defendant was rescinded before the service of the attachment, and that thereby the title was re-vested free from the claim of creditors of defendant. Under the circumstances, there was a sufficient consideration for the rescission, the defendant having failed to make payment as agreed. But, there having been no fraud upon the part of defendant in the purchase of the wire, the transaction must be treated in the light of an ordinary sale unaccompanied by delivery at the time, and not in writing, acknowledged, and recorded, as provided by section 3410, Rev. St. 1899 (Ann. St. 1906, p. 1940). This section has often been construed, and it is held a sale not accompanied by a delivery in a reasonable time, regard being had as to the situation of the property, is void as to creditors. *State ex rel. v. Goetz*, 131 Mo. 675, 33 S. W. 161; *State ex rel. v. Hall*, 45 Mo. App. 298. It was a question of law for the court, under the evidence, to say whether interpleader had taken possession within a reasonable time. The finding, we believe, was proper. It was the duty of interpleader to have removed the wire from the possession of defendant with reasonable dispatch after the agreement to rescind. Instead of doing so, it delayed its attempt for about 20 days, when its action was anticipated by seizure of the sheriff under the writ of attachment.

Interpleader has called our attention to cases where goods have been obtained by fraud and in which the rule is different; but, as fraud does not enter into this contract, they need not be considered.

Affirmed. All concur.

PETTIS COUNTY, to Use of MUCKEY, v. DE BOLD et al.

(Kansas City Court of Appeals. Missouri. March 1, 1909.)

1. WITNESSES (§ 52\*)—COMPETENCY—HUSBAND AND WIFE.

In a suit to the use of a married woman on a dramshop keeper's bond for the penalty provided by Rev. St. 1899, § 3017 (Ann. St. 1906, p. 1728), for selling, etc., liquors to her husband, an habitual drunkard, after notice not to do so,

the husband is a competent witness, regardless of the availability of other witnesses, on the ground of public policy.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 123; Dec. Dig. § 52.\*]

2. DISMISSAL AND NONSUIT (§ 1\*)—VOLUNTARINESS.

A nonsuit taken by plaintiff on the exclusion of a deposition was not voluntary, where recovery was precluded by such ruling, to which exception was taken.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Action by Pettis County, Mo., to the use of Lillie F. Muckey, against Will De Bold and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Barnett & Barnett, for appellant. C. C. Kelly, for respondents.

JOHNSON, J. This action is prosecuted by the wife of an habitual drunkard against a licensed dramshop keeper and the sureties on his bond to recover the penalty provided in section 3017, Rev. St. 1899 (page 1728, Ann. St. 1906). At the trial, plaintiff took a nonsuit, with leave to move to set the same aside, and, after her motion was overruled, brought the case here by appeal.

All the facts constitutive of the cause pleaded in the petition, save one, either were admitted or were supported by evidence introduced by plaintiff. It was admitted that defendant was a dramshop keeper, and that he and his codefendants executed the bond pleaded, and it was shown that the husband was an habitual drunkard, and that before the alleged sale defendant had been served by plaintiff with a statutory notice not to sell or provide her husband with intoxicating liquors. But the evidence offered by plaintiff to prove the fact that defendant did provide her husband with intoxicating liquors in the face of the notice was rejected by the court on the objection of defendant, and the propriety of that ruling is the principal question before us for solution. The evidence consisted of the deposition of Stephen D. Muckey, the habitual drunkard. He testified that on the date alleged a detective named Moss invited him to go into defendant's dramshop and "have something." The invitation was accepted, and the detective "treated" the witness, who drank intoxicating liquor furnished him by defendant on the order of the detective. The ground of the objection is that the witness was incompetent, being the husband of plaintiff. When the court sustained the objection, counsel for defendant said, "To which ruling of the court we except, and state to the court we have no further evidence at hand by which we can prove that the defendant sold liquor to the plaintiff's husband." By counsel for defendant: "We object to having that go

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

into the record, for the reason that it appears here that it does have the witness Moss, referred to in the deposition, as a witness in this case, and he is in attendance here." By counsel for plaintiff: "If he is, he will not support the allegation of our petition." After the court excluded the deposition, counsel for plaintiff made the following announcement, without waiting for defendant to offer a demurrer to the evidence: "I will state now, in view of the adverse ruling of the court, we are unable to proceed with our case, and are compelled to take an involuntary nonsuit, with leave to move to set the same aside." The record goes on with the recitation, "Thereupon the plaintiff took a nonsuit, with leave to move to set the same aside, and filed her motion to set the same aside as hereinbefore set forth."

Section 3017, Rev. St. 1899, not only provides as penalties for the offense charged in the petition the forfeiture by the dramshop keeper to the wife of the habitual drunkard of a sum not less than fifty nor more than five hundred dollars, to be recovered in a civil action, and the forfeiture of the dramshop license of the offender, but also constitutes the offense a misdemeanor, and provides a fine "of not less than five nor more than one hundred dollars for each offense, to be collected and paid into the county treasury for the use and benefit of the common school fund of such county."

This reference to the statute is made for the purpose of directing attention to the criminal nature of the charge on which the present cause of action is predicated. The common-law rule which disqualifies a married person from testifying as a witness in a case in which his spouse is interested as a party has been adopted and frequently applied in this state. Various reasons have been assigned for the rule, most, if not all of which, it must be confessed, are not logically sound. Sir Edward Coke placed the rule on the ground that "a wife cannot be produced either for or against her husband, *Quia sunt due animæ in carna una*." Other judges have expressed the idea that the close relationship would be so great an incentive to the commission of perjury by the witness as to deprive his testimony of evidentiary value, while still others seem to think that to suffer one spouse to testify for or against the other would tend strongly to provoke domestic discord and infelicity. The common-law doctrine generally accepted thus is stated by Greenleaf (1 Greenleaf on Evidence [16th Ed.] § 334): "The rule by which parties are excluded from being witnesses for themselves applies to the case of husband and wife; neither of them being admissible as a witness in a cause, civil or criminal, in which the other is a party. This exclusion is founded partly on the identity of their legal rights and interests, and partly on principles of public policy, which

lie at the basis of civil society. For it is essential to the happiness of social life that the confidence subsisting between husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down or impair the great principles which protect the sanctities of that relation would be to destroy the best solace of human existence. The principle of this rule requires its application to all cases in which the interests of the other party are involved."

It is apparent the accepted reasons for the rule are founded on considerations of public policy, as are also the common-law exceptions to the rule. These exceptions embrace cases of personal injuries committed by the husband or wife against the other. In such cases "the injured party is an admissible witness against the other." 1 Greenleaf on Evidence (16th Ed.) § 343. By the provisions of section 4656, Rev. St. 1899 (page 2536, Ann. St. 1906), another exception is added, viz.: "In cases where a married person is employed as agent for his spouse in the transaction in question, he is not disqualified as a witness." But our Supreme Court has enlarged the exceptions beyond those noted, without doing violence, we think, to the principle underlying the rule and the exceptions thereto recognized by the common-law writers. A fundamental and dominating principle of evidence has been resorted to for the support of these new exceptions. Subordinate rules of evidence "are silenced by the most transcendent and universal rule that in all cases that evidence is good than which the matter of the subject presumes none better to be attainable." *Cramer v. Hurt*, 154 Mo., loc. cit. 118, 55 S. W. 253, 77 Am. St. Rep. 752, quoting Greenleaf (14th Ed.) § 348. Thus in *Henry v. Sneed*, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580, it was held (we quote from the syllabus): "In a suit to enjoin the enforcement of a deed of trust securing upon the wife's land certain notes given by the husband in a transaction for the sale of property induced by fraud, the husband may testify as to conversation had with the fraud-feasors, and the husband and wife may testify as to conversations between themselves as to the transaction, as part of the *res gestæ*, and also on the ground of fraud, and this *ex necessitate rei*."

And in *Moeckel v. Helm*, 134 Mo. 576, 36 S. W. 226, it was said: "That where the husband is made the conduit and mouthpiece of the fraud of others, and in furtherance of that fraud prevails upon his wife to sign a note and incumber her property, that there a court of equity, in the absence of other evidence, in order to unearth that fraud and to expose it in all of its details, will, *ex necessitate rei*, and upon a familiar common-law principle respecting evidence of fraud, permit both husband and wife to testify as to the conversations had between them in regard to the transaction."

In *Cramer v. Hurt*, *supra*, this doctrine was given further application. There a husband sued a physician for damages occasioned by an abortion performed on his wife by the physician. Held, that the wife was a competent witness to testify to the fact that defendant had performed the operation. Two principal reasons for the ruling were assigned, both of which may be said to rest on considerations of public policy. First, that of necessity, to which belonged the class of cases under review. The offense being a crime of a revolting character, it would be presumed that knowledge of the act would be confined to the participants in it, and, if one of them were disqualified from giving testimony, it would contravene the principle we have stated, "that in all cases that evidence is good than which the matter of the subject presumes none better to be attainable." The second reason is stated in this language: "Moreover, we think Mrs. Cramer is a competent witness in the case on general grounds of public policy; for if it be known that a married woman is a competent witness for her husband in a suit for damages by him against a physician who produces an abortion upon her without the consent of her husband, in consequence of which her health is injured and he is deprived of her services, to which he is entitled by law, and expenses are entailed upon him in her nursing and for medical treatment, it might to some extent, at least, put a stop to such revolting and unnatural practices."

In the present case, the offense charged against defendant is criminal in its nature, and is one that the law, which takes notice of the common traits of human nature, would presume would be committed only in the most clandestine manner. The appetite of the habitual drunkard for intoxicating liquor is so strong that it will impel him to have recourse to every device and stratagem to satisfy its cravings. Naturally, the dramshop keeper who would sell or give liquor to such a person after receiving the notice provided by statute would take every precaution to escape detection and the heavy penalties imposed by law. In the vast majority of instances, the act necessarily would be known to none but the drunkard and the dramshop keeper, and, if the disqualifying rule should apply to the former, the evil and demoralizing practice condemned by the statute might be indulged in with impunity. The law is remedial and highly beneficent in purpose, and, should we emasculate it by applying the rule invoked by defendant, we would do violence to the fundamental rule of evidence to which we have twice referred. The necessity of the case, as well as considerations of public good, compel us to hold that the evidence should have been admitted. It is immaterial whether another witness to

the offense was available to plaintiff. The decisive question is whether the evidence offered is admissible in the class of cases to which the one in hand belongs, not whether other evidence might have been obtained in the particular case.

We do not agree with defendant that the nonsuit taken by plaintiff was voluntary. The rejection of the deposition left her without proof of one of the elemental facts of her cause of action. The ruling precluded a recovery, and entitled her to stop at that point and take a nonsuit. Her action was compulsory, not voluntary, and a careful analysis of the opinion in *Lewis v. Mining Co.*, 199 Mo. 463, 97 S. W. 938, demonstrates that the views there entertained are not inconsistent with what we are saying. In that case, the plaintiff was not put out of action by an adverse ruling on a question of evidence, but, after the evidence was in, took a nonsuit on the mere intimation of the judge that he intended to sustain a demurrer to the evidence. It was held that, until the court ruled on the demurrer, no exception could be taken and preserved in the record, and, without an exception, the appellate court could not review the ruling. Here an exception was taken to the ruling of the court on the question of the admissibility of the deposition, and, as we have said, that ruling made it impossible for plaintiff to recover.

The judgment is reversed, and the cause remanded. All concur.

#### MORGAN v. TEMAGAMI MINING CO.

(Kansas City Court of Appeals. Missouri.  
March 1, 1909.)

##### 1. MASTER AND SERVANT (§ 276\*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action for injuries to an employé, evidence held not to show a defect in the machine, for which the employer was responsible, to have caused the accident.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 959; Dec. Dig. § 276.\*]

##### 2. NEGLIGENCE (§ 121\*)—CAUSE OF INJURY—BURDEN OF PROOF.

Where an accident might have resulted from one of two causes, for one of which defendant is liable, plaintiff must prove that the injury arose from such cause.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 228; Dec. Dig. § 121.\*]

Appeal from Circuit Court, Jasper County; Haywood Scott, Judge.

Action by T. A. Morgan against the Temagami Mining Company. From a judgment for plaintiff, defendant appeals. Reversed.

A. E. Spencer, for appellant. D. M. Roper, for respondent.

JOHNSON, J. Plaintiff sued to recover damages for personal injuries received by

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

him while in the employment of defendant. A trial to a jury resulted in a judgment for plaintiff. Defendant was engaged in mining in Jasper county, and employed plaintiff as helper to the operator of a machine drill. The operator, assisted by plaintiff, attempted to drill a hole in a perpendicular wall of hard flint. The point selected was about  $4\frac{1}{2}$  feet above the floor, and the hole was intended to be run on a lateral slant of about 45 degrees. Finding it difficult to start the hole owing to the fact that the drill would not take hold but slipped, plaintiff took his pick, and standing in front of the drill, facing it, attempted, by picking at the place where the drill was working, to help start the hole. A spall weighing about a pound and a half flew off and struck plaintiff on the left foot, inflicting an injury.

Plaintiff contends that a defect in the machine was the proximate cause of the injury, and that defendant was negligent in providing its servants with a defective and dangerous machine with which to work. His evidence tends to show that the sash or frame which held the drill in place was worn to an extent to allow the drill more play than it would have had in a proper sash. But we think the evidence of plaintiff fails to show a causal connection between this defect and his injury. Drill and pick were operating on the wall simultaneously at the place where the spall was detached.

Plaintiff testified: "Q. You were striking with your pick right at the point where you were trying to make the bit take hold? A. Yes. Q. And the object in striking was to break the surface of the rock so the bit would take hold? A. Yes, sir. \* \* \* Q. And, while you were striking with your pick and the drill was running, this little piece fell, while you were doing that—this rock fell? A. Yes. \* \* \* Q. And you don't know what did break it off, whether the drill or the pick? A. No, sir. Q. You were simply working there, trying to break off some of this rock or something, and broke some of it off? A. Yes, sir."

The operator of the machine, introduced as a witness by plaintiff, did not know "whether the pick knocked the rock off, or whether the machine knocked it off." He states it was difficult to start the hole with the drill owing to the hardness of the material and the angle at which the hole was to be drilled.

If plaintiff himself detached the spall by striking the wall with his pick, it goes without saying that his injury was the result of his own act, and not of any negligence of defendant. If the drill did it, still it would not necessarily follow that the defect in the sash had any causal connection with the detachment of the spall. It is just as reasonable to attribute the result to the character of the rock and the direction from which the force was exerted as it would be to believe

that the play of the drill was the producing cause. Thus it appears from the evidence of plaintiff that at least three different and independent causes of the injury are fairly and about equally inferable. For two of them defendant would not be liable. In choosing among them, the jury were bound to indulge in guesswork, and for this reason the demurrer to the evidence should have been sustained. Frequent recognition has been given in this state to the rule that "if the accident might have resulted from more than one cause, for one of which the master is liable and for the other he is not liable, it is necessary for the plaintiff to prove in the first instance that the injury arose from the cause for which the master is liable, for it is not the province of a court or jury to speculate or guess from which cause the accident happened." *Goranson v. Mfg. Co.*, 186 Mo. 300, 85 S. W. 338; *Browning v. Railway*, 106 Mo. App. 729, 80 S. W. 591; *Candle v. Kirkbride*, 117 Mo. App. 412, 93 S. W. 868; *Thornberry v. Old Judge Mining Co.*, 126 Mo. App. 660, 105 S. W. 659; *Trigg v. Ozark Land Co.*, 187 Mo. 227, 86 S. W. 222.

The judgment is reversed. All concur.

#### SHINNERS v. MULLINS.

(Kansas City Court of Appeals. Missouri.)

March 1, 1909.)

#### 1. MASTER AND SERVANT (§ 101\*)—DUTY TO FURNISH SAFE APPLIANCES—NEWEST AND SAFEST APPLIANCES.

A master is not bound to furnish any particular appliances, nor the newest and best ones, his duty being performed when he furnishes those of reasonable safety; and where a master provided for the lowering of brick into a sewer by a rope tied around them, which was a method in general use and reasonably safe, he was not liable for injuries to a workman in the sewer because of his failure to provide iron boxes for that purpose, though they would have been safer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 181, 182; Dec. Dig. § 101.\*]

#### 2. MASTER AND SERVANT (§ 279\*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—EVIDENCE.

Evidence held to show that an injury to an employé was the proximate result of a fellow servant's negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 979; Dec. Dig. § 279.\*]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Personal injury action by Cornelius Shinnars against William C. Mullins. Judgment for plaintiff, and defendant appeals. Reversed.

Pierre R. Porter, for appellant. Henry J. Latschaw, for respondent.

BROADDUS, P. J. This is an action for damages for injuries plaintiff sustained to his person while working for defendant. The

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff, an experienced brick mason, was injured, while he was standing in a sewer which was being constructed by defendant, by a brick which fell from a quantity of bricks and which hit him on the top of the head, causing a severe wound.

In order for a proper understanding of the case, it is necessary to state the manner in which the sewer was being constructed at the time in question. After the trench for the sewer had been dug, it was the duty of the brick masons to go to the bottom of it and erect the walls. The brick for the purpose were lowered by means of a rope with a hook on the end from a scaffold about 16 feet square, built upon the surface of the ground, and which extended about halfway over the sewer, which was about  $7\frac{1}{2}$  feet deep. The bricks were placed in a pile in the following manner: Two boys, engaged for the purpose, would place two bricks lengthwise upon the edge of the scaffold, and would then place other bricks horizontally on the tops of them until they had constructed a pile about 4 feet high. A man would then adjust the pile and place the rope around it, which was caught in the hook which acted as a slip-knot, and thus the bricks were held together. Then the man would lower the pile thus secured to a dumper, in the bottom of the sewer, who would receive it and release the rope, which was drawn up again, and the operation continued as long as it was necessary.

On the 23d day of April, 1906, the plaintiff went to work as usual in the trench laying bricks, and continued work until about 10 o'clock, when he received an injury. It was the custom to "stock up," that is, to lower a quantity of bricks before the masons began work in the morning, and again before they went to work after their noon meals. The material stocked up would last from 15 to 20 minutes; after that it was customary to lower bricks while the masons were at work. It was while lowering bricks under the latter conditions that plaintiff was hurt.

The plaintiff alleged many grounds of negligence upon the part of defendant, but relies chiefly upon the following for recovery, viz.: "Defendant carelessly and negligently lowered said bricks and caused them to be lowered by means of a rope and hook, or noose, or sling, thereby making it dangerous to the lives and limbs of employes working at or near the bottom of said sewer, and, thereby making it unusually and unnecessarily dangerous to employes, especially plaintiff, working at or near the bottom of said sewer. Defendant carelessly and negligently forced and compelled plaintiff and other employes to work in the bottom of said sewer immediately under the place where said bricks were being lowered, while said bricks were being lowered as above set forth. Failure to have had bricks and defective bricks of improper size culled out."

There was evidence tending to show that at the time of the injury the defendant was present within a short distance of plaintiff, watching the work, and that he saw the men while they were lowering the bricks directly over the heads of the masons at work, and that he saw the brick fall and strike plaintiff. There was also evidence tending to show that there was another and safe means of lowering bricks by the use of iron boxes, but that defendant allowed his employes to use the rope or the boxes as they pleased. The boxes were not often used, except where some of the bricks were broken; that the only reason for using the rope in preference to the boxes was that the former was the most expeditious, and that the boxes being heavier required more power in their use. However, the defendant introduced much evidence to the effect that the rope with the noose was most generally used by contractors in such work, and it may be said that such evidence stands practically uncontradicted.

Jefferson, the man who placed the rope around the pile of bricks and lowered them, and who testified for the plaintiff, explained what caused the brick to slip from the sling, viz., that there was a crooked brick in the pile "that had a knot on it, which held it higher than the other bricks, and that didn't give me room to tighten it." He further explained that, "when two bricks are put in to tie the hack, if one is a little thicker than the other, the thick brick will take most of the strain on itself, and quite often it is the case that the thin brick will slip out."

The evidence being that the method by which the bricks were lowered was one in general use and reasonably safe, as a matter of law, it must be conceded that the defendant was not negligent in that respect. The fact that there was a safer method for doing the work did not make it incumbent upon defendant to adopt it. "A master is bound to use reasonable care to furnish his servants safe appliances, but is not bound to furnish any particular appliances nor the newest and best appliances; his duty being performed when he furnishes those of ordinary character and of reasonable safety." *Brands v. St. Louis Car Co.* (Mo.) 112 S. W. 511; *Chrismer v. Bell Telephone Co.*, 194 Mo. 189, 92 S. W. 378, 6 L. R. A. (N. S.) 492. Such, we believe, is the holding of all the appellate courts of the state.

The cause of the accident was the negligence of Jefferson, who lowered the bricks at the time. He saw the defective brick, and knew that on account of its defect he could not properly secure the pile so as to prevent one of them from falling out. Conceding that it was negligence in the boys who placed the brick in question in the pile, there is no evidence that they were incompetent for the business. And their act, as well as that of Jefferson, was the act of fellow serv-

ants. There is nothing to show, notwithstanding defendant was present, that he knew of the defective brick in the pile. And we are of the opinion that the approximate and direct cause of the injury was the negligence of the man Jefferson, plaintiff's fellow servant. Therefore, defendant was not liable for his act.

The court should have instructed the jury to return a verdict for the defendant as requested.

Reversed. All concur.

### In re FLICK'S ESTATE.

FLICK v. SCHENK et al.

(St. Louis Court of Appeals. Missouri. April 18, 1905. On Rehearing, May 16, 1905.)

EXECUTORS AND ADMINISTRATORS (§ 20\*)—MANDAMUS (§ 4\*)—APPOINTMENT OF ADMINISTRATOR—APPEAL.

An order refusing to appoint intestate's son as his administrator in accordance with the son's application is not appealable, mandamus being the proper remedy to compel the probate court to follow the statutory right to priority of appointment.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 20;\* Mandamus, Cent. Dig. § 10; Dec. Dig. § 4.\*]

Appeal from Circuit Court, Scotland County; Edwin R. McKee, Judge.

Application by Henry P. Flick for appointment as administrator of the estate of Sylvanus Flick, deceased. The probate court declined to appoint petitioner, and appointed J. A. Schenk public administrator, which order was affirmed by the circuit court on appeal, from which Henry P. Flick appeals. Dismissed.

See opinion of Supreme Court affirming the same, 212 Mo. 275, 110 S. W. 1074.

E. R. Bartlett and Berkhimer & Dawson, for appellant. J. M. Jayne and Smoot, Boyd & Smoot, for respondents.

GOODE, J. The contest in this case is over the appointment of an administrator of the estate of Sylvanus Flick, deceased. Henry P. Flick, his son, applied for the appointment, but other heirs of the estate, his brothers and sisters, resisted his application. After hearing the evidence the probate court found he was not a suitable person to be administrator, principally because he was administrator already of the estate of his deceased mother, and there would be a conflict of duties if he had charge of both estates, as there was some controversy over property rights between the two. The probate court likewise found there was no person among the heirs and distributees suitable to be administrator of Sylvanus Flick's estate, and therefore appointed J. A. Schenk, public administrator of Scotland county. The son, H. P. Flick, carried the contest by

appeal to the circuit court, which, on a hearing anew, confirmed the action of the probate court in all respects, and from the judgment of the circuit court the case was appealed to this court.

We appreciate the care with which this matter has been prepared for our attention by the counsel for the respective parties, and regret that we cannot examine the interesting questions that are raised; but in *State ex rel. Grover v. Fowler*, 108 Mo. 465, 18 S. W. 968, the Supreme Court decided that no appeal lies from an order of the probate court appointing an administrator of an estate. The opinion in that case points out the method of procedure to be followed in order to enforce the priority of right allowed by the statutes to relations, heirs, and distributees in the matter of administering estates. In view of that decision, we must hold the circuit court had no jurisdiction of the appeal from the probate court, and, consequently, this court has no jurisdiction of the present appeal. It is therefore dismissed. All concur.

### On Rehearing.

In a motion for rehearing the appellant insists the *Fowler Case* is not in point because it merely decided that an appeal will not lie from an order appointing an administrator, and the present appeal was not taken from an order appointing Schenk, but from an order refusing to appoint Flick. This distinction strikes us as being too tenuous for practical purposes. In truth, the present case is exactly like the *Fowler Case* in its essential facts. In the *Fowler Case* two persons, Mrs. Grover and Geo. J. Cockrell, had applied for administration on the estate of the deceased. Mrs. Grover also filed objections to Cockrell's appointment. The probate court heard both applications and the objections at the same time, overruled the objections, refused Mrs. Grover's application, and appointed Cockrell. Mrs. Grover took an appeal, and sued for a writ of prohibition to prevent Cockrell from acting, and the probate court from recognizing him as administrator pending the appeal. The prohibition was denied by the Supreme Court on the sole ground that Mrs. Grover's appeal did not lie. She appealed from an order just like we have here; namely, from one appointing an administrator of the estate and refusing to appoint her. Flick appealed from an order appointing Schenk and refusing to appoint him. Both matters were disposed of by the probate court in the same order. Moreover, the Supreme Court in the *Fowler Case* showed why an appeal would not lie and what the proper remedy was. Suppose an appeal was allowed from a refusal to appoint one person administrator, another having been appointed at the same time. If on the appeal the probate court's

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ruling was reversed and a decision given that the appealing party should have been appointed, this would be, in effect, an adjudication against the right of the appointee without his having been heard; that is, the decision would be that the appealing party was entitled to the appointment instead of the one actually appointed. If the probate court should afterwards revoke the original appointment, by the express words of the statutes the appointee could appeal from that order. Meanwhile the estate would be thrown into confusion. What was decided in the Fowler Case was that an appeal would not lie from an order appointing one person administrator and refusing to appoint another; and that is just the order we have here.

We are cited to the decision of this court in *State v. Collier*, 62 Mo. App. 38, and the decision of the Kansas City Court of Appeals in *Burge v. Burge*, 94 Mo. App. 15, 87 S. W. 703, as holding that an appeal does lie from an order of the probate court refusing letters of administration to a party entitled to them. We think both those decisions are in direct conflict with the Fowler Case, decided by the Supreme Court, and will follow the latter case. We are unable to draw a valid distinction between the Fowler Case and the present one, and therefore adhere to our ruling dismissing the appeal.

Because the Judges of this court deem this decision in conflict with the decision of the Kansas City Court of Appeals above cited, this cause is certified to the Supreme Court for final determination. It is so ordered. All concur.

#### MARTIN v. CITY OF ST. JOSEPH et al.

(Kansas City Court of Appeals. Missouri.  
March 1, 1909.)

#### 1. MUNICIPAL CORPORATIONS (§ 845\*)—NUISANCE—INSUFFICIENT CULVERTS—PLEADING.

A petition, in an action against a city for injuries caused by the overflow of water from an insufficient culvert, which alleged that an embankment was negligently raised and maintained, that such culvert was negligently built and maintained and too small to accommodate the flow of water in the stream, and that defendant allowed it to be choked with debris, is not necessarily based on negligence; but it is sufficient to sustain a recovery as for a nuisance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1797; Dec. Dig. § 845.\*]

#### 2. NUISANCE, (§ 1\*)—DEFINITION—"PRIVATE NUISANCE."

A "nuisance" is anything that worketh hurt, inconvenience, or damage. A "private nuisance" is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4855-4864; vol. 6, pp. 5574-5576; vol. 8, p. 7734.]

#### 3. PLEADING (§ 49\*)—PETITION—THEORY AND FORM OF ACTION.

Under Rev. St. 1899, § 592 (Ann. St. 1906, p. 612), providing that the petition in an action shall contain a plain and concise statement of the facts constituting a cause of action and a demand of the relief which the plaintiff may suppose himself entitled to, whether a petition states facts constituting a cause of action for a nuisance or negligence is immaterial, where the relief demanded would be the same in either case.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 107; Dec. Dig. § 49.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 839\*)—NUISANCE—NOTICE.

Where a city does not create a nuisance caused by a city street obstructing the flow of a stream, it is not liable for its maintenance, unless it maintains the same after notice and request to abate it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1789; Dec. Dig. § 839.\*]

#### 5. MUNICIPAL CORPORATIONS (§ 658\*)—STREETS—INTEREST IN.

A city does not occupy a relation to its streets as that of lessee. The interest of the city in the street is not of a private character and in no sense partakes of the nature of ownership as understood when applied to the rights of private persons.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1430; Dec. Dig. § 658.\*]

#### 6. COURTS (§ 90\*)—STARE DECISIS.

The last expression of the court on a subject is controlling as against prior opinions conflicting with it.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 314; Dec. Dig. § 90.\*]

#### 7. MUNICIPAL CORPORATIONS (§ 845\*)—NUISANCE—NOTICE—QUESTIONS FOR JURY.

The evidence being conflicting as to whether a city had received notice to abate a nuisance, it was a question for the jury whether the city was liable for the maintenance of the nuisance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1800; Dec. Dig. § 845.\*]

#### 8. MUNICIPAL CORPORATIONS (§ 834\*)—OBSTRUCTING STREAM—CITY LIMITS.

Where a street obstructs a stream, the culvert being too small to pass the water, the fact that the outlet of the culvert was outside the city limits does not affect the liability of the city for the nuisance caused by the overflow; the liability being based on the maintenance of the embankment within the city limits with an insufficient outlet.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1784; Dec. Dig. § 834.\*]

#### 9. MUNICIPAL CORPORATIONS (§ 834\*)—OBSTRUCTION OF STREAM—NUISANCE—MAINTENANCE—LIABILITY.

Where a street obstructs a stream by providing too small a culvert to pass the water, the city's liability for the nuisance is not affected by the fact that it did not originally construct the street; its maintenance of the obstruction after the city limits were extended to include the locality being sufficient to create the liability.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1784; Dec. Dig. § 834.\*]

#### 10. MUNICIPAL CORPORATIONS (§ 834\*)—NUISANCE—DUE CARE.

Neither can the city escape liability if the culvert was too small by using due care to keep



the embankment in proper condition, though such care might affect the extent of damages by lessening the amount of overflow.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1784; Dec. Dig. § 834.\*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by Freeman W. Martin against the City of St. Joseph and the St. Joseph Light, Heat & Power Company for the maintenance of a nuisance. From a judgment in favor of plaintiff against the city, the city appeals. Reversed and remanded.

W. B. Norris and O. E. Shultz, for appellant. Rusk & Stringfellow, for respondent.

BROADDUS, P. J. This is a suit by plaintiff for damages to his property caused by the acts of the defendants in obstructing a natural water course. There is running into and through the city of St. Joseph a natural water course, which crosses Jule street between Twenty-Eighth and Twenty-Ninth streets. In the year 1889, before the territory in the locality mentioned was within the city limits, a fair association in constructing its race track made a fill in the stream, in which was placed a culvert about five feet in diameter, which was sufficient to carry off the water under ordinary conditions. Afterwards, the race track was abandoned by the association, and later on the property was platted into blocks and lots, and the city extended its limits beyond the locality of the stream and embankment. There was evidence to the effect that the entrance and outlet of the culvert were both on private property. A portion of the old race track that crosses the stream forms a part of Jule street. Jule street at this point has never been improved by the city. The defendant street railway company built its tracks over this embankment in 1889, but had abandoned them for a time until about 1902 or 1903, when it resumed possession, at which time the embankment had been partially washed away. The railway company at the latter date repaired the damages before relaying its tracks and also raised the height of the embankment. The city was shown to have had knowledge that Jule street was an obstruction to the flow of water in the stream, and at different times through its employes removed the debris that had accumulated at the culvert. The plaintiff's house is located south of Jule street and a short distance east of the stream. In July, 1907, there was an unusual precipitation of rain and, the culvert not being sufficient to discharge the water that flowed through the stream, it was backed up by the embankment until it overflowed onto plaintiff's property and into the cellar of his house to his damage. The judgment was in favor of the railway company and in

favor of plaintiff against the city, which appealed.

It is insisted by defendant that plaintiff's cause of action is based on negligence, whereas, he was permitted to recover on the theory that it was an action for a nuisance. The facts upon which plaintiff relies are set forth in his petition, but it fails to allege in terms that they constituted a nuisance. Although the petition alleged that the embankment was negligently raised by the railway company, and that it has been negligently so maintained that said culvert was negligently built and maintained by defendant and too small to accommodate the flow of the water in the stream, and that defendant allowed it to be choked with debris, yet we cannot see why the acts complained of do not amount to a nuisance. A nuisance is: "Anything that worketh hurt, inconvenience, or damage. A private nuisance is anything done to the hurt or annoyance of the lands, tenements or hereditaments of another." *Bouvier's Law Dictionary*. Under our system of code pleading, it could make no difference in this case whether we call the action one of negligence or nuisance, as the relief would be the same. *Rev. St. 1899, § 592 (Ann. St. 1906, p. 612)*.

Instructions 2, 3, and 4, given for the plaintiff, are based upon the theory that the city was maintaining a nuisance, but fail to instruct the jury that before the city could be held liable they must find that it had knowledge of the nuisance and a request to abate it. The city did not create the nuisance and could be held liable only on the ground of maintenance after notice and request to abate it. *Rychlicki v. City of St. Louis*, 115 Mo. 662, 22 S. W. 908. It was held, however, in *Dickson v. Railroad Co.*, 71 Mo. 575, that, to maintain an action against the lessee for the continuance of a nuisance erected by his lessor before the lease, it is not necessary to show that the lessee was notified of the existence of the nuisance and was requested to abate it. It is sufficient if he knew it; and such is the holding in *Pinney v. Berry*, 61 Mo. 359. If these cases are held to be in conflict with *Rychlicki v. Railroad Co.*, *supra*, which we do not believe, the latter would be controlling as being the last expression of the court on the question. The city does not occupy a relation to the street as that of lessee. The interest of the city in the street is not of a private character and in no sense partakes of the nature of ownership as understood when applied to the rights of private persons. It is true that there was evidence tending to show that some of the officers of the city had been requested to abate the nuisance, and also that the board of public works of the city had been so requested; but there was evidence to the contrary. It was therefore a question for the jury.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We are of the opinion that it was immaterial whether the opening or outlet of the culvert was or was not within the city limits. The embankment was, and, if it constituted a dam without sufficient outlet for the water to prevent it damming up and overflowing plaintiff's land, the city was maintaining a nuisance. *Rychlicki v. Railroad*, supra. And this is true, notwithstanding the city had nothing to with the original construction of the street. In exercising dominion over it and in permitting the railroad company to use it in its business, it became responsible for the nuisance.

The defendant, in instruction No. 13, asked the court to instruct the jury, in effect, that, if the city since the extension of its limits over the locality "has used that care which an ordinarily prudent man would exercise under like conditions in regard to said embankment and culvert, your verdict must be for the defendant." The court refused to so instruct, and properly. If the embankment proved a nuisance without sufficient outlet, it was immaterial whether the city exercised due care to keep it in proper condition, except in so far as such care might affect the extent of damages by lessening the amount of overflow on plaintiff's land.

Other questions are raised on the appeal, but we find no material error other than that mentioned. As the case is to be retried, we suggest that it would simplify matters if the plaintiff would amend his petition and so state his case as to eliminate all the allegations of negligence and make plain his cause of action for nuisance.

Reversed and remanded. All concur.

**BROWN et al. v. TUCKER'S ESTATE.**  
(St. Louis Court of Appeals. Missouri. Feb. 23, 1909.)

**1. DESCENT AND DISTRIBUTION (§ 65\*)—WIDOW'S ELECTION—FAILURE TO ELECT—EFFECT—"DOWER."**

Rev. St. 1899, § 2939 (Ann. St. 1906, p. 1694), provides that, if the husband dies childless, the widow shall take one-half of the realty and personalty absolutely, subject to payment of his debts. Section 2940 (Ann. St. 1906, p. 1696) provides that, when the husband dies leaving children other than by his last marriage, his widow may, in lieu of dower, elect to take, in addition to the realty, personalty coming to the husband through his wife or by her consent, subject to his debt. Section 2941 (Ann. St. 1906, p. 1696) provides that, if the husband dies without descendants capable of inheriting, the widow may elect to take dower, as provided in section 2933 (Ann. St. 1906, p. 1690), as discharged of debts, or in section 2939. Section 2942 (Ann. St. 1906, p. 1696) provides that, when the widow is entitled to dower under the three sections preceding it, the executor shall notify her and require her to elect, as provided in the next section. Section 2943 (Ann. St. 1906, p. 1696) requires the election to be by a statement executed and recorded as deeds, and provides that, unless she files her election within 12

months after the granting of letters testamentary, she shall be endowed under sections 2933, 2935, and 2936 (Ann. St. 1906, pp. 1690, 1693). Section 2933 relates to dower in realty, and sections 2935 and 2936 subject land under contract by the husband to dower. *Held*, that the election provided for in section 2943 related only to dower in realty, and the wife's failure to elect would not prevent her from taking one-half of the personal estate under section 2939; that not being dower.

[Ed. Note.—For other cases, see Descent and Distribution, Dec. Dig. § 65.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2188-2193; vol. 3, p. 7642.]

**2. DOWER (§ 28\*)—CHARGES UPON DOWER—HUSBAND'S DEBTS.**

Dower in land is taken free from the husband's debts.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 79; Dec. Dig. § 28.\*]

Appeal from Circuit Court, Perry County; Chas. A. Killian, Judge.

Action by Margaret Brown and others against the estate of James F. Tucker, deceased; Andrew Doerr, administrator. From a judgment overruling objections to an order of distribution and approving final settlement, plaintiffs appeal. Affirmed.

T. P. Whitledge, for appellants.

REYNOLDS, P. J. One James F. Tucker, late of Perry county, died on the \_\_\_\_\_ day of July, 1905, in Perry county, intestate, leaving surviving him his widow, Margaret Tucker, and no children or descendants of children. On the 10th of July, 1905, Margaret Tucker filed her relinquishment of the right to administer on his estate, and on the same day Andrew Doerr was by the probate court of Perry county appointed and duly qualified as administrator of the estate. Margaret Tucker never executed or filed any instrument in writing electing to take one-half of the real and personal property, provided for by sections 2939 and 2943, Rev. St. 1899 (Ann. St. 1906, pp. 1694, 1696). James F. Tucker owned, at the time of his death, a house and lot in Perryville, Mo., worth about \$1,200, which was the only real estate he owned, and which it seems goes to his widow as the homestead, and was also possessed of personal property of the value of about \$2,700. The administrator made his final settlement in the probate court November 23, 1907, showing \$1,745.45 as due the estate and subject to distribution, and the probate court on the same day made an order of distribution of said amount of \$1,745.45, allowing to Margaret Tucker, as widow of James F. Tucker, \$672.72, being one-half of the above sum of \$1,745.45, after deducting \$400 theretofore paid her as the widow's absolute property. The appellants filed their objections to this, which objections being overruled, the appellants perfected their appeal to the circuit court in due form. The case coming up for trial in the circuit court,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by stipulation of parties, the case was submitted to the court upon an agreed statement of facts, setting them out substantially as above. The objection urged and passed on by the circuit court rests upon the right of the widow to take one-half of the personal estate; she never having executed or filed her election under sections 2939 and 2943. The circuit court, overruling the objection, approved the order of distribution and final settlement, as made by the probate court, by which the widow was allowed one-half of the personal property. Thereupon the appellants duly perfected their appeal to this court.

On this state of facts we think the action of the probate court and of the circuit court was correct. Counsel for appellants has submitted a very readable brief, supplemented by argument at the bar, presenting an elaborate disquisition on the philological meaning of the words "dower" and "endowed," claiming that the latter term, used in section 2943, has no technical meaning, and that we must resort to the dictionary to ascertain its usual and commonly accepted meaning. He thereupon cites the lexicographers as defining it to mean, "furnished with a portion," while "dower" is defined, primarily, as: "Endowment; gift." Secondly, "that which a wife brings to her husband in marriage; dowry." Thirdly, "that portion, usually one-third, of a man's lands and tenelements to which his wife is entitled after his death to hold for her natural life." All this is for the purpose of proving that, unless the widow files her election under section 2943, and does so within the time required by that section, she loses her right to take one-half of the personal property of her childless husband, as she may do under the second clause of section 2939; that clause providing that when the husband shall die without any child or other descendants in being, capable of inheriting, his widow shall be entitled "to one-half of the real and personal estate belonging to the husband at the time of his death, absolutely, subject to the payment of the husband's debts." Section 2943 provides that, unless the widow files her election within 12 months after the grant of letters testamentary or of administration, "she shall be endowed under the provisions of sections 2933, 2935, and 2936 [Ann. St. 1906, pp. 1690, 1693]." Section 2933 relates to dower as at common law—dower in real estate. Sections 2935 and 2936, speaking somewhat broadly, subject lands under contract by the husband—that is, the husband's interest in realty—to dower. It is hardly to be supposed therefore that when the lawmakers, by section 2943, remitted the widow to dower proper—that is, her interest in the realty—on her failure to elect, they had in mind the interest in the personal estate which section 2939 gives her. When she is to be "endowed" under the three sections, she is dowered of

the realty. It is to be noted that, when the widow elects under section 2943, she must do so by an instrument executed and recorded under all the formalities of a deed to real property. The reason for that is apparent. Her election affects the title to realty. No such reason can apply to her interest in the personalty. Our conclusion is that when a widow shall only be entitled to dower, as provided by sections 2939, 2940, and 2941 (Ann. St. 1906, pp. 1694-1696), which are "the three preceding sections" to section 2942 (Ann. St. 1906, p. 1696), unless she has elected to take otherwise within the time and in the manner pointed out in section 2943, that the election required relates only to dower proper—that is, her interest in the realty—and that it does not apply to the personal estate. Under section 2939, she takes one-half the latter, subject, however, to the payment of the debts of the husband, without any election. This provision, that she takes subject to the payment of her husband's debts, is somewhat suggestive, as indicating that what the widow takes under section 2939 is not dower, for dower was always taken free of the husband's debts. That, however, we need not now elaborate.

The judgment of the circuit court is affirmed. All concur.

#### WELCH v. DIETER et al.

(Kansas City Court of Appeals. Missouri.  
March 1, 1909.)

#### 1. MASTER AND SERVANT (§ 278\*)—STONE MASONS—INJURY—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show that contractors were negligent toward a stone mason injured through a slab of stone falling.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.\*]

#### 2. MASTER AND SERVANT (§ 102\*)—EMPLOYER'S DUTY—SAFE PLACE TO WORK.

One must use reasonable care to provide his employé a reasonably safe place of work, and not to increase the natural hazards of the employment by negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 173; Dec. Dig. § 102.\*]

#### 3. MASTER AND SERVANT (§ 217\*)—STONE MASONS—INJURY—RISK ASSUMED.

A stone mason of 20 years' experience employed in setting stone slabs on edge on an outside wall of the second story of a building, while standing on a ledge 15 inches wide, 18 feet above the ground, assumed the risk of injury caused by a slab falling when a wedge which he placed under it slipped, where he did not deem a scaffold necessary.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 583, 584, 593, 594; Dec. Dig. § 217.\*]

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by Thomas R. Welch against August C. Dieter and another. From a judg-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
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ment setting aside a nonsuit and granting a new trial, defendants appeal. Reversed.

A. E. Spencer, for appellants. H. L. Shannon, for respondent.

JOHNSON, J. Action by a servant against his master to recover damages for personal injuries alleged to have been caused by the negligence of the master. At the conclusion of the evidence offered by plaintiff, the court instructed the jury to return a verdict for defendants, and plaintiff took a nonsuit, with leave to move to set the same aside. Afterward the court sustained the motion filed by plaintiff to set aside the nonsuit and to grant him a new trial. Defendants appealed.

The sole question presented for our determination is whether or not the evidence of plaintiff entitled him to go to the jury. Defendants were contractors engaged in the erection of the Connor Hotel at Joplin. Plaintiff was a stone mason employed by them. The skeleton of the building was a steel frame which had been completed at the time of the injury. The walls of brick and stone were being filled in, and this work had progressed to the second story, at a height of about 18 feet from the ground. A stone sill, level on the top, encircled the building at the base of the second story and the walls of this story, consisting of brick faced with cut stone, were started upward from the sill in a way to leave the sill projecting outward from the foot of the wall some 15 or 15½ inches. Thus the sill made a level platform or bench around the building about 18 feet high. Plaintiff was engaged in the work of setting the stone slabs with which the brick wall on the second story was veneered. These slabs were set on edge in courses, and plaintiff was setting the fourth course, the top of which was about 4 feet above the sill. The slab he was setting was 3 feet long, 1 foot high, 4 inches thick, and weighed about 180 lbs. The stones in the course underneath were 2½ inches thick, as the face of the fourth course was designed to project 1½ inches over the lower course. The slab was carried to the place by a steam crane. Plaintiff placed a piece of brick under each end for it to rest on while he put in the mortar. He then put in a small wooden wedge at each end to support the stone while the mortar was hardening. Then he removed the pieces of brick, and let the stone down on the wedges. While he was leveling the stone, one of the wedges slipped out in some way not known. This let the end of the stone down into the fresh mortar, causing the stone to slip and fall to the ground. Plaintiff, in his efforts to prevent the accident, lost his balance and fell to the ground, breaking his leg.

A witness testified: "I saw Mr. Welch standing on a wall setting a stone; Dr. Long and I were looking at him set the stone, and it seems the stone was a trace

high, and he had his left hand on the stone putting a wedge under it, a chisel bar in the right, a colored gentleman on the inside of the building and Mr. Welch on the outside, standing on the wall, and he raised the stone just a little with his bar, the chisel bar, and this wedge seemed to slip, and the way we were looking at him, it seemed like his right foot slipped on the wet mortar underneath, and he pulled the stone right down, and him and the stone come right down together."

Plaintiff had been working at the trade of stone mason for 20 years, and was a thoroughly experienced workman. He had been using the sill in lieu of a scaffold for more than a month. Two or three days before the injury, he asked the foreman to build a scaffold. The foreman complied with the request, and built a scaffold for use in laying the fifth course. Plaintiff was at work while it was being built, and made no request or suggestion that it be built for use in setting the fourth course. He testified: "I just told him we would have to have a scaffold there; we had went just about as high as we could possibly go; and he walked on through the building, and they went to building it right away. \* \* \* Q. You say they were putting it for the fifth? A. There wasn't any use putting it for the fourth. Q. You still had some of the fourth? A. Not very much. Q. You didn't say anything about wanting it for the fourth course? A. I didn't have very much."

After plaintiff had rested and the court heard counsel argue the demurrer to the evidence, plaintiff was recalled to the stand, and testified that his request for a scaffold was made before he commenced putting on the fourth course; but his testimony, considered as a whole, shows conclusively that he did not consider the sill a dangerous place on which to stand, and that he did not ask for a scaffold to be built for his use while his work was in easy reach from the sill. It is fair to say, from his actions and testimony, that he considered the scaffold to be necessary only when the wall had grown too high for him to work conveniently from the sill, and that he was satisfied that a scaffold was not needed for the laying of the fourth course.

These facts do not accuse defendants of any negligence, and to hold them liable for plaintiff's injury would be to say that they were insurers of their servant's safety. The injury of plaintiff was clearly the result of a natural risk of the employment—a risk assumed by him—and not of defendant's negligence. The proximate cause of the injury was the falling of the slab and this was caused not by the insecure footing of plaintiff, but by the dislodgment of the wedge, a result obviously caused by the manner in which plaintiff handled the stone and his tools in his efforts to level the stone. If it

may be said that plaintiff might have prevented the stone from falling had he been on a scaffold, his position here is not improved. It is the duty of the master to exercise reasonable care to provide his servant a reasonably safe place in which to work, and not to increase the natural hazards of the employment by a negligent breach of such duty. But it is apparent that neither master nor man thought, or had reason to think, that a sill 15 inches wide was a dangerous place to work in setting the lower courses. No one knew better than plaintiff at what stage of the work a scaffold would become necessary, and defendant promptly complied with his request by building a scaffold which was satisfactory to him. If he needed the scaffold for the fourth course, he should have said so. From whatever standpoint the facts are viewed, the conclusion is irresistible that the unfortunate accident, if the fault of any one, was the fault of plaintiff, and not due to any negligence of defendants. *Fugler v. Bothe*, 117 Mo. 475, 22 S. W. 1113; *Steinhauser v. Spraul*, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441; *Blundell v. Miller*, 189 Mo. 552, 88 S. W. 103; *Mathis v. Stockyards Co.*, 185 Mo. 434, 84 S. W. 66; *Christy v. Railway*, 131 Mo. App. 286, 110 S. W. 694.

It follows that the judgment must be reversed. All concur.

### PEOPLE'S BANK v. STEWART.

(St. Louis Court of Appeals. Missouri. March 9, 1909.)

#### 1. APPEAL AND ERROR (§ 699\*)—RECORD—SUFFICIENCY OF BILL OF EXCEPTIONS.

Where the bill of exceptions does not show that the court modified instructions as claimed, error in the alleged modifications cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 699.\*]

#### 2. TRIAL (§ 251\*)—INSTRUCTIONS—APPLICABILITY TO PLEADINGS.

In an action by a bank against a person on his orders upon which a firm had been allowed to overdraw its account, where defendant did not plead payment of the orders sued on, a modification of charges permitting defendant's recovery if plaintiff had accepted from the firm its note in full satisfaction of defendant's liability would be improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587–595; Dec. Dig. § 251.\*]

#### 3. APPEAL AND ERROR (§ 274\*)—OBJECTIONS TO INSTRUCTIONS—SCOPE AND EFFECT.

An objection to the theory on which a case is tried is saved by exception to instructions given.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 274; Trial, Cent. Dig. § 691.]

#### 4. PLEADING (§ 93\*)—INCONSISTENT DEFENSES—PAYMENT AND NON EST FACTUM.

The plea of non est factum is not inconsistent with the plea of payment; defenses be-

ing inconsistent only when the proof of one necessarily disproves the other.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 190; Dec. Dig. § 93.\*]

#### 5. PLEADING (§ 79\*)—AFFIRMATIVE DEFENSES—NECESSITY FOR SPECIAL PLEADING.

The defenses of release because defendant was a surety, and was discharged for want of notice of certain facts, accord and satisfaction, payment, or any defense going to show the extinguishment of a cause of action which once existed are affirmative defenses, and as such must be specially pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 160; Dec. Dig. § 79.\*]

#### 6. PAYMENT (§ 60\*)—PLEADING.

Where payment is pleaded, the plea is held in law to mean payment in money, and, if payment is other than by money or if it rests on an independent agreement, the substantive facts of the agreement must be pleaded, and cannot be shown under a general denial or a simple plea of payment.

[Ed. Note.—For other cases, see Payment, Dec. Dig. § 60.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5247–5253; vol. 8, p. 7749.]

#### 7. PLEADING (§ 90\*)—ANSWER—JOINDER OF DEFENSES.

The answer may contain as many defenses as defendant may have, provided they are separately stated and are consistent.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 184; Dec. Dig. § 90.\*]

#### 8. BANKS AND BANKING (§ 226\*)—ACTIONS—ISSUES AND PROOF—EVIDENCE ADMISSIBLE UNDER PLEADINGS—GENERAL DENIAL.

In an action by a bank on orders to the bank to allow a firm to overdraw its account, where the only defenses pleaded were a general denial of the execution of the orders or that anything was due on them and a plea of non est factum, it was reversible error to admit evidence of the affirmative defenses of suretyship of defendant, his discharge as surety and of payment, and to charge on those defenses.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 226.\*]

Appeal from Circuit Court, Lawrence County; John C. Turk, Special Judge.

Action by the People's Bank against Peter W. Stewart. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The petition in this case is made up of six counts. The first and second counts were dismissed by plaintiff. The third, fourth, fifth, and sixth counts are on orders alleged to have been given by respondent to appellant. While the orders are for different amounts and giving different dates, they, so far as plead and proven, are substantially alike. Quoting the third count, it is as follows: "And, for another and further cause of action, the plaintiff states: That at all the dates and times mentioned in this petition it was a banking corporation organized under the laws of the state of Missouri, and was engaged in the banking business at Aurora, Mo., and that at all such dates and times Roley & Co. was a copartnership engaged in running and operating a zinc mine at Aurora, Mo. That on January 6, 1906, the defendant herein, Peter W. Stewart, by his

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

written order of that date, duly executed by him and delivered to the plaintiff, which said order is lost and cannot be filed herewith for that reason, ordered and requested the plaintiff to advance to the said partnership of Roley & Co. such sum as was needed to meet the pay roll of the said partnership due to and including that date. That on the said date the plaintiff accepted the said order of the defendant and advanced to the said Roley & Co. on the said order and request of the defendant the sum then due by the said partnership on account of its pay roll which plaintiff alleges was the sum of \$300, which said sum the plaintiff states it then paid on account of the said order of the defendant on account of the said pay roll of the said partnership of Roley & Co. Plaintiff further states that the defendant herein, Peter W. Stewart, had notice of the acceptance by the said plaintiff of the said written order aforesaid, and of the fact that the plaintiff had paid the sum aforesaid on account of the pay roll of the said partnership as aforesaid on his written order aforesaid. Plaintiff further states that no part of the said sum so paid by it on the order in writing aforesaid signed and delivered to it as aforesaid by the defendant has been paid to it by the said defendant or by the said partnership, but the whole thereof remains due and unpaid, although the same has been demanded of the said defendant, and from the said partnership. Wherefore the plaintiff demands judgment against the defendant for the said sum of \$300, with interest thereon from January 6, 1906, at the rate of 6 per cent." The answer, after a general denial and omitting that part of it pertinent to the first and second counts, is as follows: "And, further answering, defendant denies that he is or ever was a partner in the mining partnership of Roley & Co., as set out in plaintiff's petition, and denies that he was a partner in such or any mining partnership or any other partnership that in any way became indebted to the plaintiff bank; and, further answering, defendant denies specifically that he made or executed either or any of the orders described in the plaintiff's petition in either of the counts therein, and denies that he authorized any one for him to make, execute, or deliver any such orders, and denies that he owes the plaintiff the sums described in the several counts set forth in its petition, or any sum whatever; that any orders which defendant may have given have long since been paid and discharged by said Roley & Co. Wherefore he prays to be discharged from further answering and that he recover his cost herein expended and laid out." This answer was sworn to by the defendant. Plaintiff filed a general denial in reply. At the close of the testimony in the case, defendant interposed an instruction in the nature of a demurrer, which was overruled. At the instance of the defendant, the court

gave three instructions, marked "1," "2," and "5," which are complained of and which will be noted hereafter. It is set out in the bill of exceptions that exception was taken to the action of the court in giving instructions A, B, C, D, and E, as modified by the court. As will be noted, it is averred that the orders on which these four counts are based are alleged to have been lost or destroyed. The witnesses who testified as to the contents of the orders testified that they were substantially as follows: "Please allow Roley & Co. to overdraw the amount of their pay roll, as they did not get to turn in their ore for the week." That seems to have been the first order. The others appear to have read: "Allow Roley & Co. to check the pay roll." All the orders, so far as the testimony goes, were signed by respondent, P. W. Stewart. They were addressed to the People's Bank, the appellant here. A great deal of testimony was given to the effect that Stewart, being a responsible man and in some way interested in the mining and milling enterprise of Roley & Co., had given these orders at the various dates mentioned in the petition; that the pay rolls were cashed on his credit, and that the practice of the bank was, when the pay rolls came in from Roley & Co., to figure up the amount of the pay roll and take a note from Roley & Co. for that amount. As far as can be gathered from the testimony, these notes were demand notes, and were apparently discounted by the bank; the amount specified in them being placed to the credit of Roley & Co., and, as Roley & Co. turned in money from their operations, the amount turned in was credited to the account of Roley & Co. It is claimed by the respondent that these notes were taken in payment of the orders and in lieu of them, and that thereby the respondent, Stewart, was released from liability on these orders. During the cross-examination of a witness, counsel for respondent, after eliciting the fact that the witness was the cashier of the appellant bank, asked this question: "And you instituted this suit, gave the notes to the attorneys to sue on? Did you order them to sue anybody but Stewart?" This was objected to by counsel for appellant, and the objection sustained. Whereupon counsel for respondent asked witness this question: "Why didn't you sue Thorp and Thorp and Steve Roley? Mr. McPherson (counsel for appellant): We object to that as immaterial. (Objection sustained by the court, to which ruling of the court the defendant by his counsel duly excepted at the time.) Mr. McNatt: We offer to show by this witness that he has refused to file or sue Steve Roley and the two Thorps, who composed the partnership of Roley & Co., and that, therefore, the plaintiff in this action would not be permitted to recover at all until it is shown that he has exhausted his remedy. Under any theory of law, this

defendant could only be surety. The Court: I believe you may prove that. (To which ruling of the court plaintiff by its counsel duly excepted at the time.) The witness was then asked to go ahead and answer why the bank had not sued these parties, which he did. After a verdict for the defendant and the overruling of a motion for new trial, defendant, duly excepting, appeals.

McPherson & Hilpert, for appellant. McNatt & McNatt, for respondent.

REYNOLDS, P. J. (after stating the facts as above). Taking up the proposition as to the modification of four of the instructions asked by appellant, we cannot notice this exception, because, while the brief of the learned counsel for appellant sets out what they claim was added to these instructions by the court, it does not appear by the bill of exceptions that those were the additions made by the court. We are therefore shut off from considering this assigned error as ground for reversal. Assuming, however, that the clause added by the court to these instructions was, as stated by counsel to be, "unless you further find and believe that the plaintiff accepted from Roley & Co., in full satisfaction of defendant's liability on the said orders, a demand note of the said Roley & Co., intending then and there to relieve the defendant from such liability on his said order," we will remark that under the pleadings in the case that addition should not have been made to the instructions asked by appellant, but, as before observed, in the state of the record, we cannot reverse for that error. We are, however, compelled to reverse this case for an error that undoubtedly was prejudicial to the appellant; exception to the ruling of the court at the time that it occurred having been duly taken and saved. That error consisted in allowing respondent, over the objection of appellant, to show by the cashier of the bank while under cross-examination that the bank had refused to sue Roley & Co. and the two Thorps, and that, therefore, the plaintiff in this action should not be permitted to recover at all until it had shown that it had exhausted its remedy; that under any theory of law the defendant could only be surety. The court allowed this to be done over the objection and exception of the appellant. This was a fatal error.

This same error runs through instructions Nos. 1, 2, and 5, given at the instance of the respondent. By instruction No. 1 the jury were told that even though they believe from the evidence that respondent executed and delivered the several orders sued on, authorizing the appellant to pay Roley & Co. certain sums of money, and even though they found that plaintiff did pay Roley & Co. the amounts or any part thereof, if they further found from the evidence that the orders simply authorized plaintiff to pay the money acting as surety or guarantor for the repayment

of the same by Roley & Co., and that if after the date of the orders Roley & Co. deposited with the plaintiff sufficient funds to repay the money obtained by the order, and that the plaintiff failed and neglected to appropriate and apply the deposits to the payment of the debt of Roley & Co., for which the defendant stood surety or guarantor, and failed to notify defendant that the indebtedness was not paid until after plaintiff had settled with the firm and had accepted their promissory note for the amounts covering the orders, and if they further find and believe that the bank did so receive and accept such notes, then plaintiff is entitled to recover in this action.

The second instruction, in effect, told the jury that the orders sued on were different from demand notes, and, although the jury might believe that the defendant executed the orders, yet if they believed that plaintiff refused to allow Roley & Co. to check against the orders, unless they were given demand notes and took the demand notes from Roley & Co., in payment of the orders and credited the amount thereof to the account of Roley & Co. before allowing them to check against the account, and afterwards purposely threw the orders in the waste basket, then defendant is not obligated by the orders, and their verdict should be for the defendant.

By the fifth instruction, given at the instance of respondent, the jury were told that if they believed from the evidence that the only orders that were given to plaintiff, signed by defendant, were accepted and received by plaintiff for the purpose of holding defendant as surety for Roley & Co. and to reimburse plaintiff for the overdrafts for the particular debts for which they were given, and that afterwards plaintiff had a settlement with Roley & Co., and accepted the demand notes of Roley & Co. in payment of the orders, then their verdict should be for the defendant. It will be noticed that all through these instructions the court proceeded upon the theory that the defendant was either a surety and had been released or that he had been discharged by the taking of other notes, or that the orders sued on had been extinguished by the acceptance of the notes of Roley & Co. There is no specific exception apparent in the abstract, and we have read it very carefully, to the admission of evidence tending to prove the payment of the orders and their extinguishment by the demand and acceptance of the notes of Roley & Co. In point of fact a careful reading of the proceedings at the trial, as disclosed by the abstract, convinces us that it would have been difficult to interpose a specific objection of that kind until the evidence was all in, and it is possible that it was impracticable to have raised that objection until the evidence was in, but the objection to the theory on which the case was tried is saved by exception to instructions given; and the very point of complaint and

exception to the addition by the court of the proposition or fact of payment of the orders, if the part of the instruction set out by them as that added by the court is correct, is bot-tomed on the defense that no payment had been plead.

Beyond question, when the instructions were given by the court at the instance of the respondent, the issues of suretyship and of discharge of the surety and of the pay-ment of the orders by the notes and of the failure of the bank to prosecute the principal to the hurt of the surety was submitted to the jury by the instructions, to the giving of which instructions exception has been duly saved. As we have shown, there was specific exception saved to the introduction of testi-mony tending to show that the respondent was a surety and had been released by the acts of the bank. This is an error that we are at liberty to notice as ground for reversal. As will be noted, the counts upon which the case went to the jury, four of them, are practically alike, differing only in the dates and amounts of the orders upon which they are founded, and they, in effect, charge that the respondent by his written orders of cer-tain dates, duly executed and delivered by him to plaintiff, which orders could not be filed by reason of their being lost, ordered and requested plaintiff to advance to the partnership of Roley & Co. such sum as was needed to meet the pay roll of the partnership due to and including that date; that the plaintiff accepted the orders and advanced to Roley & Co., on the order and request of de-fendant, the sums then due by the partner-ship on account of its pay roll, stating the amount advanced under each order; that the respondent had notice of the acceptance by plaintiff of the written order and of the fact that the plaintiff had paid the sums on account of the pay roll under the orders aforesaid; and that no part of the sums men-tioned in the orders had been paid by de-fendant or by the partnership, but the same remains due and unpaid. That tendered a plain issue.

The answer to this, as noted, is, first, a general denial, then a denial of the partner-ship of respondent in the firm of Roley & Co. (and that claim of partnership was aban-doned at the trial), whereupon the answer proceeds to deny specifically the making or executing of either of the orders in either of the counts set out, and denies that defend-ant authorized any one for him to make, ex-ecute, or deliver any such orders, and denies that he owes the plaintiff the sums describ-ed in the counts set forth in the petition or any sum whatever, and then avers "that any orders which defendant may have given have long since been paid and discharged by said Roley. Wherefore he prays to be dis-charged from further answering, and that he recover his costs herein expended and laid out." That is to say, here is a specific de-nial of the execution of the orders sued on

or that anything is due on them and the plea of non est factum duly verified. The only plea of payment set up in the answer is the plea of payment, not of the orders sued on, but of orders other than these. As a matter of course, this plea of payment does not reach the orders sued on. Therefore, so far as these particular orders are concerned, they are defended against under the plea of non est factum, and the rest of the plea is a general denial. It is settled by the ad-judications of our court from the case of Nelson v. Brodhack, 44 Mo. 596, 100 Am. Dec. 328, down to Gaar, Scott & Co. v. Black, 120 Mo. App. 181, 96 S. W. 683, that the plea of non est factum is not inconsistent with the plea of payment. But in this case there is no plea of payment of the orders sued on. Furthermore, the defense of release because a surety, discharge for failure to notify de-fendant of certain facts, accord and satis-faction, payment, or any defense going to show the extinguishment of a cause of action which once existed, must be specially plead-ed to avail a party as a defense. These are all affirmative defenses. Jones v. Rush, 156 Mo. 364, loc. cit. 371, 57 S. W. 118; Trimble v. Railroad, 199 Mo. 44, 97 S. W. 164. Even where the plea of payment is set up, the plea is held in law to mean payment in mon-ey. If payment is other than by money, or if it rests on an independent agreement, the sub-stantive facts of the agreement must be pleaded, and cannot be shown under a gen-eral denial or a simple plea of payment. Moore v. Renick, 95 Mo. App. 202, loc. cit. 210, 68 S. W. 936.

To repeat, where a cause of action which once existed has been determined by some matter which subsequently transpired, such new matter must be specially pleaded. This covers, as before said, not only payment, but release, discharge, accord, and satisfaction. Greenway v. James, 34 Mo. 326; Young v. Glascock, 79 Mo. 574; Wilkerson v. Farn-ham, 82 Mo. 672; Hyde v. Hazel, 43 Mo. App. 609; Hardwick v. Cox, 50 Mo. App. 509; Scudder v. Atwood, 55 Mo. App. 512. So, too, any special agreement upon which a party relies as a defense. Meyer v. Broadwell, 83 Mo. 571. While it was incumbent on plaintiff to aver that the notes or orders had not been paid, it was not bound to prove the fact of nonpayment. That was for defend-ant to aver and prove. It is urged here by counsel for appellant that the plea of non est factum cannot be joined with the plea of payment because inconsistent, but, as we have before noted, Nelson v. Brodhack, 44 Mo. 596, 100 Am. Dec. 328, and cases follow-ing that, have established the contrary rule; the rule being that the answer may contain as many defenses as defendant may have, provided they are separately stated and are consistent with each other. Munford v. Keet, 154 Mo. 36, 55 S. W. 271. It is only when the proof of one necessarily disproves the other



that defenses are said to be inconsistent, and not capable of being joined in the same answer. This is also illustrated in *Cox v. Bishop*, 55 Mo. App. 135; *Cohn v. Lehman*, 93 Mo. 574, 6 S. W. 267. For the error, then, which permeates all these instructions, and which was present throughout the whole trial, in admitting what are held to be affirmative defenses under a general denial, and in instructing the jury on affirmative defenses, none of which have been pleaded, we are compelled to reverse this case. We do not deem it necessary to notice any of the many other alleged errors, as undoubtedly this case, if again tried, will be under a different set of pleadings, and we cannot anticipate what they will be. It would therefore serve no useful purpose to further comment on this case. For the error in the admission of the line of testimony referred to and above noted, we base our action in this case; but for the guidance of court and counsel as far as we can, in anticipation of the further conduct of the case, we have gone somewhat out of the record to call attention to the absolute necessity of pleading affirmative defenses, if any exist of which defendant seeks to avail himself.

The judgment of the lower court is reversed, and the cause remanded. All concur.

### SIMS v. HALL.

(St. Louis Court of Appeals. Missouri. Feb. 23, 1909.)

#### 1. TRIAL (§ 252\*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

Where, in an action for killing dogs, the only evidence of their destruction of property was that of defendant, who testified that the dogs which he admitted killing while coming out of his kitchen were not plaintiff's, there was no error in striking out of an instruction requested by defendant, a part thereof relating to his right to kill plaintiff's dogs in case they were destroying his property.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 601; Dec. Dig. § 252.\*]

#### 2. TRIAL (§ 143\*)—CONFLICTING EVIDENCE—QUESTION FOR JURY.

Where the evidence conflicts on questions of fact, their determination is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 342; Dec. Dig. § 143.\*]

#### 3. APPEAL AND ERROR (§ 260\*)—PRESERVATION OF OBJECTIONS FOR REVIEW—RECEPTION OF EVIDENCE.

A losing party cannot avail himself of an objection that the trial court failed or refused to rule on objections to evidence, where it appears from the record that his counsel did not insist on or wait for a ruling, and no exception was saved on the court's failure to make one.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1503; Dec. Dig. § 260.\*]

Appeal from Circuit Court, Stone County; Jno. T. Moore, Judge.

Action by George E. Hall against Ed. Sims. From a judgment for defendant in

the circuit court on appeal from a justice of the peace, plaintiff appeals. Affirmed.

G. Purd Hays and P. M. Viles, for appellant. G. W. Thornberry, for respondent.

REYNOLDS, P. J. This action was commenced before a justice of the peace, in Stone county, for damages for the value of three foxhounds, alleged to have been killed by the defendant. On verdict and judgment in favor of respondent, plaintiff below, defendant appealed to the circuit court, where, on a new trial, verdict was again rendered in favor of respondent, and the case is here on appeal.

The only assigned error necessary to notice is to the action of the trial court in striking out from an instruction asked by the defendant the words, "or destroying the property of defendant." That instruction is as follows: "The court instructs the jury that if you find and believe from the evidence in this case that the dogs killed by defendant were the dogs of plaintiff, and that at the time the defendant killed said dogs they were chasing sheep or goats (or destroying the property of defendant), or were acting under such suspicious circumstances as to satisfactorily show that such dog or dogs had recently been engaged in chasing or killing sheep or domestic animals (or destroying the property of defendant), then the defendant had a right to kill such dog or dogs, and your verdict will be for defendant." The defendant himself, testifying as a witness, admitted that he had killed dogs, and he testified that those he killed were shot by him while they were coming out of his kitchen or house, but he distinctly testified that the dogs which he had killed were not the dogs of the plaintiff. He was asked this question by his counsel: "They charge you of killing three of Ed. Sims' dogs, foxhounds. State to the jury whether or not you ever killed any of his foxhounds." To this he answered: "No, sir, I never did kill one of his foxhounds." With this testimony given by the defendant himself, there was no evidence before the jury which would have authorized the court to have retained the words stricken out from the instruction asked, and it was not error to strike them out. The failure of any evidence, therefore, to show that the foxhounds of plaintiff which were killed were killed in the act of destroying the property of the defendant, fails to bring this case within the rule laid down in *Fisher v. Badger*, 95 Mo. App. 289, 69 S. W. 26, and *Reed v. Goldneck*, 112 Mo. App. 310, 86 S. W. 1104. As to the fact of these dogs being of the kind specified in section 8 of the act providing for the registration, licensing, or killing of dogs, etc., approved April 12, 1907 (Sess. Acts 1907, p. 388), which authorized them to be

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

killed by any person at any time or place, there was evidence both ways, as also evidence as to whether the defendant had killed the dogs of plaintiff. These questions, therefore, became questions of fact for the determination of the jury; and, the jury having been correctly instructed as to those facts and the law governing them, we see no reason to disturb their verdict. This also disposes of the proposition earnestly made by counsel for respondent, that the demurrer to the evidence should have been sustained. There was no error in this action of the lower court. We say this after having read all the testimony, covering some 90 pages, in a very excellently prepared abstract of it submitted by the learned and industrious counsel for the appellant.

Complaint is made of the failure of the trial court to rule on objections made by defendant, and on the failure and refusal of the court to pass on them when made, and in receiving evidence subject to objection. The first place to which counsel directs our attention to the record where this is said to have occurred shows the following (pages 10 and 11 of the abstract); the plaintiff being under examination in chief: He was asked by his counsel: "Q. You used your dogs for running foxes? A. Yes, sir; that is what I used them for. That is all they would run after night. They would run rabbits some in the daytime. Mr. Hays: Defendant objects to this, and asks that it be excluded. Mr. Thornberry: Plaintiff wants to prove the value of the dogs. A rabbit dog isn't much account to a fox hunter. By the Court: No ruling. Q. Were those dogs trained dogs? A. Yes, sir; trained when I got them." The other instance cited by appellant occurs on page 14 of the abstract, and is set out thus: "By Mr. Thornberry: Plaintiff objects, for the reason it is immaterial and not in contradiction of anything. By the Court: No ruling. A. I said I never saw but one of them." It will be noticed that on not one of these occasions did counsel insist on or wait for a ruling, and no exceptions were saved to the failure of the court to make one. As a matter of fact it appears to us from reading the record, as well as from some experience in trials, that a ruling was not insisted on or waited for, and the failure to rule was most probably produced by the rapidity of counsel in going on with their examination without giving the court time or opportunity to rule. This happens in almost every trial. Therefore these objections now made are not within the cases cited in support of them, namely, *Seafeld v. Bohne*, 169 Mo. 537, 69 S. W. 1051, and *Asbury v. Hicklin*, 181 Mo. 658, 81 S. W. 390.

Counsel for appellant make the further point that the court erred in receiving evidence subject to objection of the defendant

and withholding his ruling on such evidence, and then orally telling the jury not to consider certain parts of it, and they refer to page 59 of their abstract in support of this. A reference to that page shows this: "By Mr. Hays (of counsel for appellant): Defendant objects to all of this evidence. By the Court: You need not ask him anything further, and the above can be excluded from the record, and the jury will not pay any attention to his testimony along that line. By Mr. Thornberry (of counsel for respondent): Plaintiff excepts to the ruling of the court." So that it appears that the exceptions to the actions of the court in so ruling were taken by counsel for respondent, and not by counsel for appellant. We have not had the aid of any brief on the part of respondent, but have been guided in our investigation by the very able one of counsel for appellant. After consideration of that, and after reading all of the testimony as well as the abstract, we discover no error justifying us in reversing the judgment.

It is accordingly affirmed; all concurring.

#### NATIONAL BANK OF ROLLA v. ROMINE et al.

(St. Louis Court of Appeals. \* Missouri. March 9, 1909. Rehearing Denied March 23, 1909.)

#### 1. BILLS AND NOTES (§ 370\*)—BONA FIDE PURCHASER—DEFENSES—WANT OF CONSIDERATION.

Want of consideration is not available as a defense to a note as against a bona fide purchaser for value before maturity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 963; Dec. Dig. § 370.\*]

#### 2. BILLS AND NOTES (§ 493\*)—WANT OF CONSIDERATION—BURDEN OF PROOF.

As against the purchaser of a note before maturity, the makers are bound to show by the greater weight of evidence a want of consideration for the note, as well as knowledge, on the purchaser's part before purchase.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1654; Dec. Dig. § 493.\*]

#### 3. BILLS AND NOTES (§ 497\*)—BONA FIDE PURCHASER—FRAUD—BURDEN OF PROOF.

An instruction that if plaintiff purchased the note in suit before maturity, in good faith, for a valuable consideration, and without knowledge of any fraud in its inception, plaintiff could recover, but that the burden was on plaintiff to establish by the greater weight of evidence that it purchased for a valuable consideration and without knowledge of the fraud, was proper.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1675-1687; Dec. Dig. § 497.\*]

#### 4. BILLS AND NOTES (§ 538\*)—INSTRUCTIONS—"KNOWLEDGE."

In an action by an alleged bona fide purchaser of a note claimed to have been without consideration and fraudulently obtained, an instruction that the word "knowledge" as applied to plaintiff with reference to the defenses meant information of the facts constituting a fraud or failure of consideration, if any, and not information from which a prudent man might be

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

expected to investigate and ascertain whether there was any fraud or failure of consideration in the transaction or not, and that such information must be as to some material fact constituting fraud or failure of consideration, but that it does not mean that the purchaser must himself know that the facts are true, it being sufficient if he is informed that any such fact existed, was misleading and erroneous for, while notice of want of consideration or fraud will not be imputed because the purchaser was apprised of facts which would put a prudent man on inquiry, it was not essential that the purchaser's knowledge be proved by direct testimony, circumstances sufficient to warrant a finding of knowledge being sufficient.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 538.\*]

Appeal from Circuit Court, Phelps County; Leigh B. Woodside, Judge.

Action by the National Bank of Rolla against W. T. Romine and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Farris & Clymer, for appellant. Watson & Holmes, for respondents.

GOODE, J. Action on a promissory note by an indorsee. The note was executed by respondents, who are husband and wife, March 22, 1905, payable September 15, 1905, to the order of C. A. Post, for \$120, with interest from maturity at 8 per cent. The answer says the note in suit and another like it were procured from respondents by the fraud of Post the payee, were without consideration, and were purchased for appellant by its cashier when he knew both facts, viz., that the notes had been obtained by fraud and were without consideration. Evidence in favor of both appellant and respondents was introduced on these issues, and one witness swore he told appellant's cashier when the latter was considering the purchase of the note that he ought not to buy it, for it was a bare-faced steal. There is other evidence tending to prove bad faith in appellant.

The disposition of the appeal turns on the rulings of the court in instructing the jury, principally on the accuracy of this instruction: "The word 'knowledge,' as used in these instructions, means information of the facts constituting the fraud or failure of consideration, if any. It does not mean information of facts from which a prudent man might be expected to investigate and ascertain whether there was any fraud in the transaction or not or failure of consideration, but such information must be as to some material fact constituting such fraud or failure of consideration. Upon the other hand, it does not mean that he must of himself know that the facts are true, but, if plaintiff was informed that any such fact did exist, then such information would constitute knowledge of such fact, if you find it did exist." The transaction in ques-

tion antedates the time when our negotiable instrument act went into effect. In advising the jury the court rightly discriminated between the two defenses of want of consideration and procurement of the note by fraud. As to the former, the jury were told that, though they found there was no consideration for the note, they must find a verdict for the bank on said defense if they also found it bought the note and Post assigned it to the bank for value before the bank had knowledge of the want of consideration, and, further, that the burden was on respondents to establish by the greater weight of evidence want of consideration and knowledge thereof by appellant before purchase. Regarding the defense of fraud, the court instructed that if the jury found appellant purchased the note before maturity and in good faith for a valuable consideration, without knowledge of any false and fraudulent representations on the part of Post, even though he had made such false and fraudulent representations to obtain the note, they should find for the bank; that, if they believed the note was obtained from respondents by fraud, it devolved on the bank to show by the weight of evidence it had purchased for a valuable consideration and without knowledge of the fraud.

Another charge said the execution of the note in suit was admitted, and if the jury found from the evidence appellant purchased before maturity, in good faith, for a valuable consideration and without knowledge of any false representations on the part of Post or failure of consideration, the issues should be found for the bank. Those charges were sound, for the burden was on respondents to prove want of consideration of the note and knowledge thereof by the bank when it bought; also to prove the note was obtained from them by fraud, in which case it devolved on the bank to prove it acquired the note in good faith. *Hamilton v. Marks*, 63 Mo. 167; *Hahn v. Bradley*, 92 Mo. App. 399; 1 *Randolph, Com. Paper* (2d Ed.) 566; 2 *Randolph, Com. Paper*, 1024, 1028; 1 *Daniel, Neg. Inst.* (5th Ed.) §§ 814, 815. The instructions threw the stress of the case on the knowledge the bank had when the note was bought, of want of consideration for it or fraud in obtaining it, instead of the bank's good or bad faith, and attempted to advise the jury what "knowledge" meant, as used in the instructions, saying it meant information of facts constituting the fraud or failure of consideration, if any, and did not mean information of facts from which a prudent man might be expected to investigate and ascertain whether there was failure of consideration or fraud. Further, that knowledge did not mean he (i. e., the bank's cashier) must have known the facts were true; but, if appellant was informed any such fact existed, this information constituted knowl-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

edge of the fact, if the jury found it existed. That charge was erroneous and quite misleading. It is true, as the instruction says, that notice of want of consideration for a negotiable instrument or of fraud in procuring its execution will not be imputed by law to an indorsee who acquired the instrument in the usual course of business for value and before maturity simply because when he bought he was apprised of facts which would put a prudent man on inquiry, and enable him, by a reasonable investigation, to learn the whole truth. This species of notice is not applied by way of a legal presumption to transactions in commercial paper as it is to other affairs where it appears the party to be charged with notice was remiss in pushing an inquiry which the facts he knew ought to have incited. *Hamilton v. Marks*, supra; *Mayes v. Robinson*, 93 Mo. 114, 5 S. W. 611. It is not essential to prove by direct testimony an indorsee knew when he acquired a negotiable instrument it lacked consideration or was obtained by fraud; but the triers of the facts may find he knew as much from relevant circumstances, and, perchance, from such circumstances as would suffice in other dealings to raise a presumption of notice. The difference is that in the instance of a negotiable instrument indorsed for value, in the usual course of business and before it was due, knowledge by the indorsee of the existence of an equity in favor of the maker must be found as a fact. *Brown v. Hoffelmeyer*, 74 Mo. App. 383. But any information concerning an equity which may be given to the indorsee before he buys will not affect him, of course, with knowledge that the equity exists, or authorize an instruction to the jury trying the issue to find the indorsee had knowledge, if they find information had come to him of the equity, or some material fact relating to it. The information might be in the nature of vague rumors or circumstances to excite suspicion, but not impart knowledge, or even induce belief, that there was some infirmity in the instrument. And the information might be of a kind to stimulate inquiry in a careful man, and therefore show the holder was careless in omitting to investigate before buying. Those shades of culpability do not detract from the rights accruing to the indorsee by virtue of the negotiable quality of the paper. 1 Daniel, § 774 et seq., and notes; 2 Randolph, § 998 et seq. The fact essential to defeat those rights is bad faith on the part of the indorsee in acquiring the paper; and this must be found by the triers of the fact unless the evidence is conclusive one way or the other (authorities supra). To deprive appellant of the status of an innocent holder for value, it must be found to have bought the note with knowledge of one or both of the defenses alleged against it. It is not meant the officers of the bank who

were connected with the purchase must have known the truth in the sense which would be requisite to enable them to testify to it in a trial, but that they had such knowledge as satisfies the triers of the issue they acted in bad faith; that is, in the belief, and not merely the suspicion, the note was tainted with fraud or lacked a consideration.

The judgment is reversed, and the cause remanded. All concur.

#### MORGAN v. MISSOURI PAC. RY. CO.

(Kansas City Court of Appeals. Missouri.)

March 1, 1909. Rehearing Denied

March 29, 1909.)

#### 1. MASTER AND SERVANT (§ 281\*)—INJURIES TO SERVANT—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

Evidence in an action by a servant for injuries received while working in a pit underneath a locomotive held to show that plaintiff did not voluntarily go into the pit, but went there under the order of defendant's foreman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 994; Dec. Dig. § 281.\*]

#### 2. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—QUESTION FOR JURY.

Evidence in an action by a servant for injuries received while working in a pit underneath a locomotive held to present a question for the jury as to whether defendant's foreman was negligent in ordering plaintiff into the pit.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1041; Dec. Dig. § 280.\*]

#### 3. MASTER AND SERVANT (§ 102\*)—INJURIES TO SERVANT—CARE REQUIRED OF MASTER.

It is the duty of a master to exercise reasonable care to provide a servant a reasonably safe place in which to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 173; Dec. Dig. § 102.\*]

#### 4. MASTER AND SERVANT (§ 137\*)—INJURIES TO SERVANT—PLACES FOR WORK—LOCOMOTIVES.

Plaintiff, a machinist's helper, while assisting in transposing the tires of the driving wheels on one side of a locomotive, was sent into the pit beneath the locomotive by defendant's foreman to hammer the tire of one of the wheels loose at the bottom of the wheel. When he had detached it from the wheel, the flange of the tire struck the guide yoke which had not been removed, and, instead of falling outward, it slipped backward into the pit, thereby injuring plaintiff. Held, that it was the foreman's duty to have ascertained before ordering plaintiff into the pit whether the tire would fall clear of the guide yoke, and, if it would not, to take proper steps to prevent the tire from sliding into the pit.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 273, 274; Dec. Dig. § 137.\*]

#### 5. MASTER AND SERVANT (§ 226\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A servant only assumes the risks that are incidental to the employment, and not those created by the negligence of his master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659, 660; Dec. Dig. § 226.\*]

#### 6. MASTER AND SERVANT (§ 238\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

If a master orders a servant into a place of danger and the servant is injured, he is not

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

guilty of contributory negligence, unless the danger was so glaring that a reasonably prudent person would not have entered into it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 743; Dec. Dig. § 238.\*]

**7. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

Where plaintiff is ordered into a pit underneath a locomotive for the purpose of assisting in taking off the tires of the locomotive, and a mere inspection on his part would not have disclosed the fact that the flange of the tire would not clear the guide yoke and for that reason the tire instead of falling on the ground would fall into the pit, the question as to whether plaintiff was negligent in not ascertaining the danger was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1113; Dec. Dig. § 289.\*]

**Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.**

Action by J. M. Morgan against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Roy D. Williams and C. D. Corum, for appellant. George F. Longan, for respondent.

**JOHNSON, J.** Action by a servant against his master to recover damages for personal injuries alleged to have been caused by the negligence of the master. The defenses offered by the answer were a general denial and pleas of assumed risk, contributory negligence, and that the injury was caused by the negligence of a fellow servant. Verdict and judgment were for plaintiff in the sum of \$2,500. Defendant appealed.

First we shall dispose of the contention of defendant that the jury should have been instructed to return a verdict in its favor on the evidence introduced by plaintiff, which is all the evidence in the record. At the time of his injury, August 31, 1906, plaintiff was employed by defendant at its machine shops in Sedalia as a machinist's helper. He was a member of a gang of workmen which was ordered by defendant to transpose the tires of the two driving wheels on one side of a locomotive. The removal of the tires from the wheels was the first thing to be done. To do this, the engine was run onto a track provided with a pit between the rails about three feet deep. The engine then was raised about six inches from the rails by a hoister and held suspended in that position during the operation of removing the wheels. It is charged in the petition, and the evidence tends to show, that the usual method then followed in such cases was to have the wheel carried by an electric crane to trestles provided for the operation of removing the tire. The tire then was heated by means of heat conducted through a tube placed around its periphery. After being sufficiently heated, it was knocked off the wheel. This method was not pursued in the present instance. In-

stead, the foreman ordered the men to apply the heat and knock off the tires with the wheels remaining on the engine. The tire of the rear wheel was heated, and, in compliance with the further order of the foreman, plaintiff and another helper went into the pit under the engine for the purpose of hammering the tire loose at the bottom of the wheel. The task was successfully accomplished, and the tire fell outward to the floor. The foreman then ordered the heat put on the forward wheel and left to attend to some other duty. The men heated the tire on the front wheel, and at the proper time plaintiff descended into the pit to hammer it loose. When detached from the wheel, the tire started to fall outward, but the flange struck the guide yoke which had not been removed, and the direction of the fall was thereby changed in a manner to cause the tire to slide downward into the pit. It struck one of plaintiff's legs, inflicting the injuries which are the subject of present complaint. The negligence alleged in the petition is "that the defendant then and there failed to furnish sufficient appliances and employes to safely manipulate and remove the said tire from the wheel of said engine in the aforesaid special manner decided on by its agent, the said John M. Blue, and negligently attempted and undertook to remove the tire from the said wheel of the said engine with insufficient appliances and an insufficient number of employes and in an insufficient manner, in this, to wit: that said defendant failed to attach a rope or chain to said tire which would prevent said tire from falling into said pit, and said defendant negligently failed to remove from said engine the yoke and yoke block thereof, which could possibly intervene in the handling of the said tires, so that the said tires by striking the same on being loosened might be precipitated suddenly into said pit." The evidence tends to show that the guide yoke and guide blocks should have been removed before the attempted removal of the tire, and that, had this been done, the tire would have fallen to the floor. It further tends to show that by fastening the tire to the spokes with a chain its fall into the pit would have been prevented.

It is earnestly insisted by defendant that plaintiff voluntarily went into the pit the last time, and did not go there under the order of defendant's vice principal, the foreman. But the facts we have stated support the contrary inference. The foreman directed the men to take off both tires with the wheels on the engine. He told plaintiff to go into the pit to loosen the first tire, and it was necessary for plaintiff or some other helper to go into the pit to remove the second tire. Clearly the foreman intended, and the men so understood him, that each tire should be removed by the same process. Plaintiff did

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not go into the place as a mere volunteer, but under the orders of the foreman. It was for the jury to decide as an issue of fact whether the foreman was negligent in ordering plaintiff into a place of danger. It is the duty of the master to exercise reasonable care to provide the servant a reasonably safe place in which to work, and, in the discharge of such duty, it would appear that an ordinarily careful and prudent person in the position of the foreman would have ascertained before ordering plaintiff into the pit whether or not the tire would fall clear of the guide yoke. Finding that it would not, it then would become the obvious duty of the foreman to order proper steps to be taken to prevent the tire from sliding into the pit. There is no room in this case for the application of the doctrine of assumed risk. Plaintiff only assumed the risks that were incidental to the employment, and did not assume those created by the negligence of his master. *Cole v. Transit Co.*, 183 Mo., loc. cit. 94, 81 S. W. 1138; *Settle v. Railway*, 127 Mo., loc. cit. 344, 30 S. W. 125, 48 Am. St. Rep. 633; *Blanton v. Dold*, 109 Mo., loc. cit. 76, 18 S. W. 1149; *Curtis v. McNair*, 173 Mo. 270, 72 S. W. 167. But it is argued that plaintiff was guilty in law of contributory negligence. Master and servant do not stand on equal ground. The master is charged with the duty of exercising reasonable care to guard against sending the servant into a place fraught with dangers beyond those which are incidental to the employment. The servant owes obedience to the master, his time belongs to the master, and, while he must make reasonable use of his senses to protect his own safety, he is not required to make a critical examination of the place in which his master directs him to work. The rule thus is stated by the Supreme Court in *Shortel v. City of St. Joseph*, 104 Mo. 114, 16 S. W. 397, 24 Am. St. Rep. 317: "The master and servant do not stand upon an equal footing, even when they have equal knowledge of the danger. The position of the servant is one of subordination and obedience to the master, and he has the right to rely upon the superior knowledge and skill of the master. The servant is not entirely free to act upon his own suspicions of danger. If, therefore, the master orders the servant into a place of danger, and the servant is injured, he is not guilty of contributory negligence, unless the danger was so glaring that a reasonably prudent person would not have entered into it. *Keegan v. Kavanaugh*, 62 Mo. 230; *Stephens v. Railroad*, 96 Mo. 209, 9 S. W. 589, 9 Am. St. Rep. 336." The evidence in its aspect most favorable to plaintiff shows that the tire proper cleared the obstruction, but that its flange lapped over less than an inch. Further, it appears that a mere visual inspection would not disclose the fact that the flange

would not clear the guide yoke. It required a measurement to ascertain that fact. In such situation plaintiff was justified in relying on the superior knowledge of the master and on the implied assurance that the master had performed its duty, and knew that the tire would not be obstructed in its fall to the floor. The classification of the conduct of plaintiff was an issue of fact for the jury to settle. The demurrer to the evidence was properly overruled.

The objection offered to the admission of certain evidence is so obviously devoid of merit that we do not deem it necessary to discuss it. The case was tried without substantial error, and it follows that the judgment must be affirmed. All concur.

#### HAM v. ST. LOUIS & S. F. R. CO.

(St. Louis Court of Appeals. Missouri. March 9, 1909. Rehearing Denied March 23, 1909.)

#### 1. MASTER AND SERVANT (§ 198\*)—FELLOW SERVANTS—RAILROAD EMPLOYÉS.

The members of a train crew who set cars on a spur track are fellow servants of the brakeman on another train, injured while his car is passing the cars on the spur track because the cars on the spur track were left too close to the main track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 506, 509; Dec. Dig. § 198.\*]

#### 2. MASTER AND SERVANT (§ 294\*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action by a railroad employé for injuries resulting from the negligence of another employé, where the injury occurred in another state, an instruction as to who are fellow servants, which was according to Rev. St. 1899, § 2875 (Ann. St. 1906, p. 1657), was error, as the statutes of this state, under which plaintiff claims to bring his action, make a railroad company answerable for an injury done to an employé by the negligence of a co-employé, and if the action was not brought under the statutes of this state, the instruction should have defined a fellow servant according to the law of the state in which the accident occurred.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 294.\*]

#### 3. MASTER AND SERVANT (§ 86\*)—INJURIES TO SERVANT—WHAT LAW GOVERNS.

An action brought in Missouri for injuries to a servant must be governed by the law of the state in which the injury occurred.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 137; Dec. Dig. § 86.\*]

#### 4. EVIDENCE (§ 80\*)—PRESUMPTIONS—LAWS OF OTHER STATES.

It will be presumed from a statute of another state putting the common law in effect in that state that the general doctrines of the common law as they prevail in this state prevail also in such other state, but it will not be presumed that a statute of this state, making a railroad company liable for injuries from the negligence of fellow servants, is in force in such other state, or that an action for an injury which happened in that state is to be determined according to the law of this state, if the law of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such other state is different from the law of this state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80;\* Common Law, Cent. Dig. §§ 14-16.]

**5. TRIAL (§ 75\*)—RECEPTION OF EVIDENCE—WITHDRAWAL OF OBJECTIONS.**

Where evidence that is inadmissible is objected to, but the objection is subsequently withdrawn, the party withdrawing the objection cannot afterwards insist it was error to admit the evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 75.\*]

**6. MASTER AND SERVANT (§ 264\*)—ACTIONS FOR INJURIES—ISSUES AND PROOF.**

In an action for injuries to a servant occurring in another state, defendant pleaded assumption of risk, and offered in evidence a statute of the state in which the accident occurred, declaring that the common law should be the rule of decision of said state, unless altered or repealed by the General Assembly. *Held*, that the statute was relevant as evidence in support of such defense.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 264.\*]

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by Thomas E. Ham against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

W. F. Evans and Moses Whybark, for appellant. Von Mayes, Duncan & Bragg, for respondent.

GOODE, J. This plaintiff was injured by being crushed between a freight car on which he was working as a brakeman and another freight car standing on a side track. Plaintiff was riding at the time on a ladder, on the side of one of several freight cars hitched to an engine, and constituting part of the train he was attached to as a member of its crew. This portion of the train had been detached from the rest, in order to run out on a switch and pick up some idle cars. A spur track connected with this switch, and two freight cars were standing on this spur track so close to the switch track that plaintiff, while riding past and hanging on the ladder at the side of the car, was mashed between the car he was on and the one on the spur track. The two cars on the spur track had been set out by the crew of another of defendant's trains some days before the accident, and were negligently placed so close to the switch track as not to be "in the clear," to use the expression of the witnesses; that is to say, they were so close as to endanger members of train crews who had to attend to their duties about the intersection of the two tracks. The scene of the accident was at Blythesville in the state of Arkansas. The defenses were a general denial, contributory negligence on plaintiff's part, and assumption of the risk by him. What we have said indicates we think that the issues of defendant's negligence and plaintiff's contribu-

tory negligence were for the jury. Counsel for defendant say plaintiff assumed the risk of injury, because, if it is to be ascribed to the negligence of any of defendant's employes, the train crew who set the cars too close to the switch track were to blame, and these employes were, at common law, co-servants of plaintiff. Prima facie, and on the facts before us, they were fellow servants according to direct decisions. *Schaub v. Railroad*, 106 Mo. 74, 18 S. W. 924. See, also, 2 *Labatt, Master & Servant*, 1364, note c; *Randall v. Railroad*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003. An issue of fact about this matter was submitted to the jury, but under advice concerning who were fellow servants, which is not asserted by respondent's counsel to have been an accurate statement of the common-law doctrine on the subject. In truth the definition given in the instruction was according to section 2875 of the Missouri Revised Statutes of 1899 (Ann. St. 1906, p. 1657). Why this statutory definition of fellow servants was given in a charge to the jury is not clear; for our statute, on which respondent's counsel claim their action is founded, makes a railway company answerable for an injury done to an employe by the negligence of a co-employe; whereas the court below, as the condition of a verdict for plaintiff, required the jury to find his injury was not due to the negligence of a fellow servant. If our statutes govern the matter, this charge was unfair to plaintiff; and, if they do not, then the definition of a fellow servant was unfair to defendant, which, in that event, was entitled to have the fellow-servant question determined by the common law, or perchance, by some Arkansas statute enacted, like ours, to alter the common law.

Defendant offered in evidence a statute of Arkansas which declared the common law of England, so far as the same was applicable and of a general nature; and all statutes of the British Parliament in aid of or to supply the defects of the common law, enacted prior to the fourth year of James I, that are applicable to our form of government, and not local to the kingdom of Great Britain, or inconsistent with the Constitution and laws of the United States or of Arkansas, should be the rule of decision of said state, unless altered or repealed by the General Assembly. Kirby's Dig. § 623, c. 21. The effect of that statute was to put in force in Arkansas the rules of the common law regarding who were fellow servants, and the exemption of employers from liability for injuries to servants caused by the negligence of co-servants. To break the effect of said statute plaintiff's counsel offered in evidence sections 6658 and 6660 of the Arkansas Statutes. The first section says all persons engaged in the service of any railroad corporation, foreign or domestic, doing business in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said state, who are intrusted by such corporation with the authority of superintendence, control, or command of other persons in the employ of such corporation, or with authority to direct any other employé in performing any duty, are vice principals of such corporation, and not fellow servants of such employé. On the evidence adduced said statute did not help plaintiff's case, because there was no proof that the employés who had negligently set the cars on the spur track too near the switch track had been vested with any authority, superintendence, control, or command over other persons in the service of the company, or with power to direct plaintiff in the performance of his duties. He remained a fellow servant for aught shown in this record. The other of the two sections put in evidence by plaintiff says no contract made between employer and employed, based upon the contingency of the injury or death of the employé, and limiting the liability of the employer under the Arkansas act, or fixing the damages to be recovered, shall be valid and binding. Said section has no relevancy to this case, for no such contract is in proof. On the facts shown, the Arkansas statute did not affect the question of whether plaintiff was a fellow servant of the negligent employés, but said question stood for determination according to the principles of the common law, unless other reasons advanced by plaintiff's counsel in opposition to this conclusion ought to prevail. They say the action is founded upon the statutory law of Missouri; and, as Arkansas was not originally subject to the law of England, but to the civil law of France, from which nation it was acquired, the law of Missouri will furnish the rule of decision. We cannot accept this view. The action must rest on some Arkansas statute changing the common law, or on the latter, which we have seen prevails there except as altered by legislation. *Williams v. Railroad*, 106 Mo. App. 61, 79 S. W. 1167; *Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516, 61 S. W. 617; *Root v. Railroad*, 195 Mo. 348, 92 S. W. 621, 6 L. R. A. (N. S.) 212. In view of the Arkansas statute putting the common law in effect, and in the absence of proof of what specific common-law rules touching the case are in force there, we must presume the general doctrines of that law as they prevail in this state prevailed also in Arkansas. *Slaughter v. Railroad*, 116 Mo. 269, 277, 23 S. W. 760. But we will not presume the statute of Missouri making railroad companies liable for injuries to employés from the negligence of fellow servants is in force there, or that an action for a tortious injury which happened in another jurisdiction is to be determined according to the law of Missouri, if the law of the situs is different. *Root v. Railroad* and *Williams v. Railroad*, supra.

Plaintiff's counsel further contend the statute of Arkansas first cited was received in evidence improperly, because it was not counted on in the answer in pleading the defenses. This would be a sound proposition but for the circumstances that counsel for plaintiff first objected to the admission of the statute because not pleaded, and, after the court had excluded it, withdrew the objection. They insist now that notwithstanding this conduct, the statute ought to be disregarded as irrelevant matter, but we do not take this view. The statute was offered for the purpose of impairing plaintiff's case by showing the common-law rule, exempting a master from liability at the suit of a servant for the negligence of a co-servant, was in force in Arkansas; and, though it was incompetent evidence because not pleaded, it became competent when plaintiff's counsel consented to its admission, as virtually they did, by withdrawing their objection. Cases are cited holding new matter proved, but not pleaded, cannot be considered as a defense. *Schwartz Bros. Com. Co. v. Vanstone*, 62 Mo. App. 241. The defense of assumption of the risk by plaintiff was pleaded in the answer, and the statute was relevant as evidence in support of said defense. It results that, on the facts in evidence, whether or not plaintiff was injured by the negligence of a fellow servant was to be determined by the general rules of the common law, and these rules were not properly set forth in the instructions.

Therefore the judgment will be reversed, and the cause remanded. All concur.

CLUBB v. ST. LOUIS & S. F. R. CO.  
(St. Louis Court of Appeals. Missouri. March 9, 1909.)

1. PRINCIPAL AND AGENT (§ 183\*)—RIGHTS AS TO THIRD PERSONS—ACTION—RIGHTS OF ACTION.

An agent may sue on a contract made in his own name for the benefit of his principal.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 692; Dec. Dig. § 183.\*]

2. PRINCIPAL AND AGENT (§ 183\*)—RIGHTS AS TO THIRD PERSONS—ACTION—RIGHTS OF ACTION.

An owner of live stock shipped under a bill of lading issued to his agent and in the latter's name may sue in his own name for injuries to the stock in transit caused by defendant's negligence.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 692; Dec. Dig. § 183.\*]

3. CARRIERS (§ 218\*) — CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY—NOTICE OF CLAIM FOR DAMAGES—WAIVER.

A carrier inducing a shipper of live stock to believe strict compliance with a stipulation in the bill of lading for notice of the claim as a condition precedent to recovery of damages to the shipment will be waived cannot escape liability because of the shipper's omission to comply strictly with the requirement.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 948; Dec. Dig. § 218.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



**4. CARRIERS (§ 218\*) — CARRIAGE OF LIVE STOCK — LIMITATION OF LIABILITY — NOTICE OF CLAIM FOR DAMAGES—WAIVER.**

Where a verbal notice of a shipper's claim for injury to live stock was given to the carrier's claim agent at destination on the day of arrival, and the agent refused to investigate the claim and instructed the person giving the notice to sell the stock and put in a claim for damages, delivery of written notice of claim on the first day after arrival as required by the bill of lading was waived, and the carrier could not escape liability on the ground that the written notice was not given until the second day.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 948; Dec. Dig. § 218.\*]

Appeal from Circuit Court, Stoddard County; Jas. L. Fort, Judge.

Action by W. S. Clubb against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appealed. Affirmed.

James Orchard, for appellant. N. A. Mozley, for respondent.

GOODE, J. Plaintiff asks damages for injuries to sheep while in transit over defendant's line of railway, it being alleged the sheep were delivered to the company in good and perfectly dry condition at Elsinoire, Mo., to be carried to the National Stockyards at East St. Louis, Ill.; that through the carelessness of defendant they became wet while in transit, and the car they were shipped in became so wet as to be unfit for the use of the sheep, and defendant negligently permitted them to be kept therein, though it had knowledge of their condition and the condition of the car; that plaintiff was shipping the sheep to be sold on the market at the National Stockyards, and, as the direct result of the careless and negligent acts of defendant, the sheep were damaged and on their arrival at destination were unfit for market; that plaintiff had to keep them at an expense to himself and finally sell them at a loss. The action was instituted before a justice of the peace; no answer being filed by defendant. The case progressed in due course to the circuit court, where plaintiff proved he was the owner of the sheep, and gave evidence to prove the other averments of his complaint. Defendant put in evidence a bill of lading which showed the sheep, 110 head, had been shipped from Elsinoire by Chas. Shrene, consigned to C. M. Keyes Commission Company, National Stockyards, East St. Louis, Ill.; also that as a condition precedent to a recovery of damages for delay, loss, or injury to the stock covered by the contract the shipper must give notice in writing of any claim therefor to some general officer, or the nearest station agent of the company, or the agent at destination, before the stock was removed from the point of shipment or place of destination, and before it was mingled with other stock; that this written notification should be served in one

day after the delivery of the stock at destination so the claim might be fully and fairly investigated. The bill of lading said failure to comply with the clause requiring notice should be a bar to any recovery of damages. The shipment arrived at the stockyards July 21, 1906, and a detailed statement of damages was given by the consignee in behalf of plaintiff to defendant the second day afterward, the damages being laid at \$50.30, or within a few cents of the amount demanded in the complaint. An employé of the consignee gave the live stock agent of defendant verbal notice of the damaged condition of the sheep the day of their arrival, and asked the agent to examine them, but he said he would not examine them, but for the consignee to go ahead and sell the sheep and put in a claim for damages.

Against the judgment it is said the action will not lie in plaintiff's name because the contract of shipment was between defendant and Shrene, and the latter alone could sue on it. No doubt Shrene might have sued (*Atchison v. Railroad*, 80 Mo. 213), but under the terms of the present bill of lading it is clear plaintiff as the owner and person for whose benefit the contract was made might sue. Shrene testified Clubb wrote him from somewhere to send the car to the Keyes Commission Company at East St. Louis, and he (Shrene) signed up the contract as agent of Clubb. Shrene did not purport to contract as owner of the property, for after his signature on the bill of lading appear the words "owner or shipper"; and, whenever he is designated throughout the contract, it is as shipper. In one clause it is recited that in making the contract "the undersigned owner, or agent of the owner, of the stock named herein, expressly acknowledges," etc.; that is, agrees to a certain stipulation. So on the back of the contract, over the signature of Shrene, he was spoken of as "the undersigned, owner or in charge of the live stock mentioned in the within contract" (we italicize); and then followed certain stipulations to which he agreed. It is fairly inferable from the evidence the company understood Shrene was contracting as agent for Clubb, and the contract itself shows that, if he was an agent and not the owner of the sheep, the company was willing to contract with him in the former capacity. This being so, we are dealing with the common case of contract made by an agent for his principal on which the latter may maintain an action. *Briggs v. Munchon*, 56 Mo. 467; *Hickman v. Craig*, 6 Mo. App. 583; *Bank v. Jennings*, 18 Mo. App. 651.

Another defense invoked is failure to give notice of the claim for damages within the time stipulated in the bill of lading. There is nothing in this defense, nor is any clear argument in its favor advanced. The written notice was not given until the second day

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

after the sheep arrived, instead of the first day after. But verbal notice was given by the consignee in behalf of plaintiff the day they arrived, and defendant's live stock agent, whose business it was to investigate whether the sheep had been injured by traveling in a wet car, and if so, whether defendant was to blame, and the merits generally of the claim, refused to make an investigation, and told the person who gave the notice to go ahead and sell the sheep and put in a claim for damages. A written notice stating particulars was delivered on the second day. The stipulation for notice of a claim for damages will be enforced in reason, but not so as to permit a carrier to induce a shipper to believe strict compliance will be waived and afterwards evade liability because of omission to comply strictly. Delivery of written notice on the day after arrival was waived. *Summers v. Railroad*, 114 Mo. App., loc. cit. 458, 79 S. W. 481; *Rice v. Railroad*, 63 Mo. 322.

The judgment is affirmed. All concur.

### BROWN v. ST. LOUIS & S. F. RY. CO.

(St. Louis Court of Appeals. Missouri. Feb. 23, 1909.)

#### 1. ACTION (§ 327\*)—CARRIAGE OF LIVE STOCK—TORT OR CONTRACT—DELAY IN TRANSPORTATION OF CATTLE.

A complaint in an action against a carrier of live stock, which alleges that the hogs were carelessly detained for 10 hours at a way station, causing them to be late in reaching their destination, whereby they were damaged in weight and condition, so that plaintiff was forced to sell at a lower price than if they had promptly arrived, states a cause of action in tort against the carrier for breach of the common-law duty in transporting promptly, and not a cause of action for breach of the contract of shipment.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 327.\*]

#### 2. CARRIERS (§ 228\*) — CARRIAGE OF LIVE STOCK—ACTION—EVIDENCE — PRESUMPTIONS — LIMITATION OF LIABILITY.

An action against a carrier for damages due to negligent delay in transporting live stock being in tort for defendant's violation of its common-law duty and not on the contract of shipment, the plaintiff makes out a prima facie case by proving the delay and consequent loss, and the burden is on the defendant to show non-performance of a stipulation in the bill of lading requiring notice of claim for damages as a part of its defense.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.\*]

Appeal from Circuit Court, Stoddard County; Jas. L. Fort, Judge.

Action by Lem Brown against the St. Louis & San Francisco Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Jas. Orchard, for appellant. N. A. Mozley, for respondent.

GOODE, J. The facts of this case are like those of *Clubb v. Railroad* (Mo. App.) 117 S. W. 110, as regards the contention that plaintiff cannot maintain the action because the bill of lading was issued to his agent and in the latter's name. Complaint was filed before a justice of the peace asking damages due to defendant's negligent delay in carrying hogs from the station of Advance, in Stoddard county, Mo., to the National stockyards in East St. Louis, Ill. It is averred the hogs were carelessly detained for 10 hours at a way station, causing them to be late in arriving at destination, whereby they were damaged in weight and condition, and rendered less salable, in consequence of which plaintiff was forced to sell at a lower price than they would have brought if carried through in the usual time. The evidence for plaintiff proved the delay and consequent damage, and in defense the company relied on noncompliance with a clause in the bill of lading providing, as a condition precedent to any claim for damages due to delay, the shipper should give notice in writing of the claim to some general officer, or station agent of the company, or the agent at destination before the stock was mingled with other stock and within one day after arrival, so the claim might be fully investigated; further, that failure fully to comply with this provision should be a bar to the recovery of any claim for damages. The record shows nothing whatever about whether or not notice of claim for damages was given in due time. Defendant's counsel put the bill of lading in evidence, but asked no questions of plaintiff or his witnesses upon the subject of notice, or drew attention to the stipulation about it in the bill of lading by an instruction or in any other way. Nothing appears in the record which would have intimated to the court or the plaintiff that any defense was intended save plaintiff's inability to maintain the action when the bill of lading had been issued to another. But defendant asked the jury to be instructed to return a verdict for defendant. The refusal of this request is assigned for error, and the assignment supported by pointing to plaintiff's omission to prove he gave notice.

If the question of defendant's liability in default of notice may be raised in this way, the point for decision is whether it was incumbent on plaintiff to prove he gave notice in order to make out a prima facie case, and this point must be considered with reference to whether the action is in tort for failure of defendant to comply with its common-law duty to carry the property to destination safely and in a reasonable time, or in assumpsit on the contract of affreightment, and under pertinent Missouri decisions we must hold it was in tort. *Clark v. Railroad*, 64 Mo. 440; *Lupe v. Railroad*, 3 Mo. App.

77; *Hell v. Railroad*, 16 Mo. App. 363. It looks like plaintiff had made out his case when he proved unreasonable and negligent delay occurred in the carriage of the animals, which threw a loss upon him. A standard treatise says the courts are in conflict on the general proposition of where the burden of proof rests regarding whether such notice was given, but that the weight of authority lays the burden on the carrier. 1 *Hutchinson* (M. & D. Ed.) § 447; and see citations in notes. The question might be doubtful in an action on the contract of affreightment, and perhaps then the shipper, in order to recover, would be bound to prove he did whatever the contract made a condition precedent. In an action *ex delicto* like we have here, the plaintiff need not introduce the bill of lading, but may and must prove the carrier violated the law. This being so, we cannot see why he is bound to prove he gave notice, and it seems to be clear he need not, at least unless the stipulation is pleaded or otherwise interposed and in such a manner as to indicate nonobservance if it is relied on as a defense. The *Westminster* (D. C.) 118 Fed. 123; *Nordlinger v. United States*, 127 Fed. 683, 62 C. C. A. 409; *Hatch v. Railroad*, 15 N. D. 490, 107 N. W. 1087. Another passage in *Hutchinson* favors the doctrine that the burden of proof rests according to the form of action (section 1332), and we find that distinction was adopted by this court in *McNichol v. Express Co.*, 12 Mo. App. 401, wherein it was said, in considering where the burden lay to prove performance of a stipulation in a bill of lading for notice, that if an action of tort is brought against the carrier for a breach of its common-law duty in failing to deliver goods placed in its hands for shipment, and the carrier pleads and puts in evidence a special contract containing conditions to be performed by the plaintiff, the burden is on the carrier to show nonperformance of these conditions as part of its special defense; but, where the plaintiff sues the carrier on a special contract, and not on the common-law duty, then, as in other cases of actions on express contracts, the burden is on the plaintiff to prove compliance with all the obligations the contract imposed on him.

The judgment is affirmed. All concur.

**SCHONHOFF v. ST. LOUIS & S. F. RY. CO.**  
(St. Louis Court of Appeals. Missouri. Feb. 23, 1909.)

**CARRIERS (§ 218\*)—LIVE STOCK—LIMITATION OF LIABILITY—NOTICE OF CLAIM.**

Where a shipper of cattle, in consideration of a reduced freight rate, has consented that it shall be a condition precedent to recovery for delay that he shall give written notice of his claim within one day after arrival, and fails to give notice of any kind for two or three weeks after

arrival, and fails to show any excuse therefor or any waiver of the condition, he cannot recover.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 938, 947; Dec. Dig. § 218.\*]

Appeal from Circuit Court, Stoddard County; Jas. L. Fort, Judge.

Action by J. H. Schonhoff against the St. Louis & San Francisco Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

James Orchard, for appellant. N. A. Mozley, for respondent.

GOODE, J. The first point involved in this case regarding the right of plaintiff to sue is controlled by the decision given in *Clubb v. Railroad* (Mo. App.) 117 S. W. 110, on the like facts.

Another defense is failure of plaintiff to give notice of his claim for damages as required by the bill of lading, which made notice a condition precedent to recovery of damages due to delay, and prescribed it should be given in writing to the general officer or nearest station agent of the company, or agent at destination, before the stock was removed from the point of shipment, or at the place of destination before it was mingled with other stock, and one day after arrival of the stock at destination, that the claim might be fully and fairly investigated, saying, further, failure to comply should be a bar to recovery of any damages. No notice of the loss which was occasioned by delay in transit was given until two or three weeks after the arrival of the cattle at destination, nor was any excuse for failure to give notice shown, nor anything tending to prove waiver by the company of compliance with the requirement. There was evidence of a consideration for the clause—a reduced rate of freight. *George v. Railway Co.* (Mo.) 113 S. W. 1099. Considering the lapse of time before notice, either verbal or written, was given, plaintiff must be denied relief. *Rice v. Railroad*, 63 Mo. 314.

The judgment is reversed and the cause remanded. All concur.

**HARRIS v. ST. LOUIS & S. F. RY. CO.**  
(St. Louis Court of Appeals. Missouri. Feb. 23, 1909.)

Appeal from Circuit Court, Stoddard County; Jas. L. Fort, Judge.

Action by J. F. Harris against the St. Louis & San Francisco Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Jas. Orchard, for appellant. N. A. Mozley, for respondent.

GOODE, J. The facts of this case are like those of *Schonhoff v. St. Louis & San Francisco Railway Co.* (Mo. App.) 117 S. W. 113, and for the reasons given in that case the judgment in this one is reversed and the cause remanded. All concur.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
117 S.W.—8

**SHORT v. BUTLER et al.**

(Kansas City Court of Appeals. Missouri.  
March 1, 1909. Rehearing Denied  
March 29, 1909.)

**BANKS AND BANKING (§ 262\*) — NATIONAL BANKS—LIABILITY OF DEPOSITOR—TRANSFER OF FUNDS TO OFFICERS' ACCOUNT TO BE LOANED.**

In absence of evidence that the president and cashier of a national bank were the agents of a depositor in transferring to their account money of the depositor, which they agreed to loan on real estate security, and that the depositor knew at any time that they were acting for her in that capacity, the bank and its receiver are liable to her for her funds so transferred, though it could not lend money on such security.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 1001; Dec. Dig. § 262.\*]

Appeal from Circuit Court, Barton County; B. G. Thurman, Judge.

Action by Mary E. Short against W. J. Butler, receiver of the Bates National Bank, and such bank. From a judgment for plaintiff, defendants appeal. Affirmed.

John A. Eaton and E. H. McVey, for appellants. Silas W. Dooley, for respondent.

**BROADDUS, P. J.** This is a suit by plaintiff to recover the sum of \$1,144.60, alleged to be due her by the Bates National Bank. Before the institution of the suit, the bank became insolvent and was placed in the hands of a receiver, who is made a party defendant.

In the year 1891 plaintiff deposited in the Bates National Bank \$280, and continued to make deposits with the bank until October, 1894, when her accumulated deposits amounted to the sum of \$428, at which time she stated to Mr. Clark, the bank's cashier, that she would like for her money to earn something. The cashier told her that he would lend her money on real estate security so as to make her 8 per cent. To this proposal plaintiff assented. At the time the arrangement was made, Tygard, the president, and Clark, the cashier, of the bank, started a business represented by an account with the bank, entitled "Tygard & Clark, Agents." This was done for the purpose of lending the money of the depositors of the bank, who desired to receive more interest on their deposits than the bank was willing to pay. The money of such depositors was transferred to the credit account of Tygard & Clark. In October 1894, the sum of \$428 of plaintiff on deposit was transferred to the account of Tygard & Clark, Agents, for the purpose of being lent, and from that time was continuously being lent by said agents. Plaintiff at times drew checks upon the bank for funds, which were paid from the semiannual receipts of interest on her loans. She also made additional deposits. This course of business continued

for 12 years. At the time of the bank's failure all the money that had been deposited to the credit of Tygard & Clark had been lent, and their account was found to be overdrawn. During the course of years mentioned, plaintiff had written correspondence at various times with Clark in reference to her money. All the letters from him were signed, "J. C. Clark, Cashier," and were written upon the letter heads of the bank. The plaintiff had no knowledge of the manner in which the accounts of depositors, whose money was to be lent, were kept. She only knew that her money was lent, and that for a time it was earning her 8, and afterwards 6, per cent. When she did not draw her interest when paid, it was credited to her on the books of the bank, and then transferred to the account of Tygard & Clark for the purpose of their lending it.

The following statement was, by agreement, admitted in evidence: "It is admitted that the Bates County National Bank continued in business from 1881 until August, 1894; that at that time it was reorganized into the Bates County Bank, and continued as such as a state corporation until September 4, 1902, at which time it was reorganized under the laws of the United States into the Bates National Bank; that the Bates National Bank was declared insolvent by the Comptroller of the Currency, September 20, 1906, and that the defendant, Wm. J. Butler, was appointed receiver, and is now the duly qualified and acting receiver of the bank." At the time of the bank's failure, the books show that there was to the plaintiff's credit the sum of \$1,111.30, for the purpose of being put out in loans, and to her individual credit a balance of \$33.35. This statement is made from the report of the receiver, which was read in evidence. We infer from this statement that the former sum had been transferred to the account of Tygard & Clark, and therefore could not be withdrawn on the drafts of plaintiff.

The plaintiff recovered in the sum of \$1,144.65, and the defendants appealed.

If we understand defendants' contention, it is that the transfer of the amount to the credit of plaintiff on January 6, 1906, to the credit of Tygard & Clark, to be lent, operated to extinguish the bank's indebtedness to the plaintiff. This construction of the effect of the change of credit is based upon the assumption that Tygard & Clark were the agents of plaintiff, and therefore, the funds being in the hands of her agents, she had no cause of action against the bank. There is no evidence in the record that goes to show that Tygard & Clark were the plaintiff's agents, or that she had knowledge at any time that they were assuming to act for her in that capacity. The bank could not constitute Tygard & Clark plaintiff's agents with-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

out her consent or approval. Her dealings were with the bank alone.

Defendants try to evade liability on the ground that the bank could not act in the capacity of lending money on real estate security. It is true that the bank, while acting under the laws of the United States, had no such authority; but it is also true that, at the time plaintiff made the arrangement with the bank to lend her money on such security, it was acting under the laws of this state, and had such authority, and such authority continued until the reorganization in 1902, when it became for the second time a national bank. Such being the case, the greater part of the interest plaintiff claims was the result of an arrangement made with the bank, lawful in every particular. The argument of defendants is not supported by either law or logic. The bank had the money in its possession, and still has it, for aught the record shows; but it seeks to evade liability on the ground that it has done an unlawful thing, viz., placed it to the credit of Tygard & Clark, Agents, to be lent on real estate security. But, to do defendants justice, we must assume that their argument is based upon the theory that Tygard & Clark were plaintiff's agents. If the *legerdmain* process resorted to did not constitute Tygard & Clark the agents of plaintiff, and if the law prohibited the bank from making them her agents to lend money on real estate security, the transfer on the books to their credit of plaintiff's funds was nugatory.

After all, the case is reduced to the simple proposition of creditor and debtor. The money of plaintiff is in the hands of the bank, and whether it was held by Tygard and Clark as president and cashier, or by Tygard & Clark, Agents, can make no difference. There was no dispute as to the evidence; and, as plaintiff was entitled to an instruction directing a verdict in her favor, it is useless to discuss questions raised by defendants on the giving and refusing of instructions.

**Affirmed. All concur.**

# VAUGHN v. NATIONAL COUNCIL, JUNIOR ORDER UNITED AMERICAN MECHANICS.

(Kansas City Court of Appeals. Missouri.  
March 1, 1906. Rehearing Denied  
March 29, 1906.)

## 1. WORDS AND PHRASES—"LEGAL."

The term "legal" means that which is according to law.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4057.]

## 2. INSURANCE (§ 793\*)—POLICY PAYABLE TO "LEGAL DEPENDENT"—PERSONS TO WHOM PAYABLE.

There being no legal duty imposed by law on insured to support his mother, as is the case with his wife and minor children, she is not a

"legal dependent" within the meaning of a policy payable to his "legal dependent."

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 793.\*]

Appeal from Circuit Court, Jackson County; E. E. Porterfield, Judge.

Action by Mary Vaughn against the National Council, Junior Order United American Mechanics. From a judgment for plaintiff, defendant appeals. Reversed.

Smith W. Bennett and Ulmann & Miller, for appellant. H. S. Julian, for respondent.

**BROADDUS, P. J.** This is a suit by plaintiff to recover on a policy of insurance on the life of Harry R. McGregor. The policy reads as follows: "No. ——. Class B. The National Council, Junior Order United American Mechanics, United States of North America (Incorporated April 10, 1893), will pay to the legal dependent of Harry R. McGregor, within thirty days from the receipt of the proof of his death the sum of five hundred dollars (\$500.00), upon the condition that the said Harry R. McGregor is now and shall be at the time of his death a beneficial member in good standing of a subordinate council of said order, and affiliating with the National Council of said order and also a member in good standing of the funeral benefit department of said National Council, in class B, in accordance with the laws of said National Council, and his state and subordinate council now in force or hereafter adopted prior to said death. In witness whereof, said National Council hereunto affixes its hand and seal this — day of Jan'y, 1903. The National Council, Junior Order United American Mechanics, by Stephen Collins, Secretary and Manager of Funeral Benefit Department. [Beneficiary Degree National Council Jr. O. U. A. M. Incorporated Apr. 10, 1893. Funeral Benefit Department.]"

Plaintiff in her petition alleges: That the said Harry had neither a wife, children, father, nor brothers and sisters at the time of his death on June 27, 1906; that she was his legal dependent; and that all the terms and conditions of the policy have been complied with. In defense defendant states: That it is a fraternal beneficiary society organized under the laws of the state of Pennsylvania, and sets up the scheme of its government, including a series of by-laws which are alleged to have become a part of the contract of insurance. Section 3 of the by-laws provides that, should any council lose its membership with its state council or with the national council, its connection and the connection of each of its members with the funeral benefit department "shall thereby cease"; that the council to which the deceased belonged had lost its membership by reason of its suspension by the national council; and that consequently, under the by-laws, the deceased had also lost his membership. Oth-

er defenses are predicated upon the by-laws, and as the court excluded them on the ground that the defendant, having failed to comply with sections 1408-1411 and 1396, Rev. St. 1899 (Ann. St. 1906, pp. 1111-1114 and 1104), was not entitled to do business in this state as a beneficial society, we will not discuss that phase of the question, but confine our attention to the main question raised by the appeal, viz., that plaintiff under the pleadings and evidence was not entitled to recover.

It will be noticed that the letter of the contract is that defendant "will pay to the legal dependent of Harry R. McGregor," etc. The plaintiff contends that the word "legal," as used, is synonymous with the word "lawful," and, as the deceased's mother was a lawful dependent, she answers the description of the person intended; but we cannot see the force of such reasoning. The term "legal dependent" is used in a more limited sense than that of "lawful dependent," which would include all persons except those who might occupy an unlawful relation to the insured. A description of the latter class of persons is found in *Keener v. Grand Lodge*, 38 Mo. App. 550. There was no legal duty imposed by law on the insured to support his mother, yet at the same time it would have been lawful for him to have done so. A man's legal dependents are his wife and minor children, and the law imposes upon him the duty to support them. The term "legal" means that which is according to law. *Bouvier's Law Dictionary*. A "legal dependent" means a dependent according to law. It does not mean permitted by law, but means created by law. It seems clear to us that plaintiff does not come within the class of persons designated by the contract.

Reversed. All concur.

#### MUFF v. CAMERON et al.

(Kansas City Court of Appeals. Missouri.  
April 2, 1909.)

#### 1. MUNICIPAL CORPORATIONS (§ 330\*)—PUBLIC IMPROVEMENTS—RESTRICTIONS ON COMPETITION.

A requirement that the cement to be used in paving should be "Iola Portland cement, or better," was improper, as excluding competition by other brands of cement equally as good.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 855; Dec. Dig. § 330.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 513\*)—PUBLIC IMPROVEMENTS—TAX BILLS—ACTIONS TO CANCEL—PLEADING—ISSUES.

In a suit by abutting owners to cancel tax bills issued for paving a street, where the petition did not claim that the tax bills were invalid because the specifications of material excluded the use of cement equally as good as that specified, the question of their invalidity on that ground was not raised.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1204; Dec. Dig. § 513.\*]

#### 3. PLEADING (§ 237\*)—AMENDMENTS TO CONFORM TO EVIDENCE.

In a suit to cancel tax bills issued for paving a street, an amendment of the petition to meet the evidence, by inserting allegations that the cement mentioned in the specification of materials by the city council was made by one firm, and that such specification prevented competition, was properly refused, where the evidence did not show that the cement was made by only one party.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 603; Dec. Dig. § 237.\*]

On motion for rehearing. Motion overruled.

For former opinion, see 114 S. W. 1125.

The suit was to cancel certain tax bills issued for paving a street.

ELLISON, J. A motion for rehearing was filed, in which, among other things, it is insisted that the provision in the specifications for "Iola Portland cement, or better," gives a monopoly to one manufacturer, viz., the Iola Portland Cement Company. We think not. The provision does not say that the cement shall be made by any particular manufacturer, and the evidence showed there was more than one at Iola. But, on further consideration, we conclude it is not proper to insert in specifications a provision worded like this, though the intention may be to provide for competition; for the words calling for a certain material, "or better," can be interpreted to exclude all other material equally as good, and that should not be done.

The matter really does not arise in this case, for the reason that it was not included in plaintiff's petition, which set out the various causes why the tax bills should be declared void. *Jaicks v. Merrill*, 201 Mo. 91, 109, 98 S. W. 753. It is true that at the close of the evidence plaintiff asked leave to amend his petition by inserting that the material was "a cement made by one individual or firm, which prevented competition." The amendment was asked, as stated, "for the purpose of meeting the evidence." The request was objected to by defendants and denied by the court. Plaintiff excepted, but failed to assign it in the motion for new trial. Aside from this, the ruling was proper on the ground that the evidence did not show the cement was made by only one party.

The motion is overruled. All concur.

#### SMAIL v. COURT OF HONOR.

(Kansas City Court of Appeals. Missouri.  
March 1, 1909. Rehearing Denied  
March 29, 1909.)

#### 1. INSURANCE (§ 726\*)—BENEFICIAL INSURANCE—CERTIFICATES AS CONTRACTS OF INSURANCE.

Death benefit certificates are contracts of insurance, subject to the rules of construction and interpretation applicable to such contracts.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1870; Dec. Dig. § 726.\*]

\*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

**2. INSURANCE (§ 766\*)—BENEFICIAL INSURANCE—VESTED RIGHTS OF INSURED AND BENEFICIARY.**

During the life of an insured member, his beneficiary has no vested right in the insurance; but he has a property right conferred by his certificate which cannot be destroyed or abridged without his consent clearly and unequivocally expressed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1928; Dec. Dig. § 766.\*]

**3. INSURANCE (§ 719\*)—BENEFICIAL INSURANCE—AMOUNT PAYABLE IN CASE OF SUICIDE—EFFECT OF SUBSEQUENT AMENDMENT OF BY-LAW.**

A death benefit certificate bound the insured to "strictly comply with the constitution, laws and rules thereof now in force, or to be hereafter enacted, amended or adopted," and the application agreed that laws subsequently enacted should become a part of the contract of indemnity and "govern all rights thereunder." *Held*, that the assured did not thereby consent that the society might impair or completely destroy his rights under the contract, but only that such rules and regulations might be adopted as were best suited, in the society's judgment, to effectuate and maintain his vested rights, and hence the certificate was not affected by a subsequent amendment of a by-law reducing the amount otherwise payable in case of suicide committed in delirium resulting from illness.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.\*]

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Suit by Emma A. Small against the Court of Honor. From a judgment for plaintiff, defendant appeals. Affirmed.

W. B. Risse and John Sullivan, for appellant. James W. Garner and I. B. Kimbrell, for respondent.

JOHNSON, J. Plaintiff, the beneficiary of a death benefit certificate issued by defendant, a fraternal beneficiary society, to Marlon B. Small, a member of the society, brought this suit after the death of Small to recover \$1,600, the amount claimed to be due under the terms of the certificate. In its answer defendant tendered \$100 as the full amount of the indemnity recoverable by plaintiff and denied further liability under the contract. A jury was waived, the cause was tried on an agreed statement of facts, and plaintiff was given judgment for the amount demanded in her petition. Defendant appealed.

Defendant is a fraternal beneficiary society incorporated in Illinois and authorized to do business in this state. Small became a member and received a death benefit certificate June 28, 1903. On the 17th day of September, 1904, while in good standing, he committed suicide "in delirium resulting from illness." The certificate provided for the payment of an indemnity of \$2,000 at the death of the member to Emma A. Small, "who bears relation to him of wife," subject to the following condition: "Provided, that if the death of the benefit member named herein occurs before the end of two years after the date of initiation, then in that event, this

certificate, as provided in the constitution of the society, shall be a probational one, and the amount to be paid to the beneficiary or beneficiaries herein named shall be as follows: In the case of death within six months after initiation, \$1,200; in case of death after six months, and before the end of one year, \$1,400; in case of death after one year, and before the end of eighteen months, \$1,600; in case of death after eighteen months, and before the end of two years, \$1,800; and in case of death after two years, the full amount of the certificate; and that said benefit member shall be entitled to disability benefits as provided by the constitution and laws of the society." Small died after he had been a member for more than one year and less than eighteen months. Hence the claim of plaintiff that she is entitled to receive indemnity of \$1,600. Further, the certificate provides: "It is expressly agreed that the application for membership and medical examination upon which this certificate is issued, the constitution, laws and rules of the court of honor, and this certificate shall constitute the complete and only contract between said benefit member and the society; shall be binding upon the beneficiary or beneficiaries named herein, and that said benefit member shall, in every particular, while a benefit member of the society, strictly comply with the constitution, laws and rules thereof, now in force or to be hereafter enacted, amended or adopted." The application for membership made by Small contained this agreement: "I further understand and agree that the laws of the order now in force or hereafter enacted enter into and become a part of every contract of indemnity by and between the members of the order and govern all rights thereunder." At the time the certificate was issued, the by-law in force relating to suicide provided: "This order will not pay the benefits of members who commit suicide whether sane or insane, except it be committed in delirium resulting from illness or while the member is under treatment for insanity or has been judicially declared to be insane," etc. July 1, 1903 (after the issuance of the certificate), the above by-law was amended by the society to read as follows: "If a benefit member commits suicide whether sane or insane, voluntarily or involuntarily, there shall be payable to the beneficiaries entitled thereto five per cent. of the face of the certificate for each year he shall have continuously been a member of the society and after twenty years of continued membership, the certificate shall be paid in full." This by-law being in force at the time of the death of the member, it is contended by defendants that the amount of the indemnity must be determined by its provisions. Hence the tender of \$100, 5 per cent. of the face of the certificate.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The only question presented for our determination is whether the indemnity due plaintiff under the contract is to be measured by the by-law in force at the time Small became a member and received the certificate, or by the by-law subsequently enacted, which attempted to repeal the other. Death benefit certificates issued by fraternal beneficiary societies are contracts of insurance subject to the rules of construction and interpretation applicable to such contracts. During the life of the member insured, the beneficiary named in the certificate has no vested right to the insurance; but the member himself has a property right conferred by his contract with the society which cannot be destroyed or abridged without his consent clearly and unequivocally expressed. We find no such expression in the certificate and application before us. The certificate merely bound the insured to "strictly comply with the constitution, laws and rules thereof now in force, or to be hereafter enacted, amended or adopted." The application contains the agreement of the insured that laws subsequently enacted should become a part of his contract of indemnity and "govern all rights thereunder." Neither of these instruments, properly construed, will support the view that the assured consented in advance that the society might impair or completely destroy his rights under the contract, but only that such rules and regulations might be adopted as were best suited in the judgment of the society to maintain and effectuate the vested rights of the member.

We quote with approval from the opinion of the St. Louis Court of Appeals in *Smith v. Supreme Lodge*, 83 Mo. App. 512: "The fact that it reserved the right, by the assent of the member, to make future laws obligatory upon him, could not justly be deemed to comprehend the right to abate its debt, for that would pro tanto destroy the contract between the parties, and to permit one person to accept the consideration of a debt, and subsequently to deny a material part or all of such debt, would authorize a patent fraud, which the law does not deem to have been within the intent of a mere general agreement for changes in the contract. Such an agreement only contemplates those changes which fairly consist with the full obligation entered into. It does not imply that the obligation itself should be lessened or destroyed at the will or caprice of the obligor, for that would involve injustice to one and ill design on the part of the other of two parties to a contract." To the same effect is what was said by the same court in *Zimmerman v. Supreme Tent*, 122 Mo. App. 591, 99 S. W. 817: "This court, however, has been consistent in holding that the benefit contracted for cannot be destroyed or impaired by a subsequently enacted by-law, though the member agreed in advance that his contract should be governed by subsequently enacted by-laws, on the

ground that a by-law which impairs the indemnity secured is unreasonable and could not have been in the mind of the member when he entered into the agreement. It seems most unreasonable that the member would agree in advance that the very thing he was contracting for, to wit, the benefit to accrue to his beneficiary, might be destroyed or impaired by the opposite party to the contract at any time in the future it might choose to do so, by passing a by-law. It would be extremely difficult, even rash, for the courts to determine in advance, or even to classify, the by-laws an association may pass which shall have a retrospective operation on the certificate of a member, who had agreed that his contract should be governed and controlled by future-enacted by-laws, as well as by existing ones. It is much easier to determine whether or not a particular by-law acts retrospectively on contracts of insurance under such an agreement. According to the decisions in this jurisdiction, such a by-law cannot operate retrospectively, if its effect is to destroy or impair the benefit certificate. This would be accomplished if the by-law enacted a bar to a recovery on the certificate which did not exist at the time the contract was entered into, and the same result would follow from a by-law extending a bar beyond the period of its limitation at the making of the contract. *State v. Miller*, 50 Mo. 199; *Tice v. Fleming*, 173 Mo. 49, 72 S. W. 689, 96 Am. St. Rep. 479; *Chiles v. School District*, 103 Mo. App. 240, 77 S. W. 82. This doctrine is founded on the common-sense idea that the member, in making an agreement that his contract should be controlled by future-enacted by-laws, did not contemplate that the very thing he was contracting for, the benefits to accrue, might at the will of the association be destroyed, or impaired, and that a by-law which impairs the benefits to accrue is an unreasonable one." Another interesting and instructive case of the same tenor is *Lewine v. Supreme Lodge*, 122 Mo. App. 547, 99 S. W. 821.

In these three cases the subject is exhaustively and accurately treated, and we refer to them and the authorities collated for a full expression of our views. We think it would be most harsh and unreasonable to hold that the language employed in the certificate and application gave license to defendant to destroy or impair its obligation under the contract without the consent of the other party to that contract. It is more consonant with reason and justice to say that the authority conferred on defendant did not go beyond that of enacting reasonable laws for the regulation of the conduct of the member and for the better protection and enforcement of the property rights vested in him by the issuance of the certificate.

The learned trial judge took the proper view of the case, and it follows that the judgment must be affirmed. All concur.



**BREIMEYER et al. v. STAR BOTTLING CO.**  
(St. Louis Court of Appeals. Missouri. March 9, 1909. Rehearing Denied March 23, 1909.)

**1. EVIDENCE (§ 41\*)—JUDICIAL NOTICE—DURATION OF COURT TERM.**

Appellate courts take judicial notice of the beginning, but not of the ending, of circuit court terms.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 56; Dec. Dig. § 41.\*]

**2. APPEAL AND ERROR (§ 911\*)—RECORD—EVIDENCE AS TO QUESTION INVOLVED — PRESUMPTIONS.**

The Court of Appeals cannot presume, in the absence of a recital in the record to the contrary, that the circuit court remained in session two days after a given date, so as to show that a motion for new trial was filed during the term at which the decree was entered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 911.\*]

**3. APPEAL AND ERROR (§ 511\*)—BILL OF EXCEPTIONS—IDENTIFICATION—METHOD.**

A bill of exceptions cannot be proven by a recital in itself.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 511.\*]

**4. COURTS (§ 91\*)—ADJUDICATION—DUTY OF APPELLATE COURT.**

The Court of Appeals cannot disregard defects in the record held by the Supreme Court to be fatal, where they are challenged.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 326; Dec. Dig. § 91.\*]

**5. ACTION (§ 50\*)—MISJOINDER OF PARTIES PLAINTIFF—"MULTIFARIOUSNESS."**

Strictly speaking, misjoinder of parties plaintiff is not "multifariousness."

[Ed. Note.—For other cases, see Action, Dec. Dig. § 50.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4616-4618.]

**6. PARTIES (§ 96\*)—PLEADING—DEFECTS—WAIVER.**

Defendant in equity did not waive misjoinder of plaintiffs by pleading over after demurrer, where the objection was also asserted as a defense.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 167-177; Dec. Dig. § 96.\*]

**7. APPEAL AND ERROR (§ 518\*)—RECORD PROPER—WHAT CONSTITUTES.**

A demurrer to the petition is part of the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2346; Dec. Dig. § 518.\*]

**8. DISMISSAL AND NONSUIT (§ 22\*)—ELIMINATION OF PARTY PLAINTIFF—EFFECT.**

The dropping out of one of several plaintiffs in equity before decree did not abate the suit as to all.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Dec. Dig. § 22.\*]

**9. EQUITY (§ 51\*)—JURISDICTION—MULTIPLICITY OF SUITS.**

Equity can prevent a multiplicity of suits.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 167; Dec. Dig. § 51.\*]

**10. PLEADING (§ 214\*)—ADMISSION BY DEMURRER.**

A demurrer to an amended petition admits that its allegations are true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.\*]

Appeal from St. Louis Circuit Court; Robt. M. Foster, Judge.

Action by Henry C. Breimeyer and others against the Star Bottling Company. From a decree for plaintiffs, defendant appeals. Affirmed.

F. A. & L. A. Wind and Sim T. Price, for appellant. Frank K. Ryan, for respondents.

**REYNOLDS, P. J.** Suit in equity by Breimeyer and some 10 other plaintiffs, individuals, corporations, and partnerships, against the defendant to enjoin it from further taking or using plaintiffs' bottles and siphons. The amended petition on which the case was tried alleges that plaintiffs place their beverages upon the market in glass bottles and siphons upon each of which their respective names are distinctly and indelibly blown; that these names have been adopted and used by plaintiffs as trade-names, and are of value to plaintiffs in the sale of their goods; that it is a custom of the trade, and as such well known to defendant, that the branded bottles used by plaintiffs are not sold, but only the contents thereof, and the packages returned to the manufacturer to be by him refilled and again delivered to the dealer.

The petition further alleges that defendant repeatedly, knowingly, willfully, and continuously has gathered up and collected together the bottles and siphons of the various plaintiffs, without their consent and against their remonstrances; that it has filled the same with beverages of its own manufacture, inferior to those made by the respective plaintiffs, and has sold and delivered, and is selling and delivering same to the trade at prices less than those charged by the different plaintiffs, thereby inducing and making it possible for defendant's dealers to sell its inferior beverages in the packages of the plaintiffs to the public as and for the goods of the various plaintiffs.

The petition further alleges that defendant has taken possession of and converted to its own use many thousands of bottles and siphons belonging to the plaintiffs, and has sold large quantities of its goods therein, thereby damaging the respective plaintiffs by depriving them of the use of their property, and also injuring the reputation of the beverages of the respective plaintiffs by selling its own inferior and cheaper goods in the branded packages of plaintiffs.

The petition further alleges that because of the large number of dealers purchasing goods from defendant, and because of the extent of territory covered by plaintiffs and defendant, it would require innumerable actions at law on the part of each plaintiff to recover possession of his bottles, or damages for their wrongful taking and use, and would subject each plaintiff to great expense to conduct

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such lawsuits; that the injury to each plaintiff is and will continue to be irreparable, and that plaintiffs are without adequate remedy at law.

Defendant demurred to the petition on the ground that it was multifarious and improperly united parties plaintiff, who were not jointly interested, and that the petition did not state facts sufficient to constitute a cause of action.

The demurrer was overruled, and defendant answered. After a general denial, the answer avers:

"That, at the time of defendant's organization, defendant acquired for a valuable consideration the established trade and good will of some 14 bottlers of carbonated beverages, including some 100,000 bottles having the names of said bottlers blown in them; that, for the purpose of advertising the fact that defendant was manufacturing the product it was selling, defendant placed on such bottles filled and sold by defendant a label containing the name of defendant; that it was then an established custom to sell beverages with case and bottles and pay a consideration for the return of the cases and bottles; and defendant says that retail dealers frequently buy from two or more manufacturers regularly, and that it may happen that empty bottles of one manufacturer are placed in the case of another manufacturer and accepted by the latter in lieu of one of his own bottles.

"And defendant says that carbonated beverages are frequently sold by the retail dealers to persons who take them to picnic groves and other places away from the dealer's establishment, and become lost to the dealers as well as the manufacturer.

"That plaintiffs charge their customers for said lost bottles directly or indirectly, and by their course of business acquiesce in the abandonment of said bottles and their interest therein.

"And defendant says that for the purpose of obtaining bottles plaintiffs have established a market price for the same, and have established and maintained an agency for the purchase and sale of secondhand bottles of all kinds.

"And, further answering, defendant says that defendant also purchased empty secondhand bottles regardless of the names blown in said bottles, fills such bottles with their products, and for the purpose of designating the manufacturer of the beverage contained therein, and of obtaining the benefit of its reputation as the manufacturer of superior goods, defendant places upon such bottles, so filled and sold, a conspicuous label containing defendant's name and the beverage therein contained, and places such bottles in a case containing as well the name of defendant in prominent letters, all of which is well known to the plaintiffs herein

"And, further answering, defendant says

that the course adopted by defendant in the use of bottles and the sale of beverages, as stated last aforesaid, is almost universally adopted by bottlers of beer and carbonated beverages, and the practice of buying or having made bottles with the names of manufacturers blown in the same is being abandoned.

"Further answering, defendant says that each of the plaintiffs has been in habit of accepting from his customers empty bottles not containing their names in lieu of bottles delivered with contents to such customers, and disposing of such bottles to an association known as the 'Missouri Bottlers' Association,' and have not offered to exchange bottles with defendant, but have refused to do so; that by the aforesaid conduct of plaintiffs they have lost title to their own bottles, and have made it possible and necessary for defendant to use bottles exchanged in manner aforesaid, and that, but for the said misconduct of plaintiffs, defendant would have no occasion to use any bottles bearing the brands of the plaintiffs respectively.

"Further answering, defendant says that the interest of the several plaintiffs is separate and distinct from each other; that the plaintiffs have no interest in common, and that there is a misjoinder of the plaintiffs in this action.

"And, for another and further defense, defendant says that the plaintiffs have united together in the name of the 'Missouri Bottlers' Association,' for the purpose of fixing and maintaining prices for carbonated beverages in the city of St. Louis and vicinity, and preventing competition in the sale of such beverages, and that by reason of such fact the plaintiffs should not be permitted to maintain this action."

To this answer there was a general denial by way of reply, and a trial being had, the court, on the 18th of July, 1907, found the issues for plaintiffs, and entered its decree enjoining the defendant, its officers, agents, and servants, "from taking possession of, collecting, gathering up, or buying from secondhand or from junk dealers, and from refilling and from selling or delivering to the trade or public, any bottles or siphons" of the several plaintiffs, describing the bottles and siphons by their marks and letterings, and adjudging the costs of the proceedings against the defendant. The abstract then proceeds as follows: "July 20, 1907, defendant filed motion for new trial as follows:" (The motion for new trial is then set out in the abstract of the record proper here verbatim.) The abstract then continues: "November 14, 1907, motion for new trial was overruled. November 29, 1907, defendant deposited \$10 docket fee, filed application for appeal and was granted thirty days to file bill of exceptions and ten days to give appeal bond, and appeal was allowed to St. Louis Court of Appeals. December 9, 1907, defendant was

granted five days additional to file bond. December 12, 1907, appeal bond was filed and approved. December 26, 1907, defendant was granted thirty days additional time to file bill of exceptions. January 22, 1908, defendant was granted thirty days additional time to file bill of exceptions. February 20, 1908, defendant was granted thirty days additional time to file bill of exceptions. March 20, 1908, defendant was granted thirty days additional time to file bill of exceptions. March 31, 1908, defendant filed bill of exceptions, which was signed and approved." The abstract then proceeds: "At the trial the following proceedings were had." Thereupon, extending over 322 pages, is what purports to be the testimony in the case in full. At the end of this is the recital: "The above and foregoing was all the testimony offered in the case." The abstract then concludes: "And afterwards, on, to wit, July 18, 1907, the court made and entered a finding and decree for plaintiffs, perpetually enjoining defendant from using or refilling the bottles or siphons of the plaintiffs, having their names, initials, or trade-marks therein or thereon. And on the twentieth day of July, 1907, and within four days after rendering said decree, the defendant filed its motion for a new trial, as follows." The motion for new trial is then set out verbatim as it had previously appeared in the abstract of the record proper, after which appears this in the abstract: "Which said motion the court overruled on the fourteenth day of November, 1907, to which ruling and order of the court the defendant then and there duly excepted at the time. And on, to wit, November 29, 1907, defendant was granted 30 days from date to file bill of exceptions and 10 days to file bond, and defendant deposited \$10 for docket fee and filed his affidavit for an appeal, and an appeal was allowed to St. Louis Court of Appeals. And on December 9, 1907, defendant was granted 5 days additional to file bond. And on December 12, 1907, defendant filed appeal bond, which was duly approved. And on December 26, 1907, defendant was granted 30 days additional time to file bill of exceptions. And on January 22, 1908, defendant was granted 30 days additional time to file bill of exceptions. And on February 20, 1908, defendant was granted 30 days additional time to file bill of exceptions. And on March 20, 1908, defendant was granted 10 days additional time to file bill of exceptions. And that the foregoing matters and things, ruling and exceptions may be made a part of the record, defendant tenders this, his bill of exceptions, and prays that the same may be signed and sealed as such, which is accordingly done, this thirty-first day of March, 1908. Robt. M. Foster, Judge Div. No. 9, Circuit Court, St. Louis, Mo. [Seal.]"

Appended to this a lot of exhibits are copied; then follows the index, and following the index are a lot of labels, 12 of them, apparently labels used by defendant, pasted on-

to the back or last pages of the compilation, without anything whatever appearing to show whose exhibits they are, or that they were included in or a part of the bill of exceptions, save that they are marked "Exhibits" and numbered, or had anything whatever to do with the case, or without anything to account for their presence in the abstract, nor do they appear to be called for in the bill of exceptions.

Plaintiffs insist that there is nothing before this court except the record proper, and cite cases in support of this contention, thereby invoking the benefit of the point made. We are therefore bound to notice it. It will be observed that while it appears that the decree was entered on the 18th of July, 1907, and the motion for the new trial filed on the 20th of July, 1907, there is not a suggestion or a word to show that the term of the court at which the decree was entered on the 18th of July continued until the 20th of July. While the appellate courts can take judicial knowledge of the beginning of a term, they cannot and do not take judicial notice of its ending. *Harding v. Bedoll*, 202 Mo. 625, loc. cit. 632, 100 S. W. 638. There is no presumption, in the absence of a recital from the record to the contrary, that the court was in session two days after the 18th of July, so that we are not allowed to presume that the motion for a new trial was filed during the term of court at which the decree was entered. *Harding v. Bedoll*, supra. There is not a word in this abstract to show that even what is set out as the testimony and proceedings at the trial is the bill of exceptions. *Reno v. Fitz Jarrell*, 163 Mo. 411, 63 S. W. 808, and *McCord Rubber Co. v. St. Joe Water Co.*, 181 Mo. 678, loc. cit. 690, 81 S. W. 189. We have stated it literally and exactly as it appears in the abstract, and there is no caption, no filing, no indorsement, nothing whatever, to identify the mass of what appears to be the testimony with any bill of exceptions alleged to have been filed in the case. It is true that it winds up with the statement, over the judge's signature, that "defendant tenders this, his bill of exceptions, and prays that the same may be signed and sealed as such, which is accordingly done, this thirty-first day of March, 1908. Robt. M. Foster, Judge Div. No. 9, Circuit Court, St. Louis, Mo. [Seal.]" But it has been held over and over by our supreme and appellate courts that the bill of exceptions does not prove itself. See, *passim*, *Hill v. Butler County*, 195 Mo. 511, loc. cit. 514, 94 S. W. 518; *Blick v. Williams*, 181 Mo. 526, 80 S. W. 885. So that there is no identification of anything as a bill of exceptions filed in the case. Furthermore, this abstract contains no recital whatever which by any possible intimation informs us of the term of court at which this case was tried. We are exceedingly reluctant to dispose of cases on what look like naked technicalities, not leading to the prejudice of the parties, but

we cannot disregard defects held by decision of the Supreme Court of this state to be fatal. When such defects are called to our attention and insisted upon, we have no option whatever in this matter. It is said by our Supreme Court, in *Harding v. Bedoll*, 202 Mo., at page 629, 100 S. W., at page 639: "The question of what is a proper abstract of the record is becoming so frequent of late that an excuse is furnished for this opinion, taking up in detail the delinquencies charged to this abstract. The rules of the court were established for the speedy and orderly disposition of its work. They are reasonable, and, if examined by counsel, can readily be followed. The constructions of the rules have been very liberal, but should not be so liberal as to annul the rules themselves. Nor can the court give a strained construction in one case and a more liberal one in another. The application of the rules, as made by the courts, is without respect to the case or the person. In some instances neglect or oversight of counsel may work a hardship upon clients, but this case can furnish no reason for the construction of the rules such as should practically annul them. These rules apply to all persons, all cases, and all representatives of clients alike, and must be construed in one case just as they have been or will be in another, irrespective of the case, the parties, or their counsel."

An example of the rigidity with which the rules announced by our appellate courts in construing the statutes as to the requirements of abstracts is furnished in a recent case, that of *Wilbrandt v. Laclede Gaslight Co.* (opinion filed Jan. 12, 1909) 115 S. W. 497.

All we can examine, therefore, in this case is the sufficiency of the amended petition, and whether or not the decree in the case is supported by the averments in that petition. The only point of attack upon the petition itself which we think important is that there is an improper joinder of parties plaintiff. Although often referred to as multifariousness, strictly speaking, this is not multifariousness. It is urged against the consideration of this objection that, by pleading over, defendant had waived this defect, as, its demurrer having been overruled, it answered. We do not think this point is well taken. Multifariousness is a ground of demurrer; misjoinder of parties plaintiff, when appearing on the face of the petition is; so is non-joinder. Section 598, Rev. St. 1899 (Ann. St. 1906, p. 624). Moreover, defendant by its answer distinctly set up misjoinder as a defense. So that, whatever the general rule may be on a strict application of the rules of pleading, we are not disposed, under the pleadings in this case, to hold too strictly to the application of the rule, and by determining that by pleading over, after having demurred unsuccessfully, the defendant is cut off from presenting this view of the case. Giving the defendant the benefit of having,

by his demurrer, which is a part of the record proper, and before us even without a bill of exceptions, as well as by its answer, made and saved the point of the misjoinder of parties plaintiff, we will consider that. Our statute (section 542, Rev. St. 1899 [Ann. St. 1906, p. 581]) provides that all persons having an actual interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, except as otherwise provided by law. While the point of misjoinder was not distinctly before the court in the case of *Sylvester Coal Co. v. City of St. Louis*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566, the report of the case shows that the suit was by several, three or more, different parties, to restrain the enforcement of an ordinance that affected all, but making each of them subject to a distinct and separate penalty for its violation. No question of misjoinder was raised or passed upon, but the court must have proceeded upon the theory that it was not improper in a case of that kind. In that case a demurrer had been interposed, and it was open to the court to have raised the question of misjoinder itself, if it had chosen to do so.

In *Perkins v. Baer*, 95 Mo. App. 70, loc. cit. 77, 68 S. W. 939, objection was made on the ground of multifariousness and misjoinder of parties defendant. The Kansas City Court of Appeals, deciding the case, holds that it is clear from the authorities that the Supreme Court of our state has adopted the rule that, where a bill in equity shows a single object and seeks to enforce one general right against all the defendants, it is not subject to the charge of multifariousness, and that this is especially so when all the defendants have no conflicting claims among themselves and where one defense is common to all. This decision fits the case at bar very well, with the exception that it was a case in which the common right was in all of the defendants and against a single plaintiff, while here the common right is in all the plaintiffs and against a single defendant.

The very old and accepted case of *Newmeyer v. Railroad*, 52 Mo. 81, 14 Am. Rep. 394, is a case in which the right of numerous taxpayers to unite to prevent a common injury was sustained, it being held that having a common right, by virtue of their interest as taxpayers, to complain of a wrong common to all of them, although different in degree as to each, was such a joint interest as entitled them to unite in one action.

In *Bobb v. Bobb*, 76 Mo. 419, loc. cit. 423, Judge Sherwood, referring to *Story's Equity Pleadings* and to *Mitford's Equity Pleadings*, held that, where the fraud charged equally affects all the plaintiffs, they may jointly sue; that where one general right is claimed by the bill, although the parties may have separate and distinct rights, yet there is no misjoinder of parties plaintiff or defendant in such a case.

So we assume that the right of several par-

ties, having a distinct interest in a common injury—that is, in an injury common to all—is recognized by our courts. The accepted text-writers recognize this same right. Thus, in his most clear and satisfactory treatise on Code Pleadings, particularly under the Code of this state, the late Judge Bliss states the statutory rule to be that, where two or more persons are jointly entitled or have a joint legal interest in the property affected, they must, in general, join in the action. Bliss, Code Pleading (3d Ed.) § 24. Remarking that this statutory rule is derived from the equity practice, he says (section 62) that while the statutory provisions in regard to the joinder of plaintiffs are (1) permissive and (2) imperative—that is to say, the first being that all persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs except as otherwise provided, and the second being that parties who are united in interest must be joined as plaintiffs or defendants—he observes that these two provisions have long been familiar to equity pleaders, and that, though drawn from equity practice, it must not hence be inferred that they apply only to actions for equitable relief, the chief changes made by the Code consisting in applying to pleadings in all actions rules otherwise recognized in courts of equity alone. After quoting the provision of the statute, that all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, except, etc., Judge Bliss, at section 73, says that there is a distinction between the rule requiring persons united in interest to be joined and the statutory rule just given, as the latter does not contemplate a joint interest nor is the union made imperative. "In the cases where it has been sanctioned, the interest is called a common one—that is, certain persons are interested in that concerning which the wrong has been done, and will be all benefited by the relief which is sought; they have a common interest, and may join in seeking the relief. Thus the owners of distinct parcels of property may be interested in being relieved from a nuisance; \* \* \* and tenants in common, though holding in severalty, may be interested in preventing a trespass. In either case they may unite in an action, notwithstanding the technical common-law rule confining the union to those having a joint interest. The rule, being one which has always been recognized in equity practice, is well illustrated by equity cases." The learned author in support of his view cites many cases where the rule has been applied. He further says (section 76): "All who would unite must be interested in the subject of the action and in the relief. It may not be possible to define with absolute precision the phrase 'subject of the action,' which is used in different parts of the Code, but we may say, in general, that it is the matter or thing concerning which the action is brought; and

though one may be interested in that matter, unless he is also interested in the relief which is sought by another, he is not permitted to unite with him." He then gives by way of illustration the case of two or three men, the owners of different mills propelled by water, interested in preventing an obstruction that would interfere with the downflow of the water. They may unite to restrain or abate it as a nuisance, while they cannot unite in an action for damages, for, as to the injury suffered by each, there is no unity of interest.

Story, in his work on Equity Pleadings (10th Ed.), §§ 120, 121, and 285, takes the same view. Thus, in section 120, he affirms the right of several and different parties to join as parties plaintiff, in cases where the parties are very numerous, and holds that, "although they have, or may have, separate and distinct interests, yet it is impracticable to bring them all before the court, and, on this account, they are dispensed with. In this class of cases, there is usually a privity of interest between the parties; but such a privity is not the foundation of the exception. On the contrary, it is sustained in some cases where no such privity exists. However, in all of them there always exists a common interest, or a common right, which the bill seeks to establish or enforce, or a general claim or privilege which it seeks to establish, or to narrow, or to take away." In section 121 he illustrates it by a case brought by some of the tenants of the lord of the manor, on behalf of themselves and all other tenants, against the lord, to establish some right; such, for instance, as a bill with regard to a sluice to a mill, or a right of common, or a right to cut turf. He is treating in these cases, it is true, of the right of some of the parties to bring the action when all of the parties had not united in it, and, while this is not very pertinent to the question now discussed, it is applicable to a proposition made by the learned counsel for the defendant in this case, who claims that, by reason of the dropping out of some of the plaintiffs after the institution of the suit before it culminated in a decree, therefore the action had abated as to all. As will be noticed, Judge Story disposes of that contrary to this contention. In section 285 he gives, as another exception to the general doctrine against multifariousness and misjoinder, those cases in which the parties (plaintiffs or defendants) "have one common interest touching the matter of the bill, although they claim under distinct titles, and have independent interests," and, citing authorities and giving illustrations in support of this, he announced practically the same doctrine as that laid down by Judge Bliss.

The prevention of a multiplicity of suits and actions is a well-known ground of equity jurisdiction. That is one of the grounds urged and set out in the amended petition in this case, so that upon that ground also we might sustain the action. Pomeroy, in his

work on Equity Jurisprudence, vol. 1 (3d Ed.), after calling attention to the fact that jurisdiction in equity, based upon the prevention of a multiplicity of suits, was always sustained, says that the jurisdiction has long been extended to other classes of cases, cases which are not, "technically, 'bills of peace,' but 'are analogous to' or 'within the principle of' such bills." He says (section 269) that, "Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title,' nor 'community of right,' or of 'interest in the subject-matter,' among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body."

Applying these principles to the case in hand, and referring back to the amended petition, which we have heretofore set out, substantially, it will be noticed that here is a case of a common interest in all of the plaintiffs against the defendant for an alleged wrong committed by the defendant against all of the plaintiffs. That is to say, the charge is substantially that the defendant gathers together the bottles and siphons of these different several plaintiffs indis-

criminately, and, using them as its own, refills them with its product and puts this product upon the market at a lower price than it is possible for the plaintiffs to do by reason of the fact that the defendant, as is alleged, is able to buy up these bottles or get possession of them at a very low figure. Unfair competition with all the plaintiffs is charged, a competition leveled at all of them in an unfair manner, by using the several plaintiffs' containers in selling to the public goods not the manufacture of plaintiffs, and of inferior quality. Assuming that the demurrer is to be considered as offered, or disregarding that and treating the attack upon the amended petition here made on the same grounds as those in the demurrer, all the allegations of the pleader set out in his amended petition must be taken as true, in as far as they are well pleaded. This amended petition, therefore, sets out a common interest of each of the plaintiffs in the prevention of the same wrong by the defendant against each and all the plaintiffs. In effect, it sets out a case of an injury by the defendant against each and all of the plaintiffs indiscriminately, and the relief sought is common to all of these plaintiffs. That relief is to prevent this defendant from carrying on this business, on its part, in this manner and by these instruments of trade. On principle, as announced by the authorities which we have cited above, there is no misjoinder, and the case presented a wrong, the redress of which is peculiarly within the power of a court of equity. The decree in the case is no broader than the allegations of the amended petition. As we have said in the state of the case as presented in the abstract, we must refuse to go into an examination of the evidence.

Decree affirmed. All concur.

## In re T. S. HEATH &amp; SON.

## HEATH v. TUCKER.

(Kansas City Court of Appeals. Missouri.  
March 1, 1909. Rehearing Denied  
March 29, 1909.)

**1. VENUE (§ 36\*)—CHANGE OF VENUE—ASSIGNMENTS FOR BENEFIT OF CREDITORS—"CIVIL SUIT."**

Under Rev. St. 1899, § 818 (Ann. St. 1906, p. 789), providing that a change of venue may be awarded in any civil suit to any court of record, the term "civil suit" refers to legal proceedings by which the rights and remedies of private individuals are enforced or protected, and authorizes a change of venue in proceedings under an assignment for benefit of creditors.

[Ed. Note.—For other cases, see *Venus*, Dec. Dig. § 36.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1183-1193; vol. 8, p. 7603.]

**2. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 395\*)—ACCOUNTING—SCOPE OF INQUIRY ON HEARING.**

On the hearing of exceptions to the final report of an assignee for the benefit of creditors, the validity of a transfer by the assignor to the assignee of the former's equity in the property cannot be attacked, as only such matters as pertain to the administration of the estate in the hands of an assignee can be investigated.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Dec. Dig. § 395.\*]

**3. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 385\*)—ACCOUNTING—CREDITS—AMOUNT PAID ON CLAIMS.**

Where an assignee for the benefit of creditors purchased claims against the assignor at a discount, he should only be allowed credit for the amount that he actually paid for the claims.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Dec. Dig. § 385.\*]

**4. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 393\*)—ACCOUNTING—COMPENSATION.**

Where an assignee for the benefit of creditors has purchased the assignor's equity in the estate, he should not be allowed compensation for administering the estate.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Dec. Dig. § 393.\*]

Appeal from Circuit Court, St. Clair County; C. A. Denton, Judge.

Exceptions by T. S. Heath to the final report of B. F. Tucker, assignee, in the matter of the assignment of T. S. Heath & Son, were sustained, and B. F. Tucker appeals. Reversed and remanded.

J. W. Montgomery and Rechow & Pufahl, for appellant. W. S. Jackson, W. A. Dollardhide, and Henry P. Lay, for respondent.

**BROADDUS, P. J.** This appeal grows out of a judgment of the court sustaining certain exceptions to the final report of the appellant as assignee in an assignment proceeding under the statute. T. S. Heath, a merchant doing business at Weaubleau, Hickory county, in February, 1907, conveyed his property to B. F. Tucker as assignee for the benefit of

creditors. The assignee in due time filed his final report as such assignee, to which Heath filed exceptions. Heath applied for a change of venue, which was sustained, and the venue of the cause was changed to St. Clair county.

The facts which gave rise to the controversy, stated in a general way, are as follows: The assignor, Heath, became worried about his business affairs, and, while suffering under much distress of mind, conceived the intention of making some disposition of his property, which he finally consummated by conveying it to the appellant, Tucker, for the benefit of his creditors. The property, consisting largely of merchandise, at the invoice price amounted to \$14,000, and was appraised at the value of \$9,629.96, a value largely in excess of the assignor's indebtedness. After making the assignment of his property, and while still laboring under a state of great mental perturbation, the assignor formed the resolution of selling his equity in the property so conveyed and proposed to sell it to Tucker, the assignee. Finally, they entered into an agreement, by the terms of which Tucker agreed to pay him \$2,200 therefor, which agreement was carried out by Tucker paying \$500 in cash and executing his note for \$1,700 for the balance, and Heath conveying his equity to Tucker. Tucker continued the administration of the estate, in the course of which, in connection with another person, he bought up some of the claims for which it was liable at a discount. The entire indebtedness amounted to \$5,249.80. Heath, the assignor, filed various exceptions to the final report of the assignee, which, upon hearing, the court found and adjudged substantially as follows: That the transfer of the assignor's equity in the estate to the assignee was procured by the latter while the mind of the former was in a greatly disturbed state when he was in no condition to bargain with the assignee on fair and equal terms, was obtained unfairly, and should be set aside; "that in the management of the estate the assignee wholly disregarded his duties and the interests of the assignor, and had an eye wholly to his own interests; that he failed to comply with the law in many respects in the conduct of said estate, and that his expenses were for the benefit of the assignee, and not the estate, and that no allowance should be made for such expenses or for the services of the assignor; that the reasonable value of the estate was \$9,629.96"; that no claims have been allowed as required by law, but the assignee has actually paid up debts in the aggregate amounting to the sum of \$5,162.40, upon which the assignee and his partner received discount amounting to \$782.75; that, although the claims so paid were not legally allowed, they were valid obligations against the estate, for which the as-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

signee should receive credit less the said discounts in the sum of \$4,379.68; that the assignee should receive credit for the \$500 paid to the assignor and the \$1,700 now outstanding; that the assignee is entitled to no further credits, and should account to the assignor for the sum of \$3,050.28. It was adjudged that the transfer of the assignor's equity to the assignee be held for naught, and the assignor recover as against the assignee the sum of \$3,050.28, and that execution issue therefor. The assignee appealed.

The appellant attacks the judgment upon the ground, first, that the court had no jurisdiction, as the change of venue to St. Clair county was not authorized by law. We have examined the authorities cited to support this view of the case, but are not persuaded of its correctness. Section 818, Rev. St. 1899 (Ann. St. 1906, p. 789), provides in what cases a change of venue may be awarded, viz.: "A change of venue may be awarded in any civil suit to any court of record for any of the following causes," etc. In *State ex rel. Kochtitzky v. Riley*, 203 Mo. 175, 101 S. W. 567, 12 L. R. A. (N. S.) 900, it is held: "The phrases 'civil case' and 'civil suit' refer to the legal proceedings by which the rights and remedies of private individuals are enforced or protected," etc. As there can be no doubt but that the case in hand comes within the foregoing definition, the objection of appellant in that respect is not valid.

However, the judgment must be reversed upon another ground—want of jurisdiction in the court to set aside said transfer. The proceedings in this case are purely statutory,

and not equitable. On exceptions to the final report of the assignee, only such matters as pertained to his administration of the estate in his hands were matters for investigation. The validity of the transfer could only be attacked for fraud in its procurement in a proceeding instituted for that purpose. There is no pretext that the assignor was of unsound mind and incapable of contracting, but, owing to his mental perturbation, the assignee took advantage of his condition and fraudulently obtained the transfer. The Supreme Court has drawn a distinction between this class of cases and those where the fraud may be shown as a matter of law. *Hancock v. Blackwell*, 139 Mo., loc. cit. 453, 41 S. W. 205. We are of the opinion that the judgment of the court was right in so far as it allowed the assignee on the claims only the amount he paid for them on discount. The assignee, as he continued the administration of the estate after the assignment to him, should be required to follow the directions of the statute. And, when his final settlement is in conformity therewith, it should be approved. And he should not be allowed any compensation for administering his own estate, for it is to be so treated as long as the said transfer of plaintiff's equity therein stands unimpeached and is not set aside. No rights of the assignor would thereby be prejudiced in the event he seeks and obtains relief in a court of equity.

The cause is reversed and remanded, with directions to the assignee to make final settlement in accordance with the views herein expressed. All concur.



## JONES v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1908. Rehearing Denied March 17, 1909.)

**1. BURGLARY (§ 21\*)—SUFFICIENCY OF INDICTMENT—POSSESSION OF BUILDING AS PRIVATE RESIDENCE.**

An indictment for burglarizing a private residence, which alleged that accused in the nighttime a certain house, then and there actually used, occupied, and controlled by B. as the private residence of his family, feloniously, etc., sufficiently alleged that the house, at the time it was burglarized, was actually used and occupied by B. as the private residence of his family.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 62; Dec. Dig. § 21.\*]

**2. CRIMINAL LAW (§ 881\*)—VERDICT.**

Under Code Cr. Proc. 1895, art. 743, it is not necessary to name the offense in the verdict; and where, on an indictment charging ordinary burglary and burglary of a private residence in separate counts, the only issue submitted was the burglary of a private residence, a verdict, "We find the defendant guilty as charged," was responsive to the court's charge and the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2089-2093; Dec. Dig. § 881.\*]

**3. JURY (§ 66\*)—DRAWING JURY—DUTY OF CLERK OF DISTRICT COURT.**

Under Acts 30th Leg. 1907, p. 269, c. 139, providing for the selection of juries in counties having a population of more than 20,000, the clerk of the district court, and not the clerk of the criminal court, is the proper person to assist in drawing the jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 284; Dec. Dig. § 66.\*]

Appeal from District Court, Galveston County; J. K. P. Gillaspie, Judge.

Zack Jones was convicted of burglary, and appeals. Affirmed.

See, also, 96 S. W. 44.

R. H. & Alice S. Tiernan, for appellant.  
F. J. McCoord, Asst. Atty. Gen., for the State.

**RAMSEY, J.** Appellant was convicted of burglary, from which he has appealed to this court, and asks this court to revise certain errors that he claims were committed in the trial in the court below.

The indictment has two counts—one charging an ordinary burglary, while the second count charges a burglary of a private residence. The case was submitted to the jury on the second count; that is, the burglary of a private residence. Defendant in the court below made a motion to quash the second count in the indictment, and claims that the same is defective on the ground that it fails to allege the actual use and occupancy of the house by R. Bernadoni, but that it was used and occupied by his family, and that it fails to set out the names of his family. The indictment in this case alleges "that the defendant, in the county of Galveston, in the state of Texas, with force and arms then and there in the nighttime a certain house there situate, then and there actually used,

occupied, and controlled by R. Bernadoni as the private residence of his family, feloniously, fraudulently, and burglariously," etc. Now the point is made that the house was not used by Bernadoni, nor occupied by him, but by his family, and therefore the indictment is fatally defective. In the former appeal of this case, which will be found in 50 Tex. Cr. R. 100, 96 S. W. 44, the question of the sufficiency of the indictment came before this court for revision, and the court held that the allegations as to being a private residence were not sufficient; the charging part of the indictment being as follows: "With force and arms then and there in the nighttime a certain house there situate, then and there occupied and controlled by R. R. Bernadoni, the same then and there being a private residence." The court held that the indictment was insufficient, that the words "a private residence" were not sufficient, and that the indictment, in order to be complete, should have alleged that said building was occupied and actually used at the time of the offense by prosecutor as a place of residence. Now, we think that the indictment in this case meets the suggestion of this court as pointed out in the Jones Case, supra. The indictment alleges that the house at the time it was burglarized was actually used and occupied by the prosecutor as the private residence of his family. We think the bill of indictment is sufficient.

The next objection is that the verdict of the jury is a finding of a daytime burglary, and is contrary to the charge of the court and the evidence in the case, and that the verdict should have read, "We, the jury, find the defendant guilty of the burglary of a private residence, and assess his punishment," etc., as the burglary of a private residence is a distinct offense. While it is true that the burglary of a private residence is a separate offense from an ordinary burglary, yet nevertheless it is a burglary, and this was the only issue that was submitted to the jury, and their verdict was responsive to the charge of the court, and was a bar to any other prosecution. It will be noted, further, that the verdict of the jury in this case is that we find the defendant guilty as charged and assess his punishment. This was responsive to the charge of the court and the bill of indictment. Article 743, Code Cr. Proc. 1895, says: "A verdict is a declaration by a jury of their decision of the issue submitted to them in the case, and must be in writing and must be concurred in by each member of the jury." In *Henderson v. State*, 5 Tex. App. 134, this court held it is not necessary to name the offense in the verdict. Guilty as charged in the indictment is sufficient. We therefore hold that the verdict as returned by the jury in this case was in proper form and is not subject to the criticism made by appellant.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The remaining question in the case is that the clerk of the district court, and not the clerk of the criminal court assisted in drawing the jury, under the provisions of Acts 30th Leg. 1907, p. 269, c. 139, providing for the selection of juries in counties having a population of more than 20,000. This question has been before this court, and we have held adversely to appellant's contention, and that under the provisions of said act the district clerk, and not the clerk of the criminal court, is the proper person to draw the jury. *Lee v. State*, 113 S. W. 301.

The proof establishes the guilt beyond question; and, finding no error in the record, the judgment is affirmed.

### CRAIGHEAD v. STATE.

(Court of Criminal Appeals of Texas. Feb. 24, 1909.)

#### 1. MALICIOUS MISCHIEF (§ 4\*)—INFORMATION—SUFFICIENCY.

An information charging that accused unlawfully and willfully injured and destroyed "certain personal property, to wit, did cut, injure, and pull up posts that were to be used as a phone line," the same belonging to specified persons, "without the consent of any of the parties interested in said property, the property injured, cut, and destroyed by" accused being under the value of \$50, is sufficient.

[Ed. Note.—For other cases, see *Malicious Mischief*, Cent. Dig. § 7; Dec. Dig. § 4.\*]

#### 2. MALICIOUS MISCHIEF (§ 8\*)—EVIDENCE—ADMISSIBILITY.

Where one accused of willfully destroying telephone poles claimed that he believed them to be on his land, instead of in an abutting road, and contended that the fence on the south side of the road was on his land, the state could show that he previously told witness that the fence on the north side of the road encroached four feet upon his land, and that, pursuant to accused's instructions, witness placed the poles six feet from the fence.

[Ed. Note.—For other cases, see *Malicious Mischief*, Cent. Dig. § 14; Dec. Dig. § 8.\*]

#### 3. MALICIOUS MISCHIEF (§ 8\*)—EVIDENCE—ADMISSIBILITY.

In a trial for willfully destroying telephone posts, witness could testify that the posts belonged to him and the other prosecuting witnesses.

[Ed. Note.—For other cases, see *Malicious Mischief*, Cent. Dig. § 14; Dec. Dig. § 8.\*]

#### 4. HIGHWAYS (§ 47\*)—"FIRST-CLASS ROADS."

A "first-class road" is not less than 40 nor more than 60 feet wide.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 147; Dec. Dig. § 47.\*]

#### 5. MALICIOUS MISCHIEF (§ 9\*)—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction for willfully injuring telephone posts in a public road.

[Ed. Note.—For other cases, see *Malicious Mischief*, Cent. Dig. § 15; Dec. Dig. § 9.\*]

Appeal from Stephens County Court; A. J. Power, Judge.

W. A. Craighead was convicted of willfully injuring another's personality, and he appeals. Affirmed.

W. P. Sebastian, for appellant. Stubblefield & Patterson and F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was prosecuted for willfully injuring the personal property of another, and his punishment assessed at a fine of \$100.

The charging part of the information is as follows: "Did unlawfully and willfully injure and destroy certain personal property, to wit, did cut, injure, and pull up posts that were to be used as a phone line, the same being the personal property of and belonging to M. Downs, T. J. Emanuel, John Taylor, J. N. Yocum, and without the consent of any of the parties interested in said property. The property injured, cut, and destroyed by the said W. A. Craighead is under the value of \$50.00." This information is sufficient. See *Adams v. State*, 47 Tex. Cr. R. 35, 81 S. W. 963; *Price v. State*, 49 Tex. Cr. R. 343, 92 S. W. 811; and *Todd v. State*, 39 Tex. Cr. R. 232, 45 S. W. 506.

The facts in this case are in substance, as follows: M. Downs, T. J. Emanuel, John Taylor, and J. N. Yocum were desirous of constructing a local telephone line, on the lower Breckenridge and Albany public road, and went before the commissioners' court of Stephens county and secured the right or permit to construct said telephone line along the said road. The defendant objected to the construction of the said telephone line, and went before said commissioners' court and protested against the construction of the said telephone line along the said public road. Downs, Taylor, Emanuel, and Yocum began the construction of the said line along the said public road, and on the south side of the said road, and when they got near the land of the defendant the defendant objected to the construction of the said telephone line, and in order to prevent the construction of the said proposed telephone line the defendant cut some of the posts and pulled up others, and injured the proposed line. This the defendant admitted at the time, or soon after he did it, and also admitted the same upon the trial of the case; but the defense which he offered was that the said posts were placed upon his own land, and contended that he had a right to remove the said posts, because they were upon his own land. The defendant testified that he thought that the posts which were to be used for the telephone poles were placed upon his land, and not in the public road, and his defense was that he had not willingly injured said poles. In response to this issue the state showed that the lower Breckenridge and Albany public road was established by the proper orders of the commissioners' court of Stephens county, and that such orders had been properly recorded in the minutes of the said commissioners' court. The state also

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

showed that the said public road had been used, occupied, claimed, and held in peaceable, adverse, and open possession by the county for more than 10 years, and that overseers had been appointed and hands apportioned to the same for more than 10 years; that is, the state showed that the said road was a public road by the records of the commissioners' court and by limitation.

Appellant objected to the court permitting the witness McFall to testify as follows: "I live in Stephens county, and am engaged in the telephone business. Some five or six years ago I was engaged in the construction of a telephone line along the lower Albany and Breckenridge road, and in a conversation with Mr. Craighead he at that time informed me that the fence on the north side of the road, where the road runs through his land, was four feet north of the north line of said road, and that he (W. A. Craighead) was the owner of four feet of land in the lane, and he forbade me to place my telephone poles within six feet of the north side of the said public road, and in keeping with his instructions I placed my telephone poles six feet from the fence on the north side of said public road." Appellant objected to this testimony, on the ground that it was irrelevant, immaterial, and foreign to any issue in the case. This testimony was admissible. Appellant contended in the trial of this case that the fence on the south side of the road was on his land; and here we have him asserting that the fence on the north side was on his land. This testimony would tend to prove the lack of sincerity in appellant's contention, and goes to show that appellant willfully destroyed the posts that were not on his land, and that he knew the posts were not on his land.

Bill of exceptions No. 3 shows that the court permitted the prosecuting witness to testify that the telephone posts destroyed were his property and the property of the other prosecuting witnesses alleged in the information. This certainly was admissible.

Bill No. 4 complains of the same matter.

Bill No. 5 shows that the state was permitted to prove by J. N. Yocum, one of the prosecuting witnesses, that the string of fence defendant was building was about 200 yards long, and was being built in a westerly direction, and almost straight; that the string of fence commenced at defendant's cow lot gate, and extended about 3 or 4 feet north to a mesquite tree, and thence almost straight in a westerly direction, alongside the old fence, to the fish lot gate. The new line of fence, which was about 200 yards long, was from about 50 feet to 39½ feet to the fence on the north side of the road. This testimony was admissible; the proof showing that this was a first-class road, and the distance between the fences showing that

appellant was not leaving a first-class road, since a first-class road is not less than 40 nor more than 60 feet.

The charge of the court in all respects presents the law applicable to the facts of this case, and appellant's requested charges, so far as applicable, were covered in the main charge of the court.

We have carefully examined the evidence in this case in the light of appellant's argument and brief, and must say that we think the same amply supports the verdict. We find the same discloses the fact that one moment appellant is insisting that the fence is on his land on the north side of the road, and the next moment insisting that the fence is on his land on the south side of the road. His effort to get a permit from the commissioners' court to survey the road seems to be more of a pretext, in order to obstruct rather than survey it. There had been no effort manifested, as shown by this record, on his part to comply with the law; but, on the contrary, it shows that he willfully destroyed prosecuting witness' posts, which were placed there to build a telephone line upon, without any thought or attempt to protect his own property; and, so believing, the judgment should be affirmed, and it is so ordered.

## RENO v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1909. Rehearing Denied March 17, 1909.)

### 1. INTOXICATING LIQUORS (§ 236\*)—UNLAWFUL SALE—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a conviction for unlawfully selling intoxicating liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

### 2. CRIMINAL LAW (§ 974\*)—MOTION IN ARREST—FAILURE TO FILE IN DUE SEASON.

So much of an amended motion for a new trial as purported to be an arrest of judgment must be held to have been properly struck out because it was not filed within two days after conviction, as the statute requires, where no reason for delay in filing it was alleged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2471; Dec. Dig. § 974.\*]

### 3. CRIMINAL LAW (§ 968\*)—ARREST OF JUDGMENT—OBJECTIONS TO LOCAL OPTION ELECTIONS—COLLATERAL ATTACK.

As the statute expressly requires that all objections to local option elections must be brought under review by direct proceedings to annul and set them aside, such objections cannot be made the basis of a motion in arrest of judgment in a prosecution for an unlawful liquor sale.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2423; Dec. Dig. § 968.\*]

Appeal from McCulloch County Court; C. A. Wright, Judge.

Jim Reno was convicted of unlawfully selling intoxicating liquors, and he appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

A. G. Walker, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged by complaint and information in the county court of McCulloch county with the unlawful sale of intoxicating liquors in said county. He was convicted, and his punishment assessed at a fine of \$25 and 60 days' imprisonment in the county jail.

After making proof that prohibition was legally adopted in McCulloch county, Tex., the state introduced one E. G. Nelin, who testified that about the 1st of February, 1908, he bought a pint of whisky from Jim Reno; that at the time they were in the back alley, back of Tom Baker's meat market. Touching the transaction he says: "He had the bottle of whisky in his pocket, and just took it out of his pocket back there in the alley and delivered it to me. The price of it was 75 cents. I do not know whether I paid for it or not. I knew what the price had always been, and I understood I was to pay for it. Reno said afterwards that I had not paid for it, and I thought I had; but, whether I paid for it or not, I understood that I was to pay for it. I did not understand that it was a gift to me, and I did not accept it as a gift. I do not remember whether I paid for the whisky or not. If I did not pay for it when I got it, I do not reckon I have paid for it yet. I do not remember that I made any promise to pay for it, but I did not expect to get it for nothing. I said 75 cents was the price of the whisky, because I knew the price."

The court instructed the jury in his general charge, in substance, that if they believed beyond a reasonable doubt that appellant sold the intoxicating liquor to Nelin on or about the day named in the information they would find him guilty. At the request of counsel for appellant the court instructed the jury as follows: "You are instructed, unless you find that the witness E. G. Nelin paid for the whisky at the time he bought it, or promised to do so, you will find the defendant not guilty, and so say by your verdict." There was no other special instruction asked touching any phase of the case. The proof is conclusive, as we believe, of the guilt of appellant, and the only issue on which a doubt could be raised was as to whether the transaction constituted a sale or not, which was submitted in the very terms asked by appellant.

2. The trial and conviction was had on the 16th day of April, 1908. The original motion for new trial was filed on the same day. On the 28th day of April, 1908, appellant filed his amended motion for new trial and in arrest of judgment, in which was questioned the validity and regularity of the orders of the commissioners' court of McCulloch county putting local option in effect therein.

Counsel for the state moved to strike out so much of the amended motion for new trial as purported to be a motion in arrest of judgment, because it was not filed within two days after conviction, and because no reason for delay in filing same was alleged. We have heretofore held that the statute touching the filing of motions for new trials and in arrest of judgment, providing, in substance, that such motions must be filed within two days, is ordinarily to be operative and controlling, and that where, as in this case, no reason is given why such motion was not filed within the time allowed by law, we would presume, in aid and support of the action of the court, that there were no grounds justifying the filing of such motion after the time allowed by law and the time to review the decisions of the court touching such matters. This question does not become important in this case, however, for the reason that under the act of the last Legislature all objections to local option elections are required to be brought under review by direct proceedings to annul and set aside such elections, and in the absence of such proceedings, timely had, their due enactment and regularity will be presumed. Again, we think, if it were important or necessary to be decided, that the proceedings were in all respects regular.

Finding no error in the judgment of the court, the same is hereby in all things affirmed.

#### BURKS v. STATE.

(Court of Criminal Appeals of Texas. March 3, 1909.)

CRIMINAL LAW (§ 1094\*)—APPEAL—PROCEEDINGS NOT IN RECORD.

Where the record on a criminal appeal does not contain bills of exception or a statement of facts, a conviction will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3204; Dec. Dig. § 1094.\*]

Appeal from Jones County Court; James P. Stinson, Judge.

John Burks was convicted of violating the local option law, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 60 days' imprisonment in the county jail.

The record contains neither bills of exception nor statement of facts. In this condition of the record, it will follow, under the well-settled rule of this court, that this case must be affirmed; and it is accordingly so ordered.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**GRUSENDORF v. STATE.**

(Court of Criminal Appeals of Texas. March 3, 1909.)

**CRIMINAL LAW (§ 1081\*)—NOTICE OF APPEAL—NECESSITY.**

The entry of the notice of appeal is a jurisdictional fact, and in the absence of such notice, entered of record, the appeal will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2722; Dec. Dig. § 1081.\*]

Appeal from Jones County Court, Jas. P. Stinson, Judge.

Gus Grusendorf was convicted of crime, and appeals. Appeal dismissed.

F. J. McCord, Asst. Atty. Gen., for the State.

**RAMSEY, J.** The state moves to dismiss the appeal in this case for the reason that there is no notice of appeal contained in the record. An inspection of the record discloses the fact that a motion for a new trial was filed after the conviction; but, so far as the record discloses, no action seems to ever have been had upon it, nor is there any notice of appeal. The entry of the notice of appeal is a jurisdictional fact, and, in the absence of such notice entered of record, we cannot take cognizance thereof.

The appeal is therefore dismissed.

**WEBB v. STATE.**

(Court of Criminal Appeals of Texas. Feb. 24, 1909.)

**1. CRIMINAL LAW (§ 1099\*)—APPEAL—STATEMENT OF FACTS—TIME OF FILING—EFFECT OF DELAY.**

The 30-day rule as to filing statements of facts does not apply to county courts, so that, where that court made no order authorizing the filing of a statement after adjournment, a statement of facts filed 30 days thereafter cannot be considered on a criminal appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2876; Dec. Dig. § 1099.\*]

**2. CRIMINAL LAW (§ 1097\*)—APPEAL—STATEMENT OF FACTS—EFFECT OF ABSENCE.**

Where the indictment was sufficient, and the instructions were proper under the facts provable under the indictment, errors urged in the motion for new trial cannot be considered on appeal, where the record contained no statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1097.\*]

Appeal from Jones County Court; Jas. P. Stinson, Judge.

John Webb was convicted of keeping a disorderly house, and he appeals. Affirmed.

J. C. Randel, Co. Atty., and F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** Appellant was convicted of keeping a disorderly house, and his punishment assessed at \$200 fine and 20 days in jail.

The court adjourned on the 26th day of September, 1908. The statement of facts was not filed until the 26th day of October, 1908. The 30-day rule does not apply to county courts. We find no order of the court authorizing the filing of the statement of facts after the adjournment of the court. In the absence of said order, we cannot consider the statement of facts.

The indictment is in proper form, charging appellant with keeping a disorderly house, in which house spirituous, vinous, and malt liquors were sold without first having obtained a license under the laws of the state of Texas to retail such liquors. In the absence of the statement of facts, there is no suggestion in the motion for new trial that can be considered.

Finding no error, the indictment being sufficient and the charge applicable to the state of facts provable under said indictment, the judgment is in all things affirmed.

**WEBB v. STATE.**

(Court of Criminal Appeals of Texas. Feb. 24, 1909.)

Appeal from Jones County Court; Jas. P. Stinson, Judge.

John Webb was convicted of keeping a disorderly house, and he appeals. Affirmed.

J. C. Randel, Co. Atty., and F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** This is a companion case to No. 4,550, supra, this day decided. All the questions necessary to be reviewed here were reviewed in that case.

There is no error in the record, and the judgment is affirmed.

**McDONALD v. STATE.**

(Court of Criminal Appeals of Texas. Feb. 17, 1909. Rehearing Denied March 17, 1909.)

**1. WEAPONS (§ 17\*)—CRIMINAL PROSECUTION—ADMISSIBILITY OF EVIDENCE.**

In a prosecution for carrying a pistol, evidence that defendant had been searched by the complaining witnesses about the time the offense charged in the complaint was alleged to have been committed, was inadmissible; there being no offer to show when the examination took place, or how long it was before defendant was accused of carrying the pistol.

[Ed. Note.—For other cases, see Weapons, Dec. Dig. § 17.\*]

**2. CRIMINAL LAW (§ 1170\*)—APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

In a prosecution for carrying a pistol, three witnesses testified that immediately after the pistol was found in a stall in a barn, and while all of the witnesses were together, the defendant was arrested by them and immediately locked up for unlawfully carrying the pistol. On cross-examination, defendant's counsel asked each of the witnesses whether defendant had requested them to notify his wife that he was in jail, and whether, immediately after they placed the defendant in the jail, they were requested by defendant's counsel to lodge a complaint

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

against defendant, or to carry him at once before the justice of the peace, who was then in town and accessible, and whether they failed and refused to notify the defendant's wife that he (defendant) was in jail, and refused to lodge any complaint against the defendant, or to carry him before a magistrate, until after the sheriff lodged a complaint against him. *Held* that, while the testimony called for was admissible, the error in excluding it was harmless, as the record shows that defendant's counsel knew he was in jail.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1170.\*]

### 3. CRIMINAL LAW (§ 720\*)—TRIAL—COMMENTS ON EVIDENCE.

In a prosecution for carrying a pistol, the evidence of accused and of two of his witnesses tended to show that he went to a stall in a livery stable and reached his hand in to get a pistol that a person who was then in jail told him to get as pay for what that person owed defendant, and the state's evidence tended to show that, apprehending arrest, defendant went to the stable and concealed the pistol in a hole in the stall. *Held*, that the evidence justified the county attorney in stating to the jury that defendant had brought his witnesses to court to swear him out of the case, and that defendant and the witnesses had manufactured the defense set up by the defendant.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 720.\*]

Appeal from Montague County Court; Geo. S. March, Judge.

Charles McDonald was convicted of carrying a pistol, and appeals. Affirmed.

Speer, Weldon & Grayham and J. W. Chancellor, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** Appellant was convicted of carrying a pistol, and his punishment assessed at a fine of \$100.

Bill of exceptions No. 1 complains that the court erred in refusing appellant the right to testify in his own behalf that he had been searched by the witnesses Rountree and White, in Bowie, Tex., one night, on his way home from his place of business, for a pistol, about the time the offense charged in the complaint and information is charged to have been committed. If permitted to testify, defendant would have stated that said parties did search him to find a pistol, and found none. It is not stated when this examination took place, or how long before appellant was accused of carrying the pistol. The evidence, therefore, became utterly immaterial and irrelevant.

Bill No. 2 shows that, while each of the witnesses J. W. Wales, Lee Rountree, and White were testifying before the jury, and after each of them had testified in response to questions propounded to them by the state's attorney, immediately after the pistol was found in the stall in the back end of Downs' barn, and while all three of said witnesses were together, the defendant was arrested by them, and immediately locked up in the cala-

boose at Bowie, Tex., for having unlawfully carried said pistol, the defendant's counsel, on cross-examination, propounded to each of said witnesses the following question, in substance: "Is it not a fact that, when you placed the defendant in the calaboose, he requested you to notify his wife that he was in jail? Is it not a further fact that immediately after you placed the defendant in the calaboose you were requested by defendant's counsel to lodge a complaint against the defendant, charging him with whatever offense you had placed him in the calaboose for, or to carry him at once before the justice of the peace, who was then in town and accessible? And is it not a fact that you failed and refused to notify the defendant's wife that he was in jail, or to have it done, and that you refused to lodge any complaint against the defendant charging him with any offense on that day, or to carry him before said magistrate, or any other officer, until after the sheriff came from Montague and lodged a complaint against him?" The state's counsel objected to all of the questions, for the reason same were irrelevant and immaterial. The objection was sustained. If permitted, the defense would have proven an affirmative answer to each of said questions. While this testimony was admissible, yet we do not think the error of the court authorizes the reversal of this case. The record shows that defendant's counsel knew he was in jail, and certainly defendant knew it.

Bill No. 3 complains of the argument of the county attorney wherein he stated to the jury, in substance, that defendant had brought his friends, Bud Wade and Ben Neece, to court to swear him out of the case, and that the defendant and said witnesses had manufactured the defense set up by the defendant. We think the evidence in this case amply warranted the statement of the prosecuting attorney. Appellant's insistence was that when he met the rangers, or was about to meet them, instead of having a pistol himself, he went to a stall in the back end of a livery stable and reached his hand in to get a pistol that a party told him to get who was then in the calaboose, as pay for what said party in the calaboose owed appellant. He proved this by himself and the witnesses above alluded to. The state's insistence was that when he met the rangers, apprehending that they were going to arrest him for carrying the pistol, he rushed off to the stable, and poked his hand into a hole in the stall, and put the pistol into it. Now, then, if he and his witnesses told a falsehood about it, it looks like it was done through a premeditated design, as counsel states, and therefore there could have been no error in the argument.

Appellant's ground, in motion for a new trial, on newly discovered evidence, does not come within the rules authorizing the grant-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing of a new trial upon newly discovered evidence.

The judgment is affirmed.

### O'BRIEN v. STATE.

(Court of Criminal Appeals of Texas. March 3, 1909.)

#### 1. INTOXICATING LIQUORS (§ 233\*)—KEEPING HOUSE FOR SALE WITHOUT LICENSE—EVIDENCE—REPUTATION.

In a prosecution for keeping a house where intoxicating liquors were sold and kept for sale without a license, evidence as to the general reputation of the character of the house is admissible.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 297; Dec. Dig. § 233.\*]

#### 2. INTOXICATING LIQUORS (§ 236\*)—KEEPING HOUSE FOR SALE WITHOUT LICENSE—EVIDENCE—REPUTATION.

A conviction for keeping a house where intoxicating liquors are unlawfully sold cannot be sustained on evidence of general reputation alone.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 319; Dec. Dig. § 236.\*]

#### 3. INTOXICATING LIQUORS (§ 236\*)—KEEPING HOUSE FOR SALE WITHOUT LICENSE—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to sustain a conviction of keeping a house where intoxicating liquors are unlawfully sold.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 319; Dec. Dig. § 236.\*]

Appeal from Grayson County Court; J. W. Hassell, Judge.

Tom O'Brien was convicted of keeping a disorderly house where intoxicating liquors were sold and kept for sale without a license, and appeals. Reversed.

E. J. Smith, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged in the county court of Grayson county with the offense of keeping a disorderly house; that is, a house in which spirituous, vinous, and malt liquors were sold and kept for sale without a license first having been obtained under the law to retail such liquors.

In view of the disposition we are to make of the case, we will discuss but one question, and that is the sufficiency of the evidence to sustain the conviction. It was shown that appellant obtained no license in Grayson county to retail spirituous, vinous, and malt liquors. It was shown, perhaps with sufficient certainty, that appellant was in such relation and control of the house as to bring him under the terms of the statute as the owner, lessee, or tenant thereof. There was no evidence from any source that he had at any time, since the act under which he was prosecuted went into effect, ever sold or offered for sale intoxicating liquors. It is not shown, nor is there any evidence tending to show, that he, at any time since the act in question went into effect,

ever had in his possession any intoxicating liquors. There was no evidence that he had an internal revenue license as a retail liquor dealer, nor was the description of the building, its furnishings, furniture, and equipment, such as would indicate particularly that he was engaged in the business, or any fact, in this respect, inconsistent with his claim that it was a restaurant. There was no evidence of any rowdiness, noise, drunkenness, or any of the ordinary conduct to be expected to be carried on about a place of business of this kind.

The proof upon which the conviction rests is that of general reputation, and that alone; and this proof is very fragmentary and slight. For instance, the witness J. B. Howard, who was a deputy sheriff, testifies that he was unable to say which was the general reputation in Denison of the house in question. M. F. Kidd, another deputy sheriff, testified that he was unable to say what the reputation of the house was, or whether it had the reputation of being a house in which intoxicating liquors were sold. J. C. Denton testified that he was acquainted with the general reputation of the house in question, and that it had the reputation of being a place where whisky was sold. It seems that appellant's place of business was located at 325 Main street, in Denison. J. W. Hendricks, who lived in Denison, and whose place of business was 411 Main street, stated that he was not acquainted with, nor could he testify as to what was, the general reputation of the house or building in question. J. D. Knauer testified that he lived in Denison, and that the reputation of the house in question was that it was a place where whisky was sold. Such, also, was the testimony of H. Alexander, J. O. Jackson, and M. C. Johnson.

As to the character of the furniture in the building, the witness Howard testifies as follows: "There is a restaurant in the front of the building. There was a counter—wooden contrivance; shelf, counter, and bench—12 or 14 feet long and about 2 feet wide. It was on the east side of the room. There was a shelf against the wall and a glass above it—a mirror; and there was a wooden box. It was a wooden box, with a cover on it, on top. It was at the south end of the shelf. I think there was a cash register on the shelf. It was on the shelf that was against the wall."

The charge of the court pertinently and aptly submitted the issue to the jury. In the fifth paragraph of the court's charge the jury were instructed as follows: "Evidence has been introduced before you with reference to the general reputation of the house in question. You are instructed that the general reputation of the house as a disorderly house, if you believe that such general reputation is proved by the evidence beyond a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

reasonable doubt, will not warrant the conviction of the defendant on the charge contained in the indictment of keeping or being concerned in keeping such house as owner, lessee, or tenant; but before the defendant can be convicted of keeping said house, if the same was a disorderly house, as the owner, lessee, or tenant of same, the evidence must directly connect him with the keeping of said house as such owner, lessee, or tenant."

Evidently the learned trial judge must have acted with reference to, and based his conclusion in overruling appellant's motion for a new trial upon, the opinion of this tribunal in the case of *Joliff v. State*, 53 Tex. Cr. R. 61, 109 S. W. 176. In that case we had occasion to discuss the admissibility of proof of general reputation in a charge of this sort. An inspection of the opinion in that case will show that Joliff had obtained a retail liquor dealer's license from the United States internal revenue department, and also that he had whisky on hand, and that sales were made at the house in question. The motion for rehearing filed in that case challenged the admissibility of the evidence of general reputation at all, and in discussing the matter we said: "It is urged that the court erred in admitting evidence of the general reputation of the house alleged to have been kept by appellant. The contention of appellant is, substantially, that proof of general reputation, in a charge similar to that made in this case, is only admissible in cases where the repute of the house is an essential element of the crime charged, and that, unless the repute of the house is the essence of the offense charged, it is not admissible. It has been the holding of this court, time out of mind, that general reputation is admissible in cases where parties are charged with keeping a disorderly house, though independent evidence must appear that the person charged was engaged in keeping such house as owner, lessee, or tenant. This construction of the disorderly statute was uniform and well settled before the passage of the act considered. We think, when the lawmakers came to add to the disorderly house statute the matters not contained in it, wherein they denounced as a disorderly house one kept for the sale of intoxicating liquors without license, that they must have intended that proof by reputation in respect to such houses would be admissible on the same basis as had theretofore been the rule in this state."

The opinion of the *Joliff* Case, *supra*, does not go beyond the holding that proof of general reputation in this character of case is admissible; and this is so, as we there held, because the statute in reference to disorderly houses had theretofore, time out of mind, received a similar construction by the courts of this state, according to which proof of

general reputation as to the character of the house was held to be receivable, and therefore it was to be assumed that the Legislature intended, in inserting in said disorderly house statute a new offense, that in respect to rules of evidence the same rule of construction should apply with reference thereto. It may be that the same reasoning on which the opinion in the *Joliff* Case was rested touching the admissibility of evidence would apply as testing its sufficiency; but this may well be doubted. In any event, as here presented, we think it would be a dangerous precedent to sustain a conviction on the proof appearing in this case.

It will be seen, from an inspection of the statement of facts, that persons in business in the adjoining block and located near appellant's place were not advised, and were not able to testify, as to the reputation of the house. Even the law officers in Grayson county, charged with the administration and enforcement of the law, did not know the reputation of the house. If it was in fact a disorderly house, in that it was a place where intoxicating liquors were sold in a local option territory without a license, there were so many means and methods by which proof of this fact could be secured, in addition to evidence of general reputation, that it seems unlikely that the Legislature could ever have intended that a conviction should rest on proof of general reputation alone. It would, in many cases, be easy enough, if this were the rule, on bare suspicion, to convict. The speech which Shakespeare attributes to Iago has become something of a truism: "That reputation is often got without merit and lost without deserving." There is no legislative enactment that any special weight or conclusive force should be given to such reputation, and, as stated, if the rule can apply in any case, which we doubt, under the facts of this case, we should not hesitate to say that it is insufficient.

For the reason that the evidence is, in our judgment, insufficient to sustain a conviction, the judgment of the lower court is reversed, and the cause remanded.

#### HILL v. STATE

(Court of Criminal Appeals of Texas. March 3, 1909.)

#### CRIMINAL LAW (§ 533\*)—EVIDENCE—WEIGHT—ACCOMPLICES.

Testimony of an accomplice will not sustain a conviction, where he subsequently testified that such testimony was perjury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1252; Dec. Dig. § 553.\*]

Appeal from District Court, Scurry County; Cullen C. Higgins, Judge.

Wiley Hill was convicted of horse theft, and he appeals. Reversed and remanded.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of horse theft; his punishment being assessed at four years in the penitentiary.

The evidence discloses that M. C. Sliger lived a few miles from Snyder, county seat of Scurry county, and was the owner of three horses; that they were taken from his pasture on Monday night, the 16th of the month. It is shown that the witness Davis took the horses and traveled with them through different counties, disposing of them at different points. The theory of the prosecution is that appellant, Davis, and his brother (Monroe Davis) took the horses, and that Billie Davis disposed of them. Billie Davis took the stand as a witness, and testified for the state to the effect that he and appellant and a party whose name he refused to divulge took the horses, and that he himself took them away and disposed of them; that this occurred on Monday night, the 16th. He further states that he had entered into a contract with the district attorney by which he was to testify to certain facts, which are set out in a written statement signed by him in the record, and which place himself and appellant at the place and time the horses disappeared, and in fact that they took them, and that he carried them away and disposed of them. His contract was, further, that he was to be released from all the prosecutions, except one, in which he was to plead guilty and receive the minimum punishment, and also states that this contract, so far as he knew, was carried out; that he had pleaded guilty and received two years as his punishment for participancy in the theft; that he had not been sentenced, and was testifying in accordance with his contract and the testimony as written out by the district attorney. The following day he again took the stand and stated, in substance, that he had fulfilled his contract and testified for the state, implicating the appellant, but that he now desired to tell the truth about it, and, being somewhat conscience-stricken, desired to recant his former testimony and tell the truth. He also states that his former testimony was entirely false, and that he committed perjury, and that appellant was not present and had nothing to do with taking the horses. His testimony was detailed at some length, and the cross-examination by the defendant when he first testified, and his cross-examination by the state when he last testified, was rather acrimonious.

Outside the testimony of this accomplice, the state had a very weak case, if in fact there was evidence justifying a conviction, even conceding he was corroborated. Appellant testified to an alibi, placing himself at another point, quite a number of miles away, at the home of his father-in-law. He is cor-

roborated to some extent by state's witnesses to the effect that he (appellant) was at this little village early Tuesday morning. It is unnecessary to go into a detailed statement of the corroborating evidence, as we are not here passing upon the sufficiency of the evidence, if the accomplice had adhered to his original story. We are unwilling to sanction a judgment upon a record of this character. The accomplice had sworn positively both ways, and in his latter statement that he had committed perjury in placing appellant at the scene of the theft, and that the truth is appellant was not there. This evidence comes in entirely too questionable shape to form the basis for the incarceration of men in the penitentiary.

We have not been able to find a case precisely in point among the decisions. A somewhat analogous case is reported in *Mann v. State*, 44 Tex. 642. The opinion was by Judge Gould, concurred in by Chief Justice Roberts and Associate Justice Moore. In that case the appellant was convicted for the rape of Teresa Lotke. Among other things it is said by the court: "That the witness Teresa, after the trial, made oath that her first statements when on the stand, to the effect that the accused had not injured her, were true, and her statements to the contrary were made, not knowing their bearing, and were untrue; that her mother, Mrs. Lotke, likewise swore, in support of the motion for new trial, that her daughter was weak-minded and unreliable." This was made a ground of the motion for a new trial, on the theory of its being newly discovered. The court further says: "We think the case was such as required that the motion for a new trial should be granted. It has been held a good ground for new trial in civil cases that a material witness had since the trial been convicted of perjury on his own confession. *Great Falls Mfg. Co. v. Mathes*, 5 N. H. 574. So where a witness makes affidavit of his own mistake. *Richardson v. Fisher*, 1 Bing. 145. Looking at the entire case, including the affidavits, it is our opinion that the guilt of the appellant was left too uncertain, and the character of the evidence against him appeared too frail and unreliable, to justify the court in refusing him another trial." To the same effect is *Heskew v. State*, 14 Tex. App. 606; *Lindley v. State*, 11 Tex. App. 283; *Dennis v. State*, 103 Ind. 142, 2 N. E. 349; *Keenan v. People*, 104 Ill. 335.

As this record presents this case on the testimony and the effect of this accomplice's evidence, we are unwilling to affirm this judgment. The matters growing out of the application for continuance will not be revised, as the absent testimony may be obtained upon another trial.

The judgment is reversed, and the cause is remanded.

**DAWSON v. STATE.**

(Court of Criminal Appeals of Texas. Feb. 17, 1909. Rehearing Denied March 17, 1909.)

**1. CRIMINAL LAW (§ 772\*)—TRIAL—INSTRUCTIONS—TIME OF OFFENSE.**

Where, in a prosecution for violating a local option law, the uncontradicted evidence showed that the sale was made before the prosecution, a requested instruction that the evidence must show that the alleged sale occurred before the filing of the complaint was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1814; Dec. Dig. § 772.\*]

**2. INTOXICATING LIQUORS (§ 146\*)—OFFENSES—ELEMENTS OF—"SALE."**

In order to constitute a "sale" of whisky in violation of the local option law, it is not necessary that the purchaser deliver to the seller the money for the whisky; but it is necessary that both parties assent to the sale and payment, if any is made or is to be made therefor.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 160; Dec. Dig. § 146.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

**3. INTOXICATING LIQUORS (§ 239\*)—ILLEGAL SALE—INSTRUCTIONS—BURDEN OF PROOF.**

In a prosecution for selling whisky in violation of the local option law, an instruction directing an acquittal if defendant acted as agent for a certain person in locating and purchasing the whisky, and was not interested as a seller in its sale, or if the jury had a reasonable doubt as to whether defendant sold the whisky to such person, or acted as his agent, was not objectionable as placing the burden on defendant to establish that he was not interested in the sale.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 331, 334; Dec. Dig. § 239.\*]

Appeal from Hill County Court; N. J. Smith, Judge.

G. F. Dawson was convicted of violating the local option law, and appeals. Affirmed.

Collins & Cummings, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** This conviction was for violating the local option law; the punishment assessed being a fine of \$25 and 20 days in jail.

Bill of exceptions No. 2 complains that the court erred in not charging the jury that the evidence must show that the sale alleged in the information occurred before the filing of the complaint. This is true in ordinary cases; but the evidence in this case conclusively shows that the sale did occur prior to the institution of this prosecution. If there had been any evidence suggesting that it occurred afterwards, we think it would have been reversible error not to have so charged; but, under the evidence in this case, we do not think it was an error authorizing a reversal of this case.

Bill No. 3 complains of the following charge of the court: "In order to constitute a sale in this case, it is not necessary that

the purchaser deliver to the seller the money for the whisky; but it is necessary that both parties assent to the sale and payment, if any is made or is to be made therefor." This is a correct proposition of law, and was clearly applicable to the facts of this case.

Appellant further complains of the following charge: "You are further instructed that, if you believe from the evidence that the defendant acted as the agent of and for the witness Charles Hubbard in locating and in purchasing said quart of whisky, and that he was not interested in the sale thereof as a seller, or if you have a reasonable doubt as to whether the defendant sold said quart of whisky to the witness Hubbard, or acted as his agent in the purchase of said quart of whisky, you will acquit the defendant and so say by your verdict." Appellant insists that the court placed the burden upon appellant to establish that he was not interested in the sale. We think this charge is not subject to this criticism. He was interested in the sale. The court very properly told the jury that if he sold it, or was interested in selling it, etc. Reasonable doubt is applied all through the charge, and there is nothing that suggests that the burden of proving appellant's innocence was placed upon him.

Appellant insists that the evidence is insufficient to show that the commodity sold was whisky. We do not deem it necessary to collate the evidence; but it clearly establishes by potent circumstantial evidence that it was whisky, and also establishes appellant's guilt.

Finding no error in the record, the judgment is affirmed.

**ZINN v. STATE.**

(Court of Criminal Appeals of Texas. Feb. 24, 1909.)

**1. CRIMINAL LAW (§ 292\*)—PLEA OF FORMER ACQUITTAL—SUFFICIENCY.**

A plea of former acquittal, which does not contain the indictment or the judgment in the case in which accused was acquitted, is insufficient on its face.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 668, 669; Dec. Dig. § 292.\*]

**2. CRIMINAL LAW (§ 1090\*)—APPEAL—REVIEW—STATEMENT OF FACTS—BILL OF EXCEPTIONS.**

In the absence of a statement of facts or bill of exceptions, an instruction directing the jury to disregard the plea of former acquittal, because of the absence of evidence to support it, will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2818, 2862; Dec. Dig. § 1090.\*]

Appeal from Haskell County Court; Joe Irby, Judge.

Arley Zinn was convicted of crime, and he appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This record is here before us without a statement of facts or bill of exceptions.

Appellant interposed a plea of former acquittal. The plea does not contain the indictment or the judgment in the case in which he says he was acquitted, which we think is insufficient on its face; but the record does not contain any evidence, not only in regard to this matter, but in regard to any matter occurring during the trial.

It is also urged that the court instructed the jury that there was no evidence to support the plea of former acquittal, and that they would therefore disregard it. As the record is presented, we cannot review that question. If there was no evidence in fact to support the plea, the court was correct in so charging.

The judgment is affirmed.

### CLOSE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 24, 1909.)

#### 1. LARCENY (§ 46\*)—VALUE OF GOODS—EVIDENCE.

In a prosecution for theft, evidence of a witness as to the value of goods handled by him, which were of a quality superior to those stolen, is not admissible to show the value of the goods stolen.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 138; Dec. Dig. § 46.\*]

#### 2. LARCENY (§ 6\*)—VALUE OF PROPERTY—CRITERION.

In a prosecution for theft, the criterion of value of the property stolen is the fair market value at the time and in the county where taken, if it has such a value, and, if not, the amount it would cost to replace it.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 18; Dec. Dig. § 6.\*]

#### 3. LARCENY (§ 59\*)—VALUE OF PROPERTY—SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for theft of property over the value of \$50 held insufficient to show the value.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 154; Dec. Dig. § 59.\*]

#### 4. CRIMINAL LAW (§ 780\*)—ACCOMPLICE TESTIMONY—INSTRUCTIONS.

An instruction that a conviction cannot be had on the testimony of an accomplice, unless corroborated by other evidence to connect defendant with the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, which was followed by a definition of "accomplice," but nowhere applying the law to the facts, nor charging that the accomplice's testimony must be considered as true by the jury, was defective.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1861; Dec. Dig. § 780.\*]

#### 5. CRIMINAL LAW (§ 780\*)—ACCOMPLICE TESTIMONY—INSTRUCTIONS.

In a prosecution for theft of property over the value of \$50, L. testified that he and another assisted in taking the goods, and that all

the goods were taken in pursuance of one design. There was testimony that part of the property was taken in pursuance of an after agreement. The court's charge failed to designate who were accomplices. Held, that it was error to refuse to charge that if the jury believed beyond a reasonable doubt that defendant was guilty, and that the value of the property was over \$50, yet as the state's witness L. was an accomplice, they could not convict defendant on L.'s testimony, unless corroborated by evidence tending to connect defendant with the crime, so as to constitute the taking of the property at one time, or in such manner as to constitute the taking one continuous transaction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1860; Dec. Dig. § 780.\*]

#### 6. CRIMINAL LAW (§ 1181\*)—APPEAL—DECISION.

Where a question suggested for reversal on account of overruling an application for a continuance will not arise on another trial, it will not be decided.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8192; Dec. Dig. § 1181.\*]

Appeal from District Court, Dallam County; J. N. Browning, Judge.

Jess Close was convicted of theft, and he appeals. Reversed and remanded.

Tatum & Tatum, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for theft of property over the value of \$50. The evidence shows that appellant, Lambert, and Floyd went into a railroad car at night and carried away quite a lot of blacksmith tools and other things. The separate value of the articles being set out in the indictment, the evidence adduced made it a question as to whether the property was over or under the value of \$50.

Appellant urged objections to the character of proof offered in regard to the value. Pyle testified in regard to the anvil and other blacksmith tools, as to the value and character of the goods with which he was acquainted and handled, and stated, among other things, that the goods spoken of were of a higher grade or quality than those shown to have been taken. The evidence further discloses that the goods taken were bought of and shipped by Sears, Roebuck & Co. to Wilson, and that such character of goods handled and sold by Sears, Roebuck & Co. were of a much inferior quality compared with the goods about which Pyle testified. In fact, the witnesses who testified in regard to most of the articles stated they were not acquainted with the market value of the goods, if in fact they had any market value. Some of them were reasonably shown to have a market value; but the amount in the aggregate of those goods was very small. There was no evidence offered to show at what price the goods could be replaced. We are of opinion the contention of appellant is correct that the evidence introduced was not of the character authorized or required, and that the criterion

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was not such as the law justified. See *Martinez v. State*, 16 Tex. App. 122.

As we understand this record, there was no evidence introduced or sought to be introduced to show what the real value of the goods was, either in the market or for the purpose of replacing them, or even what they could be sold at in that market. This was a very important factor in determining the value of the goods, as to whether this was a felony or a misdemeanor. The court instructed the jury, in accordance with the above views, that the proper measure of value would be the fair market value at the time and in the county where they were taken; but, if the kind and class of goods taken have no market value at the time and in the county where they were taken, then the sum of money it would cost to replace the goods taken would be the rule to govern in determining the value. As before stated, no witness undertook to state the market value of goods of the character taken; but they fixed the criterion of market value for a much higher grade of goods, and there was no evidence showing or tending to show what it would cost to replace the goods. As the record presents these matters, we think there is no sufficient testimony in regard to the value, and that the criterion fixed by the witnesses was not legal, and exceptions to the introduction of this evidence were correct.

Appellant reserved an exception, also, to the court's charge in regard to accomplice testimony. That portion of the charge is as follows: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." Then follows the definition of the word "accomplice." This charge nowhere undertakes to apply the law to the facts of the case, nor does it undertake to tell the jury that the testimony of the accomplice must be considered by them as true. This charge was defective under the decisions of this court.

Appellant also asked the following charge, which we think should have been given: "You are charged, as the law applicable to the facts in this case, that, if you believe from the evidence beyond a reasonable doubt that the defendant is guilty of the theft of the property alleged in the indictment, and that the value of said property is \$50 or over, yet, as the state's witness J. E. Lambert is an accomplice in this case, you cannot convict the defendant of a felony upon the testimony of the witness Lambert, unless he is corroborated by other evidence tending to connect the defendant with the crime, so as to constitute the taking of the property alleged in the indictment to have been taken at one time, or in such manner as to constitute the taking of said property one continuous trans-

action." This charge points out to the jury the fact that Lambert was an accomplice, which his testimony demonstrates, if it is true; for he states in his testimony that he assisted in taking the goods, and that himself, appellant, and Floyd took and carried the goods away. The court's charge failed to point out or designate who were accomplices in the case, and the charge also calls the court's attention to another phase of the case, which we think made it incumbent upon the court to give this charge; that is, it is a serious question in the case whether the property was all taken at one time, or at different times, or in such manner as to constitute more than one transaction or taking. Lambert's testimony tended to show a continuous transaction, and that all the goods were taken in pursuance of one design and purpose, and carried off as rapidly and conveniently as they could be carried. There is some testimony to the effect that the second or subsequent taking of the property, or a portion of it, was in pursuance of an after agreement.

The question suggested for reversal on account of overruling the application for continuance will not be noticed, as it will not arise upon another trial.

For the errors indicated, the judgment is reversed, and the cause is remanded.

#### FLOYD v. STATE

(Court of Criminal Appeals of Texas. Feb. 24, 1909.)

Appeal from District Court, Dallam County; J. N. Browning, Judge.

Wesley Floyd was convicted of theft, and he appeals. Reversed and remanded.

Tatum & Tatum, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft, and his punishment assessed at two years' confinement in the penitentiary.

This is a companion case to the case of *Jess Close v. State* (this day decided) 117 S. W. 137. Upon the authority of that case, the judgment is reversed, and the cause remanded.

#### DAVIS v. STATE.

(Court of Criminal Appeals of Texas. March 3, 1909.)

#### 1. CRIMINAL LAW (§ 406\*) — EVIDENCE — ADMISSIONS.

In a prosecution for throwing a missile into the window of a train, where the evidence showed that defendant and his codefendant were put off of a train, and after leaving the same threw rocks at it, the statement of a witness, who was near the place where the transaction occurred, that defendant, in the presence of his codefendant, stated that they had been throwing missiles at the train, was admissible in evidence, though the witness was unable to recall the exact words used by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-927; Dec. Dig. § 406.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

**2. CRIMINAL LAW (§ 1171\*)—APPEAL AND ERROR — HARMLESS ERROR — STATEMENT OF PROSECUTING ATTORNEY.**

In a prosecution for throwing a missile into the window of a train, the prosecuting attorney stated to the jury that, not long before defendant threw the missile, he and his codefendant were warned by one of their friends that if they were not more careful they would be in trouble, and upon objection of the defendant's attorney the prosecuting attorney stated to the jury that he would ask them not to consider the remark, and that he thought it was right and proper, but in making it he might have gone a little too far. *Held*, that the error in making the remark was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126-3127; Dec. Dig. § 1171.\*]

Appeal from Armstrong County Court; R. D. Doak, Judge.

Dock Davis was convicted of willfully and maliciously throwing a missile into a window of a train, and appeals. Affirmed.

Cooper & Stanford, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of willfully and maliciously throwing a missile into the window of a train, and his punishment assessed at a fine of \$5.

Bill of exceptions No. 1 complains that the state, over appellant's objection, proved by the prosecuting witness, Jack Nolen, the following: "I am not certain as to the words used, but to the best of my memory the substance of the conversation between me and Dock Davis, which followed, is as follows: 'Dock Davis asked me if I heard the shooting, and I told him that I did, and asked him what he reckoned was the matter with them, and he said something about some bums being on the train, and that they (meaning the boys, Dock Davis and Powell Jack) had come to the depot to ride the train out of town, and that the train crew had put the boys off the train, and would not let them ride, and that they were chunking them.'" Appellant objected to this testimony, on the ground that same was incompetent, because the witness did not remember the exact words used by the said Dock Davis, and was too uncertain to be used as the admissions of Dock Davis. There is no merit in this objection. The facts of this case show that appellant and his codefendant, Powell Jack, were put off of a train, and after leaving same threw rocks at it, and the conductor came out and fired off his pistol; he saying he fired it in the air. Other witnesses say he shot at the parties throwing rocks. The witness Jack Nolen happened to be near when the transaction occurred, and one of the boys, in the presence of the other, as shown by circumstantial evidence, made the above statement to him, the said Jack Nolen. This renders the testimony altogether admissible.

Bill No. 2 complains of the argument of

the prosecuting attorney, wherein he used the following language: "Gentlemen of the jury, not long before all this happened [having reference to the throwing of the stone at the train] these boys were warned by one of their friends that if they did not be more careful they would be in trouble the first thing they knew." Whereupon the defendant's attorney then objected to said remark, because the same was beyond the record, and was not based upon evidence, and the prosecuting attorney then stated to the jury: "Gentlemen of the jury, I will ask you not to consider the said remark. I thought it was right and proper, but I may be going a little too far." While this statement was not proper, it does not authorize a reversal of this case.

The judgment is affirmed.

**JACK v. STATE.**

(Court of Criminal Appeals of Texas. March 3, 1909.)

**1. CRIMINAL LAW (§ 859\*) — TRIAL — RETURN OF JURY AND REPETITION OF EVIDENCE.**

Where a jury in a criminal trial, after they have retired to consider their verdict, return and report that they disagree as to what a certain witness testified to, and ask to have the witness against placed on the stand and asked a certain question, the defendant should be permitted to see the question before it has been asked of the witness.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 859.\*]

**2. CRIMINAL LAW (§ 1174\*)—APPEAL AND ERROR—HARMLESS ERROR—REPETITION OF EVIDENCE.**

Where a jury in a criminal prosecution return to the courtroom, after having retired to consider their verdict, and state to the court that they disagree as to what a certain witness testified to, and ask to have the witness placed upon the stand again and asked a certain question, the error in refusing to permit defendant and his attorneys to see the question before it is asked of the witness is harmless.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1174.\*]

Appeal from Armstrong County Court; R. D. Doak, Judge.

Powell Jack was convicted of throwing a missile through the window of a train, and appeals. Affirmed.

Cooper & Stanford, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. This is a companion case to the case of Dock Davis v. State (this day decided) 117 S. W. 133.

Bill of exceptions No. 2 shows that, after the jury had retired to consider of their verdict, the jury returned into open court and reported to the court in writing, in due form, that they were disagreed as to what the witness Jack Nolen testified, and asked the court to have said witness placed upon the stand again and asked the following

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

question: "Did Dock Davis say they were chunking them?" to which the witness answered, "Yes." The court refused to permit the defendant and his attorney to see the request of the jury aforesaid, until after the question was asked and answered, to which action of the court in asking the said question in the above form, and contrary to the requirements of the statute of the state in such case and under such circumstances, defendant excepted. We think appellant should have been permitted to see the question.

We think there was no reversible error in the ruling of the court. There is nothing authorizing a reversal of the case.

The judgment is affirmed.

#### GARDNER v. STATE.

(Court of Criminal Appeals of Texas. Feb. 24, 1909.)

##### 1. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

In a prosecution for theft of cotton, the admission of evidence tending to connect defendant with another theft of cotton, committed a few days previous to the offense charged, from a person living several miles from the place of the offense charged, was erroneous, where it was not limited to showing system and intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 822; Dec. Dig. § 369.\*]

##### 2. CRIMINAL LAW (§ 636\*)—TRIAL—CONDUCT OF JUDGE—SECRETLY INSTRUCTING JURY.

The act of the judge in entering the jury room during the deliberations of the jury, at their request, in the absence of accused and his counsel, and verbally explaining a portion of his charge, is improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1476; Dec. Dig. § 636.\*]

##### 3. CRIMINAL LAW (§ 424\*)—EVIDENCE—CONFESSIONS OF ACCOMPLICES.

In a prosecution for theft, testimony as to a confession made by an alleged accomplice of defendant on the morning after the theft, and not in the presence of defendant, held inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1002; Dec. Dig. § 424.\*]

Appeal from Callahan County Court; C. D. Russell, Judge.

Math Gardner was convicted of theft, and appeals. Reversed and remanded.

Otis Bowyer and F. S. Bell, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the county court of Callahan county on a charge of theft of certain cotton belonging to one J. C. Burleson and alleged to have been taken on the 14th day of October, 1907.

1. The fact of the taking by appellant in connection with one Tom South was proven by the testimony of the latter. South was undoubtedly an accomplice, and an inspection of the record shows a very slight corroboration of his testimony.

2. The state was permitted, over objection of appellant, to prove by one Mason the theft of certain cotton owned by him on the night of the 9th of October of the same year. There was some rather strong testimony introduced in evidence tending to connect appellant and South with the last-named theft, which testimony we deem unnecessary to set out here. It was shown that Burleson and Mason lived several miles from each other, and it is stated the Mason theft occurred on the night of the 9th of October, 1907, and the theft from Burleson on the 14th day of October, 1907. When this testimony was offered, counsel for appellant objected on the ground that this was a separate offense from that for which he stood charged on the trial, and that the transaction was too remote, did not tend to connect him with the theft of J. C. Burleson's cotton, and was irrelevant and prejudicial. Under the authorities this objection, it seems, is clearly tenable. See *Carter v. State*, 23 Tex. App. 508, 5 S. W. 128; *Mayfield v. State*, 23 Tex. App. 645, 5 S. W. 161; *Denton v. State*, 42 Tex. Cr. R. 427, 60 S. W. 670; and *Wyatt v. State* (Tex. Cr. App.) 114 S. W. 812. A reading of the cases will disclose that, while they differ in their facts as to the length of time intervening between the transactions sought to be shown in the evidence, if they are in fact independent and unrelated, it would seem that such testimony should not be received. See, also, *Walton v. State*, 41 Tex. Cr. R. 454, 55 S. W. 567; *Kelley v. State*, 18 Tex. App. 269; *Nixon v. State*, 31 Tex. Cr. R. 205, 20 S. W. 364; *Williams v. State*, 38 Tex. Cr. R. 135, 41 S. W. 645; and *Buck v. State* (Tex. Cr. App.) 38 S. W. 772. Again, it is clear that, if this testimony could in any event be admitted under the decisions, it should have been limited for the purpose of showing system and intent. *Scott v. State* (Tex. Cr. App.) 68 S. W. 680; *Long v. State*, 11 Tex. App. 381.

3. The record further shows that while the jury were deliberating, at their request, the presiding judge entered the jury room, where the jury were considering their verdict in the case, closed the door behind him, and in the absence of appellant and his counsel was asked by the jury for an explanation as to the court's charge touching the penalty that might be inflicted in case of conviction; and the court then and there stated to the jury verbally that it was as he had written the matter in his charge, and then and there verbally explained to the jury said part of the charge. This conduct of the presiding judge was called in question and objected to because, as stated in the bill: "The jury failed to appear before the judge in open court in a body, and their foreman stated to the court the particular point of law on which they desired further instruction, and the court failed to give such instruction in writing in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

open court." The statute prescribes the manner in which the jury may communicate with the court touching additional instructions, and should always be scrupulously followed. While there is nothing in this case to cast the slightest imputation upon the good faith and honesty of the court's action, it is a practice that ought not to be permitted. It is so liable to abuse that, even in the absence of injury, it must be reprobated.

4. Again, on the trial of the case the state was permitted to show by one Estes that on the morning after the theft in question he had a talk with Tom South and Burleson, in which conversation South made a confession to him of stealing this cotton with appellant, and that they had put the cotton in Wyatt Hanks' cotton seed house. This testimony was objected to, because this was after the commission of the offense, and was not admissible to show conspiracy, and said statement was not made in the presence of appellant, and was hearsay, irrelevant, and prejudicial. These objections should have been sustained. It may well be doubted whether the testimony of corroboration is sufficient, though, in view of another trial, we forego any discussion of this matter.

For the errors pointed out, the judgment is reversed, and the cause remanded.

### SIMMONS v. STATE.

(Court of Criminal Appeals of Texas. March 3, 1908.)

#### 1. CRIMINAL LAW (§ 656\*)—TRIAL—MISCONDUCT OF PRESIDING JUDGE.

The remarks of the court, in sustaining an objection to a question, asked a witness on redirect examination, as to what had become of criminal charges against him as shown by his cross-examination, to impeach him, that if there had been any objection at the start it might have sustained the same, on the ground that it was immaterial and irrelevant, was erroneous, as impressing on the jury that the attack on the credibility of the witness was inconsequential, and that the proof offered to support the same was immaterial and irrelevant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1530; Dec. Dig. § 656.\*]

#### 2. CRIMINAL LAW (§ 476\*)—OPINION EVIDENCE—ADMISSIBILITY.

Where the state's evidence showed that the body of decedent was dragged along the ground after he had been shot, and accused showed that an examination of the ground disclosed no trace of blood, and a physician who qualified as an expert testified that decedent was shot in the neck, severing both the jugular vein and the arteries connected therewith, that a person so shot would quickly bleed to death, and that the blood would begin to flow immediately, the refusal to permit the physician to give his opinion as to whether the flow of blood would have been so immediate and in such quantities as to have left on the ground and vegetation signs of blood easily discoverable, was error; such matter being a proper subject of expert testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1062; Dec. Dig. § 476.\*]

#### 3. HOMICIDE (§ 110\*)—SELF-DEFENSE—WHAT CONSTITUTES ATTACK.

Proof that, at the moment accused shot decedent, decedent had his gun practically in a firing position, cocked, presented, with his hand on the trigger, showed an actual attack, authorizing accused to defend as against an actual attack, and not merely as against a reasonable apprehension of danger based on acts of mere preparation.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 140; Dec. Dig. § 110.\*]

#### 4. HOMICIDE (§ 300\*)—SELF-DEFENSE—EVIDENCE—INSTRUCTIONS.

Where the evidence showed that, at the moment accused shot decedent, decedent had his gun practically in a firing position, cocked, presented, with his hand on the trigger, and that accused shot in the belief that his life was in immediate danger, an instruction that a homicide is permitted in the necessary defense of the person, when the attack is such as to produce a reasonable fear of death, etc., and that, if decedent was at the time of the shooting in the act of making an attack on accused under circumstances reasonably indicating to accused that decedent intended to murder him, etc., accused was not guilty, sufficiently presented the issue of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 617; Dec. Dig. § 300.\*]

Appeal from District Court, Roberts County; H. G. Hendricks, Judge.

J. M. Simmons was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Hoover & Taylor, W. T. Allen, and W. R. Ewing, for appellant. Baker, Willis & Willis and F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Hansford county on the 14th day of October, 1907, charged with the murder of one George Aitkens, alleged to have been committed in said county on the 30th day of June of the same year. The case was thereafter transferred on change of venue, by agreement, to Roberts county, and on the trial, ending on the 15th day of February, 1908, appellant was found guilty of murder in the second degree, and his punishment assessed at confinement in the penitentiary for six years.

We deem it unnecessary to give an extended statement of the facts. Briefly, the evidence shows that both appellant and deceased resided on Palo Duro creek, in Hansford county; their residences being something like a mile and a half apart. Appellant lived below deceased on the creek, but his land extended and his fence was built something like 300 yards from Aitkens' residence. Appellant was mainly engaged in raising alfalfa, and had not made any serious effort to grow any other crops. From the testimony it seems that the hogs of Aitkens and probably others had been making serious depredations upon appellant's crops, greatly to his annoyance and to the extent of causing him considerable loss. He had made some effort to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stop these inroads, and out of this and probably other facts developed the strained relations between the parties. The evidence tended to show threats on the part of deceased to kill appellant, or at least do him some serious injury, and it is shown beyond doubt or question that deceased was a dangerous, violent, and quarrelsome man, and also that he had been engaged in a number of difficulties and controversies with his neighbors, which facts came to the knowledge of appellant. On the morning of the killing, which was on Sunday morning, appellant and his young son, Lindsey Simmons, left the former's residence to go some distance from the house down in the alfalfa field, with the avowed purpose, as stated by them, of looking to see if there were any hogs in the field, and also to finish stacking some alfalfa, which had been cut, in view of threatened, impending rain, and with the purpose on appellant's part, as stated by him, if he killed deceased's hogs, to pay for them. The testimony of appellant and his son shows that when they got to the field they discovered only one hog, and in view of this fact and the messages which appellant had sent deceased he seemed to think it likely that deceased had made some effort to get his hogs out of the field, and stated, therefore, that he would not kill the hog, but would set his dogs on it and run it out of the field. The dogs were set upon the hog and ran it into a branch or creek, and soon after this, or about this time, deceased was seen coming from towards his residence with his gun in his hand at a very rapid gait. At this time appellant and his son were on different sides of the creek; appellant having a rifle and his son a shotgun. Appellant seems to have crossed the creek to where his son was and exchanged guns with him. When deceased came up, some colloquy ensued. In the meantime appellant claims he had called out to deceased to go back; that he wanted no trouble with him. He testifies, further, that deceased proposed that they step off 20 paces and shoot it out, to which he replied that it did not matter, or something to that effect; that he really believed this was a pretext to get some advantage of him, and that at this time deceased was somewhat in the act of walking away from him, and yet with his back not squarely to him, and that after he had gone a few paces he turned partly and almost entirely around, with his gun almost raised to a shooting position, cocked, with his left hand supporting the gun and his right hand on the trigger, and, while almost in the act of shooting, appellant fired upon him and killed him.

There were two witnesses for the state, Alfred Kinnebrugh and Thomas Aitkens, who gave a different account of the matter, and who in substance testified that, while quite a distance away, they were in a situation to see and did see the parties, at the time of the shots, and did not see deceased making

any demonstration. These witnesses also testified, and especially Kinnebrugh, that, immediately after the shot was fired, appellant and his son went to the place where deceased was standing, and appeared to be dragging something along through the alfalfa, and then stooped down over the body as if in the act of fixing something. There was some proof, also, to the effect, in substance, that the cartridge which was found in deceased's gun had blood on the end of it, and that there was also some blood about the gun. The state's theory evidently was, and they sought by this testimony to prove, that the bloody cartridge in the gun had been placed there by appellant, and that deceased was dragged from the place where he had been killed, and the body placed in such position and the gun in such position as to support and lend color to his theory and claim of self-defense. This is not intended by any means to be a full statement of the case; but it is perhaps sufficient to illustrate the questions discussed. Both the witnesses Kinnebrugh and Aitkens were some 250 yards from the place of the killing, and there was quite a controversy as to just where they were and what, if anything, they saw.

1. During the progress of the trial the state introduced as a witness one George Trost. By him they sought to prove, and did prove, that he was near to the scene of the difficulty, and heard, just preceding the firing, some loud talking in a voice which he did not believe to be the voice of deceased; but he thought he heard some one calling him, and immediately went to the scene of the fatal difficulty. Just before he got there he met Kinnebrugh coming away, and saw George Aitkens at or near the place where the body of deceased lay. There were many discrepancies in the testimony of both Kinnebrugh and Aitkens, and the cross-examination of these witnesses and the disclosures thereby brought about were such as much, and probably would have, impaired the weight of their testimony with the jury. The testimony of this witness Trost was important to the state and very damaging to the appellant, in that it supported their contention and claim that they were in such a point of nearness to the difficulty as to have seen what transpired at the immediate time of the shooting. On cross-examination the defendant proved by the witness Trost that he had been charged in Oklahoma with robbing a Jew peddler, and also with getting too much whisky.

Soon after these developments on the inquiry of the defendant, the state, on redirect examination, asked him what had become of the charges against him. This question was objected to by counsel for appellant, and the objection sustained. In sustaining this objection for the appellant, the court made this remark, as stated in the bill of excep-



tions: "If there had been any objection made at the start, I might have sustained it on the ground that it was immaterial and irrelevant." Counsel for defendant excepted to this remark of the court, made in the presence and hearing of the jury, because said remark was on the weight of the evidence, was in the presence and hearing of the jury, and was calculated to prejudice the rights of the defendant, and because said testimony was admissible and relevant in this case. We think the court was in error in making such remark in the presence and hearing of the jury; nor can we say that the error was not harmful. That the testimony of this witness was important is not to be doubted. That it was proper for the defendant to contradict or impeach the witness by any method known to the law, of course, admits of no question. For the court to say, in the presence and hearing of the jury, that if the objection had been timely made he might or would have sustained the objection to it as being irrelevant and immaterial, must obviously have had the effect to impress the jury that the attack on the credibility of the witness sought to be made by the defendant was inconsequential, and that the proof offered to support same was both immaterial and irrelevant.

In the case of *Moore v. State*, 33 Tex. Cr. R. 306, 26 S. W. 403, we said: "The court should simply rule upon objections to the admission or rejection of testimony without comment. Such is the spirit, and even letter, of the statute. Inquiry on appeal as to whether injury was caused by comments of the court in such state of case ought not to be a question for revision." Again, in the later case of *Kirk v. State*, 35 Tex. Cr. R. 224, 32 S. W. 1045, Judge Hurt, speaking for the court, and discussing a quite similar question, says: "To corroborate the prosecutor, who swears positively that appellant was the party who assaulted and robbed him, the state introduced evidence of horse tracks found near the place of robbery, and circumstances which tended strongly to show that they were made by the appellant's horse. Appellant objected to this evidence, on the ground that it was immaterial. In ruling upon the admissibility of this testimony, the learned judge below remarked, in the hearing of the jury, that he thought that evidence of that character was highly material. To these remarks appellant by counsel objected, reserving his bill of exceptions. Article 715, Code Cr. Proc. 1895, provides that in charging the jury the court shall not express any opinion as to the weight of the evidence. Article 767 provides that in ruling upon the admissibility of evidence the judge shall not discuss or comment upon the weight of same or its bearing in the case, but shall simply decide whether or not it be admissible; nor shall he at any stage of the proceedings previous to the return of the verdict make any remark calculated to convey to the jury

his opinion of the case. Now, let us suppose that in the charge of the court he had instructed the jury, with reference to the horse tracks, that he believed this was highly important and material testimony; would he not have been charging the jury in regard to the weight of the testimony? Most evidently he would. It is the object of our Code, gathered from every provision relating to that subject, to prohibit the judge from expressing any opinion as to the weight of the testimony or credibility of the witnesses. The court can neither do this in its charge nor in ruling upon the admissibility of testimony. See *Wilson v. State*, 17 Tex. App. 525; *Crook v. State*, 27 Tex. App. 198, 11 S. W. 444; *Reason v. State* (Tex. Cr. App.) 30 S. W. 780; *Lawson v. State* (Tex. Cr. App.) 32 S. W. 895."

We can well understand how in practice it may sometimes become important, with a view of making clear to counsel the precise limit and scope of a ruling in respect to a matter of evidence, that the court should make some statement, and it may sometimes happen, in seeking information from counsel, the court may have occasion to use language that might be construed into some expression touching the importance or scope of the testimony offered or the nature of the objections made; but ordinarily the rule laid down in the case first quoted ought to be strictly and literally observed; that is, the court ought, without discussion or comment, to rule, and either admit or reject proffered testimony. The fact that a statement of the court as to the importance or unimportance of testimony is stated from the bench would often make it no less hurtful than if contained in the written charge. The trial judge is to the jury the Lord's anointed. His language and his conduct have to them a special and peculiar weight. Literally, in such matters, his communications should be, "yea, yea, and nay, nay."

2. During the progress of the trial, and while appellant was introducing his testimony, he produced as a witness Dr. M. L. Gunn. This witness qualified as an expert, and testified, in substance, that deceased was shot in the neck, severing both the jugular vein and the arteries connected therewith. Having before this shown by several witnesses a careful examination of the ground and alfalfa growing thereon, at and near the place where the body of deceased was found, without discovering any sign or trace of blood, and evidently with a view of adducing before the jury all possible testimony from which they could gather the conclusion of the impossibility of the body of deceased having been moved as indicated by the testimony of the state's witnesses, without there being some trace of blood on the ground or alfalfa, the appellant proposed to prove by this witness, and, if permitted, he would have answered, that a wound inflicted in the manner in which deceased was wounded would have

been such as that such a quantity of blood would have flowed from the wound immediately as would have left a sign where the body fell. This was in response to a question as to whether or not, if a person was shot in such a way as to sever the jugular vein and the arteries in connection therewith, the blood would begin to spurt from the wound immediately, and whether or not the blood would flow in such quantities as to leave a sign of the blood upon the ground where the body fell. The objection to this testimony was that same was not the subject of expert testimony. The court makes, in approving this bill of exceptions, the following statement: "The following is the question as taken from the stenographer's notes asked by defendant's counsel as to said matter: 'State to this jury whether or not if the body fell, shot as I have described, and then be dragged 10 or 15 steps, whether or not it would be possible to drag a body that way without leaving traces of blood where the body was dragged. Counsel for the State: We object to that, as not a proper subject of expert testimony. The Court: Sustain the objection. Mr. Taylor: We except.'" An inspection of the statement of facts shows that the witness, among other things, testified as follows: "There is a large vein on the inside of the muscle on both sides, and there is an artery on the inside of the vein. All the blood to the head goes through those veins. If those veins are severed and those arteries are severed, the result would be that the man would bleed to death pretty quick. If a man was shot so the jugular vein and the artery were cut, the blood would begin to flow immediately. If the artery was cut in two, it would come in spurts with every pulsation of the heart. If the vein was cut, it would flow in small streams. If a man was shot in the center of the neck, that would sever the artery."

In this condition of the record and proof it is our belief that appellant was entitled to have the opinion of this witness as an expert, in view of all the facts stated by him, as to whether the flow of blood would have been so immediate and in such quantities as to have left on the ground and vegetation signs of blood easily discoverable. It seems to us that it might be a matter of common knowledge that, if the jugular vein was severed, it would result in loss of blood; but as to how great the loss, how immediate, whether in such quantities as would have become evident, and as would have left impressions and signs on the ground, were matters peculiarly within the knowledge of an expert, and it was such a question as he should have been permitted to express an opinion upon. In the case of *Pilot v. State*, 38 Tex. Cr. R. 515, 43 S. W. 112, 1024, a somewhat similar matter came before this court. In that case Dr. Reeves was permitted to state that he had examined the leg of the deceased, who had been injured by a gun-

shot wound; that the bone had been fractured in three places, and the muscles and arteries had been severed; that his leg at the time was covered by heavy drawers and pants, and the sock was drawn up over the drawers. The testimony in the case showed that he had been shot in the house about 12 o'clock, and that his dead body was found the next morning about 18 feet in the rear of the store in a gully. In this condition of affairs the expert was permitted to testify on these facts that it was possible for the deceased to have been shot in the house as related, and to have gotten to the gully 18 feet in the rear of the store, and left no sign of blood along the route. It was held in this case that such testimony came within the rule of expert testimony. Clearly, if a physician who qualifies as an expert is permitted under a given state of facts shown in the evidence to express the opinion that a wounded person might go a given distance without leaving any sign of blood along the route, it would seem necessarily to follow that the converse of this proposition would be true, and that he might testify, and should be allowed to testify, if such in his opinion was the case, that a different wound would be such as inevitably to leave signs of blood along the route either voluntarily undertaken by him or along one which he had been dragged. Such, also, as we understand, is the rule of the Supreme Court of the United States in the well-considered case of *Bram v. United States*, 108 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568. In that case Mr. Justice White, speaking for the court, uses this language: "An objection to a question, asked of a medical witness, whether in his opinion a man standing at the hip of a recumbent person, and striking blows on that person's head and forehead with an ax, would necessarily be spattered with or covered with some of the blood, was also properly overruled. We think the assumed facts recited in the question were warranted by the proof in the case, and that the evidence sought to be elicited from the witness was of a character justifying an expression of opinion by the witness; the jury, after all, being at liberty to give to the evidence such weight as in their judgment it was entitled to." *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708. See, also, *Wharton, Crim. Evidence*, § 412; *Robinson v. State* (Tex. Cr. App.) 63 S. W. 870; *Henry v. State* (Tex. Cr. App.) 49 S. W. 97; *Sebastian v. State*, 41 Tex. Cr. R. 248, 53 S. W. 875.

3. The charge of the court on the issue of self-defense is most vigorously and fiercely assailed by counsel for appellant. It is urgently insisted that same is erroneous, in that it submits to the jury as a ground of self-defense the issue of actual attack and danger only, and the same does not submit the issue of reasonable apprehension of danger. We have carefully examined the statement of facts, and are not prepared to agree

with counsel for appellant that the charge of the court in this respect is erroneous or subject to just criticism. Without undertaking to set out at length the testimony, which would require more time than can be given to it, the evidence of both appellant and his son was to the effect that at the moment appellant fired the deceased had his gun practically in a firing position, cocked, presented, with his hand on the trigger, and that he shot in the belief that his life was in imminent, pressing, and immediate danger. Of course, charges on self-defense, as upon all other issues, must and should conform to facts. It may sometimes happen that the testimony would present both the issue of actual attack, as well as a ground of self-defense based on reasonable apprehension of danger. The evidence may sometimes present the latter defense without the testimony showing an actual attack made. But, as we read the record in this case, the acts and conduct of the deceased had gone far beyond the act of mere preparation, but that his every movement, whole conduct, and the entire acts constituted an actual attack made by him on appellant. We do not understand that, in order that there should be an attack, it must be a completed attack; but it means such progress in the hostile demonstration and movement as to go beyond the mere acts of preparation, and such as to demonstrate beyond doubt the beginning and evidence the progress of an actual hostile movement. In this respect this case is easily distinguishable from all the cases cited by appellant. *Phipps v. State*, 34 Tex. Cr. R. 560, 31 S. W. 397; *Poole v. State*, 45 Tex. Cr. R. 365, 76 S. W. 565; *Brady v. State* (Tex. Cr. App.) 65 S. W. 521. This case in its facts is strikingly like those considered in *Pinson v. State*, 50 Tex. Cr. R. 234, 96 S. W. 23. See, also, *Casey v. State* (Tex. Cr. App.) 113 S. W. 534.

On this subject the court did instruct the jury as follows: "You are charged that homicide is permitted in the necessary defense of person—that is to say, that when the attack is such as to produce in the mind of the person doing the killing at the time of the homicide a reasonable expectation or fear of death or serious bodily injury; and, considering the plea of self-defense of the defendant in this case, it is your duty to look at the transaction from what you believe from the evidence was the standpoint of the defendant at the time of the homicide. Hence you are instructed in this case that if you find and believe from the evidence that, at the time the defendant Simmons fired the fatal shot, the deceased, Aitkens, was in the act of making an attack upon

him, Simmons, with a rifle, under circumstances which reasonably indicated to the said Simmons that the said Aitkens intended to murder him, or inflict upon said Simmons some serious bodily injury, and that said rifle and the manner of its use were such as were reasonably calculated to produce such results, or either of them, you are charged that the law presumes that the deceased intended to murder, or inflict serious bodily injury upon, the defendant, and it will be your duty to find the defendant not guilty; and in this connection you are further charged that the defendant was not required to retreat at the time to avoid the necessity of killing deceased." This, under the facts of the case, was, as we believe, a sufficient submission of the issue of self-defense. The only portion of same which is subject to any criticism is a part of the first sentence of the clause above quoted, which is as follows: "It is your duty to look at the transaction from what you believe from the evidence was the standpoint of the defendant." This is criticised, and thought to be objectionable, in that the jury may have inferred that they would judge of the transaction from what the after developments disclosed to be the real facts, and would not determine the question of danger under the circumstances as they appeared to appellant at the time and in his great extremity. We think this criticism is probably well taken, and on another trial we suggest that this portion of the charge of the court be so framed as not to be subject to this objection.

4. There are a number of other questions raised in the record, most of which relate to remarks of the court during the progress of the trial, to demonstrations of counsel in the presence of the jury, and to what are urged as improper arguments and statements by counsel for the prosecution in the course of their arguments to the jury. These are matters which are not likely to occur again. While some of the matters urged are subject to fair criticism, they are scarcely of such a substantial or weighty nature as would justify us in reversing the case; but we beg again to suggest to the courts the impropriety of comments upon the proceedings in the development of a case, and the admission of testimony, and to urge upon counsel for the state greater moderation and restraint in the matters of appeals to the jury and the introduction of outside and extraneous matters having no foundation in the testimony, and which are not proper and legitimate subjects of discussion.

On the grounds stated, the judgment of the court below is set aside, and the cause remanded for trial in accordance with law.

**JEFFRIES v. STATE.**

(Court of Criminal Appeals of Texas. Feb. 24, 1909.)

**CRIMINAL LAW (§ 1090\*)—APPEAL—RECORD—BILL OF EXCEPTIONS—STATEMENT OF FACTS—NECESSITY.**

Where the record contains no statement of facts or bill of exceptions, a conviction will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2807; Dec. Dig. § 1090.\*]

Appeal from District Court, Jack County; J. W. Patterson, Judge.

H. J. Jeffries was convicted of rape, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** Appellant was convicted of rape, and his punishment assessed at six years' confinement in the penitentiary.

There is neither a statement of the facts nor bills of exceptions in this record. The motion for new trial raises no question that authorizes a review, in the absence of the statement of facts and bills of exceptions.

Finding no error in the record, the judgment is affirmed.

**YARDLEY v. STATE.**

(Court of Criminal Appeals of Texas. Dec. 12, 1908. Rehearing Denied March 17, 1909.)

**1. PERJURY (§ 25\*)—INDICTMENT—SUFFICIENCY.**  
An indictment for perjury, which states distinctly what accused swore to and alleges that his testimony was material, is sufficient, without showing how or wherein the testimony was material; but, where the indictment does not allege that the false statement was material, it must show on its face its materiality.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 84; Dec. Dig. § 25.\*]

**2. CRIMINAL LAW (§ 614\*)—CONTINUANCE—ABSENCE OF WITNESSES—DILIGENCE.**

Where, on the second application for a continuance on the ground of the absence of witnesses, it appeared that the court convened on November 4th, that the case was called and postponed, that it was tried on November 6th, that the absent witnesses were accessible to the court within two or three days, if served with process, and that no process was applied for, the application was properly denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1314; Dec. Dig. § 614.\*]

**3. CRIMINAL LAW (§ 723\*)—MISCONDUCT OF PROSECUTING ATTORNEY—IMPROPER ARGUMENT.**

Where, on a trial for perjury, counsel for accused urged the jury to consider the feelings of accused's wife, the argument of the district attorney, warranted by the evidence, that, if accused had had as much consideration for his wife as accused's counsel seemed to have, accused would not have entered into the conspiracy that the evidence showed that he did, followed by instructions of the court directing the district attorney to avoid inflammatory argument, did not justify a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1676; Dec. Dig. § 723.\*]

Appeal from District Court, San Saba County; Clarence Martin, Judge.

E. W. Yardley was convicted of perjury, and he appeals. Affirmed.

Leigh Burleson, R. L. H. Williams, and Flack & Dalrymple, for appellant. Dayton Moses, Dist. Atty., and F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** This conviction was for perjury; the punishment assessed being two years' confinement in the penitentiary.

The charging part of the indictment is as follows: "The said E. W. Yardley then and there appeared as a witness in his own behalf, and was then and there duly and legally sworn and did take his corporal oath, before the said court and a jury, as a witness to testify in said cause, which oath was then and there required by law and necessary for the ends of public justice, and which said Yardley by W. V. Dean, the clerk of said court, then and there having sufficient and competent authority under the law to administer the said oath to the said E. W. Yardley in that behalf, and at and upon the trial of the said issue so joined between the parties as aforesaid, it then and there became and was a material question whether the said E. W. Yardley, who was then and there on trial, charged by indictment as aforesaid with having murdered one Pat Carroll, did on Sunday, the next afternoon after the said Pat Carroll was killed, go to the feed pens located about 1½ miles east of the town of San Saba, in said county and state, and have a conversation with one Mitch Alexander, a witness in said cause, and who was present at the time of the killing of said Pat Carroll; and the said E. W. Yardley, being so sworn as aforesaid, then and there on the trial of said cause upon his oath as aforesaid did falsely, willfully, and deliberately, before Hon. Clarence Martin, judge as aforesaid, and before the jurors so sworn as aforesaid, depose and state and testify in substance and to the effect following: That on Sunday, the next day after the said Pat Carroll was killed, he, the said E. W. Yardley, did not go to the feed pens where the said Mitch Alexander was working, about 1½ miles east of the town of San Saba, in said county and state, at any time that day, and that he did not at any time on that day have a conversation with the said Mitch Alexander at said feed pens so located as aforesaid, and that he did not have a conversation with said Mitch Alexander at any place on Sunday, the day after the said Pat Carroll was killed, and the statement so made by the said E. W. Yardley was then and there material to the issue in said cause. Whereas in truth and in fact the said E. W. Yardley, on Sunday, the day after the killing of Pat Carroll, and in the afternoon of said

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

day, did go to the feed pens located about 1½ miles east of the town of San Saba, and did then and there have a conversation with the said Mitch Alexander. The said Pat Carroll, for whose murder the said E. W. Yardley was then and there on trial, was killed in the said town of San Saba on the 3d day of March, A. D. 1906. The said statements so made by the said E. W. Yardley as a witness in his own behalf in said cause, in the manner and form as aforesaid, were deliberately and willfully made, and were deliberately and willfully false, as he, the said E. W. Yardley, then and there well knew."

Appellant filed a motion to quash the indictment, and cites the court to the case of *McVickers v. State*, 52 Tex. Cr. R. 508, 107 S. W. 834, to support same, insisting that the indictment does not show how or wherein the testimony upon which perjury was predicated is material. There are some expressions in the *McVickers* Case that support appellant's contention, but the first statement therein is to the effect that the indictment in that case was inartistically drawn and was vague and indefinite. Then follows a statement that the same does not show how or wherein the statement upon which perjury is predicated became material. In a subsequent clause of the same opinion will be found this very explicit statement: "And while it is not necessary for the indictment to show the materiality, under a long line of authorities of this court, we suggest, in view of the lack of certainty in the allegation, that a new indictment be found." So it will be seen, from a careful analysis of said decision, that there was no effort made therein to overturn the settled rule of this court, which is this: That in perjury cases all that is necessary to do is to state distinctly what the party swore to and allege its materiality, and it is not necessary to show how or wherein, it was material. It is not necessary to show the materiality, since to do so would be placing the evidence in the pleading, to wit, the indictment, which would violate a rudimentary rule of the law of practice and procedure. If the indictment alleges that the false statement was material to the issue on trial, it is sufficient, without alleging the facts which show the materiality. See *Washington v. State*, 22 Tex. App. 26, 3 S. W. 228; *Partain v. State*, 22 Tex. App. 100, 2 S. W. 854; *Kitchen v. State*, 26 Tex. App. 165, 9 S. W. 461; and *Slak v. State*, 28 Tex. App. 432, 13 S. W. 647. Of course, if the indictment does not allege that the false statement was material, then the indictment must show upon its face its materiality. But the better practice is to allege the false statement, and then allege that said statement was then and there material, as is suggested in *White's Ann. Pen. Code*, section 333. See, also, *Cravey v. State*, 33 Tex. Cr. R. 557, 28 S. W. 472.

Reverting a moment to the *McVickers* Case, it will be observed that the judgment was reversed and the cause dismissed. This was done in view of the lack of certainty in the allegation in the indictment—not because the indictment did not show the materiality, but for the lack of certainty in the allegation of the statement upon which perjury was predicated. Many other authorities, in addition to those above, might be cited to support the rule that it is not necessary for the indictment to show the materiality of the statement upon which perjury is predicated. The indictment before us in this case is quite explicit as to what appellant swore, and is equally explicit in charging that said statement was material in the course of the judicial inquiry. The evidence clearly shows the materiality of the testimony. This was all that the state was required to do. We accordingly hold that the indictment is sufficient, and that the evidence amply supports the allegations of the indictment.

As presented by the bill of exceptions and qualifications of the judge, we are of opinion that there was no error in overruling the application for continuance. The diligence was not sufficient. It was the second application. The court qualifies the bill, and states that the court convened on November 4, 1907. The case was called and postponed until Wednesday of the first week of court. The witness Mrs. Woodward lived within 45 miles of court, and no effort was made to secure her attendance. No process was applied for, and it is further stated that the witnesses were accessible to the court within two or three days' time if served with process; but no process of any kind was applied for, and two of the witnesses, Mrs. McFarland and Mrs. Pace, were absent at the last term of the court. The case was tried on November 6th. As that matter is presented, we are of opinion that there is not a sufficient showing made to require a reversal for refusing the continuance.

There is another bill of exceptions in the record. It complains of the closing remarks of the district attorney. The following language is recited: "If the defendant had have had as much consideration for his wife and her feelings as the defendant's counsel seem to have, the defendant would not have entered into the damnable conspiracy that the evidence in this case shows that he did to take the life of Pat Carroll." Signing the bill, the court thus explains: "That said remarks were made in behalf of the state in reply to counsel's appeal in behalf of the defendant for the jury to respect and consider the feelings of defendant's wife; and, though the evidence showed that defendant had killed said Pat Carroll, the court instructed the district attorney to not indulge in any inflammatory appeal to the jury in answer to defendant's appeal in behalf of the feelings of defendant's wife; and as no

special requested instructions were requested by defendant's counsel, and as said remarks of district attorney were warranted by the evidence, and in reply to defendant's counsel, and not outside of the record, the court did nothing further than to suggest that no inflammatory argument be used, and the district attorney followed and was guided by the court's request and suggestion." As this matter is explained, we are of opinion that there is no sufficient reason to reverse the judgment.

The bills of exception discussed are all that are incorporated in the record.

Finding no reversible error in the record, the judgment is ordered to be affirmed.

### GARDNER v. STATE.

(Court of Criminal Appeals of Texas. Feb. 24, 1909.)

#### 1. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

While evidence of extraneous and contemporary crimes is sometimes admissible, when it tends to develop the *res gestæ*, show intent or system, or connect accused with the crime for which he is being tried, it is never admissible where there is positive evidence supporting the state regarding the cause on trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 822; Dec. Dig. § 369.\*]

#### 2. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

In a trial for theft of cotton from M. on a certain date, S., an accomplice, testified that five or six days thereafter he and accused went to B.'s place and stole some cotton from him, and secreted it in a certain house, where B. subsequently found it. A liveryman testified that S. hired a team and buggy, which he said was for himself and accused, and that the two drove away together, and S. testified that this was the vehicle which he and accused used in going to B.'s and taking the cotton. There was also evidence that a whip, which was in the buggy when hired, was found the next day somewhere in the section of country where the cotton was taken. *Held*, that the testimony was inadmissible; the transactions being independent, and the testimony of the accomplice as to the connection of accused with the taking of M.'s cotton not being corroborated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 822; Dec. Dig. § 369.\*]

#### 3. WITNESSES (§ 345\*)—IMPEACHMENT—ACQUITTAL OR CONVICTION OF CRIME.

In a trial for theft, a witness for accused could not be impeached by evidence that about 30 years before the trial he was convicted for horse theft, and the same year was indicted for murder, but not convicted; the transactions being too remote.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1126, 1127; Dec. Dig. § 345.\*]

#### 4. CRIMINAL LAW (§ 780\*)—THEFT—TESTIMONY OF ACCOMPLICE—CORROBORATION—INSTRUCTIONS.

In a trial for theft, a charge which failed to instruct the jury that, in order to convict, they must believe the testimony of an accomplice to be true, and that such accomplice must be corroborated by evidence, outside his own tes-

timony, tending to connect accused with the theft of the cotton, was insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.\*]

Appeal from Callahan County Court; C. D. Russell, Judge.

Math Gardner was convicted of theft, and appeals. Reversed and remanded.

Otis Bowyer and F. S. Bell, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of the theft of seed cotton of the alleged value of \$5 from Mason.

An accomplice by the name of Tom South testified in the case. He says that himself and Gardner went out to the place controlled by one Burleson, and en route stole some sacks from McIntosh; that when they reached Burleson's place they got one sack of cotton from a wagon, and filled the other two sacks with cotton, and carried them from that point, and secreted them in a house on the place of Wyatt Hanks, some five or six miles southwest of Burleson's place. Burleson found his sack, with cotton in it, in this house, controlled by Hanks. A liveryman in the little village of Clyde testified that South hired a buggy and pair of horses, which he said was for himself and Gardner. He further states that South and Gardner drove away in the buggy. One of the liveryman's employes testified that the buggy was returned next morning about 5 o'clock, and that Gardner and South were in the buggy and jointly paid for its hire. South testifies that this is the vehicle that they used in going down to Burleson's and taking the cotton from that point to Hanks'. There was a whip in the buggy, when hired, which was found the following day somewhere in the section of country where the cotton was taken. Objection was reserved to all this testimony, because it did not serve to illustrate or connect the defendant with any of the matters alleged in the information, and did not serve in any way to connect defendant with the theft of Mason's cotton, which was alleged in the information to have been stolen. Some days elapsed between the two transactions; Mason's cotton having been taken on the night of the 9th, and Burleson's on the night of the 14th. South testified that he and Gardner took Mason's cotton, and carried it also to Hanks' place, and put it in the same house in which they placed Burleson's.

There is no corroboration of the accomplice, South, as to Gardner's connection with the taking of Mason's cotton. There was no evidence introduced showing that Mason's cotton was carried to Hanks' place, corroborative of the accomplice, South. Mason could not identify any cotton, nor is there any evidence in the record to identify any

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cotton. There is some evidence of buggy tracks, or tracks of a vehicle of some kind, going in the direction of Hanks' place from Mason's; but that is very confused, indeed, and tends to show that the buggy tracks went in the direction of Abilene, rather than towards Clyde. South says that he and appellant hired a buggy, also, to go to Mason's; but the liveryman does not corroborate him, or undertake to corroborate him, in this respect. The evidence from the liveryman and his employé is to the effect that South got a buggy on the night of the 9th; but they in no way connect Gardner with it, and did not see him, either when the buggy left or when it was returned, nor did Gardner assist in paying for the hire of the vehicle on this occasion. Extraneous and contemporary crimes are sometimes admissible, when they may tend to develop the res geste, show the intent or system, or connect the defendant with the crime for which he is being tried. But this is never the case where there is positive evidence introduced to support the state in regard to the cause on trial. The transaction in regard to the Mason theft is not corroborated by the fact that Burleson lost cotton five or six days afterward. Nor does the fact that appellant went with South, if he did go with him, to take the Burleson cotton, corroborate South in regard to the Mason transaction. They were entirely independent transactions, and the corroboration, if there was any, of South in regard to the Burleson matter, could not be introduced to connect appellant with the Mason matter, occurring five or six days prior to the Burleson transaction, under the facts of this case. We say, therefore, this testimony was inadmissible. Being before the jury, it ought to have been limited by the court's charge. This was not done. Exception was reserved, and the special requested instructions were refused. The authorities are so clear and harmonious on the proposition, we deem it unnecessary to cite them.

The witness Hanks testified in behalf of the defendant, and was required to answer that he had been indicted and convicted for horse theft in Karnes county in 1878, and had been indicted for murder the same year, but had never been convicted for that offense. This was inadmissible as impeaching evidence. The transactions are too remote. The decisions of this court are harmonious to that effect.

The charge of the court with reference to accomplice's testimony in this case is not sufficient. It omits to instruct the jury that they must believe the testimony of the accomplice to be true, and, in addition to believing the testimony of the accomplice, that he must be corroborated by evidence, outside and beyond his own testimony, tending to connect defendant with the theft of Mason's cotton.

The judgment is reversed, and the cause is remanded.

## HANKS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 24, 1909.)

CRIMINAL LAW (§ 780\*)—WITNESSES—ACCOMPLICES—CORROBORATION—INSTRUCTIONS.

In a trial for receiving and concealing stolen property, accused was entitled to an instruction that an alleged accomplice, who testified as to the theft and the receiving of the property, should be corroborated as to both acts; that no statement or declaration made by him subsequent to the commission of the offenses could corroborate his testimony; and that the jury must believe such testimony to be true before a conviction could be had.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.\*]

Davidson, P. J., dissenting in part.

Appeal from Callahan County Court; C. D. Russell, Judge.

Wyatt Hanks was convicted of receiving and concealing stolen property, and appeals. Reversed and remanded.

Otis Bowyer and F. S. Bell, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Hanks was charged with receiving and concealing property that had theretofore been acquired by theft by Math Gardner and Tom South, which is alleged to have been the property of J. C. Burleson. A sufficient statement of the facts in this case will be found in No. 4,394, Gardner v. State, 117 S. W. 148, this day decided, in so far as the theft is concerned. Hanks took the stand in his own behalf, and denied the evidence of South in regard to receiving any property, and stated that, if any property was found in his house, it was placed there without his knowledge and consent, and in his absence, and he had no knowledge of the fact that it had been placed in his house. The house was not his residence, but an out-house on his place. The evidence in regard to the theft of Mason's cotton went before the jury, and appellant reserved an exception, and further made a motion to exclude the testimony which was overruled. The majority are of opinion that these exceptions should not have been sustained. The writer believes the exceptions are well taken.

The following special charge was requested: "The jury are charged that, though they may find that Math Gardner and Tom South did steal Burleson's cotton on the 14th day of October, 1907, yet that alone will not justify them in finding the defendant, Wyatt Hanks, guilty of the offense of receiving and concealing said cotton, unless they believe, beyond a reasonable doubt, from all the evidence adduced, that the evidence of the witness Tom South, is sufficiently corroborated as to the concealing and receiving of said cotton by said defendant, Wyatt Hanks, on October 14, 1907." The court charged the jury in a general way in regard to accom-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

police's testimony, but failed to instruct the jury that they must believe the testimony of said accomplice in order to convict. This was called to the court's attention, exception reserved, and a special charge requested, as follows: "You are charged, as part of the law of this case, that you cannot convict defendant upon the uncorroborated testimony of Tom South. Before you would be authorized to convict upon his testimony, it is necessary for him to be corroborated upon both the theft of said cotton and also the act of receiving and concealing said cotton after it was stolen; and in this connection the court further instructs you that no act, statement, or declaration made by said Tom South subsequent to the alleged theft and the alleged receiving and concealing of said cotton can be considered by you as corroborating his testimony. The court instructs you that said corroboration is absolutely essential to a legal conviction; that although the jury might believe the testimony of Tom South to be true, still they cannot convict, unless they further believe that there is other testimony, outside of Tom South's testimony, tending to connect defendant with the commission of the offense charged." This charge should have been given. It is a correct proposition that Tom South should be corroborated, both in respect to the theft and as to the receiving of the stolen property; and it is also a correct proposition that no statement or declaration made by Tom South can corroborate his testimony. The accomplice cannot corroborate himself, and it is further a correct proposition that the jury must believe the testimony of Tom South to be true before a conviction can be had.

For the reasons indicated, the judgment is reversed, and the cause is remanded.

#### HANKS v. STATE.

(Court of Criminal Appeals of Texas. March 3, 1909.)

#### 1. CRIMINAL LAW (§ 784\*)—RECEIVING STOLEN GOODS—TRIAL—CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS.

Where, in a trial for receiving stolen property, an accomplice testified positively to taking the property to accused, a charge on circumstantial evidence was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1893; Dec. Dig. § 784.\*]

#### 2. CRIMINAL LAW (§ 371\*)—EVIDENCE—OTHER OFFENSES—KNOWLEDGE AND INTENT.

In a trial for receiving stolen cotton, evidence that accused had received other cotton stolen from other parties about the same time was admissible to show knowledge and criminal intent; the cotton being all found in accused's possession at one time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 830; Dec. Dig. § 371.\*]

#### 3. CRIMINAL LAW (§ 683\*)—EVIDENCE—REBUTTAL.

Where, in a trial for receiving stolen cotton, accused claimed that the cotton was placed

in his smokehouse without his knowledge and consent, evidence that he had repeatedly received other cotton, which was also placed in the house, and all of which was found therein when he was arrested, was admissible in rebuttal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1615; Dec. Dig. § 683.\*]

#### 4. CRIMINAL LAW (§ 783\*)—EVIDENCE—PURPOSE AND EFFECT—INSTRUCTIONS.

In a trial for receiving on October 14th cotton stolen on that date, an instruction that the jury could not consider any evidence as to any offense prior thereto, except to show intent on accused's part, or consider such evidence in corroborating an accomplice, who testified for the state, in connecting accused with receiving and concealing another party's cotton on a prior date, was properly refused, since, to whatever extent the receipt of other stolen cotton was proven, to that extent it showed the intent with which the cotton in the case on trial was stolen, and in a certain sense corroborated the testimony of the accomplice, though the court should have limited the introduction of the receipt of other stolen cotton to the intent with which the cotton in the case on trial was received.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1874; Dec. Dig. § 783.\*]

#### 5. CRIMINAL LAW (§ 673\*)—EVIDENCE—LIMITING EFFECT.

Where the indictment charged that accused and one G. stole certain cotton, and that accused received the same knowing it was stolen, testimony of a witness that one S. confessed to him that he and G. stole the cotton and put it in accused's house was admissible to establish the theft of the cotton, though the court should have limited it to proof of the guilt of the accomplice alone.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1872; Dec. Dig. § 673.\*]

Appeal from Callahan County Court; C. D. Russell, Judge.

Wyatt Hanks was convicted of receiving and concealing stolen property, and appeals. Reversed and remanded.

Otis Bowyer and F. S. Bell, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. This is a companion case to the case of Wyatt Hanks v. State (No. 4,432, decided at the present term) 117 S. W. 149. The evidence in this case in many respects is the same as in the above-cited case, and in what respect same differs will be hereafter stated.

Bill of exceptions No. 1 complains that the court erred in not charging on the law of circumstantial evidence. This issue is not in the case, since the accomplice testified positively to taking the cotton to appellant.

Appellant asked the court to give the following charge: "You are instructed that you cannot consider any evidence herein adduced as to any offense prior to the 14th day of October, 1907, except to show intent on the part of this defendant, and you cannot consider such evidence in corroborating the prosecuting witness, Tom South, in connecting this defendant with the theft of the cotton herein charged on the 14th day of October, 1907." As heretofore held in above-cited companion case by the majority of



this court, this charge was properly refused. Where cotton is stolen from various and sundry parties, or from two or more parties, and carried to appellant's house, in order to fasten guilt and criminality, or, in other words, criminal intent, upon him, it is proper and germane to prove that he received divers and sundry articles that the evidence shows were stolen practically contemporaneous with the receipt of the stolen property charged in this case. The proposition here announced is very different from the question often decided by this court, and the decisions relied upon by appellant are not in point. Of course, if appellant had been charged with receiving stolen property on one occasion, and at entirely another and different occasion, and at a different time, disconnected in toto with receiving of the property in this case, it would not be admissible; but where the property is all found in possession of appellant at one and the same time, in order to prove scienter and criminal intent on his part, the different thefts or different receipts of stolen property are admissible. Appellant in this case insists, although the smokehouse in which the cotton was placed was within 50 yards of his house, that he knew nothing about it being in there, and that, if any cotton was stolen and placed there in his smokehouse, it was without his knowledge or consent. This is a valid defense, if true. Now, to rebut the proposition of his innocence, the state has a right to introduce the fact, if it is a fact, that he repeatedly received property of like kind and character, which was also placed in the house, and all of which was found in the house at the time he was arrested for the different offenses.

Appellant further asked the court to give the following charge: "The jury are instructed that they cannot consider any evidence prior to the 14th day of October, 1907, except to corroborate the commission of the offense charged herein, and not to connect this defendant with the commission of said offense." This charge is not correct. The evidence, as stated above, showing the receipt of other stolen property, could not be considered by the jury, except as going to show intent on the part of appellant, and to that effect should have been so limited; but appellant does not except to it on that ground.

Appellant presented to the court the following charge: "The jury are instructed that they cannot consider any evidence herein adduced as to any offense prior to the 14th of October, 1907, except to show intent on the part of this defendant, and they cannot consider such evidence in corroborating the prosecuting witness Tom South in connecting this defendant with the receiving and concealing of the cotton of Charlie Mason on the 9th day of October, 1907." This is not a correct charge, since, to whatever extent the receipt of other stolen cotton is proven, to that extent it does show the felonious

intent with which this cotton in this case was stolen, and in a certain sense corroborates the testimony of the accomplice, Tom South; but the court should have charged the jury that the evidence that was introduced by the state going to show receipt of other stolen property cannot be considered by them for any purpose, save and except as the jury may believe the same shows a fraudulent intent in receiving, if appellant did receive, the cotton for which he was prosecuted in this case. In other words, the court should have simply limited the introduction of the receipt of other stolen property to the intent with which the cotton alleged to have been stolen and received in this case was received.

Bill No. 3 shows that, over appellant's objection, the prosecuting witness, Jesse Mason, testified that on the 9th day of October, 1907, Charlie Mason had some cotton in his wagon, near the public road at his place, about 14 miles from Clyde, and that on the morning of the 10th day of October, 1907, they missed about 150 or 200 pounds of cotton, and they tracked the vehicle to the house of Wyatt Hanks, thence west to the Abilene road, and saw that it went north towards Abilene in said road. Appellant objects to this on the ground that it was a separate offense from the receiving and concealing of J. C. Burleson's cotton, and because it was too remote, and it did not tend to connect this defendant with the commission of the receiving and concealing Burleson's cotton. We apprehend appellant intended to place this bill of exceptions in the companion record. It has no place in this record. Certainly it was germane to this prosecution to prove circumstantially that appellant received stolen property belonging to the prosecuting witness, Mason, since the indictment charged that he did so receive.

Bill No. 5 shows the following: The state, over appellant's objection, proved by Will Estes that before he went to Gardner's house that morning, meaning the morning of October 15, 1907, he had a talk with Tom South, and also with J. C. Burleson; and Tom South, during the conversation, made a confession to him of stealing this cotton with Math Gardner, and that they put it in Wyatt Hanks' cotton seed house. Appellant objected to this testimony, because this was after the commission of the offense for which he was then on trial, it was not admissible to show conspiracy, and said statement was not made in the presence of this defendant, was hearsay, irrelevant, and prejudicial. This testimony was admissible. The indictment charged that Math Gardner and appellant stole cotton from Jesse Mason, and that appellant, knowing the same was stolen, received the same. Now, to prove that appellant received stolen property, it must first be established that the property was stolen. Therefore a confession of the thief that he stole the property is certainly admissible

testimony to establish the theft of the property. If he turned state's evidence, he would be none the less an accomplice, and could also swear that he delivered the cotton to appellant. Then the question would resolve itself to the proposition as to whether the accomplice was corroborated; but we could not hold that a confession of the principal to the crime would not be admissible to establish the fact of the theft of the cotton. This testimony, however, should have been limited by the court in his charge to proof of the guilt of the accomplice alone, and that the jury must not appropriate same for any other purpose, except to prove said accomplice's guilt.

Bill No. 6 shows the following: Defendant was permitted, over his objection, to answer questions propounded to him by the state, and which answer was as follows: "Yes; I served a term in the penitentiary for horse theft, committed in Karnes county. It all grew out of the Taylor-Sutton-Harden feud. I was 18 years old, and it was in 1878." Appellant objected to the admission of this evidence, and moved the court to exclude and withdraw it from the jury. No reason is stated in the bill of exceptions why it should be withdrawn. In the shape of this bill, we cannot say whether there was any error in the ruling of the court or not. In view of another trial, however, we would suggest that this testimony be not admitted, because it shows the offense to have been committed at a time too remote from this trial to serve as a predicate to impeach the integrity of appellant. For discussion of this question, see many authorities in Reports of this court.

As we understand the record before us, there is no fact corroborating the testimony of the accomplice South. In the companion case the accomplice seems to have been sufficiently corroborated; but in this case there is no circumstance showing that South and his codefendant, Math Gardner, were acting together at the time they secured the wagon that South swears that he secured from the livery stable with which to haul the cotton to appellant's house. The indictment charges that Math Gardner and the accomplice, South, stole the cotton from Jesse Mason and delivered it to appellant. We would suggest that, upon another trial, if the evidence does not corroborate the accomplice, South, as to the guilty participation of Gardner in the theft of the cotton in this case, as it does in the companion case, that the state file a new indictment, alleging the theft of the cotton by South alone; otherwise, there is a fatal variance in the allegation in the indictment and the proof in the case. Furthermore, we would suggest that the evidence is quite meager and unsatisfactory in this record as to whether or not the accomplice is corroborated as to the theft of the Mason cotton. To whatever extent cir-

cumstances can be introduced to corroborate the accomplice, in addition to those heretofore proven, same should be done.

For the error pointed out, the judgment is reversed, and the cause remanded.

#### Ex parte BURDINE.

(Court of Criminal Appeals of Texas. March 3, 1909.)

#### HABEAS CORPUS (§ 109\*)—RELIEF AWARDED.

On habeas corpus to secure the release of a prisoner arrested on a complaint for burglary in the justice court, on the ground of the insufficiency of the evidence, it was proper to remand the relator to custody of the sheriff to await the action of the grand jury, and to fix the amount of bond required.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 109.\*]

Appeal from District Court, Williamson County; C. A. Wilcox, Judge.

Habeas corpus, on the relation of G. P. Burdine, to procure his release from custody on a charge of burglary. From a judgment remanding relator to the custody of the sheriff, relator appeals. Affirmed.

J. F. Taulbee, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was arrested on a complaint in the justice court on a charge of burglary. He sued out a writ of habeas corpus before the district court of Williamson county, asking that he be released from custody, on the ground of the insufficiency of the evidence. Upon a hearing of the case the judge remanded relator to the custody of the sheriff of Williamson county to await the action of the grand jury, and set his bond at \$500, from which order he appeals to this court. We do not think there was any error in the ruling of the court.

The judgment is in all things affirmed.

#### REYES v. STATE.

(Court of Criminal Appeals of Texas. March 3, 1909.)

#### 1. HOMICIDE (§ 166\*)—ASSAULT WITH INTENT TO MURDER—ADMISSIBILITY OF EVIDENCE—INTENT.

In a prosecution for assault with intent to murder, evidence that accused, who had been going with a certain woman, had asked another person if he or prosecuting witness was going with her, and had asked the woman if she had anything to do with prosecuting witness or the other person, was admissible to show accused's jealousy of prosecuting witness as the motive for the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 328; Dec. Dig. § 166.\*]

#### 2. HOMICIDE (§ 234\*)—ASSAULT WITH INTENT TO MURDER—PROSECUTION—EVIDENCE.

In a prosecution for assault with intent to murder, evidence held to show that the assaulted person was shot by accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 482; Dec. Dig. § 234.\*]

**3. CRIMINAL LAW (§ 1152\*)—APPEAL—DISCRETION OF TRIAL COURT—MATTERS OF PRACTICE AND EVIDENCE.**

Matters of practice and evidence occurring during a criminal trial are largely to be determined by the trial court, and ordinarily his conclusions in respect thereto are binding on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3053; Dec. Dig. § 1152.\*]

**4. CRIMINAL LAW (§ 956\*)—NEW TRIAL—CONDUCT OF JURY—MANNER OF ARRIVING AT VERDICT—EVIDENCE.**

Evidence on motion for new trial held to show that there was no agreement among jurors, in advance of balloting on the length of imprisonment that the number of years ascertained by a quotient ballot should be their verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2389; Dec. Dig. § 956.\*]

**5. CRIMINAL LAW (§ 955\*)—MOTION FOR NEW TRIAL—BILL OF EXCEPTIONS—NECESSITY OF COURT'S APPROVAL.**

Where a bill of exceptions evidencing the fact that state's counsel in his closing argument had alluded to accused's failure to testify in his own behalf was not approved by the court in the form tendered, but had indorsed thereon a statement by the judge that he was at the time paying no attention to the argument and did not know what was said, and there was no effort made to prove up a bill by bystanders, testimony was inadmissible on a motion for a new trial to prove as a matter of fact that the allusion claimed was in fact made, as a bill of exceptions was necessary to perpetuate the matter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2368-2372; Dec. Dig. § 955.\*]

**6. HOMICIDE (§ 166\*)—ASSAULT WITH INTENT TO MURDER—ADMISSIBILITY OF EVIDENCE—MOTIVE.**

In a prosecution for assault with intent to murder, testimony of a woman that accused had been going with her for two or three years was admissible, where, when taken in connection with other evidence, including a threat of accused to another in reference to the woman, it showed such a relationship as would furnish a basis for the motive for the assault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 328; Dec. Dig. § 166.\*]

**7. CRIMINAL LAW (§ 940\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

In a prosecution for assault with intent to murder, where the evidence showed that accused shot the injured party, the mere fact that a useless pistol was found in the house where accused stayed was unimportant, and it was not error to refuse a new trial for newly discovered evidence of that fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324, 2325; Dec. Dig. § 940.\*]

**8. CRIMINAL LAW (§ 1174\*)—APPEAL—REVIEW—MISCONDUCT OF JURY—DISCUSSION OF ACCUSED'S FAILURE TO TESTIFY.**

A conviction will not be reversed for misconduct of the jury in referring to and discussing accused's failure to testify, unless it fairly and reasonably appears, in the light of all the circumstances, that the reference and discussion did or might probably have prejudiced accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3171; Dec. Dig. § 1174.\*]

**9. CRIMINAL LAW (§ 1174\*)—APPEAL—REVIEW—MISCONDUCT OF JURY—DISCUSSION OF ACCUSED'S FAILURE TO TESTIFY.**

In a prosecution for assault with intent to murder, it appeared that the jury discussed ac-

cused's failure to testify in his own behalf, the inquiry being made several times as to why he had not been put on the stand if he was not guilty, and that the discussion created a stronger feeling against accused than would have otherwise existed. A bill of exceptions was presented, evidencing the fact that the state's counsel alluded to the failure of accused to testify; but the court refused to approve it on the ground that he was not paying attention to counsel's argument and did not know what he said. Held that, in view of the evidence and record, the discussion by the jury was prejudicial, and ground for reversal of the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3171; Dec. Dig. § 1174.\*]

Appeal from District Court, Tom Green County; J. W. Timmins, Judge.

Anisetto Reyes was convicted of assault with intent to murder, and appeals. Reversed and remanded.

L. L. Montgomery and Taylor & Frink, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Tom Green county on a charge of assault with intent to murder one Jesus Munoz. On June 5, 1908, thereafter, he was on trial before the court and jury, found guilty as charged, and his punishment assessed at confinement in the penitentiary for eight years.

The evidence shows that both parties were Mexicans, and both resided in or near San Angelo. On the morning of the 27th day of April, 1908, Jesus Munoz was found on the streets of San Angelo in a horrible condition—a gunshot wound in his head, and his face beaten almost beyond recognition. He was removed to the home of his father, and his wounds treated, and he remained practically unconscious for many days. On the night before he was found there had been a dance given in San Angelo, which was attended by both appellant and the assaulted party. It seems from the evidence that for quite a while appellant had been waiting on one Juanita Subia, and that at the dance she had danced three sets with appellant and three with Munoz. It is shown by the testimony of Adolph Flores that on the night in question appellant called him aside and asked him if he was going with this girl, and that Flores told him to ask her, to which he replied that he did not believe what she said; and appellant then asked him if Jesus Munoz was going with her, to which he replied that he did not know; that he asked witness if Jesus was his friend, and he told him, "yes," that he thought he was; he pretended to be his (witness') friend, and "he said he thought Jesus wasn't nobody's friend." It was also shown by the testimony of the girl that, something like a month before the shooting, appellant had asked her if she had anything to do with either Jesus Munoz or Adolph Flores. This testimony

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was introduced, and other testimony of similar character, to show that appellant's jealousy of Jesus Munoz was the motive for the crime, and was admissible for this purpose. Jesus Munoz testified that he was walking along the street, about 12 o'clock, with appellant, and that he had done nothing to him, and that appellant was near him, and on the left side of him, and that nobody else was near him, and that he was shot, and did not know who shot him. The evidence further showed that the flesh on the left side of his face was powder-burned. Dr. Smith, the physician who attended Munoz, testified that the wound entered on the left side of his eye, and he probed the pistol shot wound to nearly the depth of his finger; that the bullet passed under the eye, and that afterwards, perhaps two days, he blew his nose and blew out a little brain on his handkerchief; that at the time he was conscious, but not hardly at himself; that he thought he was that way yet, and that it looked to him like his mind might be affected, and that he did not believe that his mind was entirely clear. We think, from the evidence, which we have carefully read and carefully analyzed, that the conclusion is inevitable that the assaulted party was shot by appellant.

1. There are a number of grounds urged by appellant in his motion for a new trial why the conviction should be set aside. First, it is averred that the cause was decided by lot, in that while the jury were in consultation and during their deliberation they agreed upon the following plan: That each juror should write his verdict and the number of years of confinement which he proposed for defendant, and that the total number of years so written down should be divided by twelve, the number of jurors, thereby obtaining the average length of years of confinement, and agreed that they should thus arrive at their verdict in said cause. This matter was fully investigated by the court, and, among others, the following jurors were sworn and testified in the presence and hearing of the court:

D. B. Adams testified that soon after the jury went out there was an agreement reached that appellant was guilty, and that some one (Mr. Carpenter, as he remembered) suggested that they take a ballot; that the jury wanted all to agree to take a ballot and write it down on a piece of paper, and drop it into a hat, and then count it out and divide by 12, the number of jurors; that he replied that he would not do that; that it was not the proper way to get at the thing; but that after this they did each set down the number of years for which they thought appellant ought to be punished, and made the division by 12. On cross-examination this juror testified as follows: "Q. Were you all adding up these votes, totaling up the votes of each one, for the purpose of arriving at a verdict, or seeing how much it would average?" To which he answered: "I

don't know. You could consider it both ways possibly. I said I wouldn't agree before we made a ballot. I said I wouldn't agree to stand by that kind of a verdict, because I don't think it is right; but Mr. Carpenter said, 'Let us take it any way, and see how we stand.' I said, 'All right,' and that was about the extent of the agreement beforehand. I didn't bind myself to abide by it; but most of the jury wanted to stand by it."

D. C. Chamberlain, another juror, testified that they first took a ballot as to the guilt of the defendant, and, after arriving at a unanimous conclusion that he was guilty, there was then some balloting done on the punishment to be assessed; but in respect to the matter of agreement to abide the result thereof he says: "I didn't understand that in balloting there that they were to divide by 12 and abide by it. We just did it to see that each one was to know the length of time in our judgment the punishment should be."

Rube Bates, another juror, testified to the balloting, and probably makes the strongest showing of either of the jurors sworn in respect to this matter, and this statement appears in his cross-examination, in which the following questions were asked and answers made: "Q. Did you make any agreement that each man would write down the numbers of years he thought the defendant ought to receive, and that they add that up and divide by 12, and that that should be the verdict? A. I did not make any agreement to be bound by a verdict of that kind. It was not the agreement of the jury to be bound or reach a verdict in that way. It seems to me that that verdict that was added up and divided by 12 came to 9 years and a fraction. Q. There was no ballot taken there that divided the amount up to 8 years? A. No, sir; the balloting was all done, and we arrived at the verdict."

Matters of practice and evidence occurring during the trial are largely to be determined by the trial court, and ordinarily his conclusions in respect thereto are binding upon this tribunal. It will be noted that three only of the jurors were sworn, and a fair analysis of the testimony would seem to leave no doubt that there was no agreement in advance of the balloting that the jury, as claimed, should abide thereby, and that the number of years so ascertained should be the verdict of the jury. On the contrary, this course seems to have been taken as a means of securing an expression from them as to their views in respect to the punishment; and the jurors, in substance, seemed to agree on the proposition that this was the sole purpose of taking the ballots. *Leo Fox v. State*, 53 Tex. Cr. R. 150, 109 S. W. 370.

2. Again, appellant in his motion for new trial complains that the court erred in permitting counsel for the state in his closing argument to refer to the failure of appellant to testify in his own behalf. A bill evi-

dencing this fact and that such comment was made was tendered by counsel for appellant to the court, but was not approved in the form tendered. The court did, however, indorse on such a bill a statement to the effect, in substance, that he was at the time paying no attention to the argument of counsel for the state and did not know what he said. The bill, with this qualification, was accepted by counsel for appellant. There was no effort made to prove up a bill by bystanders, and the matter rested in this condition until the motion for new trial came on to be heard, when counsel in question, Mr. W. A. Anderson, was placed on the witness stand, and counsel for appellant offered and undertook to prove by him that as a matter of fact he did in substance use the language set out in appellant's bill of exceptions tendered to the court, and had in general referred to appellant's failure to testify. This evidence was objected to by counsel for the state on the ground that it was a matter that should have been evidenced and perpetuated by bill of exceptions, and we think this objection was good. If it was allowed in every case where an issue of fact had been made and proof introduced, as to what transpired on the hearing, so as to supply a bill of exceptions, which the court declined to approve, it would also follow that they should be permitted to introduce proof, qualify, overrule, modify, or change the record as made by the court in bills of exceptions allowed by him. This practice would lead to endless confusion, and is one that ought not to be and cannot be tolerated. The office of district judge is a great position. It is a great tribunal; and unless we may and can give credence and have respect to the proceedings of the court below, as authenticated and evidenced by the approval of our district judges, there could be no certitude or integrity in the records which reach us.

3. Again, complaint is made that the court erred in permitting the witness Juanita Subia to testify, in substance, that appellant had been going with her or waiting on her for two or three years. This testimony was objected to on the ground that it was incompetent, immaterial, irrelevant, and calculated to prejudice the jury against this defendant, and that there was no evidence that appellant was in love with said girl, or she with him, or that they were betrothed, or had ever intended to marry. The evidence does show, while showing no betrothal or engagement between the parties, that appellant had been going with or waiting on the girl for two or three years, which, taken in connection with the other evidence, including a threat made by appellant to Munoz in reference to the girl in question, renders this testimony admissible as showing such relationship as would furnish a basis for the motive for the assault. With its weight, of course, we have nothing to do. Its admissibility seems to us to be clear.

4. Again, the motion for new trial was urged on the ground of newly discovered testimony. The sister of appellant testified that the officers, in searching the house where appellant stayed, and where he slept on the night of said assault, and where he frequently slept, found a pistol; that it could have been shown by the witness Merchant that this pistol was in a worthless condition, and could not possibly have been used in inflicting the wound upon Munoz; and it was claimed that this testimony could not have been discovered by counsel for appellant by the exercise of any reasonable diligence. We confess that we do not see how there could be any difficulty about discovering the condition of this pistol. If it had been there for any considerable length of time, the appellant must have known its condition. His sister probably knew it, and certainly his brother-in-law, who owned the house, could have known and would have known it. Nor do we believe that the testimony was particularly valuable in any event. That the injured party was shot admits of no doubt. The mere fact that a pistol was found in the house where he stayed, which was useless, would not have been important on any issuable fact in the case.

5. There is no complaint of the charge of the court in the motion for new trial, nor, indeed, is same subject to any serious objection.

6. Again, it is urged that a reversal should be had because of the fact that the failure of the appellant to testify in his own behalf was discussed by the jury. As stated above, only three of the jurors testified or were produced on the hearing of this matter. The juror D. B. Adams testified as follows: "I think there was something said about the defendant not testifying in his own behalf. I think it was Mr. Brown was the first man that suggested the idea. He said, 'Did you notice that the defendant did not testify in his own behalf, and if he was not guilty why shouldn't he have been put on the stand.' He spoke and was talking to me, and I told him, 'That's nothing; a man don't have to take the stand in any kind of matter for himself,' and it was brought up just in these words, and that was used two or three more times. I don't know who made about the same remark. I didn't consider it as much myself. I didn't consider that a man had to testify. There were four that I recollect that spoke of the defendant not taking the stand and testifying in his own behalf. Mr. Brown, if I remember right, brought up the subject, and said the defendant didn't take the stand in his own behalf, and it looked like he was guilty by that. That statement never had a bit of effect in the world on me." Another of the three jurors who were sworn testified as follows: "I didn't hear that mentioned about the defendant not going on the stand and testifying in the case. I don't think I heard that

mentioned." Another of the jurors, Rube Bates, testified: "As well as I recollect, some one asked why they didn't put the Mexican on the stand, and, if there was any reply made to it, I didn't hear it. I recollect hearing the question asked. I don't remember whether the question was asked by one Mr. Brown, who lived down about Mereta. I didn't hear any answer. I don't know whether any other juror heard it or not. I suppose they did, but I don't know." Again, on cross-examination, he says: "The fact that the defendant didn't go on the stand and testify was not discussed by the jury. It was not considered in evidence by any of the jury so far as I know." In addition to the testimony taken before the court, appended to appellant's motion for a new trial, was an affidavit of J. J. Brown, one of the jury trying him, filed on June 6, 1908, in which he stated that "there was quite a little discussion of the fact that the said defendant, Anisetto Reyes, was not put on the witness stand in said trial; that this discussion created a stronger feeling against defendant than would otherwise have existed."

The motion of appellant containing this affidavit remained on file until June 26, 1908, when it was acted on. It will be noticed from the above statement, if the affidavit of Brown is to be believed, that not only was the failure of the defendant to testify discussed, but that this discussion created a stronger feeling against him than would otherwise have existed. It appears from the testimony of the witness Adams that this matter was not only mentioned, but discussed, and that Brown said, "Did you notice the defendant did not testify in his own behalf, and if he was not guilty why shouldn't he have been put on the stand?" And that the witness replied to him, "That is nothing; a man don't have to take the stand in any kind of a matter for himself." It will also be observed by the testimony of Adams that this matter was brought up in these words, and that this language was used two or three or more times. It is stated by Adams, in his testimony, that he did not consider it himself; that he did not consider that a man had to testify. This, of course, was a correct statement of the law, and seems to have been in line with his argument. But it is equally clear that, if we are to have regard to the terms of the discussion, Brown, and probably other jurors, did pay some attention to it, and were not improbably influenced by it.

Article 823 of the Code of Criminal Procedure of 1895 is as follows: "The effect of a new trial is to place the cause in the same position in which it was before any trial had taken place. The former conviction shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument." In

the case of *Horn v. State*, 50 Tex. Cr. R. 404, 97 S. W. 822, it was held that this article was broad enough to include, and did include, any argument or discussion of a former conviction by the jury in the jury room. We have heretofore held, however, and correctly, that it is not every mere and casual reference or incidental allusion to the former conviction that will necessarily afford cause for reversal. *Gaines v. State*, 77 S. W. 10, 8 Tex. Ct. Rep. 616. In the case of *Smith v. State*, 52 Tex. Cr. R. 344, 106 S. W. 1161, on a full review of all the authorities, we held that a conviction would not be set aside, unless the court may fairly and reasonably see and determine, in the light of all the circumstances, that such reference and discussion did or might probably have prejudiced the appellant's case. We have no doubt that this is the correct doctrine, and that its proper application to the facts here must and should work a reversal of the conviction. The matter here was more than a mere casual or incidental reference. It was an argument by the juror Brown that the appellant was guilty, and if he was not guilty the pertinent inquiry was urged why he should not have been put on the stand. Nor does the matter rest here, as Adams says: "It was brought up just in these words, and that was used two or three more times." In a matter of this kind, necessarily the decision in every case must to some extent rest upon its peculiar facts. In view of the evidence in the record, and in view of the state of the record in respect to the comment of counsel on appellant's failure to testify, having regard to the affidavit of the juror Brown, that remained 20 days on file, with the direct statement and charge of the discussion in the jury room of the former conviction, and that it operated to the prejudice of appellant, aided by the testimony of the juror Adams, who confirms the charge contained in Brown's affidavit, and which includes, not only an allusion, but an argument, and a forceful argument, of appellant's guilt and silence, we think it would be unfair to appellant and violative of the statute to affirm his case.

For this error, and this error alone, the judgment of conviction is set aside, and the cause remanded.

#### CRAVENS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1908. On Rehearing, March 17, 1909.)

##### 1. CRIMINAL LAW (§ 634\*)—TRIAL—ABSENCE OF JUDGE—EFFECT.

To warrant reversal of a conviction for absence of the trial judge from the courtroom, the record must show that the proceedings were out of his view and hearing; and hence the absence of the judge in an anteroom for about 15 minutes while accused's counsel was address-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing the jury was not reversible error, where he viewed the proceeding through a window while at a telephone, and could hear counsel speaking, though he could not distinguish the words.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1461; Dec. Dig. § 634.\*]

**2. CRIMINAL LAW (§ 866\*)—VERDICT—METHOD OF REACHING—REGULARITY.**

To vitiate a verdict wherein the penalty on conviction was determined by lot, it must appear that the jurors agreed beforehand to abide the result; and hence a verdict assessing nine years' imprisonment was not bad because three votes were taken as an experiment before agreement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2063; Dec. Dig. § 866.\*]

**On Rehearing.**

**3. CRIMINAL LAW (§ 1112\*)—REVIEW—AFFIDAVITS IMPEACHING TRIAL JUDGE—EFFECT.**

The Court of Criminal Appeals will not consider affidavits filed to contradict statements by the trial judge respecting matters presented by bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2896; Dec. Dig. § 1112.\*]

**4. CRIMINAL LAW (§ 1092\*)—BILLS OF EXCEPTION—EXPLANATION—VERIFICATION BY JUDGE—ESSENTIALITY.**

A trial judge, in preparing a statement explaining a bill of exceptions, need not be sworn respecting the statements made by him; the matter being comprehended by his official oath.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1092.\*]

Appeal from District Court, Shelby County; James I. Perkins, Judge.

Jeff Cravens was convicted of murder in the second degree, and he appeals. Affirmed.

H. E. Stephenson and S. H. Sanders, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**RAMSEY, J.** This is an appeal from a conviction for murder in the second degree, with a penalty of nine years. No statement of facts accompanies the record in this case. In the record we find two bills of exceptions. One is that the judge absented himself from the courtroom while the case was being tried; and, second, the jury reached their verdict by lot.

1. In regard to the first question, the facts show that while one of counsel for appellant was addressing the jury some one called the judge to the telephone. This telephone was located in an anteroom, which opened into the courtroom, and was situated some 16 feet from where the jury sat, and the courtroom was in view of the judge all the time. The judge was absent some 15 minutes, and in his qualification to the bill states that while in said room he had the case under control, and had the jury and counsel in view while he was talking over the telephone. In the well-considered case of *Bateson v. State*, 46 Tex. Cr. R. 34, 80 S. W. 88, this court, speaking through Judge Henderson, says: "This question has been before a number of tribunals in the various states of the Union, and

the current of authority in criminal cases is one way, with a very few exceptions; that is, in the trial of felony cases, especially in capital cases, the absence of the judge from the courtroom during the trial will constitute cause for reversal in case of conviction. This presence of the judge, who is the presiding genius of the court, is construed not to mean absolutely within the courtroom, but so near as to be within sight and hearing of the proceedings; that is, in such a situation as to retain control of all that transpires during the trial. Otherwise, there is no way by which the court can be informed as to the errors that may occur; for as to these he does not get his information by proxy, but he must judge of the matter by his own ear and his own eye. If by his absence, though temporary, the reins escape him, and he loses that control and supervision of the court which is so necessary to safeguard every right of the defendant in the particular case, and a conviction follow, it will be set aside, notwithstanding no injury can be pointed out." The facts of this case are dissimilar to the *Bateson Case*. In the *Bateson Case* the judge absented himself from the courtroom, went into an anteroom, closed the door, and remained in there some three hours; while in this case the door was not closed, and the judge had in view and control the proceedings of the case, and was so near as to be within sight and hearing of the proceedings, and was in such situation as to retain control of all that transpired during the trial. We therefore hold that this exception is without merit, and, to authorize a reversal because of the absence of the judge, the record must disclose that said absence was of such a character as to show affirmatively that the proceedings were out of view and hearing of the court, and that the judge was in such position, during his absence, as to lose control of the proceedings of the trial. See *Lewis v. State*, 15 Tex. App. 647.

2. The next question presented by appellant is the misconduct of the jury, in that the jury decided on the penalty that should be given the defendant by lot; that is each man put down the number of years, and they added this up and divided by 12, and the result was the verdict agreed upon. The court below heard testimony upon this issue, and on the trial of the issue two of the jurors, to wit, Will Rogers and J. P. Wood, testified. The substance of their testimony is as follows: Some one of the jurors suggested that each man put down the number of years that he thought the appellant should have, and add their sum total up, and run 12 through it, and see how many that would give. Rogers further testified: "Before we did this we did not agree. There was some of them that would not agree that that should be the verdict. We just wanted to see how it would run through, and we tried it three

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

times, and the last time, after some discussion, we decided on nine years. We did not get the same result each time, because some of the jurors changed their numbers. They made them lower, and finally it came out nine years and a fraction, and then, after something like 35 or 40 minutes' discussion, we agreed on nine years; but before we run 12 through the number it was not understood that that should be the verdict. We were simply experimenting with it. My impression is that I was the one who suggested this experiment; but four or five of the jurors spoke up, and said they would not be bound or agree to any result that might be reached in that way." The juror Wood testified as follows: "Q. If in determining the term you would give defendant, if each member put down the term he wanted him to have, and you divided by 12, just tell me fully how you did that, and what the agreement was, and what should be the effect of your proceeding that way? A. Well, the way we did in reaching at an average of what the verdict should be, we would take what each man would say, and add them together, and divide it by 12, and would get at about what the average would be, and then, whenever we would do that, we would take a vote on all that was in favor of about what that average would be. We did this two or three times; but I will state that it was understood by me, and I think thoroughly with everybody, that there was nothing to that more than just to try to get together. There was no agreement between us that we should be bound by the result, and after this result was reached we voted two or three times, and never did agree upon the result reached by this adding and division. There was no agreement that we should be bound by this result; but this was simply done as an experiment."

We think this case is unlike the case of *Driver v. State*, 37 Tex. Cr. R. 160, 38 S. W. 1022. In the *Driver* Case the jury agreed that they should add the number of years that each juror wanted to give the defendant, and divide by 12, and the result should be the verdict. This court held that that was reversible error. But the facts of this case are similar to the case of *Pruitt v. State*, 30 Tex. App. 156, 16 S. W. 773, in which this court held that the verdict was not vitiated on proof of the following facts: To ascertain the punishment to be assessed, the jury agreed that each juror should state the number of years he was in favor of assessing, and that the several numbers thus stated should be added together, and the aggregate sum should be divided by 12, and the quotient should be the term assessed by the verdict. This was done, and the quotient was five years and seven months. This result was not agreed to by the jury, and after some discussion the jury fixed the punishment at five years. This court held that the verdict was not the result of any agreement entered into by the jury beforehand to determine the penalty by lot. We

therefore hold that, in order to vitiate a verdict that has been determined by lot, the proof must show that the jury made an agreement beforehand, and that they should be bound by that agreement, and that whatever results might be ascertained from the agreement should be the penalty affixed. This, as we understand it, would be a verdict that would be improper, and such a verdict as the court could not uphold. In this case we do not think the facts show a verdict reached by lot; and, following the rule laid down in the *Pruitt* Case, *supra*, we think the point is without merit.

Finding no error in the record, the judgment is affirmed.

#### On Rehearing.

The motion for rehearing in this case is but an amplification of the matters urged on the original submission and somewhat fully treated in the original opinion. In view of the earnestness with which the matter is presented, however, and the insistence that the opinion does not fully or accurately state the facts in respect to the matter of the absence of the judge, we make the following additional statement: The bill of exceptions, as tendered, recites that while the trial was in progress the judge left the courtroom, and was absent about 20 minutes, and that, when such alleged absence was questioned, appellant tendered proof of this fact that the said presiding judge went into an anteroom, where he remained for a period of not less than 15 minutes, and where he carried on a conversation over the telephone, and that the door to this room was closed, as were also the windows, and that, in view of the surroundings and location of the rooms, it would be an absolute physical impossibility for any person carrying on a conversation over the telephone to have heard or seen anything that was being said and done in the courtroom where appellant was being tried; that, when this proffer was made, the bill recites, the court agreed and stated that no proof need be introduced, and that he would agree that what was set forth was true and correct; that later the court said he would agree to all but that he could see all that was going on, to which appellant excepted; and, to substantiate the matters contained in the bill, appellant attaches the affidavit of certain witnesses named by him, and asks that same be made a part thereof, together with a plat attached to his motion, showing the location of the anteroom with reference to the main courtroom, as well as the location of the telephone in said anteroom. On this bill of exceptions the court makes the following indorsement: "This bill is allowed, with the qualification that the map, while perhaps in most respects correct, appears incomplete and misleading, from its being on so large a scale and yet failing to bring out the entire courtroom; and particularly the brick wall between the



window at the right of the telephone and the window between it and jury box appear proportionately too thick, because they appear to cut off the view between window at telephone and the front of jury box, while my recollection is that this view is unobstructed. Further the incident occurred this way: While one of the counsel for defendant was addressing the jury, I was notified there was a long-distance call for me, and I went to telephone without interrupting counsel, and closed the door behind me, but took care to keep in touch with what was going on in the courtroom to the extent that I could hear the voice (while, perhaps, I did not distinguish the words) of the counsel speaking, and would have noted any interruption of his speech, or any unusual occurrence in the course of it. I had my face at the telephone but a moment while speaking through it, and the balance of the time was standing some feet in front of it, and waiting for the party to call me, and meanwhile I was listening and looking through the window to note what was going on in the courtroom, while at the telephone I was the same distance from the jury as when in my seat on the bench, and while on the bench during arguments to the jury I am usually engaged in reading or writing, and ordinarily am less conscious of what is going on than on this occasion, when I had the matter somewhat in mind, and was endeavoring to keep in touch with same, and think I was so in touch for all substantial purposes."

The statement in the opinion that the door was not closed was inaccurate. The substantial statement, however, is true, if we may accept the statement of the presiding judge that he was in touch with what was going on in the courtroom to the extent that he could hear the voice of counsel, and would have noted any interruption of the speech of counsel, or any unusual occurrence in the course of it, and that he was listening, and looking through the window, and noted what was going on in the courtroom, and was, as he states, rather more conscious of what was going on on this occasion, when he had the matter somewhat in his mind and was endeavoring to keep in touch with same, than he usually was when on the bench engaged in the preparation of his charge.

In this connection it may be stated that attached to the motion for rehearing are certain affidavits impeaching the correctness of the judge's statements. These, for obvious reasons, cannot be considered. This was a matter happening in the presence of and subject to the control and regulation of the court, and in respect to which, in the shape that the bill was filed, we must give credence to the statement of the presiding judge. It is unfortunate that such a controversy should arise, and, as explained in the affidavits touching the motion, it is possible that they

might have strengthened their case materially, but for the fact that the bill was prepared and filed at so late a date in the term as to render this course impossible. It is not, however, lightly to be assumed that a presiding judge in this state would either inaccurately or untruly state the facts in respect to so important a matter. We must, in the nature of things, have some criterion and some ultimate arbiter in respect to matters of this sort, and if we may not and cannot accept the authentication deliberately made of a sworn officer of this state, charged with the responsibility of the proceedings in the trial of cases, there would be endless confusion. Nor do we believe that it should be required that, in respect to a matter of this sort, the judge should become as any other person, a simple witness, and to be sworn as such. In respect to this matter he is acting in an official capacity, and under all the solemnities and with reference to all the obligations of an oath of office. We beg to urge trial courts to use the utmost care to always keep in personal touch with trials and to be personally present in the courtroom during the progress thereof.

There is no other matter discussed in the motion that seems to require attention. Believing that, as presented, there is no error for which the case could or should be reversed, it is ordered that the motion for rehearing be, and the same is hereby, overruled.

#### DAVIS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 20, 1909. On Rehearing, Feb. 17, 1909. State's Rehearing Denied March 17, 1909.)

##### 1. CRIMINAL LAW (§ 780\*)—TESTIMONY OF ACCOMPLICE—INSTRUCTIONS.

Where the relation of a witness to the crime charged is in doubt, it is proper for the court to submit the issue as to whether the witness was or was not an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859, 1860; Dec. Dig. § 780.\*]

##### 2. CRIMINAL LAW (§ 742\*)—TESTIMONY OF ACCOMPLICE—QUESTION FOR JURY.

Where, on a trial for cattle theft, a witness testified that he came to where the animal was killed, that the meat was cut from the body, that accused instructed those present to take what was left of the animal into a pasture and to take the meat to his house, and denied any complicity in the killing, or knowledge of the ownership of the animal, and a son of accused stated that the meat had been bought from the witness, the court properly submitted to the jury the question whether the witness was an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1720; Dec. Dig. § 742.\*]

##### 3. CRIMINAL LAW (§ 761\*)—INSTRUCTIONS—TESTIMONY OF ACCOMPLICE—ASSUMPTION OF FACTS.

An instruction that a conviction cannot be had on the testimony of an accomplice, unless corroborated, that the jury cannot find accused guilty on the testimony of a witness who was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

an accomplice, unless satisfied that his testimony is true, and that it has been corroborated, is not erroneous as assuming that the testimony of the accomplice showed accused's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1761, 1764; Dec. Dig. § 761.\*]

#### 4. LARCENY (§ 77\*) — EVIDENCE — INSTRUCTIONS.

Where, on a trial for cattle theft, the evidence for the state showed that the animal was killed, and that pursuant to instructions of accused the meat was taken to his house, and the evidence of accused showed that he bought the meat from another, the failure to charge as to the meat found in accused's house, and that the jury must believe that accused took the animal from the owner and cannot convict, if they believe any one else took it, and that accused subsequently came into possession of a part of the meat, was not erroneous.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 202-204; Dec. Dig. § 77.\*]

#### 5. LARCENY (§ 77\*)—RECENT POSSESSION OF STOLEN PROPERTY — EVIDENCE—INSTRUCTIONS.

Where accused, charged with larceny, is found in possession of recently stolen property, and there is no explanation by him of its possession, the court may not charge on reasonable explanation in connection with accused's recent possession of the stolen property, merely because a codefendant stated, in the absence of accused, that the property had been bought from a third person.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 202-204; Dec. Dig. § 77.\*]

#### On Rehearing.

#### 6. CRIMINAL LAW (§ 59\*)—PARTIES—"PRINCIPAL"—ACCOMPLICE—ACCESSORY.

To constitute a "principal," the offender must either be present where the crime is committed, or he must do some act during the time when the offense is being committed which connects him with the commission in some way, and where the acts committed occurred prior to the commission of the principal offense, or subsequent thereto, and are independent of and disconnected with the actual commission, and no act is done during the commission in aid thereof, one is not a principal offender, but an accomplice, or an accessory, according to the facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71-74; Dec. Dig. § 59.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5553-5557; vol. 8, p. 7763.]

#### 7. LARCENY (§ 77\*) — EVIDENCE — INSTRUCTIONS.

Where, on a trial for cattle theft, there was no direct testimony of the presence of accused at the time of the taking and killing of the animal, but his connection with the original taking was sought to be established by acts and conduct soon thereafter, as well as by his possession of a part of the stolen property, and accused relied on an alibi, and denied any connection with any theft, the court was required to submit to the jury the question as to whether accused was a principal, accessory, accomplice, or receiver of stolen property.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 202-204; Dec. Dig. § 77.\*]

Appeal from District Court, Madison County; S. W. Dean, Judge.

Aus Davis was convicted of cattle theft, and he appeals. Reversed and remanded.

E. A. Berry, for appellant. Deen, Humphrey & Powell and F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Madison county, charged with the theft of one head of cattle, the property of one Ford. On trial he was convicted, and his punishment assessed at confinement in the penitentiary for a period of two years.

The evidence shows, briefly, that about the 15th of August, 1907, a red heifer yearling belonging to Ford was missed by him, and later found, not far from where appellant resided, in what is known as the old "Judy field," with the hide covering the bones of the yearling, from which the flesh had pretty well all been cut. There was no doubt about the identity of the animal. The ear, which seems to have been left, bore Ford's mark, and near where the skeleton was found was a bell which had been worn by the animal. The conviction rested somewhat largely upon the testimony of Thomas Johnson, who stated in substance that he came to where the yearling was killed after it was killed, and that the meat was cut from the body of the animal, and that after this was done appellant instructed the parties present, who were younger than himself, to take what was left of the animal into a nearby pasture and cover the bones with the hide, and also to take the meat to his house by a roundabout way. This witness denied any complicity in the actual killing of the yearling, or any knowledge of the ownership of same. Later on the same day the party searching the premises of appellant found in his smokehouse a large can pretty well filled with fresh meat, in which there were no bones. No explanation of this was given by appellant. One of his sons stated, in his absence, however, to the officer, that he had bought the meat from one Johnson. This is a brief summary of the more important evidence, and is not intended in any sense to be more than a mere outline of the inculpatory facts.

1. A number of grounds are urged why this conviction should be set aside. First, it is claimed that the court erred in its charge to the jury in failing to instruct them, as a matter of fact and law, that the witness Thomas Johnson was an accomplice. The court did instruct the jury that if they believed, or found from the evidence, that this witness was an accomplice, then that no conviction could be had on his testimony, unless they believed his testimony was true, and there was other evidence in the record tending to corroborate his testimony, and that such corroboration was not sufficient if it merely showed that an offense had been committed. It is well settled in this state that, where the matter is left in doubt as to the relation of a witness to a crime charged, it is proper and frequently demanded that the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

court should submit the issue in question to the jury as to whether such witness was or not an accomplice; and so in this case, not only do we believe that the court did not err in so instructing the jury, but that if he had instructed the jury that as a matter of law the witness Johnson was an accomplice, appellant would have had just ground for complaint, and we would on such instruction have been compelled, if the matter were challenged, to have reversed the judgment.

2. The next and second ground of the motion for a new trial is thus stated: "Because the court erred in his general charge to the jury on the subject of accomplice's testimony, in this: That it assumed that the testimony of the accomplice showed or tended to show that the defendant was guilty of the offense charged, and only required the jury to believe that said testimony was true, and that same had been corroborated by other evidence tending to establish beyond a reasonable doubt that the defendant committed the offense charged. Defendant says that before the jury would be authorized to convict upon the testimony of an accomplice three things must be found: (a) That the accomplice's testimony is true; (b) that the accomplice's testimony showed or tended to show that defendant was guilty of the offense charged; and (c) that there was other testimony, outside of the accomplice's testimony, tending to connect defendant with the offense charged. And defendant shows to the court that nowhere in his charge did he tell the jury that before they could convict upon the testimony of an accomplice that his testimony shows or tends to show that defendant was guilty of the offense charged. And the court further erred in said charge in failing to instruct the jury that the corroboration is not sufficient if it merely shows the commission of the offense." On this subject the court charged the jury as follows: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed, and the corroboration is not sufficient if it merely shows the commission of the offense. An 'accomplice,' as the word is here used, means any one connected with the crime committed, either as principal offender, as an accomplice, as an accessory, or otherwise. It includes all persons who are connected with the crime by unlawful act or omission on their part, transpiring either about, at the time, or after the commission of the offense, and whether or not he was present and participated in the commission of the crime. Now, if you are satisfied from the evidence that the witness Thomas Johnson was an accomplice, or you have a reasonable doubt as to whether he was, or not, as that term is defined in the foregoing instructions, then you are further instructed that you cannot find the defendant guilty upon his testimony, unless you are satisfied beyond a reasonable doubt that the

testimony of said witness is true, and you are further satisfied by other evidence beyond a reasonable doubt that the testimony of said witness has been corroborated by other evidence tending to establish beyond a reasonable doubt that the defendant did in fact commit the offense charged as charged."

It will be seen, we think, that the criticisms contained in the second paragraph of appellant's motion, above quoted, are not wholly justified by the record. We think that this charge is entirely in accordance with the decisions of this court in the cases of *Barton v. State*, 49 Tex. Cr. R. 121, 90 S. W. 877, and *Burrell Oates v. State*, 50 Tex. Cr. R. 40, 95 S. W. 105. These decisions proceed upon the principle that where, in any case, the court merely charges the jury that, in order to sustain a conviction, the testimony of the accomplice must be corroborated, the jury might thereby infer that it was the opinion of the court that the testimony of the accomplice was true, and that, in order to relieve such charge of the criticism that it was upon the weight of the testimony, the jury should be further instructed that, before they could convict upon such accomplice's testimony, they must believe that such testimony was true. Whatever might be thought of the correctness of these decisions at this late day, they have become a settled rule of this court, and the profession generally, as well as trial judges, have come so to regard it. However, testing the charge of the court by the strictest rule ever laid down by this tribunal, we think it is substantially beyond just criticism, and follows the doctrine laid down in the cases above cited. In addition to the charge on accomplice's testimony, and after the definition of the offense of theft, the court charged on the law of principals, reasonable doubt, and the defense of alibi.

3. There is complaint made in the motion for new trial that the court erred in that it did not instruct the jury as to the meat found in defendant's smokehouse, and that they must believe that the appellant took the cow from Ford, and could not convict if they believed any one else took the cow, and that defendant subsequently came into the possession of a part of the meat, etc. We do not think that this issue was raised in the evidence, further than as it was connected with the general proposition as to whether appellant was guilty of the theft of the cow in question.

4. Again, it is urged that the court erred in that it failed in its charge to give an instruction on reasonable explanation in connection with appellant's recent possession of meat presumably taken from the stolen cow. The record does not show that the defendant made any explanation when the meat was found in his smokehouse, or at the time of his arrest. One of the other parties charged with the crime, probably John Davis, did tell the officer that he had bought the meat from

one Frank Johnson; but the evidence shows without conflict that at this time appellant was not present. Nor does the statement of John Davis connect appellant as being present at the time the meat was acquired. The question is, therefore, whether appellant is entitled to the benefit of a charge on recent possession of stolen property, where he made no such explanation himself, but where an explanation was made by a codefendant. We do not think so. The rule is well settled that, where a defendant is found in possession of recently stolen property, and there is no explanation of his possession, the court is not authorized to charge on such phase of the case. *Grande v. State*, 37 Tex. Cr. R. 51, 38 S. W. 613.

5. Again, it is urged that the court erred in his charge to the jury in instructing them on the law of principals, for that there was no evidence in the case showing or tending to show that appellant was the principal in the original taking of the alleged stolen cattle, and because same would warrant the jury in finding appellant guilty regardless of whether he was actually present or participated in any way in the commission of the offense. In this connection it may be stated that, when Johnson came on the scene where the animal was, appellant was not at that time present. The animal had evidently been killed a very short time before this. Very soon after this appellant did appear on the scene, and, according to the testimony of Johnson, practically took charge of the situation, gave directions as to where the remains of the animal should be taken, how covered up, how placed, and, further, what disposition should be made of the meat cut from the animal's body, and even of the journey to be made to his house. These facts unquestionably raise the issue as to his guilty participation in the original taking.

6. Finally, it is urged that the verdict of the jury is unsupported by the evidence, and absolutely without evidence to sustain it, in that there is no evidence, outside of that of the accomplice, Thomas Johnson, going to show or tending to show that appellant had any connection whatever with the theft of the animal alleged to have been stolen, or that he had ever entered into any conspiracy to steal said cow, and even the testimony of the accomplice wholly and absolutely fails to show that appellant was guilty of the original taking of the cow alleged to have been stolen. We cannot accede to this conclusion. On the contrary, we think the evidence not only sufficient to justify the jury in convicting the appellant, but it raises in our minds the almost certain conviction that he was concerned in the theft.

Finding no error in the proceedings of the court below, the judgment is affirmed.

#### On Rehearing.

This case was affirmed at a former day of this term, and it is now before us on motion

for rehearing. On original submission there was no brief filed by appellant (without, however, as subsequently shown, his fault or his counsel's), so the investigation of the case made by the court was without the aid of any explanation or discussion on his behalf.

We seem clearly to have overlooked one of the most important, perhaps the controlling, question in the case. That question is with reference to the charge of the court as to who are principals. If it were important to do so, we might give some reasonable excuse for our error in the fact that the ground of the motion raising this question seems to emphasize the action of the court in giving a charge on principals at all. This same question and supposed error is also pointed out in appellant's bill of exception No. 5. but, after all is said, the question now raised—that is, that the charge of the court on the doctrine of principals is erroneous—is clearly raised in appellant's seventh assignment of error. So we have no doubt that a court, whose principal office it is to point out and correct the errors of others, should in all faithfulness and candor openly acknowledge its own.

The charge of the court complained of is as follows: "All persons are principals who are guilty of acting together in the commission of an offense. When an offense has been actually committed by one or more persons, the criterion for determining who are principals is: Did the parties act together in the commission of the offense? Was the act done in pursuance of a common intent, and in pursuance of a previously formed design, in which the minds of all united and concurred? If so, then the law is that all are alike guilty, provided the offense was actually committed during the existence and in the execution of the common design and intent of all, whether in point of fact all were actually bodily present on the ground when the offense was actually committed, or not." This precise charge has not infrequently been condemned by us. The most recent cases are those cited by appellant: *Yates v. State*, 42 S. W. 296; *McDonald v. State*, 46 Tex. Cr. R. 4, 79 S. W. 542; and *Criner v. State*, 41 Tex. Cr. R. 290, 53 S. W. 873.

In the *Yates Case* we said: "We have heretofore discussed this charge as defining who are principals, and it is not necessary here to reiterate what was then said. See *Dawson v. State*, 38 Tex. Cr. R. 50, 41 S. W. 599. In our opinion, as therein expressed, said charge does not contain a correct definition as to who are principals. According to the testimony in this case, the charge in question was calculated to injure defendant's rights, inasmuch as there was no positive testimony connecting him with the original taking, and the prosecution depended wholly upon circumstantial evidence; and the circumstances in proof were all of subsequent acts and conduct of the defendant, and agreed as well, and indeed more strongly, with the theory

that he was not present at the time of the taking." In the case at bar there was no direct testimony of the presence of appellant at the time the animal was either taken or killed; but his connection with the original taking was sought to be established by acts and conduct occurring soon thereafter, as well as by his possession of part of the stolen property. So that we think it is obvious that this charge was not only, under the authorities, erroneous, but must have been seriously injurious and hurtful to appellant's case. The principle upon which the objection to this charge rests is to our minds best stated in the case of *Bean v. State*, 17 Tex. App. 61, quoted by Judge Brooks approvingly in the case of *Dawson v. State*, supra. The court in the *Bean* Case says: "The dividing line between the two is the commencement of the commission of the principal offense. If the parties acted together in the commission of the offense, they are principals. If they agreed to commit the offense together, but did not act together in its commission, the one who actually committed it is the principal, while the other, who was not present at the commission, and who was not in any way aiding in its commission, as by keeping watch, or by securing the safety or concealment of the principal, would be an accomplice. To constitute a principal, the offender must either be present where the crime is committed, or he must do some act during the time when the offense is being committed which connects him with the act of commission in some of the ways named in the statute. Where the acts committed occur prior to the commission of the principal offense, or subsequent thereto, and are independent of and disconnected with the actual commission of the principal offense, and no act is done by the party during the commission of the principal offense in aid thereof, such party is not a principal offender, but is an accomplice or an accessory, according to the facts."

As a necessary deduction and corollary of what we have said above it is evident that the court should have submitted to the jury the issue and question as to whether under the facts appellant was an accessory, accomplice, or receiver of stolen property. See *McAllister v. State*, 45 Tex. Cr. R. 258, 78 S. W. 760, 108 Am. St. Rep. 958; *Criner v. State*, 41 Tex. Cr. R. 290, 53 S. W. 873. The facts in the *McAllister* Case, supra, were not unlike those here, and in disposing of that case Judge Davidson says: "Appellant introduced evidence showing, if the mules were taken by the accomplice, Hughes, that he was not only not present, but had no knowledge of the intended theft on the part of Hughes. The issue was also presented that Hughes committed the theft, and appellant may have been an accomplice by advising, aiding, etc.; Hughes thereby rendering himself an accom-

plice to the crime. The court submitted the issue of principals under both counts. Error is assigned because the jury were not instructed that, if he was only an accomplice to the crime, he should have been acquitted under the indictment. Upon another trial this phase of the law should be given, because, if he advised Hughes to take the property, and Hughes did in fact take it, and appellant was not present at the time of the taking, nor aided in any way to the original taking, he could not be subject to conviction under this indictment, because it charges him with being a principal." In this case there is, as we have stated, no positive proof that appellant was concerned in the original taking of the animal in question. His connection with the theft after the animal was killed is shown by what seems to us strong testimony; and from the facts the jury might be justified in believing, and the issue is distinctly made in view of appellant's proof of alibi and denial of any connection with any theft at all, that he was not more, under the law and facts, than an accomplice, accessory, or receiver of stolen property. This issue being raised by the evidence, the court should have instructed with reference to it. On fuller consideration, it is clear to our minds that the objections now made to the court's charge must be sustained.

It is accordingly ordered that the motion be and the same is hereby granted, and the judgment of conviction set aside, and the cause remanded for another trial.

#### BICE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 10, 1908. On Rehearing, March 17, 1909.)

##### 1. CRIMINAL LAW (§ 614\*)—CONTINUANCE—THIRD APPLICATION.

Where one continuance was granted and another application refused, the denial of which application was held error on appeal, a subsequent application for a continuance was a third application.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1312-1314; Dec. Dig. § 614.\*]

##### 2. CRIMINAL LAW (§ 594\*)—CONTINUANCE—GROUNDS—ABSENCE OF WITNESS.

An application for a continuance in a criminal case, in order to secure the testimony of one who was not summoned as a witness, and whom none of the witnesses ever saw near the place of the killing, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1331; Dec. Dig. § 594.\*]

##### 3. CRIMINAL LAW (§ 614\*)—CONTINUANCE—GROUNDS—DISCRETION OF COURT—THIRD APPLICATION.

The witness for whose testimony a continuance was asked was a nephew of accused, was an industrious boy, and before the homicide had always lived with his mother in the county of the killing, and worked for her support; but shortly after the homicide he disappeared from the county, knowing that his testimony was of vital importance to accused, and did not communicate with him, and, while the boy's mother

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

testified that she did not know his whereabouts, her testimony showed a deliberate effort by herself and accused to secrete him in order to procure continuances. The boy had been indicted for the same offense, but his case was dismissed, at which time accused procured a continuance of his own case; but accused made no effort to then attach the boy as a witness, and when the application was denied it did not appear that there was any probability that the witness could be secured. *Held*, that the court did not abuse its discretion in denying a third application for a continuance in order to secure such witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1314; Dec. Dig. § 614.\*]

**4. CRIMINAL LAW (§ 614\*)—CONTINUANCE—DISCRETION OF COURT—THIRD APPLICATION.**

The third application for a continuance in a criminal case is addressed to the sound discretion of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1312-1314; Dec. Dig. § 614.\*]

**5. JURY (§ 103\*)—COMPETENCY OF JURORS—PRIOR OPINIONS.**

Where a juror had never heard the facts of the case, and stated that he would render a verdict according to the evidence, regardless of the opinions he had theretofore had, and in reply to a question as to whether his opinion would have any weight answered that he thought not, and thought he could try the case impartially, he was qualified, though he had a preconceived opinion.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 461, 463, 466; Dec. Dig. § 103.\*]

**6. JURY (§ 110\*)—COMPETENCY—FAILURE TO STRIKE TALESMEN—EFFECT.**

Where a list of five talesmen was given to accused to strike from, and accused did not strike a particular juror, he could not complain of the court's action in compelling him to accept such juror, on the ground that he was disqualified for having a preconceived opinion.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 511; Dec. Dig. § 110.\*]

**7. HOMICIDE (§ 308\*)—INSTRUCTIONS—MURDER IN SECOND DEGREE.**

As bearing on the question whether a homicide was murder in the second degree, it was proper to instruct that, while accused could go to the place where others were quarreling with his nephew in order to stop the trouble, he could not go there for the purpose of raising a row, or avenging any supposed wrong done to his nephew.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 642-648; Dec. Dig. § 308.\*]

**8. HOMICIDE (§ 348\*)—APPEAL—HARMLESS ERROR—PREJUDICIAL EFFECT—INSTRUCTIONS.**

Where the evidence showed that accused first struck decedent, who retreated, and secured a spade, and was striking accused when he was shot, a charge that the killing must have been done in a sudden transport of passion in order to reduce the offense to manslaughter, was not prejudicial, even if subject to verbal criticism, and hence was not reversible, under Code Cr. Proc. 1895, art. 723, prohibiting reversals unless the error is calculated to injure accused.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 348.\*]

**9. HOMICIDE (§ 309\*)—INSTRUCTIONS—MANSLAUGHTER.**

Where the evidence showed that accused either intended to commit a battery on decedent or to kill him, and the court instructed that, if accused had provoked the difficulty with intent

to kill, it would be murder, an objection to an instruction that if he pursued decedent with intent to commit a battery on him the killing would be manslaughter, on the ground that if defendant, under the circumstances stated, pursued decedent with a less intent than to take his life, he would only be guilty of manslaughter, was hypercritical.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 655; Dec. Dig. § 309.\*]

**10. HOMICIDE (§ 9\*)—MURDER—INTENT TO KILL.**

If accused went to the place where his nephew and others were quarreling, and deliberately provoked the difficulty with intent to kill decedent, it would be murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 14; Dec. Dig. § 9.\*]

**11. HOMICIDE (§ 63\*)—MANSLAUGHTER—INTENT TO COMMIT ASSAULT.**

If accused provoked the difficulty with decedent with intent to commit a simple battery on him, the killing would be manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 86, 87; Dec. Dig. § 63.\*]

**On Rehearing.**

**12. CRIMINAL LAW (§ 1088\*)—APPEAL—RECORD—CONTENTS—AFFIDAVITS.**

An affidavit filed in the Court of Criminal Appeals in support of an assignment of error in denying a continuance is not a part of the record, and cannot be considered in disposing of the assignment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2789; Dec. Dig. § 1088.\*]

Appeal from District Court, Marlon County; P. A. Turner, Judge.

T. C. Bice was convicted of murder in the second degree, and he appeals. Affirmed.

See 51 Tex. Cr. R. 133, 100 S. W. 949.

The killing occurred at a foundry, where accused's nephew and others were quarreling, and accused claimed that the killing occurred while he was attempting to protect his nephew and stop the difficulty.

Moore, Park & Birmingham, S. P. Jones, J. H. Benefield, and W. T. Armistead, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at seven years' confinement in the penitentiary.

The former appeal of this case will be found in 51 Tex. Cr. R. 133, 100 S. W. 949, 19 Tex. Ct. Rep. 61. When the case was called for trial, appellant presented an application for continuance for want of the testimony of Dew Gully and William Jackson, both of whom reside in Harrison county. As stated in former opinion in this case, the homicide occurred in Harrison county, and the venue was changed to Marlon county, where the former trial took place, and also this trial. For the facts pertaining to the homicide see former opinion.

Appellant insists that the application for continuance now relied upon as cause for

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

reversal is the second application. This is not correct. It is the third application. The case was continued in the first instance by appellant. In the second instance he presented application for continuance for want of the witnesses now relied upon for same, which continuance was overruled by the trial court, and this court reversed same in part because of said ruling. Failure to get a continuance at the first trial would not make this the second application. In other words, the failure to get a continuance does not change the fact that the application is made. It is the application for continuance that controls the matter, and not the fact of same being granted. The court appends to the bill of exceptions reserved to the overruling of the application the following statement: "Alex Galloway appeared in a few minutes after the motion was overruled and testified on the trial. James Turner did not appear, but both parties excused him, and agreed to use his evidence taken on the first trial, which was done. This case was called for trial first time in this court at January term, 1906, and was continued on written application of defendant for want of evidence of Dew Gully and Will Jackson. At June term of said court, 1906, the defendant made a second application for continuance for same two witnesses. It was overruled, and the case was tried, and defendant convicted, and he appealed. January term, 1907, the appeal was still pending. In March, 1907, it was reversed and remanded. At June term, 1907, the third application for continuance for these two witnesses was made and overruled. Will Jackson is a negro, and not a witness in the case ever saw him at the place of the killing or near it."

The explanation of the court answers any suggestion of merit in appellant's insistence that he desires Will Jackson's testimony. Dew Gully, the record shows, is a nephew of appellant. His mother lives in Marshall, Harrison county, where the homicide occurred. He is a dutiful, industrious boy, who constantly contributed to the support of his mother; and yet this application for continuance shows that immediately after the homicide he disappeared from the county, and has been roving about the country, with appellant unable to locate him. This statement does not appear reasonable. It is true appellant attaches to the application for continuance the depositions of the witness' mother, which, in substance, show that she did not know, at the time of answering, where the witness was. Her testimony clearly convinces this court that there has been a studious effort to secrete the witness in order to secure continuances. This phase of the matter at the time we wrote the former opinion did not suggest itself to our minds, and in fact was not apparent, like the present record discloses. Furthermore,

this being a third application, the testimony of the witness is cumulative of other testimony in the record, save and except in those particulars that the same becomes immaterial in the light of this record. The third application is addressed to the sound discretion of the court. We do not believe the court abused his discretion in overruling this application, as viewed in the light of motion for new trial. There does not appear any reasonable probability that the presence of the witness Gully can be secured by reversal of this case. The application shows that appellant has written letters to various and sundry sheriffs searching for the witness. The application further shows that immediately after the homicide was committed the witness was also indicted for this homicide; but his case was dismissed, and thereupon appellant continued his case. There is nothing in the record to show that the witness was not there then, but everything to indicate that he was. The homicide occurred on the 12th day of June, 1905. No effort was made to attach him. So we hold that the court did not err in overruling the application for continuance.

Bill of exceptions No. 2 complains that the court erred in forcing appellant to take the juror Lee Waddell, because said juror was disqualified. The juror testified that he did not know anything of the facts of the case, did not know the deceased, never heard the case tried, and never heard there was such a case. The following question was propounded to said juror: "Q. Suppose you are accepted as a juror; in making up your verdict, after you hear all the testimony and the charge of the court, would you be governed exclusively and alone by that testimony that you hear from the witness stand, sworn to, and the charge of the court, or is there some outside influence that would influence you? A. No, sir; if I should be selected on the jury, I would be bound to render a verdict according to the evidence, the facts in the case, regardless of opinions I have had heretofore. Q. Would that opinion you had have any weight with you on earth? A. I think not." The juror said, further, that he thought he could try the case impartially. This, in substance, is the bill presenting this matter. While the bill shows that the witness had an opinion, yet the substance of same shows that he would and could lay the same aside and give the defendant a fair and impartial trial. We think the juror was clearly qualified. Furthermore, we find that the bill discloses the fact that this juror's name was furnished as a talesman, and four or five jurors were qualified, and a list of five jurors was given to appellant and the state to strike from; that neither the state nor the defendant marked the juror's name off of the list. There certainly could be no error under this fact.

Appellant's third ground of the motion for a new trial complains that the court erred in defining murder in the second degree. Appellant objects to the following paragraph of the court's charge: "On the other hand, I charge you that he would have no right to go to said brass foundry for the purpose of raising a row or difficulty, or for the purpose of avenging any wrong that he might think that said Ed Noble or any of said other persons had done his said nephew." The first part of the charge informed the jury that he had a right to go to the foundry for the purpose of stopping trouble, and the clause complained of is the converse of the first clause, and is correct.

The fifth ground of the motion complains that the court erred in telling the jury that if defendant entered into the quarrel, with the intention to kill Noble, or to inflict on him some serious injury, and continued to press the difficulty until he shot Noble, he would be guilty of murder in the second degree, because there is no evidence to authorize said charge. The former opinion of this court settles this question against appellant.

The sixth ground of the motion complains that the court erred in defining the offense of manslaughter, in requiring that the killing must have been in a sudden transport of passion, which is more onerous on defendant than required by law. The decisions of this court have frequently called attention to the propriety of giving this clause in a charge on manslaughter; but it certainly could not have injured appellant in this case, since the difficulty was sudden, and the facts show clearly that appellant first struck at deceased and deceased retreated. Then deceased secured a spade, and was in the act of striking appellant with same at the time the shot was fired. Even if subject to verbal criticism, it was not calculated to injure the rights of appellant. Article 723 of the Code of Criminal Procedure of 1895 says this court shall not reverse any case unless the error is calculated to injure the rights of appellant.

The seventh ground of the motion complains that the court erred in telling the jury that defendant would be guilty of manslaughter, if he pursued the deceased with the intent only to commit a battery on him, because, if the defendant, under the circumstances stated in said paragraph, pursued deceased with a less intent than to take his life, he would be guilty of no higher degree of homicide than manslaughter. This is hypercritical. There is no evidence in the record that he intended to do otherwise than one of two things—either to commit a battery on him or to kill him; and the court told the jury, if he provoked the difficulty with intent to kill it would be murder, and if he provoked it with intent to commit a simple battery on him it would be manslaughter. This was correct.

The eighth and ninth grounds of the motion complain of the charge, and are in substance the same as the seventh ground.

The tenth ground complains that the court erred in refusing a special charge asked by appellant, which charge was, in substance, given by the court. We have carefully reviewed all of appellant's special charges in the light of the court's general charge, and must say that the charge aptly and properly presents all the law as suggested in the original opinion to the jury in a proper manner, and there are none of appellant's special charges applicable to the facts of this case that were not given in the main charge. The court charged on murder in the second degree, both phases of the imperfect right of self-defense, and the perfect right of self-defense fully. These are all the phases of the law of homicide presented by this record.

The evidence in the case clearly supports the verdict, and the judgment is in all things affirmed.

#### On Rehearing.

This case comes before us on motion for rehearing. Appellant in his motion criticises the fact that we stated in the original opinion that the evidence "clearly convinces this court that there has been a studious effort to secrete the witness Dew Gully in order to secure continuance." Appellant was indicted in August, 1905, and the trial took place on June 25, 1907. It is quite apparent from an inspection of the record, as stated in the original opinion, that this witness was absent with the connivance and consent of his mother and appellant, and this suggestion is not controverted, to our minds, by the filing now in this court of the affidavit of the witness Dew Gully, in which affidavit he states that he is now residing in Deberry, Panola county, Tex. This affidavit cannot be considered by this court as a part of any record, nor can we allude to same in discussing the application and the record before us; but it does lend to our minds additional reason for holding that he studiously avoided the trial until now.

The second ground of the motion complains that the court erred in holding that appellant claimed and insisted that the third application for continuance was only a second application; that appellant only contended that the third application should be considered as a second application. The opinion did not say what appellant was contending, but said, in view of the fact that the second application had been overruled by the lower court, and that this court had held that said ruling was error, that this application thereby became a third application.

The fourth ground of the motion complains that this court erred in holding that the testimony of Dew Gully is cumulative. If it be conceded that this is true, still the



motion for rehearing should not be granted, because of the first ground stated in overruling same, to wit: That there seemed to have been a studious effort on the part of appellant to keep the witness away from court, or at any rate the record clearly shows that there was no reasonable probability of securing the attendance of the witness by a continuance of the case at the time the application for continuance was made, nor was there, at the time the opinion in this case was written by this court, any reasonable expectancy of securing the attendance of the witness. The record in this case shows that the witness was related to appellant, his mother living in the town; that he had been a dutiful boy, always stayed at home, and knew his testimony was of vital concern to appellant in the trial of this case, and yet he leaves the country, and, if the testimony of appellant be true, never communicated with him at any time, or let him know where his whereabouts was; and yet the court was asked under such a statement to indefinitely continue this case in order that he might find the witness. After a review of this record, we are now more than ever convinced that the application for continuance was without merit.

The fifth ground of the motion complains that the court erred in upholding the charge of the trial court wherein the trial court charged the jury that it could find appellant guilty of manslaughter only in the event that the killing was done in a sudden transport of passion; that the charge imposed too great a burden on appellant. We apprehend that this contention is predicated upon the decision of this court in the case of *Kannmacher v. State*, 51 Tex. Cr. R. 118, 101 S. W. 238. This decision on this point has been expressly overruled in the case of *Waters v. State* (Tex. Cr. App.) 114 S. W. 628.

We have anew carefully reviewed all of appellant's contentions in this case, and must say that the original opinion is correct, and the motion for rehearing, therefore, is in all things overruled.

#### EVANS v. STATE.

(Court of Criminal Appeals of Texas. March 3, 1909.)

#### 1. CONSTITUTIONAL LAW (§ 266\*)—DUE PROCESS—LOCAL OPTION LAWS.

Acts 30th Leg. 1907, p. 447, c. 8, regulating local option election contests, and providing for the conclusiveness thereof in trials, is not unconstitutional as a denial of due process of law to one accused of violating the local option law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 266.\*]

#### 2. ELECTIONS (§ 269\*)—CONTESTS—NATURE.

An election contest is in rem, and not in personam.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 245, 246; Dec. Dig. § 269.\*]

#### 3. INTOXICATING LIQUORS (§ 40\*)—LOCAL OPTION LAW—CONTEST OF ELECTION—LIMITATION.

Under Acts 30th Leg. 1907, p. 447, c. 8, precluding contests of local option elections after the expiration of 60 days, one accused of violating the local option law could not show, after that time expired, irregularities in the initiatory steps necessary to make local option effective.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 40.\*]

#### 4. INTOXICATING LIQUORS (§ 226\*)—LOCAL OPTION LAW—PROSECUTIONS—EVIDENCE.

In a trial for violating the local option law, it was proper to admit enough orders of the commissioners' court to show that the county had adopted local option.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 226.\*]

#### 5. INTOXICATING LIQUORS (§ 169\*)—OFFENSES—PERSONS LIABLE—AGENTS.

If accused acted as agent of the prosecuting witness when intoxicating liquors were bought, he cannot be convicted of violating the local option law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 187, 188; Dec. Dig. § 169.\*]

#### 6. CRIMINAL LAW (§ 770\*)—INSTRUCTIONS—DUTY TO GIVE.

It is improper to refuse to instruct on an issue raised by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. § 770.\*]

Appeal from Randall County Court; A. N. Henson, Judge.

Red Evans was convicted of violating the local option law, and he appeals. Reversed and remanded.

Reeder, Graham & Williams, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days in jail.

Appellant insists that article 3301, Sayles' Ann. Civ. St. 1897, is void for uncertainty, in that it fails to provide by what authority an order of the commissioners' court declaring the result of a local option election shall be published. Appellant insists that the act of the 30th Legislature, passed May 14, 1907 (Acts 1907, p. 447, c. 8), regulating contests of local option elections, and providing for conclusiveness thereof in court trials, has no application to persons other than those that, under the provisions of said law, could have contested, and if said law can be construed to have said effect it is violative of defendant's rights as a citizen of the United States, in that it deprives him of life, liberty, and property without due process of law. This statute is not only constitutional, but is a salutary provision of the election law. It does not deprive appellant of life, liberty, or property. The contest of an election is an action in rem, and not in personam, and after the expiration of 60 days or 30 days, as the case may be, all parties are inhibited under

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the statute from contesting the regularity of an election. In passing this statute there was no effort made or intention on the part of the Legislature to pass a local option law for any given county that had not already adopted a local option law. The statute simply serves as a statute of limitation and repose against any one contesting irregularities thereof after the expiration of 60 days.

We have frequently upheld the validity of this statute. We have carefully reviewed appellant's brief, and note with pleasure his able argument therein; but after the most deliberate reflection and conclusion we hold, without a further discussion thereof, that the article is constitutional, and it follows, therefore, that the court did not err in refusing to permit appellant, after the expiration of 60 days, to introduce evidence going to show irregularities or defects in the initiatory steps necessary to place local option into effect. It was proper for the court to have the county attorney introduce a sufficient number of the orders of the commissioners' court to show that the county had adopted local option. It was also proper, as stated, to refuse to permit appellant to contest the validity of said orders after the expiration of the 60 days.

The affidavit and information in this case are in the usual form, and appellant's objections to same are not well taken.

Appellant complains that the court erred in refusing to give charge No. 3, which in effect asked the court to instruct the jury that, "if appellant was acting as the agent of the prosecuting witness at the time the purchase was made, they should find him not guilty. The evidence of the prosecuting witness suggests this issue, and the court erred in refusing to so charge.

The judgment is reversed, and the cause is remanded.

#### GIBBENS & ROUNDTREE v. HART.

(Court of Civil Appeals of Texas. Feb. 24, 1909. Rehearing Denied March 24, 1909.)

#### 1. SALES (§ 413\*)—ACTION FOR BREACH OF CONTRACT—ISSUES.

Where, in an action for breach of contract to sell and deliver cattle, the evidence showed that defendant had authority to sell the cattle, the issue as to whether the property was the separate property of defendant's wife should not be considered.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 413.\*]

#### 2. WITNESSES (§ 37\*)—COMPETENCY—KNOWLEDGE OF FACTS.

A witness who had not seen the cattle of the seller for about two years before the contract of sale covering all the cattle was not competent to estimate the number of the cattle.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.\*]

#### 3. SALES (§ 418\*)—BREACH—DAMAGES.

The measure of damages for the failure of the seller of cattle to deliver them is the differ-

ence between the contract price and the market value at the time and place that the cattle should have been delivered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.\*]

Appeal from Uvalde County Court; W. D. Love, Judge.

Action by Gibbens & Roundtree against J. L. Hart. From a judgment for defendant, plaintiffs appeal. Reversed and rendered.

Martin, Old & Martin and Geo. C. Hermann, for appellants. G. B. Fenley and C. Lawrence, for appellee.

FLY, J. Appellants instituted this suit to recover of appellee the sum of \$945 as damages for the breach of a contract to deliver certain cattle to appellants. A trial by jury resulted in a verdict and judgment for appellee.

Appellee entered into a contract with appellants to sell and deliver to them his entire stock of cattle. He admitted that he had about 175 head of cattle, and that he only delivered 96 head. When asked as to how many there were in his pasture after delivering the 96 head, he said, "There must be about 75 head," and proceeded to classify them. He further testified: "Yes; it is a fact that all these cattle were covered by, and included in, the contract, and have not been delivered to the plaintiffs." He refused to deliver the other cattle. The contract bound appellee to pen the entire stock of cattle as near as possible. Appellee wrote a letter to appellants, in which he positively refused to gather the cattle, basing his refusal on the ground that "it would cost too much to gather them under the circumstances." The evidence showed an open breach of the contract, and the verdict of the jury was clearly in disregard of it. Under the facts appellee had authority to sell the whole of the cattle, and the court should, as requested by appellants, have charged the jury that the issue as to the property being the separate property of appellee's wife, which was raised by the answer, should not be considered in making up a verdict. The charge should not have confined the cattle within the purview of the contract to those shown to appellants, because the contract covered all of the cattle belonging to appellee, with a few exceptions made therein. Appellants did not have all the cattle shown or pointed out to them. Appellee admitted that they bought the whole stock of cattle.

The witness George Johnson had not seen the cattle for about two years before the contract was made, and was not in a position to estimate their number, and his evidence should have been excluded. His testimony had no probative force whatever, because he evidently knew nothing about the number of cattle. The son of appellee testified that there were about 175 head of cattle. Ray,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

who assisted in gathering the cattle, stated that there were about 175 head of them.

The measure of damages in this case would be the difference between the contract purchase price and the market value at the time and place that the cattle should have been delivered, and upon that basis is fixed the amount of damages for which the judgment of this court is rendered.

Appellee testified: "Yes; I would say that there were at least 20 or 30 head of dry cows left. I would say there were at least 10 or 12 cows and calves. I know there are two six year old steers, the ones that got away from us. There are at least seven, two year old steers. There are at least seven one year old steers. There is only one four year old steer. There are 20 calves, and 10 head of heifers." Taking the least number sworn to by him, and there were left in the pasture 20 dry cows, for which appellants were to pay \$12 each, the market value at the time they should have been delivered being \$15, causing damages in the sum of \$60, 10 cows and calves, purchase price \$12, market price \$17 each, damages \$50, two six year old steers, purchase price \$25 each, market value \$45, damages \$40, seven two year old steers, purchase price \$14 each, market value \$17, damages \$21, 10 heifers purchase price \$7 each, market value \$12.50, damages \$55, and one four year old steer, purchase price \$25, market value \$27.50, damages \$2.50. There was no market value proved for one year old steers, and there was no provision in the contract for the delivery of any calves except young calves with their mothers. It is claimed by appellants that the calves were to be delivered without charge for them, but it does not so appear in the contract; the only reference to calves being to "baby calves" which went with their mothers.

We have concluded that it is best to end this controversy, and therefore the judgment of the county court is reversed and judgment here rendered in favor of appellants for \$228.50 and all costs of this and the lower court.

# GALVESTON, H. & S. A. RY. CO. v. WALLACE.†

(Court of Civil Appeals of Texas. Feb. 24, 1909. Rehearing Denied March 24, 1909.)

## 1. CONSTITUTIONAL LAW (§ 297\*)—DUE PROCESS—CARRIERS.

Act Cong. June 29, 1906, c. 3591, 34 Stat. 593 (U. S. Comp. St. Supp. 1907, p. 909), providing that a carrier receiving property from a point in one state to a point in another cannot limit its liability to its own line, is not unconstitutional, as taking carrier's property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 832; Dec. Dig. § 297.\*]

## 2. CONSTITUTIONAL LAW (§ 241\*)—EQUAL PROTECTION OF THE LAWS—CARRIERS.

Act Cong. June 29, 1906, c. 3591, 34 Stat. 593 (U. S. Comp. St. Supp. 1907, p. 909), providing that a carrier receiving property from a point in one state to a point in another cannot limit its liability to its own line, is not unconstitutional as denying equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 241.\*]

## 3. COMMERCE (§ 33\*)—STATE SOVEREIGNTY—CARRIERS.

Act Cong. June 29, 1906, c. 3591, 34 Stat. 593 (U. S. Comp. St. Supp. 1907, p. 909), providing that a carrier receiving property from a point in one state to a point in another cannot limit its liability to its own line, is not unconstitutional as infringing state sovereignty.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 28, 81; Dec. Dig. § 33.\*]

Appeal from Uvalde County Court; W. D. Love, Judge.

Action by L. V. Wallace against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood, W. B. Teagarden and G. B. Fenley, for appellant. Martin, Old & Martin, for appellee.

FLY, J. Suit by L. V. Wallace to recover of appellant \$436.20, the value of mohair delivered to appellant for transportation to Lowell, Mass., and which was never delivered. The mohair was shipped from Uvalde, Tex., by appellee, and consigned to the Massachusetts Mohair Plush Company. The court sustained a general demurrer to that portion of the answer which sought to evade liability on the ground that appellant had restricted its liability to its own line. The cause was tried by jury, and resulted in a verdict and judgment for appellee in the sum of \$414.92.

By an act of the Congress of the United States of date June 29, 1906 (Act June 29, 1906, c. 3591, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 909]), it is provided that no common carrier receiving property from a point in one state to a point in another state can limit its liability to its own line. It is the contention of appellant that the act is unconstitutional, in that it takes the carrier's property without compensation and without due process of law, and deprives the carrier of equal protection of the law, and also attacks the sovereignty of the state. All of these points have been duly considered and overruled by this court in case of *Railway v. Piper*, 115 S. W. 107. In the same decision this court held adversely to the contention that the federal courts have exclusive jurisdiction of this class of cases. That opinion will be adhered to. The evidence is sufficient to show that the mohair was not delivered to the consignee.

The judgment is affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

**GALVESTON, H. & S. A. RY. CO. v. CROW.**†  
(Court of Civil Appeals of Texas. Feb. 24,  
1909. Rehearing Denied March 24, 1909.)

**1. CARRIERS (§ 23\*)—CONNECTING CARRIERS—LIABILITY OF INITIAL CARRIER—FEDERAL STATUTE—VALIDITY.**

Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1907, p. 909), providing that any common carrier receiving property for interstate shipment shall be liable for any loss or injury thereto caused by it or any common carrier to which such property may be delivered, or over whose line such property may pass, and that no contract shall exempt such common carrier from such liability, is not unconstitutional.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 23.\*]

**2. CARRIERS (§ 94\*)—CARRIAGE OF GOODS—NONDELIVERY—EVIDENCE.**

Evidence held to show nondelivery of goods received for transportation to the consignee, authorizing the consignor to recover the value thereof.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 382; Dec. Dig. § 94.\*]

**3. CARRIERS (§ 86\*)—CARRIAGE OF GOODS—DELIVERY.**

A carrier receiving goods for transportation to the consignee must deliver the same in such condition that it may be identified by the consignee who has no power to arbitrarily apply a portion of unidentified goods in his warehouse, subject to the order of the carrier, to the consignor's account.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 86.\*]

Appeal from Uvalde County Court; W. D. Love, Judge.

Action by J. D. Crow against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood, W. B. Teagarden, and G. B. Fenley, for appellant. T. M. Milam, for appellee.

**FLY, J.** This is a suit for the value of 3½ bags of mohair delivered by appellee to appellant at Uvalde, Tex., for shipment to a consignee at Lowell, Mass. Appellant alleged, among other things, a contract between it and appellee, by which its liability was limited to its own line, and attacked the constitutionality of the amendment of 1906 to the interstate commerce act. A demurrer was sustained to that part of the answer, and a trial by jury resulted in a verdict and judgment for appellee in the sum of \$241.91. The property was delivered to appellant by appellee for transportation from Uvalde, Tex., to Lowell, Mass., and was not delivered there, to appellee's loss in the sum found by the jury.

The first nine assignments of error present the points that only federal courts have jurisdiction of claims for damages for non-delivery of freight when it is an interstate shipment, and that Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1907,

p. 909), is unconstitutional, because it invades the sovereignty of the states, and is violative of the fourteenth amendment of the federal Constitution, and section 19, art. 1, State Const. All of these points have been fully considered by this court in the case of *Railway v. Piper*, 115 S. W. 107, and decided adversely to the contentions of appellant, and we adhere to that decision. The evidence was positive that appellant did not deliver to the consignee the mohair shipped by appellee, and it follows that there is no merit in the contention that the evidence failed to show that the mohair in question was not delivered to the consignee. The receiving clerk of the consignee, the Mohair Plush Company, stated: "Witness inspected and weighed the bags and made a record of them. No one ever besides witness received mohair for his employers. Witness did not receive any bags of mohair consigned to the Massachusetts Mohair Plush Company by J. D. Crow of Uvalde, Tex., shipped from Uvalde, Tex., March 12, 1907, nor was any mohair received from such party consigned to the Massachusetts Mohair Plush Company during the year 1907." It is true that the record shows that appellee sent the Mohair to Uvalde on March 11, 1908, for shipment; but in connection with his testimony a bill of lading was offered in evidence which showed that the shipment was made on March 12, 1907, the date on which appellee alleged that it was shipped, and which was also alleged by appellant. It is true that the receiving clerk swore that at the end of the season of 1907 there were about 10 unidentified bags of mohair remaining in the warehouse subject to the order of the railroad. The consignee had no power to arbitrarily apply a portion of the unidentified mohair to appellee's account. It was appellant's duty to deliver appellee's property to the consignee in such condition that it could be identified by the consignee.

The judgment is affirmed.

**MISSOURI, K. & T. RY. CO. OF TEXAS v. WILLIS.**

(Court of Civil Appeals of Texas. March 6, 1909.)

**1. DAMAGES (§ 163\*)—BURDEN OF PROOF—REASONABLENESS OF EXPENDITURES.**

In an action by a passenger for sickness caused by his wrongful ejection from a train, it was error to permit the jury to consider expenditures for medicines and doctor bills, where there was no evidence as to the reasonableness of those expenditures.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 454; Dec. Dig. § 163.\*]

**2. DAMAGES (§ 216\*)—INSTRUCTIONS—REQUESTS—APPLICABILITY TO ISSUES.**

Where a passenger claimed damages for 20 days' loss of time, but his testimony showed 60 days' loss of time, it was error to refuse an in-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

struction limiting recovery to 20 days; the general charge having authorized the jury to consider generally his loss of time in estimating damages, without restriction as to the amount of time lost.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 553; Dec. Dig. § 216.\*]

Appeal from Wood County Court; J. O. Rouse, Judge.

Action by G. W. Willis against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

L. L. Wood, for appellant. Jones & Jones, for appellee.

TALBOT, J. This is an action by the appellee, Willis, to recover of the appellant damages alleged to have been sustained by him as a result of being required to alight from one of appellant's trains on which he was a passenger at a station other than his destination, whereby he was forced to walk, in order to reach his home, a distance of four or five miles, through the rain, and was made sick. The petition alleged, in substance, that on November 19, 1907, the plaintiff purchased from defendant's agent at Golden, Tex., a ticket, paying the usual and customary price therefor, which entitled him to transportation from that point over appellant's road to Emory, Rains county, Tex.; that he boarded a passenger train of defendant, and when said train reached a station called Ginger, which was about four or five miles south of Emory, one of defendant's agents in charge of said train in a rough, rude, and insulting manner told him to get off of the train; that plaintiff remonstrated with said agent, but to no avail, and he was forced to get off at said station of Ginger. It was further alleged that plaintiff was a negro; that defendant had no depot or station house at Ginger; that there were no negroes residing in or near Ginger, and that the citizens of said town would not permit a negro to stay in said town, all of which was known to defendant; that it was raining, and plaintiff could not get shelter at Ginger, and was forced to walk to Emory, and by reason of said walk and the exposure to which he was subjected he contracted rheumatism and neuralgia, and suffered excruciating pain therefrom; that, by reason of his sickness, he lost 20 days' time from his work, which was worth \$1 per day, and paid out for medical attention and medicines the sum of \$5. A jury trial resulted in a verdict and judgment in favor of plaintiff for the sum of \$275, from which this appeal is prosecuted.

The evidence was sufficient to authorize the submission of the question whether or not appellee used that degree of care that a person of ordinary prudence would have used, situated as he was, to find a place of shelter at Ginger, and appellant's first assignment of error will be overruled.

The second assignment of error is that the court erred in charging the jury to take into account, in estimating plaintiff's damages, the amount paid out by plaintiff for medicines and doctors' bills. This assignment is well taken. There is no evidence whatever in the record showing that the amounts paid out or incurred on account of doctors' bills or medicines were reasonable. That such proof is necessary to authorize a recovery for such items of damages is well settled. *Wheeler v. Railway Company*, 91 Tex. 356, 43 S. W. 876.

Appellant's fifth assignment of error complains of the court's refusal to charge the jury, at its request, as follows: "If you should find for the plaintiff, you cannot allow him for loss of more than twenty days' time." The failure to give this charge was error, and requires a reversal of the case. As shown, plaintiff claimed a loss of 20 days' time only, but he testified that he lost 60 days on account of the sickness contracted by reason of the exposure to which he had been subjected as a result of his alleged ejection from appellant's train. In his general charge the court told the jury to take into account, in estimating plaintiff's damages, his loss of time without restricting such consideration to the time alleged. Having only claimed a loss of 20 days' time of the value of \$1 per day, and the proof tending to show a loss of 60 days' time, of the value of \$1 per day, it is clear the special charge should have been given.

On the other question presented in appellant's brief we rule against it.

The judgment is reversed and the cause remanded.

### SULLIVAN v. GRAHAM.

(Court of Civil Appeals of Texas. Feb. 20, 1909.)

ATTACHMENT (§ 178\*)—LEVY—LIEN ACQUIRED—PROPERTY AFFECTED.

The levy of an attachment on the interest that defendant owned in land made at the time he owned no title therein does not attach to title subsequently acquired by him and conveyed to another.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 528; Dec. Dig. § 178.\*]

Appeal from District Court, Young County; A. H. Carrigan, Judge.

Action by James Sullivan against M. K. Graham. From a judgment for defendant, plaintiff appeals. Affirmed.

Arnold & Arnold, for appellant. C. W. Johnson and Theodore Mack, for appellee.

DUNKLIN, J. James Sullivan instituted this suit in the form of trespass to try title against M. K. Graham in the district court of Young county, and from a judgment in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

favor of the defendant the plaintiff has appealed.

The suit was to recover Texan Emigration & Land Company survey No. 2,396, situated in Young county, but upon the trial, by agreement in writing filed, the plaintiff limited his claim to an undivided one-half interest in that survey. The parties both claimed title from Henry C. Payne as a common source; the plaintiff claiming under a sheriff's deed executed under and by virtue of an order of sale issued on a judgment rendered in the district court of Clay county, where in James Sullivan, the purchaser, was plaintiff, and said Henry C. Payne was defendant, dated March 1, 1902, and which judgment foreclosed an attachment lien as it existed on September 13, 1901, on all the interest of said Henry C. Payne in survey No. 2,396 in Young county, Tex.; and appellee claiming title under a deed from Henry C. Payne dated December 23, 1901, duly recorded December 30, 1901, for a consideration of \$900 paid Payne by appellee. The petition filed by plaintiff in the suit in the district court of Clay county, above referred to, alleged that both the plaintiff and defendant therein were non-residents of the state of Texas, but further alleged that Henry C. Payne owned vast tracts of land in Clay and other counties in Texas, and prayed for the issuance of writs of attachment to be levied thereon, and for foreclosure of any attachment liens that might thereby be created. That suit was filed September 9, 1901, and an attachment writ issued therein was on September 13, 1901, levied by the sheriff of Young county on all the interest that the said Henry C. Payne owned in survey No. 2,396 in Young county, and the judgment rendered in that suit was by default. A certified copy of the sheriff's return indorsed on the writ of attachment showing said levy was filed for record in the attachment record of Young county September 25, 1901. While in the judgment of foreclosure the only description of the land afterwards sold to James Sullivan by the sheriff under the foreclosure was survey No. 2,396, situated in Young county, Tex., yet in the order of sale issued thereon, and in the deed from the sheriff to Sullivan, the land is described as Texan Emigration & Land Company survey No. 2,396, situated in Young county, Tex. The order of sale was issued September 6, 1905, and sale thereunder to Sullivan was made November 7, 1905; the sheriff's deed reciting that it conveyed to Sullivan all the estate, right, title, and interest which Henry C. Payne had on the 18th day of September, 1905, or any time afterwards in and to the land therein described.

There was no other survey numbered, 2,396 in Young county. At the time of the levy of the writ of attachment Henry C. Payne did not own any interest in the land in con-

troversy. He had owned it previous to that date, but had conveyed it to R. B. Rankin by deed dated November 14, 1896, and duly recorded in Young county July 26, 1897. But on December 21, 1901, after the levy of the attachment, R. B. Rankin reconveyed the land to Henry C. Payne by deed of that date, which was duly recorded December 30, 1901, and by deed dated December 23, 1901, and recorded December 30, 1901, Henry C. Payne conveyed the land to appellee, M. K. Graham, for a consideration of \$900 cash paid by Graham, who had no actual knowledge of the levy of the attachment above mentioned. Each of the deeds above mentioned recited a valuable consideration paid to the vendor, and none of them have been attacked by appellant for fraud. It will be gathered from the foregoing findings that the writ of attachment was levied September 13, 1901, on all the interest that Henry C. Payne owned in survey No. 2,396; that at that time Henry C. Payne owned no title in the land in controversy, but that he purchased it December 21, 1901, by deed of that date, and sold it to appellee December 23, 1901, and the judgment foreclosing the attachment lien foreclosed only the interest that Henry C. Payne owned on September 13, 1901, in survey No. 2,396, situated in Young county, Tex.

It is unnecessary for us to decide whether or not M. K. Graham is entitled to be protected as an innocent purchaser of the land in controversy, or the further question whether or not the description of the land described in the sheriff's return on the attachment writ and in the judgment of foreclosure as survey No. 2,396, in connection with the proof that there was no other survey of that number in Young county, was sufficient to identify the land so described as the land in controversy in this suit; for it is our opinion that the levy of the writ which was ineffective when made did not later attach to the title thereafter acquired by Henry C. Payne and conveyed to appellee. Drake on Attachments (7th Ed.) § 234; 3 Amer. & Eng. Ency. Law (2d Ed.) pp. 222, 223; 4 Cyc. 632; and authorities there cited.

The judgment of the trial court is therefore affirmed.

#### MINTER v. HAWKINS et al.†

(Court of Civil Appeals of Texas. Jan. 30, 1909. On Rehearing, Feb. 27, 1909.)

#### 1. CONTRACTS (§ 97\*)—RIGHT OF RESCISSION—NECESSITY OF ACTING PROMPTLY—RATIFICATION.

A party seeking to rescind a contract for fraud cannot speculate on the situation, but must act promptly, and if, after discovery of the fraud, he ratifies it or affirmatively acquiesces in it by distinctly treating it as of continuing force, claiming its benefits, he cannot thereafter repudiate it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 443-446; Dec. Dig. § 97.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

**2. VENDOR AND PURCHASER (§ 44\*)—FRAUD OF VENDEE — RATIFICATION OF CONTRACT BY VENDEE—EVIDENCE.**

Evidence held to show that, after discovery of fraud, a vendor dealt with the property which he acquired as the consideration as his own, and treated the contract as a continuing one, and so lost his right to rescind.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 44.\*]

**3. VENDOR AND PURCHASER (§ 43\*)—RIGHT OF VENDOR TO RESCISSION—RATIFICATION—EFFECT OF INCREASE OF VALUE OF PROPERTY.**

If, at the time of a vendor's discovery of fraud on the part of the purchaser, the property sold is of small actual value, and vendor deliberately chooses to affirm the contract and resort to his remedy for damages as more satisfactory at the time, the equitable remedy of rescission is no longer available, so as to enable him nearly three months afterward to recover the property, if it has been augmented in value far in excess of vendor's actual damage.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 67; Dec. Dig. § 43.\*]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Suit by C. D. Minter against W. E. Hawkins and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Smith & Lattimore, for appellant. W. P. McLean and W. Erskine Williams, for appellees.

CONNER, C. J. This case is thus stated in one of the briefs of the parties to this appeal, viz.: "Appellant brought this action against appellee W. E. Hawkins, and also against W. J. Boaz. He dismissed as to W. J. Boaz before the beginning of the trial in the court below. His action was based upon a contract dated August 28, 1905, by which appellant sold to appellee Hawkins certain lots in the city of Ft. Worth for the consideration of 50 shares of the capital stock in the Panther City Hardware Company, a mercantile concern located in the city of Ft. Worth. Appellant prayed for a cancellation of the deed of conveyance executed by him to Hawkins to said land and for the recovery of the land, or its value. He also sued to recover \$2,900, which he alleged he put into said mercantile concern after he had bought it and taken possession thereof. He alleged in his amended petition (the file mark upon which shows that it was filed on the 8th day of January, 1908, the judgment having been rendered on the 2d of December, 1907, and the motion for a new trial having been filed December 14, 1907), that Hawkins misrepresented to him the amount of goods on hand, the amount of the indebtedness of said Panther City Hardware Company, and the amount due to said company, and by such false representations induced him to buy the shares of stock and give therefor the land described in his petition. He also prayed for judgment for \$2,900, which he alleged he had expended in adding to said stock of

goods after he bought it. Appellee Hawkins pleaded a general denial, and also specially answered: That appellant had every opportunity to examine said stock of goods and ascertain its value and the amount and value of its notes and accounts, as well as the amount of the outstanding indebtedness against said company. That he (appellee) had not been engaged in said business for more than a year before the sale to appellant, but had been engaged in other business not connected with said hardware company, and was ignorant of the real condition of the company and its business at the time of said sale. He answered that said company was solvent at the time of said transaction, and that if it had become insolvent thereafter, said insolvency resulted from the mismanagement and conduct of the business by appellant. After all of the testimony had been introduced, the court after hearing the argument, decided that appellant ought not to recover upon his action under the testimony, that his conduct showed a complete ratification of the contract, and that the case which he had made by the testimony was one upon which no equitable decree could be rendered by the court adjusting the rights of the parties, even if a rescission of the contract were decreed. He therefore instructed the jury to find for the appellee Hawkins." And judgment in favor of appellee Hawkins was accordingly entered, and appellant has appealed.

The evidence on the issues of the alleged false representations, of the insolvency of the Panther City Hardware Company, and of the worthlessness of the stock for which appellant traded, is undoubtedly such as to require the submission of such issues to the jury. The controlling question before us is whether the evidence of appellant's ratification or acquiescence in the transaction after his discovery of the alleged fraud is of that conclusive character which justified the court in taking that issue away from the jury and in giving the peremptory instruction stated.

Appellant's evidence relating to this issue is as follows: "I found out that the concern was not able to pay its debts, or not possessed of assets sufficient to pay its debts. I made that discovery about the 1st of January. When I made that discovery, I reported it to the creditors of the concern, and I then offered to turn them over the stock of groceries and hardware and everything in settlement of the debts. I don't think that proposition was made in writing. I made a statement of the assets and liabilities, and sent to all the creditors. That was in writing, in the shape of a letter. \* \* \* From the time I went in there, up to the time of the bankruptcy, we bought goods to replenish the stock, and paid old bills with the money. I watched that matter very close, and there was not one cent of money taken out of that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

business from the time I bought in there until this petition in bankruptcy was filed, other than salaries of the men that were in there. We sold goods right along and bought others. \* \* \* I have been in dry goods and general merchandise business all my life ever since I was 11 years old. At the time of the trade I was not engaged in merchandise, but I was an experienced merchant. At that particular time I was engaged in real estate and merchandise together, brokerage. \* \* \* We made some cash purchases all the way through after the 1st of January. We bought all the stuff we needed along, to replenish and keep up the sales. We turned the stock over, virtually turned the stock over to the creditors. It was in their hands, and then we invoiced it, and we bought. While we were selling goods we bought goods along as we would get out of things. We would buy a few and buy for cash and sold them, to keep the stock up. Q. Did you ever go to Mr. Hawkins and ask him to take back those goods and give you up your land? A. Mr. Lattimore I think made that demand for me. The 1st of January I turned it over to Mr. Lattimore. I didn't have authority to offer him the goods. I offered him the stock. The stock controls the goods. \* \* \* Witness was asked: 'You never tendered Mr. Hawkins anything after you became dissatisfied with this trade, whenever that was, except the stock, and did you ever tender him the stock?' Witness answered: 'Yes, sir; only through my attorney.' Messrs. Smith & Lattimore were my attorneys. They were already employed generally for probably three or four months back of that to attend to any business that I had, my attorneys individually and for the Panther City Hardware Company also. I didn't go to Mr. Hawkins because I couldn't find him. He lives in Ft. Worth, and lived in Ft. Worth then, and I was living here at that time. I couldn't find him. That was not the reason I didn't go—because my attorneys were attending to this matter, the effect of these misrepresentations. I had employed them to bring suit if necessary. I never personally tendered anything to Mr. Hawkins before I brought this suit. \* \* \* Q. When did you begin to notice about these debts that had not been reported to you against the company? A. There were some of them reported in October, some right along, kept coming all along. Until after the bankruptcy proceeding they came in. We got duns from parties. I think I was elected president of the company. Mr. Glass was vice president, and Mr. Burns was secretary and treasurer. I began to hear about these debts that had not been reported to me along in October and November, and all along through. I said something to Mr. Hawkins about it the first time I saw him. I don't remember the exact time, and I think I did to Mr. Boaz too. I am certain I mentioned it to Mr. Hawkins. I don't

know when exactly. I told him that the thing looked mighty bad. It was not represented right. I would ask him about things. He would refer me to Mr. Wyatt, said straighten it out. Until we got to invoice I didn't suppose it would be one-fourth as bad as it was until we invoiced. I knew about these debts. I knew all about the debts. Q. But you didn't know how much goods there were until the invoice? A. I didn't know how much debts there was either that was overplus until we checked up the books and invoices. I knew there were some debts that had not been reported to me in October and November. Some of them came in afterwards. Some of them came in quite awhile afterwards. \* \* \* We took the invoice the first of January. I think we started in December. We took the invoice, and after we found out the condition of affairs we told Mr. Glass about it. He wanted to take a gun, waved around with his knife, and was going to kill Mr. Hawkins and Mr. Wyatt. I had quite a time in there. I figured out the best I could and reported it to the creditors and proposed to make a settlement, afterwards; proposed to turn over the goods or try to pay it out at 60 cents on the dollar, 50 cents cash or 60 cents notes. After we took this inventory in January and discovered the true status of affairs, that is the first time we figured up the aggregate of the debts and the amount of the stock and found out whether there was as much as had been represented to me on hand. Q. After that did you see Mr. Hawkins? A. I couldn't find Mr. Hawkins. I had no opportunity to tender back to Mr. Hawkins his stock at any time before this was put in the hands of the bankruptcy court. I think he was away from here, to Beaumont or some place, at that time. I made a trip around, went to Chicago and St. Louis, to see Phillips-Butdorf, Belknap Hardware Company and all those people, in an effort to try to save out of this something of what had been put in. Over and above this stock that I bought from Mr. Hawkins I had put into the business the \$2,000 grocery stock and about \$1,900 in money that I had loaned it. I heard Mr. Glass testify that I bought his stock and gave him \$100 for it, and that is correct. I lost that \$100. \* \* \* I don't remember the exact date of the bankruptcy proceeding. It was in January or February. I think it was in February. In January we turned that stock over to the creditors to invoice and pay their debts, and after that somebody else put it in bankruptcy. I don't know who did that turning over to them. Mr. Burns and myself, I guess, the officers of the company, Mr. Glass. I think Mr. Glass had something to do with it. It was by his sanction. Q. You and Mr. Burns were the active members in it. Wasn't you the leading? A. I was president, yes. When I found out it wouldn't pay out. I wanted to save the creditors all I could."

There was other evidence showing that,



soon after appellant went into the business, one or more of the managers or bookkeepers discovered that some of the stock of hardware was old, that empty boxes were found on the shelves, that the concern was overdrawn at the bank, that unlisted debts were being presented, and that no tender or demand for rescission was in fact made of Hawkins until this suit was filed. The law is that the party who seeks to rescind a contract for fraud must act promptly in disaffirming the contract. If, after the discovery of the fraud, he ratifies it or affirmatively acquiesces in it by distinctly treating the contract as of continuing force, claiming its benefits, he cannot thereafter repudiate it.

We think it unnecessary to discuss the facts at length. Our conclusion thereon is that the evidence, in its most favorable aspect to appellant, conclusively shows that, after discovery of the fraud, if any, appellant consciously dealt with the property acquired as his own and treated the contract as a continuing one, and that he hence lost his right of rescission, if any ever existed. The value of the lots given for the stock is not shown, nor is insolvency on the part of Hawkins proven so as to exclude the inference that at the time of appellant's discovery of the alleged fraud the lots were of small actual value, and that appellant hence deliberately chose to affirm the contract and resort to his remedy for damages as more satisfactory at the time. If so, the equitable remedy of rescission was no longer available so as to enable appellant, nearly three months thereafter, to recover the specific lots after they may have been augmented in value far in excess of appellant's actual damage. We make this suggestion to illustrate one of the reasons of the rule in equity that one who wishes to rescind a contract for fraud must act promptly. He is not permitted to speculate upon the chances of the situation. See *Wells v. Houston*, 23 Tex. Civ. App. 653, 57 S. W. 584; *Temple Nat. Bank v. Warner* (Tex. Civ. App.) 31 S. W. 239; *Adams v. Pardue* (Tex. Civ. App.) 36 S. W. 1015; *Emma Silver Mining Co. v. Emma Silver Mining Co. of New York* (C. C.) 7 Fed. 401; 2 *Pomeroy's Equity Jurisprudence* (3d Ed.) §§ 816, 817, 917, 964; *Pomeroy's Equitable Remedies*, being volume 6 (3d Ed.) of *Pomeroy's Equity*, §§ 687, 688.

It is accordingly ordered that the judgment be affirmed.

#### On Rehearing.

We disposed of this case on original hearing upon the theory that the only issue presented and acted on by the trial court was one of rescission. It is now suggested, however, that plaintiff alleged and offered to prove the value of the lots given by him to appellee W. E. Hawkins for the alleged worthless stock in the Panther City Hard-

ware Company and sought to recover damages. The record shows that the trial was had and judgment entered upon December 2, 1907, that appellant's amended motion for a new trial was filed December 14, 1907, and the only pleading that we have been able to find purporting to set up the issue of damages in the alternative is one styled, "Plaintiff's Amended Original Petition, Filed January 8, 1908," more than a month after the judgment; and, while it is true that it appears by bill of exception that upon the trial appellant offered to prove by himself the market value of the lots involved in this controversy, it further appears that objection was made thereto and sustained by the court on the ground that there was no allegation in the petition showing what their value was. No assignment of error has been presented urging the exclusion of this evidence as error, nor did appellant request the submission of the issue of damages. In view of all which we conclude that we correctly assumed, as indeed was orally stated on the submission as we recollect it, that the only question presented was the alleged right of appellant to a rescission.

As to this phase of the case we find no reason to alter the conclusions originally announced, and the motion for new trial will therefore be overruled.

#### BURNETT et ux. v. FT. WORTH LIGHT & POWER CO. et al.

(Court of Civil Appeals of Texas. Jan. 25, 1908. Rehearing Granted Jan. 2, 1909.)

#### 1. JURY (§ 12\*)—RIGHT TO TRIAL BY JURY—ISSUES OF FACT.

If the pleadings and evidence present a controverted question of fact, it is error to refuse a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 29; Dec. Dig. § 12.\*]

#### 2. ELECTRICITY (§ 19\*)—ACTIONS—EVIDENCE.

In an action against an electric company for negligently causing a death by allowing a guy wire on the top of a building to become charged with electricity, in violation of a city ordinance, evidence held sufficient to show that the building was in the city.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.\*]

#### 3. ELECTRICITY (§ 17\*)—INJURY FROM CHARGED GUY WIRE—OWNERSHIP OF WIRE.

Where injury was caused by a guy wire which would have been harmless had it not been charged with electricity from defendants' fault in failing to observe ordinances under which they were exercising their franchises in the city, it was immaterial as affecting their liability whether the guy wire was owned or controlled by them or either of them.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 17.\*]

#### 4. ELECTRICITY (§ 15\*)—INJURIES INCIDENT TO USE—ACTIONS.

Where an electric company permitted an uncovered guy wire stretched across the roof of a building, and only two or three feet above it, to become charged with electricity contrary to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the city ordinances, the roof being accessible by means of a stairway and trapdoor, thus giving notice to the company that persons were intended to go there, it was liable to inhabitants of the city entitled to the protection of the ordinances for the death of their son, also an inhabitant of the city, who was killed by coming into contact with the wire, though he was trespassing on the roof.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 8; Dec. Dig. § 15.\*]

Appeal from District Court, Tarrant County; Mike E. Smith, Judge.

Action by Peter Burnett and wife against the Ft. Worth Light & Power Company and others. A directed verdict, for defendants was reversed, and the cause remanded by the Court of Civil Appeals, and a question certified to the Supreme Court. On remand after answer to question (112 S. W. 1040). Judgment below reversed, and cause remanded for a new trial.

Booth & Knight, for appellants. Capps, Canty, Hanger & Short and R. L. Carlock, for appellees.

STEPHENS, J. A negro boy about 12 years old went with a companion near the same age to the roof of the Dundee building in Ft. Worth, Tex., passing up a stairway and out through a trapdoor, and was there instantly killed by coming in contact with a live guy wire which had become charged with electricity through the failure of the appellees to comply with one or more of the penal ordinances of the city of Ft. Worth. This suit was brought by the parents of the deceased boy against the appellees to recover damages on account of their failure to observe said ordinances. The court instructed the jury to return a verdict in favor of the appellees, and to this the errors are assigned.

We need not stop to consider the objections urged to the form of the assignments, since it would be fundamental error for the court to deny the constitutional right of trial by jury where the pleadings and evidence present a controverted issue of fact. In disposing of the appeal we will consider the counter propositions submitted by the appellees to sustain the judgment. The first of these is that the evidence failed to show that the Dundee building, on the roof of which the boy was killed, was situated within the city limits of Ft. Worth. True, no witness stated in so many words that this building was within said limits, but it was described in the testimony of Charles Crabtree, the city electrician of Ft. Worth, as being on Houston street between Seventh and Eighth streets, which were evidently streets of said city, though no witness seems to have testified directly to this fact. Indeed it is evident from the transcript that the case was tried on the theory that the Dundee building was within the corporate limits, and it would

be unreasonable to suppose that the court instructed a verdict for want of positive evidence of this fact.

The next counter proposition is that the "uncontradicted evidence" was that neither of the appellees owned or controlled the wire on which the boy was killed; but it is sufficient answer to this proposition that it was immaterial whether the wire was owned by them or either of them, since it would have been harmless but for the fact that it had become charged with electricity through their fault in not observing the ordinances under which they were exercising their franchises in the city of Ft. Worth.

The third counter proposition is that the roof of the Dundee building was not a place to which the public had a right to resort, that in going out upon said roof the boy was an intruder or trespasser, and that from all the circumstances the appellees could not reasonably have anticipated or expected that some trespasser would go out upon the roof of said building and come in contact with said wire, in support of which the case of *Brush Electric Light & Power Co. v. Lefevre*, 93 Tex. 604, 57 S. W. 640, 49 L. R. A. 771, 77 Am. St. Rep. 898, is cited. It is not entirely clear to us that a correct conclusion was reached in that case, but, however this may be, we are of opinion that the cases are distinguishable. In that case the wire which produced the fatal shock extended over the top of an awning in front of a business house, and the decision seems to have turned on the fact that there was no evidence that the awning had been used, or was intended to be used, by any person as a place of resort either for pleasure or business. In the course of the opinion, this language is used: "There can be no liability for the injury in this case, unless, from all the circumstances, the electric light company could reasonably expect that some person might be injured by its failure to cover the wires placed by it upon the awning where the deceased received his injury." In this case access by means of a stairway and trapdoor had been provided to the roof of the Dundee building, which was itself notice to the appellees that persons were expected to go there, and which therefore distinguishes it from the one cited, in which no means of access to the awning had been provided. It matters not that the boy in going to the roof with his companion to play was a trespasser and had no business there. That principle has no application here. If the circumstances were sufficient to put the appellees on notice of the fact that persons were liable to make use of the flat roof of the building in question for any purpose, they must have contemplated that it would be dangerous to human life for an uncovered guy wire stretched across the roof only two or three feet above the same to become charged with electricity,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which was contrary to the ordinances of said city. The appellants and deceased were alike inhabitants of the city of Ft. Worth, and were clearly entitled, in common with all other persons in said city, to the protection which it was the purpose of these ordinances to afford by guarding against the dangers incident to the subtle power of electricity.

The fourth and last counter proposition is sufficiently covered by the foregoing conclusions.

Because the court erred therefore in instructing a verdict for the appellees, the judgment is reversed, and the cause remanded for a new trial.

### BEAN v. BIRD.

(Court of Civil Appeals of Texas. March 11, 1909.)

#### 1. COURTS (§ 91\*)—DECISIONS OF COURT OF LAST RESORT.

The decision of the Supreme Court that a purported copy of a statement of facts accompanying the transcript will be considered on appeal, in the absence of an objection by the adverse party made before the submission of the case, is binding on the Court of Civil Appeals, and it will of its own motion set aside an order overruling a motion for a rehearing of a decision affirming a judgment because of the absence of the original statement of facts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 325; Dec. Dig. § 91.\*]

#### 2. APPEAL AND ERROR (§ 1010\*)—FINDINGS—CONCLUSIONS.

A finding that a boundary line was fixed by agreement between the parties, based on testimony, received without objection, of witnesses who gave their conclusions as to the agreed location of the line at the place fixed, rather than stating the facts from which the court might find an agreement, without disclosing on their cross-examination the absence of any basis for the conclusions, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3980; Dec. Dig. § 1010.\*]

On motion for rehearing. Overruled.  
For former opinion, see 115 S. W. 121.

**HODGES, J.** This is a suit in which the sole question involved is the location of a boundary line between the parties. At a former day of this term the case was affirmed because of the absence of the original statement of facts; it being the opinion of this court that the statute did not authorize us to consider a purported copy incorporated in the transcript, in the absence of an agreement to that effect. 115 S. W. 121. Since then the Supreme Court in the case of Royal Insurance Company v. T. & G. Railway Company (recently decided) 116 S. W. 46, has adopted a contrary rule, and holds that a purported copy of a statement of facts which accompanies the transcript should be considered on appeal, unless there is an objection by the opposing party interposed before the case

is submitted. This rule is as binding upon us as would be a statutory provision to that effect, and we follow it through the same spirit of obedience with which we conform our rulings to legislative enactments, without questioning its wisdom or its correctness as a judicial interpretation of existing legal requirements. We have accordingly, of our own motion, set aside the order overruling the motion for a rehearing filed herein, for the purpose of disposing of the case upon the issues of fact involved.

The case was tried before the court without a jury, and the only assignment of error presented is that which questions the sufficiency of the evidence to sustain the finding of the court that there was an agreed boundary line between the parties. The court found that the south boundary line of the Gillespie survey, the land owned by the appellee, is where the latter claims it to be; and further found that the line was fixed at that place by agreement between the parties to this suit. While the evidence concerning such an agreement is of a character to create the inference that the witnesses were giving their conclusions as to an agreed location of the line at that place, rather than stating the facts from which the court might find that one had in reality been entered into, so as to bind the parties in this controversy, still we do not feel justified in setting aside the judgment rendered. There does not appear to have been any objection to the testimony in that form, nor did the cross-examination disclose the absence of any basis for the conclusions of the witnesses. There was also evidence sufficient to sustain a finding by the court that this was the true line between the surveys. We do not construe his findings as resting his judgment solely upon the fact that there was an agreed line.

The motion for rehearing is overruled.

### CONNOR et al. v. ZACKRY.

(Court of Civil Appeals of Texas. Feb. 25, 1909.)

#### 1. COUNTIES (§ 101\*)—OFFICERS—LIABILITIES ON OFFICIAL BOND.

Rev. St. 1895, art. 920, provides for a bond by the county treasurer, conditioned that he shall faithfully execute the duties of his office and pay over according to law all moneys which shall come into his hands as county treasurer. Article 921 provides that the county treasurer shall give an additional bond for the school fund of his county, conditioned that he will safely keep and faithfully disburse the school fund according to law, and pay such warrants as shall be drawn on said fund by competent authority. *Held*, that an action to recover for a part of the school fund received by the county treasurer, which he failed to pay over to his successor, must be brought upon the obligation securing the school fund, and not upon the general bond, although the sureties on both bonds are the same.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 101.\*]

## 2. COUNTIES (§ 101\*)—OFFICERS—LIABILITIES ON OFFICIAL BONDS—ACTIONS—PLEADING.

In an action by a county treasurer on the bond of his predecessor to recover money belonging to the school fund which had not been paid over, the complaint alleged the election and qualification of such predecessor, by his taking the oath of office and "executing the bond required by law with defendants \* \* \* as sureties on said bond," which was described as conditioned that "such county treasurer would faithfully perform and discharge all the duties required of him by law, as such treasurer aforesaid, and shall pay over all money that shall come into his hands during his term of office." *Held*, that the petition was not sufficient as a statement of a cause of action on the bond securing the payment of the school fund, as the petition should have alleged the giving of the bond to protect the school fund and have described the obligation of the treasurer to pay over that fund.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 157; Dec. Dig. § 101.\*]

## 3. PLEADING (§ 8\*)—EFFECT OF SUPPLEMENTAL COMPLAINT.

The statement, in a supplemental pleading, that the pleader intended to or did in fact declare upon a certain instrument, is but the conclusion of the pleader, and adds nothing to the sufficiency of the original pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.\*]

## 4. COUNTIES (§ 101\*)—OFFICERS—LIABILITIES ON OFFICIAL BONDS—AUTHORITY TO BRING ACTION.

As a county is neither the owner of the school fund nor a trustee for its distribution, and as the county treasurer is to be regarded as to that fund as an officer of the state, the county treasurer cannot maintain an action on the bond of his predecessor to recover any portion of the school fund for the use and benefit of the county.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 101.\*]

## 5. EVIDENCE (§ 48\*)—JUDICIAL NOTICE—JUDICIAL PROCEEDINGS.

Rev. St. 1895, art. 921, provides that the county treasurer shall give an additional bond for the school fund of his county, payable to and to be approved by the county judge, in a sum double the amount of the school fund, to be estimated by the county judge. *Held*, that the appellate court cannot judicially know in an action on the bond the sum specified by the county judge, nor whether its estimate was followed in making the bond.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 48.\*]

## 6. COUNTIES (§ 101\*)—OFFICERS—LIABILITIES ON OFFICIAL BOND—ACTION—PETITION.

In an action on a county treasurer's bond, begun in district court, to recover a portion of the school fund which the treasurer did not pay over to his successor, the petition should allege the amount of the bond sued on in order to show that the amount is within the jurisdiction of the trial court.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 101.\*]

Appeal from District Court, Morris County; P. A. Turner, Judge.

Action by J. N. Zackry against W. T. Connor, Jr., and others. Judgment for plaintiff, and defendants appeal. Reversed, and cause dismissed.

See, also, 115 S. W. 867.

John M. Henderson, for appellants. L. S. Schluter and Terrell, Robinson & French, for appellee.

HODGES, J. On March 24, 1903, the appellee, J. N. Zackry, filed suit against W. B. Willis, former treasurer of Morris county, as principal, and the appellants as sureties on his official bond. The petition alleges that Zackry was the then duly elected and acting treasurer of Morris county, and that he prosecuted this suit in that capacity for the use and benefit of Morris county. It sought to recover of Willis and his bondsmen the sum of \$830.60 alleged to be a part of the school fund belonging to the county, which came into the hands of Willis while he was the treasurer, and for which he had failed to account in making his final settlement. This petition was signed "J. N. Zackry for himself." On the 7th day of April of the same year, and before any answer appears to have been filed, an amended original petition was filed by Zackry through his attorney, in which he makes the same allegations as to his capacity and the purpose for which the suit was instituted, and makes substantially the following as the statement of his cause of action: That Willis was elected treasurer of Morris county in November, 1898, and on the 15th of the same month executed a bond with the appellants as his sureties, and took the oath of office as prescribed by the Constitution and law. That among the various conditions of the bond was that: "The said Willis as such treasurer shall faithfully perform and discharge all the duties required of him by law as county treasurer, and shall pay over all money that shall come into his hands during the term of his office; a copy of which said bond is hereto attached, marked 'Exhibit A,' and made a part of this petition." That Willis' term of office expired on the — day of November, 1900. That during his incumbency large sums of money which belonged to Morris county, known and designated as the "county school fund," came into his possession as such treasurer, and it became his duty to account to Morris county for the money in his final settlement, or to pay it out according to law. It is further represented that the fund collected and received by Willis was money that had been apportioned and set apart to the county of Morris by the state of Texas from the public school fund, and some of it was interest which became due and payable on the indebtedness due to Morris county for its school lands which had theretofore been sold by said county. That at the expiration of Willis' term of office it became his duty to make an official settlement and to account for all the aforesaid funds which he had received and collected which he had not paid out in the manner directed by law, and to pay the same over to the plaintiff as his successor. That Willis never accounted for

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

or paid over to the plaintiff as treasurer the funds which went into his possession as aforesaid, nor did he pay it out according to law, but still retained in his possession the sum of \$830.60, which sum he had converted to his own use and benefit. That by reason of the failure of Willis to pay out said money as it came into his hands as treasurer, and by failing and refusing to pay over the same to the plaintiff, Zackry, his successor, as required by law, he breached the condition of his bond, and he and his sureties thereby became liable to Morris county for the said sum of money. The petition asks for judgment in favor of the plaintiff in his capacity as treasurer aforesaid, for the use and benefit of Morris county, against Willis and his sureties for the amount sued for. The bond marked "Exhibit A," and referred to in the petition, has the following condition: "Now therefore if the said W. B. Willis shall faithfully perform and discharge all the duties required of him by law as treasurer aforesaid, and shall pay over all moneys that may come into his hands during the term of his office, then this obligation to be void; otherwise, to remain in full force and effect." Willis and his bondsmen answered by a general demurrer and a special exception, charging that the petition showed no authority upon the part of Zackry from the commissioners' court of Morris county to bring this suit, and that the suit should be abated and dismissed because the plaintiff showed no authority in law to prosecute it. They also pleaded general denial, and specially pleaded the statute of limitation of four years.

On September 29, 1906, a second amended original petition was filed, containing substantially the same averments embodied in the first amended original petition. The same amount was claimed, and reference again made to a bond alleged to be attached to the petition and marked "Exhibit A" referred to and made a part of the pleading. However, the record shows no such exhibit attached. It was further alleged that the plaintiff had recently discovered that Willis, while treasurer, had paid out the funds for which this suit was instituted to one Will Lewis, upon vouchers signed by the county judge, for school furniture and supplies of various kinds for schoolhouses, that the payments so made were without authority of law, and that by reason of that fact Lewis had unlawfully received the money. It sought to make Lewis a party to the suit, and asked a recovery against him. The petition further alleged authority from the commissioners' court of Morris county to institute this suit, and refers to an order to that effect designated as "Exhibit B" made a part of the petition. The record, however, does not show any such order attached.

The court sustained the general demurrer of the defendant below, and dismissed the case. Later, upon application, that judgment was set aside and a new trial granted. In

the motion for a new trial it is alleged that, by mistake of the attorneys who first instituted the suit, the wrong bond had been attached to the petition as an exhibit, that at that time the bond which was required by law of the county treasurer for the security of the school fund could not be found, and that the appellants, as sureties, had signed both bonds. They attached as an exhibit to the motion the bond purported to be signed by Willis, with the appellants as his sureties, conditioned as required by law for the safe-keeping and faithful disbursement of the school funds which might come into his hands as treasurer. Plaintiff also filed a supplemental petition setting up the mistake in attaching the wrong bond as an exhibit to the previous pleadings and the facts referred to as having been embodied in the motion for a new trial, and alleging that he now attaches to and makes a part of his petition the bond executed by Willis for the safe-keeping of the school funds that came into his hands while treasurer. To this supplemental petition the defendants below answered by a general demurrer, a general denial, and further alleging that more than four years had elapsed since the misapplication of the funds complained of, and since the final report of Willis as treasurer of Morris county had been made. The cause was tried on March 14, 1908, and a judgment rendered against Willis and his bondsmen for the sum of \$614.28, from which this appeal is prosecuted by the bondsmen alone.

The sole question we are here called upon to consider is: Do the pleadings authorize the judgment? The wrong complained of in the petition of the plaintiff is the misappropriation and conversion by Willis, while treasurer, of a part of the available school fund which had been apportioned to Morris county. The suit is to recover from Willis and the appellants that sum. In order to state a cause of action against the appellants for the defalcation of Willis, as to this particular fund, it should be alleged that they were sureties upon the bond given for the protection of this fund. The statute requires the county treasurer, before entering upon the duties of his office, to execute two bonds; one for the security of the funds of the county, and the other for the security of the available school fund apportioned to the schools of the county and of which he may have the custody. Articles 920, 921, Rev. St. 1895; *Kempner v. Galveston County*, 73 Tex. 216, 11 S. W. 190. The bond required by article 920 is made payable to the county judge, to be approved by the commissioners' court, and in a sum to be fixed by that court, conditioned that the treasurer shall faithfully execute the duties of his office and pay over according to law all moneys which shall come into his hands as county treasurer, and shall render a just and true account thereof to said court at each regular term of said court. Article 921 provides that the county treasurer

shall give an additional bond for the school fund of his county, payable to and to be approved by the county judge, in a sum double the amount of the school fund, to be estimated by such county judge, conditioned that he will safely keep and faithfully disburse the school fund according to law, and pay such warrants as may be drawn on said fund by competent authority. Under the ruling in the case of *Kempner v. Galveston County*, supra, the sureties on this last-mentioned bond, when given by Willis, were those who became liable for the default here charged; and in order to recover in this suit the action must be upon that obligation, and not upon the other bond. We gather from the briefs of the parties, and portions of the record, that much of the confusion presented in this case is due to the fact that appellants were sureties on both of the bonds executed by Willis as treasurer; but this will not dispense with the requirement that, in order to hold the appellants liable as sureties, the suit must have been based upon that contract whereby they obligated themselves to stand security for the conduct of Willis in keeping and disbursing the funds, of which that sued for is a part.

In stating the cause of action, the plaintiff alleges the election and qualification of Willis by his taking the oath of office and "executing the bond required by law, with defendants (naming appellants) as sureties on said bond." In further describing the bond, and the only place where this is attempted, it is alleged that "among the various conditions of said bond was one that the said W. B. Willis, as such county treasurer, would faithfully perform and discharge all of the duties required of him by law, as such treasurer aforesaid, and shall pay over all money that shall come into his hands during his term of office; a copy of said bond is attached hereto, marked 'Exhibit A,' and made a part of this petition." The record shows that substantially the same allegations were in the first amended original petition, and that a copy of the bond conditioned as required for the protection of the funds of the county, and signed by Willis and appellants, was attached as an exhibit to that petition; but the record fails to show that the pleadings here under consideration, the second amended original petition, had an exhibit of any sort attached. Under our system of pleading bonds and other instruments forming the whole or a part of the cause of action may be made a part of the pleadings by copies, or the originals, being attached and referred to as such, in explanation of the allegations of the petition, but will not relieve the pleader of the duty of making proper allegations of which the exhibits may be, in whole or in part, the evidence. Rule 19, District and County Courts (87 S. W. xxi). But there being no copy of any bond attached as an exhibit to the second amended original petition, the pleading upon which the

case appears to have been tried, and judgment rendered, we are not called upon to say how far such an exhibit might be relied upon as aiding the sufficiency of the petition. The legal sufficiency of the second amended original petition as a declaration upon a bond given for the safe-keeping and faithful disbursement of the available school fund apportioned to Morris county must therefore be determined solely by the averments of the pleading itself. Should the two bonds required of the county treasurer be executed on the same day, by the same sureties, and for the same amount, the only feature necessarily appearing upon the face of them which would distinguish one from the other would be the differing conditions required by law to be embraced within their respective terms. Where this is the case, and the instrument is described in the petition as embracing the conditions required by law for the protection of one fund, the action cannot be treated, at the option of the pleader, as a suit upon the other obligation. The petition in this suit having failed to allege the execution of an obligation by the appellants to secure the safe-keeping and faithful disbursement of the available school fund, no cause of action is stated, and no judgment could be rendered against them. The instrument declared on was not the proper bond.

It is true that the motion filed by the appellee for a new trial after the dismissal of its suit in 1906, which motion is copied in the transcript, alleges that it was the intention of the plaintiff in the case to sue on the bond given for the security of the available school fund, and that by reason of the fact that this particular bond could not be found at the time suit was filed, and, through a mistake of the attorney preparing the pleadings, a copy of the wrong bond was attached as an exhibit to the petition. The motion also contains as an exhibit a copy of a bond conditioned as required by law for the safety of the school fund, and prays that plaintiff be allowed to amend his pleadings. If there was any amendment of the pleadings, the record does not show it. There is among the pleadings what is termed a "second supplemental petition," filed at a subsequent term of the court, which appears to be a replication to the answer of the appellants, which again sets out the mistake and its causes, substantially as stated in the motion for new trial, avers that the proper bond is then attached to the petition, and states that this is the bond upon which the plaintiff has declared. The mere statement in a supplemental pleading that the pleader intended to, or did in fact, declare upon a certain instrument, is but the conclusion of the pleader, and adds nothing to the sufficiency of the pleading. Assuming that appellee had substituted one bond for the other and without amending the averments of his petition, when these clearly referred to the instrument removed, this would not under our

practice constitute a proper amendment of the pleadings; but even this is not shown by the record to have been done.

While we think the defects of the petition which have been discussed are sufficient to justify reversing and dismissing this case, there are other features which should probably be noticed, in view of possible future litigation that may follow. We are not prepared to hold that an action on the proper bond to recover any portion of the available school fund can be maintained in the name of another "for the use and benefit of the county." In the case of *Jernigan v. Finley*, 90 Tex. 205, 38 S. W. 25, the Supreme Court holds that the money annually apportioned to the different counties as the available school fund is in no sense the property of the counties. In delivering the opinion this language was used: "Its treasurer is the custodian of so much of the available school fund as may be set apart to the county. The county superintendent, if there be one, and, if not, the county judge, superintends its distribution under the law. It does not follow that because an officer is called a 'county officer' the functions he exercises are exercised for the quasi corporation. They may be state officers, though their jurisdiction or powers may be confined to the limits of the county, or even to one of its political subdivisions. *Fears v. Nacogdoches Co.*, 71 Tex. 337, 9 S. W. 265. \* \* \* For the purpose of convenience, in administering the available school fund of the state, the Constitution and statutes adopt the state's political subdivisions in providing for its distribution, and the statutes devolve certain duties with respect thereto upon certain of the county officers. This was, doubtless, prompted in part by motives of economy. It confers no right in the fund in the quasi corporation known as the 'county.' \* \* \* We have already endeavored to show that, to the money for which the warrant in controversy is sought, Travis county, in its corporate capacity, is not entitled, either in its own right or as trustee for the public schools of the county." But in *Burk v. Galveston County*, 76 Tex. 267, 13 S. W. 455, it was held that a suit upon such a bond in the name of the county could be maintained. It is difficult to reconcile this holding with the conclusions announced in the *Jernigan Case* previously referred to. It seems to us that if the county is neither the owner of the fund, nor a trustee for its distribution, and the treasurer of the county is to be regarded as to that fund an officer of the state, then the county would have no more authority to maintain an action for its recovery when misappropriated by the treasurer than would any other stranger. The court in the *Burk Case* cites *Simons v. County of Jackson*, 63 Tex. 428. The reports of those cases do not show what the pleadings were, except as to

the style of the suit. It may be that the petition was so framed as to make it an action in behalf of the real beneficiaries of the fund, with the county as only a nominal plaintiff, and that feature led the court to hold as it did. Such is not the case here. This suit is by the treasurer for the use and benefit of the county, and the judgment rendered awards a recovery against the appellants "for the use and benefit of the county." If this suit can be maintained as pleaded, then the form of the judgment is not improper; and, if the form of the judgment is not improper, Morris county is thus enabled to appropriate to its own use and benefit funds which the state had set apart for another purpose.

The petition in this case does not allege the amount of the bond sued on. This amount is required to be fixed by the county judge on his estimate of the available school money that may be placed in the hands of the treasurer. The court cannot judicially know the sum specified by the county judge, nor whether this estimate was followed in making the bond. It may or it may not have been for a sum sufficient to be within the jurisdiction of the trial court, or to cover the amount sued for. It should affirmatively appear from the allegations of the petition that the court has jurisdiction of the suit.

We do not undertake to decide whether limitation would run against an action to recover a portion of the available school fund when properly brought.

The judgment of the court is reversed, and the cause dismissed.

#### CRAWFORD et al. v. THOMASON et al.

(Court of Civil Appeals of Texas. Feb. 6, 1909.  
Rehearing Denied March 6, 1909.)

#### 1. TROVER AND CONVERSION (§ 1\*)—NATURE AND ELEMENTS OF "CONVERSION."

Any distinct act or dominion wrongfully exerted over another's property, in denial of his right or inconsistent with it, is a "conversion."

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. § 1; Dec. Dig. § 1.\*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1562-1570; vol. 3, p. 7618.]

#### 2. TROVER AND CONVERSION (§ 22\*)—RIGHT TO QUESTION PLAINTIFF'S TITLE.

One accused of conversion cannot question plaintiff's title or right of possession, nor defeat recovery by showing that the taking was in good faith, or under a mistake.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 152-162; Dec. Dig. § 22.\*]

#### 3. TROVER AND CONVERSION (§ 5\*)—ACTS CONSTITUTING CONVERSION—MOVING PROPERTY UNDER WRIT OF SEQUESTRATION.

The moving of a building and its contents from a strip of land, under a writ of sequestration void because issued before judgment, is a conversion of the property; the moving being over the protest of the persons in possession, although defendants disclaimed when moving the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

property any other object than enforcing the writ of sequestration by removing the property from the land.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 43; Dec. Dig. § 5.\*]

**4. TROVER AND CONVERSION (§§ 13, 22\*)—RIGHT OF ACTION—NATURE AND SCOPE OF REMEDY.**

When a wrong complained of amounts to a conversion, the injured party has the right to so treat it and to sue for the value of the property so taken, and also to refuse to accept the property when the wrongdoer offers to return it.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 103, 153; Dec. Dig. §§ 13, 22.\*]

**5. TROVER AND CONVERSION (§ 37\*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.**

In an action for conversion, in moving a house and contents located on lot 5, but projecting over on lot 6, and placing the property within the limits of lot 5, the moving being done under a void writ of sequestration directing the removal of the house from lot 6, evidence that the plaintiffs had no title to lot 5 and were trespassers thereon is inadmissible, as the action of defendants in moving the building was not based on a belief that plaintiffs had no lawful right to occupy lot 5.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 37.\*]

**6. TROVER AND CONVERSION (§ 39\*)—ACTIONS—ADMISSIBILITY OF EVIDENCE—DAMAGES.**

In an action for conversion of a building and its contents located on lot 5 but projecting over upon lot 6, by moving it to a position entirely on lot 5, evidence to show that other houses in the same block had been moved back on a line with the house in question without making any material difference in the volume of their business was inadmissible, as the market value of the property was the only measure of actual damages submitted to the jury, and the evidence was not relevant to the issue of exemplary damages.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 39.\*]

**7. TROVER AND CONVERSION (§ 40\*)—ACTIONS—WEIGHT OF EVIDENCE—DAMAGES.**

In an action for conversion of a building and its contents located on lot 5 but projecting over upon lot 6, by moving it to a position entirely on lot 5, evidence held to warrant exemplary damages.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 40.\*]

**8. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—INSTRUCTIONS AS TO CONVERSION.**

In an action for conversion, an error in defining "conversion" is rendered harmless by evidence which proves beyond controversy that plaintiffs were guilty of conversion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4227; Dec. Dig. § 1068.\*]

Appeal from District Court, Jones County; Cullen C. Higgins, Judge.

Action by Z. B. Thomason and others against Frank Crawford and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

H. G. McConnell, Brooks & Scott, and Theodore Mack, for appellants. C. H. Steele, Thomas & Chapman, and Thomason & Thomason, for appellees.

DUNKLIN, J. On the 24th day of March, 1906, a writ of sequestration was sued out

by plaintiff in the suit of S. L. Robertson against Oscar E. Oates, T. G. Carney, Z. B. Thomason, and E. P. Thomason to recover a portion of lot 6 in block 25 in the town of Haskell, consisting of a strip 12 inches in width and 140 feet in length, adjoining lot 5 lying south of lot 6. That was not the suit now before us. The writ of sequestration commanded the sheriff of Haskell county not only to take possession of the strip sued for, but also, in effect, to remove all houses and other incumbrances therefrom. At that time a storehouse was situated principally on lot 5, but also covered the strip sued for. This house consisted of two sections joined together. Defendants Z. B. and E. P. Thomason were in possession of the house and also of a stock of groceries therein, and were engaged in the business of grocery merchants. One section of the building was owned by them, and they had leased the other section. Acting under this writ, J. W. Collins, sheriff of Haskell county, at the instance of plaintiff S. L. Robertson, and over objections of the persons in charge of said house and goods, after levying on the disputed strip of land, removed the house and its contents therefrom to a place 30 feet west and a short distance south of its former location. The actual work of so doing was performed at the instance of the sheriff by Frank Crawford and others whom he had employed to assist him. To properly move the storehouse it was necessary to separate the two sections thereof and move them separately, but after being moved the two sections were again joined together as before. The goods were not taken from the house, and before moving it the sheriff disclaimed to the persons in charge any desire to take possession of the goods or to interfere with defendants' possession thereof, stating that his only purpose was to remove the house from the strip of land sued for by Robertson, and that he was acting solely under and by virtue of the writ of sequestration which he then had in his possession. When the work of moving the house was begun, the persons in charge of the store left it, taking their books of account, and did not return at any time during the progress of the work. After the house was moved and the two sections readjusted, the sheriff notified the defendant Thomasons in writing that he had moved the house 30 feet west and a short distance south on lot 5, that the house and contents were then uninjured and in as good condition as they were when the sheriff first began to move the house, and requested them to look after the property to prevent possible damage thereto; but the defendants refused to take possession of the property or to have aught to do with it, and the house and contents were afterwards destroyed by fire. The house was moved by Frank Crawford and his employes under a contract between himself and the sheriff, who hired the



work done. Crawford testified that, before closing the contract with the sheriff, E. P. Thomason, defendant in possession of the house, agreed with him that the house might be moved; but the undisputed testimony shows that afterwards, when Crawford returned to begin work, the defendants then objected, and no evidence was introduced to show that they ever thereafter consented that the house should be moved. The evidence further shows that at least three or four days were consumed in moving the house. Thereafter the suit was tried and judgment was rendered in favor of plaintiff S. L. Robertson against the defendants for the title and possession of the strip of land sued for. Upon appeal by defendants this court affirmed the judgment of the court below, but held that there was no authority for the issuance of a writ of sequestration to move a house from land in advance of a trial, and that the writ of sequestration so issued should have been quashed by the trial court upon the motion made by defendants praying for such an order.

The suit now before us for consideration was for conversion, instituted in the district court of Jones county by appellees against appellants to recover the value of the goods and store so moved by the sheriff and his employes, and also for exemplary damages. A judgment was rendered in favor of the plaintiffs against defendants S. L. Robertson, Frank Crawford, J. W. Collins, John Crawford, F. G. Alexander, J. S. Keister, and A. C. Foster for actual damages in the sum of \$2,150.24, and against S. L. Robertson and J. W. Collins for \$1,000 exemplary damages; the judgment against Alexander, Keister, and Foster being against them as sureties on the sheriff's official bond. The judgment was in favor of Oscar E. Oates, Sam Crawford, W. H. Crawford, and John E. Robertson, who were also defendants in the suit. The actual damages so awarded were the market values of the stock of goods and that section of the house that was owned by appellants. All the defendants cast in the suit have appealed to this court, and the contention which is made the basis of several assignments of error is that under the facts which have been above set out appellants were not guilty of a conversion of appellees' property.

Mr. Cooley, in his work on Torts (2d Ed.] p. 524), defines "conversion" in the following language: "Any distinct act or dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion." This definition seems to be in accord with the weight of authorities on the subject of conversion, which further hold that the wrongdoer cannot question plaintiff's title or right of possession, nor defeat recovery by showing that the taking was in good faith and under a mistake. Amer. & Eng. Enc. Law (2d Ed.) 679, 681, 691, 693, 674; Bank v. Brown, 85 Tex. 80, 23 S. W. 662; Vickery v. Crawford, 93 Tex. 373, 55

S. W. 560, 49 L. R. A. 773, 77 Am. St. Rep. 891; Hofschulte v. Panhandle Hdw. Co., 50 S. W. (Tex. Civ. App.) 608. The writ of sequestration under which the sheriff acted in moving appellees' storehouse conferring no lawful authority for such act, the situation of all parties acting with him is the same as if no writ of sequestration had ever issued, so far as affects appellees' claim for actual damages. While the sheriff distinctly and repeatedly disclaimed any purpose to take charge of appellees' goods situated in the house, and expressly stated that his only purpose was to move the house from the strip of land claimed by appellants in the suit, we are yet constrained to hold that his acts in pulling apart the two sections of the house and moving it with all its contents 30 feet back from its former location, thereby necessarily interrupting appellees' business, was the exercise of dominion over the property inconsistent with appellees' title and substantially an ouster of plaintiffs from the possession thereof. Title to the goods and one section of the house was vested in appellees, and they also held the other section of the house under lease. This, of course, gave them an unqualified right of possession to all the property.

That the act of the appellants in moving the storehouse without the consent and over the protests of appellees was a wrongful act we think is settled by our Supreme Court in the case of Sinclair v. Stanley, reported in 64 Tex. 67, also in 69 Tex. 718, 7 S. W. 511. In that case the Galveston City Railroad Company claimed title to lot 8 in northeast quarter of outlot 141, city of Galveston, and had built its road through another portion of said northeast quarter. Stanley had leased the lot from Thacher & Co. and hauled lumber on the ground with which he intended to build a house. Without the knowledge or consent of Stanley, agents of the railway company removed the lumber and hauled posts on the ground to be used in fencing the land. During the following night Stanley erected a house on the lot; the house having been previously framed and ready to be erected. Later agents of the company tore down and removed the house and its contents upon other land, notifying Stanley of its whereabouts and offering to carry it to any place Stanley would select. The offer was refused, and Stanley instituted suit against the company for damages done to the house and contents by the company. In that suit the Supreme Court held that the title to the lot was vested in the company, but that the removal of the house was wrongful, and in the first report of the case (64 Tex. 74) the following language is used: "To say that in this state of case the appellants, although representing the true owner of the lot as subsequently determined by the courts, could forcibly eject the appellee from the premises, destroying his house and other property found

in it, is to assert a proposition which, we think, has no foundation in law." And again on the same page: "A legal and peaceable remedy was open to the railroad company, and there was no necessity or propriety in its officers taking the law into their own hands and expelling by force one who had not disturbed their actual occupancy, and the appellants should answer in damages for having committed a trespass instead of pursuing the remedies provided by law." Again the court says, on the second appeal of that case (69 Tex. 727, 7 S. W. 518): "Adequate provision has been made in our laws for the recovery of possession of property which has been forcibly taken or forcibly detained, and as said in *Warren v. Kelley*, 17 Tex. 551, if one holding the title to land was permitted, by himself or his agent, with force and arms, to dispossess one in peaceable possession, the consequences would be breaches of the peace, oppression, and bloodshed, and trial by the use of the bowie knife and revolver would be resorted to, instead of the quiet and peaceable remedy afforded by the due course of law in the judicial tribunals of the country." While in that suit the wrongs alleged were by the plaintiff treated as a trespass, and damages were asked on that theory, it is well settled by the authorities that, when a wrong complained of amounts to a conversion, the injured party has the right to so treat it and to sue for the value of the property so taken, and also to refuse to accept it when the wrongdoer offers to return it. *Weaver v. Ashcroft*, 50 Tex. 444; *Hofschulte v. Panchandle Hardware Co.* (Tex. Civ. App.) 50 S. W. 608.

Upon the trial appellants offered in evidence certified copies of plaintiff's petition, defendants' answer, and the judgment of the court in a suit in the district court of Haskell county, wherein Oscar E. Oates sued and received from Z. B. Thomason and E. P. Thomason the title and possession of lot 5 prior to the occasion in controversy in this suit. This evidence was offered to show that the Thomasons were trespassers on lot 5, and therefore pertinent upon the issue of exemplary damages, and to the action of the court in excluding the evidence appellants have assigned error. We think there was no error in the ruling. The house was never moved from lot 5, and the sheriff never claimed at the time of moving nor in his testimony that his acts were based upon any belief on his part that under the judgment so offered in evidence appellees had no lawful right to occupy lot 5; but, on the contrary, he claimed that his only purpose was to move the house from the strip of land de-

scribed in the writ, in obedience to commands contained in the writ. *O'Brien v. Hilburn*, 22 Tex. 624.

We also approve the ruling of the court in excluding the offered testimony of witnesses Sutherland, a barber, and Cason, a hardware merchant, to the effect that they had moved their houses, situated in the same block with the same front, back on a line with the house in question after it was moved, and that there was no material difference in the volume of their business after they moved. The market value of the property was the only measure of actual damages submitted to the jury, and we are unable to perceive how the evidence could be relevant to the issue of exemplary damages.

No doubt appellants believed in good faith that the writ of sequestration conferred the right to move the house, but that is no valid defense to the charge that they are guilty of a conversion of appellees' property. *Coolley on Torts* (2d Ed.), pp. 519, 529.

Appellee G. W. Thomason testified that, when he protested against the house being moved, the sheriff said, "Well, by G—, if you don't believe we are going to move you, just watch, and we will show you," and that he made the further remark, "By G—, they had a bond that would cover several such stocks of goods as that, some three or four or five, if I doubted it." This witness further testified that when he told the Crawford boys, "Go away and let this building alone, don't move it," Sheriff Collins walked up and said to witness, "Go on away from here and let these boys alone, let them move the house." This testimony was contradicted by the testimony of the sheriff, but the jury were the exclusive judges of the credibility of the witnesses, and we cannot say that the verdict for exemplary damages was not warranted by the evidence. *Land v. Klein*, 21 Tex. Civ. App. 3, 50 S. W. 638; 28 Amer. & Eng. Enc. (2d Ed.) 610, 611.

If there was any error in the abstract definition of the term "conversion" given in the court's charge, we think the same was cured in the instruction which followed it, wherein the jury were told the facts which they must believe to have been proven in order to find that the defendants were guilty of a conversion. At all events, the defendants' acts in moving plaintiffs' property as above recited were proven beyond controversy, and we think they necessarily show a conversion, thus rendering harmless any error in the court's charge defining the term "conversion."

Finding no error in the judgment, it is affirmed.

## JACKSON v. MADDOX et al.

(Court of Civil Appeals of Texas. Jan. 30, 1909.  
Rehearing Denied Feb. 20, 1909.)

## 1. TAXATION (§ 696\*)—REDEMPTION—STATUTORY PROVISIONS—CONSTRUCTION.

Statutes providing for the redemption of land from sale for taxes should be liberally construed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1393; Dec. Dig. § 696.\*]

## 2. TAXATION (§ 697\*)—REDEMPTION—PERSONS ENTITLED TO REDEEM.

The widow and daughter of a deceased landowner holding possession of the premises by tenant have such an interest in the land as entitles them under Sayles' Ann. Civ. St. 1897, art. 5232n, to redeem the land from sale for taxes within two years.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1394; Dec. Dig. § 697.\*]

## 3. JUDGMENT (§ 743\*)—RES JUDICATA—MATTERS CONCLUDED—TAX SALE—PERSONS ENTITLED TO REDEEM.

Where the judgment under which defendant claims was a foreclosure of a tax lien against "unknown owners and M.," reciting that they "own or claim some right to, or interest in," the land, defendant cannot dispute the right of plaintiffs as heirs of M. to redeem such interest.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1276; Dec. Dig. § 743.\*]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by May C. Maddox and another against John L. Jackson. Plaintiffs had judgment, and defendant appeals. Affirmed.

Hunter & Hunter, for appellant. Robt. G. Johnson, for appellees.

SPEER, J. Appellees, May C. Maddox and Marguerite Ann Maddox, surviving wife and daughter, respectively, of R. E. Maddox, filed this suit against appellant to secure an enforced redemption of certain land from a tax sale. The plaintiffs had judgment, and the defendant has appealed.

The gist of appellant's contention is that appellees were not such owners under the statute as that they were entitled to redeem. The statute conferring the right of redemption reads as follows: "Where lands are sold under the provisions of this chapter the owner or any one having an interest therein shall have the right to redeem said land, or his interest therein, within two years from the date of said sale upon the payment of double the amount paid for the land." Sayles' Ann. Civ. St. 1897, art. 5232n. The rule of construction as applied to this character of statute is well stated in the oft-cited case of Dubois v. Hepburn, 10 Pet. 1, 9 L. Ed. 325, as follows: "A law authorizing the redemption of lands sold ought to receive a liberal and benign construction in favor of those whose estates will be otherwise devastated, especially where the time allowed is short, an ample indemnity given to the purchaser, and a penalty is imposed on the owner. The purchaser suffers no loss. He

buys with full knowledge that his title cannot be absolute for two years. If it is defeated by redemption, it reverts to the lawful proprietors. It would, therefore, seem not to be necessary for the purpose of justice or to effectuate the objects of the law that the right to redeem should be narrowed down by a strict construction. In this case we are abundantly satisfied that it comports with the words and spirit of the law to consider any person who has any interest in lands sold for taxes as the owner thereof for the purposes of redemption. Any right which in law or equity amounts to an ownership in the land, any right of entry upon it, to its possession or enjoyment, or any part of it, which can be deemed an estate in it, makes the person the owner so far as it is necessary to give him the right to redeem." Mr. Blackwell in his work on Tax Titles, after quoting the above language, adds that: "Proof of title is not necessary in order to redeem, but only proof of some connection with the title, past or present, by deed, descent, contract, or possession, is all that is necessary to prevent impertinent applications. If this is made out, the right to redeem is sustained, though in reality the title may be in another. The court is not bound to decide between adverse claimants to the title before allowing redemption." See that author, at section 707. The same writer further says (section 728): "Statutes favoring redemption are to be liberally construed; for the sale of land for taxes is the nearest approach to tyranny that exists in a free government, and whatever tends to modify its severity is favorable to the citizen and to rights of property and to justice."

The evidence in the present case shows without dispute that appellees are the surviving heirs of R. E. Maddox, deceased, and that one Harwell went into possession of the land as tenant of R. E. Maddox "from six to ten years ago," and continued in possession as such tenant until August, 1906, when on demand of appellant he delivered possession to him; the tax sale having taken place July 3, 1906. There was also in evidence a deed from Hugh Thomason to Thomas J. Beall, dated July 20, 1872, and one from Thomas J. Beall to R. E. Maddox, dated December 24, 1884, conveying the land in controversy. These deeds were of record on the deed records in Tarrant county. In submitting the case to the jury the trial court virtually instructed a verdict for appellees if the deceased, R. E. Maddox, was by tenant in possession of the land at the time of the rendition of the foreclosure judgment, and in this we think there was no error. When judged in the light of the rule above indicated, it is quite clear that appellees were such owners of the land in controversy as to be entitled to the benefits of the statute. Moreover, it will be observed that the stat-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ute confers the right of redemption, not only upon the owner, but upon "any one having an interest" in such land, and the appellees, who are shown through their ancestor to have been in possession of the land for a number of years under deeds duly recorded, and which possession may under our statute, especially when accompanied by the payment of taxes, ripen into a full title, certainly have an interest therein. We are further of the opinion that no other judgment than one in favor of appellees could have been rendered, because the very judgment under which appellant claims was a foreclosure against "unknown owner and R. E. Maddox," reciting that they "owned or claimed some right to, interest in, lien or claim against" the land, and appellant cannot be held to dispute the right of these appellees as heirs of said Maddox to redeem such interest. *Campbell v. Packard*, 61 Wis. 88, 22 N. W. 672.

It will be observed that we have treated the case, as appellant insists we should, as though appellees were limited in their right to recover as heirs of R. E. Maddox, when, in fact, they introduced in evidence quitclaim deeds from two of the heirs of one Terrell, deceased, in whom the record exhibited the title in regular sequence from the sovereignty of the soil. We have taken no heed of this matter, however, in view of our conclusions above indicated.

We find no error in the judgment, and it is affirmed.

#### FREEMAN v. DAVIS et ux.

(Court of Civil Appeals of Texas. Feb. 24, 1909.)

#### 1. CARRIERS (§ 316\*)—INJURIES TO PASSENGER—EVIDENCE—BURDEN OF PROOF.

In an action for injuries to a passenger, evidence that, while plaintiff was a passenger on one of defendant's trains, it was derailed, and that she was thereby thrown violently upon the floor of the car in which she was seated and injured, made out a prima facie case of negligence of defendant.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1288; Dec. Dig. § 316.\*]

#### 2. APPEAL AND ERROR (§ 1002\*)—REVIEW—QUESTIONS OF FACT.

Where, in an action for injuries to a passenger alleged to have been caused by the derailment of the train in which she was riding, evidence was conflicting as to whether the injuries were caused by the accident or were sustained by plaintiff previous thereto, the determination of the question by the jury in plaintiff's favor was conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3935; Dec. Dig. § 1002.\*]

Appeal from District Court, Frio County; J. F. Mulally, Judge.

Action by J. R. Davis and wife against T. J. Freeman, receiver of the International & Great Northern Railroad Company. From

a judgment for plaintiffs, defendant appeals. Affirmed.

King & Morris and Hicks & Hicks, for appellant. R. W. Hudson, Perry J. Lewis, and H. C. Carter, for appellees.

NEILL, J. Appellees sued appellant for damages for personal injuries inflicted on Grace Davis, the wife of J. R. Davis, by appellant's negligence. The defendant answered by a general demurrer and general denial. The trial of the case resulted in a judgment in favor of plaintiffs for \$10,000. The assignments of error assail the judgment on the grounds that the verdict is against the overwhelming weight of the testimony, and that it is excessive.

The facts are undisputed that, while Mrs. Davis was a passenger on one of appellant's trains, it was derailed, and that she was thereby thrown violently upon the floor of the car in which she was seated and injured. This made out a prima facie case of negligence (*G. & S. A. Ry. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234; *St. L. S. W. Ry. Co. v. Harkey*, 39 Tex. Civ. App. 523, 88 S. W. 508; *Lytle v. G. & S. A. Ry. Co.* [Tex. Civ. App.] 100 S. W. 199); and, as defendant introduced no evidence tending to rebut it, the jury was warranted in finding that the defendant was negligent, and that such negligence was the proximate cause of plaintiff's injuries.

This leaves for determination only the question whether the verdict is excessive. This depends upon the nature and extent of the injuries inflicted. Upon this the evidence was conflicting. According to defendant's theory the injuries from which it was shown plaintiff was suffering, though painful, severe, and permanent, were not inflicted by defendant, but were sustained by her in giving birth to a child a short time prior to the accident. According to plaintiffs, such injuries were the direct and proximate result of defendant's negligence. It was for the jury to solve the question arising from these conflicting theories. If it found in favor of that of plaintiffs, which, from the verdict, is evident, it cannot be said that the judgment is excessive.

It is therefore affirmed.

#### TIPPETT et al. v. CORDER.

(Court of Civil Appeals of Texas. Feb. 17, 1909. Rehearing Denied March 17, 1909.)

#### 1. COURTS (§ 122\*)—JURISDICTION OF COUNTY COURT—AMOUNT INVOLVED—CONSTRUCTION OF PLEADINGS.

A petition alleged: That defendants drove a herd of sheep onto plaintiff's land without plaintiff's consent, and caused them to tread down and destroy the grass to plaintiff's damage in the sum of \$100; that defendants caused the sheep to drink water from plaintiff's tanks upon the land, to pollute the water, tramp down the bank, and otherwise injure the tanks, to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff's damage, in the sum of \$150; that the sheep were infected with scab and scattered the germs over the lands, thereby depriving plaintiff of their use for grazing purposes, and by reason of the sheep so diseased having been driven and herded upon the land plaintiff was damaged in the sum of \$150. *Held*, that the first two items did not comprehend what was set up in the third, so as to render the amount in controversy only \$150 and below the jurisdiction of the county court; but the first item embraced damage from actual destruction of grass by grazing and treading it down, the second, from physical injury to tanks and use of water, and the third damage to the range from the presence of diseased sheep.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 427; Dec. Dig. § 122.\*]

## 2. TRIAL (§ 194\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an action for damages to grazing lands, a charge that "the evidence shows the following surveys were alleged to have been damaged, \* \* \* and you will consider said surveys in arriving at your verdict," was not on the weight of evidence, since it did not state that the evidence showed that the mentioned surveys were damaged, especially where it did not submit anything, but preceded the clause which submitted the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

## 3. ANIMALS (§ 100\*)—TRESPASS—INSTRUCTIONS.

In an action for damages to grazing lands by injuring water tanks thereon and herding scabby sheep at the tanks, where the evidence showed that there were seven sections of the land that plaintiff could have used in connection with the tanks had the scabby sheep not been herded there, a charge that "the evidence shows the following surveys were alleged to have been damaged (setting out the seven sections), and you will consider said sections in arriving at your verdict," was not contrary to the evidence, because there was no evidence that defendants' sheep had been on all of the seven sections, since it was not necessary that the sheep should have actually been upon each of the seven sections.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 100.\*]

## 4. EVIDENCE (§ 474\*)—OPINION EVIDENCE—VALUE OF PROPERTY WITH NO MARKET VALUE.

In an action for damages to grazing lands from herding scabby sheep thereon, tramping down grass, consuming and polluting water, injuring water tanks, and scattering germs of their disease, where there was no market value of the grass, water, or tanks injured, plaintiff, who was engaged in the sheep business, was competent to testify to the reasonable value of the water consumed and polluted and damages to the land on account of having herded scabby sheep at the tanks.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2219; Dec. Dig. § 474.\*]

## 5. DAMAGES (§ 174\*)—MEASURE—EVIDENCE.

In an action for damages to grazing lands from herding sheep thereon, tramping down grass, consuming and polluting water, and injuring the tanks, where there was no market value of the grass, water, or tanks, the price plaintiff was paying the state for the pasturage was immaterial on the question of his damages, especially where the lease was entered into nearly two years before the damages were inflicted, and evidence thereof was properly excluded.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 462-467; Dec. Dig. § 174.\*]

Appeal from Terrell County Court; Joe Kerr, Judge.

Action by N. H. Corder against Homer Tippett and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Joseph Jones, for appellants. J. B. Ross and A. T. Folsom, for appellee.

JAMES, C. J. Plaintiff, Corder, filed this suit in the county court and alleged: That he had possession and control of certain 17 sections of land on June 7, 1907, and since that date; that on or about said date, and on various days since, defendants drove about 3,000 head of sheep on said lands of plaintiff, and caused same to be herded thereon without the consent of plaintiff, and caused said sheep to graze, tread down, and destroy the grass thereon, to plaintiff's damage in the sum of \$100. Further, that defendants caused said sheep to drink the water from and pollute the water in plaintiff's tanks upon said land and tramp down the banks and otherwise injure said tanks, to plaintiff's damage in the sum of \$50. Further, that said sheep were infected with scab and scattered the germs of the disease over said lands and at and about plaintiff's tanks and watering places on said lands, thereby depriving plaintiff of the use of all of said surveys for grazing purposes, and thereby rendering same unfit for the use of plaintiff for the purpose of grazing, and watering his own sheep, some of which he desired to graze upon said land; that by reason of said sheep so diseased with scab having been driven and herded upon said lands and about his said tanks, he has been damaged in the sum of \$150. The petition prays for damages in the sum of \$300. There was a verdict in favor of plaintiff for \$100.

The court overruled a demurrer to the petition based upon the ground that the petition showed that the amount in controversy was below the jurisdiction of the county court, to wit, the sum of \$150. The first assignment alleges this ruling as error. Appellant's theory of the petition is that the first two items comprehend what is set up in the third. We think this is not the necessary or fair construction of the pleading. The first item consists of the damage sustained by the actual destruction of grass by the grazing and treading down thereof. The second is damage sustained by physical injury to the tanks and by the use and polluting of the water. The third, by its fair import, was the loss to plaintiff of the range, not that caused by the consumption and treading down of grass, which may have been partial only, but that caused by the presence of diseased sheep at the tanks, which fact rendered the whole range unfit for use and deprived plaintiff of the use of all the lands. The first assignment of error is therefore overruled.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The second assignment complains of the following expression in the charge: "The evidence shows the following surveys were alleged to have been damaged, surveys 4, 6, 12, in block D-5, surveys 6, 8, 12, and 14 in block D-4, and you will consider said surveys in arriving at your verdict." The propositions are that this was upon the weight of the evidence, an unwarranted comment on the same, and contrary to the evidence. We think the charge was not on the weight of evidence by reason of the words: "The evidence shows the following surveys were alleged to have been damaged." This did not state that the evidence showed that the mentioned surveys were damaged. The evident purpose of the clause was to confine the consideration of the jury to the seven sections and to eliminate the other ten. Besides, the charge complained of did not submit anything, and preceded the clause which submitted the issues, and there is no reasonable ground for supposing that the jury were confused or misled by the wording of the clause in question.

It is also contended that the clause was contrary to the evidence, in this, that there was no evidence that any of the defendants' sheep had ever been on any of the mentioned surveys except No. 6 and 12, block D-5. It was not necessary to plaintiff's case that he should have proved that the sheep had actually been upon each and every one of the seven surveys. There was proof that on July 4th defendant had at each of the two tanks of plaintiff about 1,500 sheep. The tanks were about a half mile apart; one being upon survey 6 and the other on survey 12, block D-5. Plaintiff saw them there on that day, but did not know how long they had been there; but he states there was considerable sheep sign about there. Plaintiff testified that there were seven sections of his land that he could have used in connection with the water in said tanks (these being those mentioned in the court's charge), and by reason of his not being able to use them as he was going to do, on account of scabby sheep having been herded at the tanks, he was damaged thereby (leaving out of account the grass and water actually destroyed by the sheep) in the sum of from \$100 to \$150. This testimony was sufficient basis for the charge.

The undisputed testimony was that there was no market value of the grass nor of the water consumed and polluted, or the tanks. Under such circumstances plaintiff's damage had to be arrived at in some other manner. The plaintiff, who gave his opinion or estimate of the reasonable value of the water consumed and polluted, of the damage sustained by him with respect to the lands he could have used from the tanks by reason of not being able to use them on account of scabby sheep having been herd-

ed at the tanks, leaving out of account the damage done to the two surveys with the tanks on them, and of the reasonable value of the grass on the two sections, was engaged in the sheep business and apparently qualified to give such testimony on the subject. The testimony was admissible. *Railway v. Prude*, 39 Tex. Civ. App. 144, 86 S. W. 1046, 12 Tex. Ct. Rep. 955.

The sixth assignment complains of the refusal of the court to allow defendants to put in evidence the state lease under which plaintiff held the lands for the purpose of showing the price he was paying for the pasturage. This testimony is claimed to have been admissible to aid the jury in determining the amount of damage that plaintiff has suffered; there being no market value to govern the same. The seventh complains of the refusal to permit defendant to show the same fact by the plaintiff. The price which plaintiff was paying for the use of the lands was not material. *Railway v. Searight*, 8 Tex. Civ. App. 597, 28 S. W. 39; *Railway v. Stone*, 60 S. W. 461, 1 Tex. Ct. Rep. 649. Besides, the lease which is described in one of the bills was entered into nearly two years before the trespass. Judgment affirmed.

#### ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. NIBLACK et al.†

(Court of Civil Appeals of Texas. Feb. 11, 1909. Rehearing Denied March 11, 1909.)

##### 1. DAMAGES (§ 38\*)—IMPAIRMENT OF EARNING CAPACITY.

In an action for personal injuries, a lessened capacity to earn money is a sufficient basis for the recovery of damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 237; Dec. Dig. § 38.\*]

##### 2. DAMAGES (§ 187\*)—IMPAIRMENT OF EARNING CAPACITY.

While, in an action for personal injuries, to support a finding of a specific sum as damages for impairment of earning capacity in a particular avocation, there should be other evidence than that merely showing the avocation of plaintiff and the character of his injuries, yet, where the injuries suffered are shown to be such as fairly to justify the conclusion that plaintiff's capacity to earn money in any avocation has been lessened, the right to a recovery of some damages therefor is established.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 509; Dec. Dig. § 187.\*]

##### 3. DAMAGES (§ 187\*)—IMPAIRMENT OF EARNING CAPACITY—SUFFICIENCY OF EVIDENCE.

Where in an action for personal injuries, there was evidence that decedent, a midwife, was paid for her services as such, and made more than a living, and that as a result of her injuries she was off and on treated by a physician, and during most of the time until her death was confined to her bed or to her house, a judgment for at least nominal damages for impairment of earning capacity was justified.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 509; Dec. Dig. § 187.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

## 4. APPEAL AND ERROR (§ 932\*)—PRESUMPTIONS.

Where no assignment attacking as excessive the verdict in an action for personal injuries was presented on appeal, the court would presume in support of the judgment that, if the jury found in plaintiff's favor on account of lessened earning capacity, they found only nominal damages, where none other were shown by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3782; Dec. Dig. § 932.\*]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Action by Mrs. R. J. Niblack and others against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiffs, and defendant appeals. Affirmed.

E. B. Perkins, Marsh & McIlwanie, and J. S. McIlwanie, for appellant. Hanson & Robertson, for appellees.

**WILLSON, C. J.** In attempting as a passenger to get on one of appellant's passenger trains at Brownsboro, Mrs. R. J. Niblack suffered injuries to her person as the proximate result of appellant's act in negligently moving its said train. By her suit commenced against appellant she sought to recover damages on account of injuries so suffered by her. Before a trial of the case was had she died intestate, and appellees, as her heirs at law, alleging that there were no debts against her estate and no necessity for an administration thereon, and further alleging that her death was not caused by the injuries she had so sustained, made themselves the parties plaintiff in the suit, and continued its prosecution. As the result of a trial they recovered a judgment against appellant for the sum of \$750. From that judgment appellant is prosecuting this appeal.

The court instructed the jury, in the event they should find for appellees, to take into consideration in determining the amount of their damages, not only the nature and extent of the injuries suffered by Mrs. Niblack and the mental or physical pain suffered by her as the direct result of such injuries, but also "any impairment of the earning capacity of said Mrs. Niblack up to the date of her death as the direct and proximate result of such injuries." An assignment questioning the correctness of the court's action in so instructing the jury is the only one presented in appellant's brief. In support of the assignment, it is insisted that the evidence failed to "disclose facts which would enable the jury to reach an intelligent conclusion as to the amount of loss sustained by reason of any impairment of the earning capacity of Mrs. Niblack," and that, therefore, it was error to submit such an issue to the jury. In their petition appellees alleged that Mrs. Niblack "was by profession a nurse, and was strong and able-bodied, and capable of earning, and did earn, \$2 per day, and that by reason of said injuries

\* \* \* she was up to the time of her death incapacitated from following her said profession or performing any kind of work, and her earning capacity was entirely destroyed." From the evidence it appeared that, before she suffered the injuries complained of, Mrs. Niblack, though then 73 or 74 years old, enjoyed good health and was as strong and active as an ordinary woman usually is when only 35 years old; that she frequently walked from her home to the post office—a distance of 3 or 3½ miles—and back, and often accompanied younger people on fishing trips to a creek about a mile from her home. It further appeared from the evidence that she was by profession a midwife, that as such she was paid for her services, and that she "more than made a living." It further appeared from the evidence that among the injuries sustained by Mrs. Niblack was a broken rib and a hernia or rupture in the left groin; that she was confined to her bed and treated by a physician during the five or six weeks immediately following after the time she was injured; that off and on thereafterwards until her death, as the result of the injuries she had received, she was under treatment by the physician; and that during most of the time she was confined to her bed or to the house in which she lived.

In *Railway Co. v. Bowlin* (Tex. Civ. App.) 32 S. W. 918, the plaintiff had alleged that, by reason of the injury he had sustained, he had suffered and still suffered "great mental and physical pain; that he is disfigured in his face by the loss of his eye; that he suffers and during his life must continue to suffer the loss of sight in his left eye." By his charge the court authorized the jury, in determining the amount of the plaintiff's damages, to take into consideration his diminished ability to earn a livelihood in the future. It was assigned as error that the pleadings and evidence did not raise an issue as to the plaintiff's diminished capacity to labor. The report of the case does not show what the evidence, if any, was, further than that plaintiff was a farmer and had suffered the loss of one of his eyes. In overruling the assignment, the Court of Civil Appeals for the Second District said: "The general rule undoubtedly is that whatever damages, though the natural, are not the necessary or obvious, result of an injury, is classed as special damages, and must be alleged; that is to say, had defendant in error sought to recover damages on account of diminished capacity to earn money in a particular vocation, the facts in relation thereto must have been alleged. Where, however, the capacity to earn a livelihood generally, without reference to any particular calling, is obviously impaired, as it must be conceded it would be by the loss

of so essential an organ as that 'little member' that 'gives life to every other part about us,' the damage should be classed as general, and not special. \* \* \* In this case, while there was proof incidentally that the party injured was a farmer, it was not pretended that he was entitled to recover anything on the ground that the loss of an eye was more detrimental in that occupation than it would have been in some other. No evidence was offered of any such peculiar damage. The charge submitted only the impaired ability generally to earn a livelihood in the future, without reference to any particular pursuit, and, that being the result of the alleged and proven loss of sight for life, it is implied by law. *Railway Co. v. Curry*, 64 Tex. 85. The issue as submitted was then without the pleadings and proof, and could have operated no surprise."

In *Railway Co. v. Bird* (Tex. Civ. App.) 48 S. W. 756, it appeared that the plaintiff, a young woman, was a teacher, but it did not appear that she had ever taught. There was evidence, however, that before she sustained the injury she had made her own living and assisted her father to take care of his family; but the circumstances under which they lived, from which the jury could infer the value of the living which she had made for herself and of her services in assisting her father, were not shown. In sustaining assignments attacking as excessive the verdict of the jury and as erroneous a charge of the trial court authorizing the jury to consider in estimating her damages the plaintiff's lessened earning capacity, the Court of Civil Appeals for the First District said: "In order to authorize this element of damage to be submitted to the jury, there should be evidence tending to show what was the earning capacity before the injury and the extent to which it has been affected. Upon the first point the evidence is wholly insufficient, and on the second it is not as clear as it might be. The physician testified very clearly and fully as to the nature of her injuries and their effect upon her during the time he treated her. He also gave his opinion as to the probability of the continuance and permanency of such effects. But as to their permanency his opinion was not positive, and a considerable period elapsed after he had last seen her before the trial, during which no other doctor had treated her. As to her condition during this time, her own evidence is quite meager. Whether she had been able to earn any money or to follow in any degree her former avocations there is no evidence. We do not mean to say that, if the evidence had been fuller as to her former earning capacity, there was not enough to authorize the court to submit the question of its impairment to the jury, but to point out the indefiniteness of the proof upon the latter as well as the former point. In the absence of evidence from which the jury could properly ascertain the

amount of loss sustained in impairment of ability to earn money, it was error for the court to submit this element to the jury, and because of the absence of such evidence we think, also, that the verdict was excessive."

In *Railway Co. v. Smith* (Tex. Civ. App.) 86 S. W. 946, plaintiff had alleged that, as a result of injuries complained of, he had lost the use of one of his eyes. He so testified on the trial. It further appeared from the evidence that he was 25 or 26 years old, that before he sustained the injuries he had been a farmer and had worked as section hand on a railroad, and that, after he received the injuries, he did not seem to be as "peart" as he was before he received them. The Court of Civil Appeals for the Fifth District, in sustaining an assignment based on the refusal of the trial court to instruct the jury not to take into consideration plaintiff's diminished capacity to earn money, and on the court's charge authorizing the jury to consider in ascertaining plaintiff's damages such diminished capacity, said: "While the evidence shows that appellee had worked on a farm and on a railroad section, it does not show or tend to show what was his earning capacity in either employment. So far as disclosed by the record, he was only employed by the day or month to work on the farm, and the evidence does not show the amount he received, or the value of his services, either as a farm laborer or section hand, nor were sufficient facts proven from which the value of such services could reasonably be inferred. It was not essential that the value of such services, or the extent to which appellee's earning capacity had been affected, should be established with exactness; for in the assessment of damages of this character the amount must necessarily be referred in a measure to the sound judgment and discretion of the jury. This does not mean, however, that their verdict may be the result and expression of a mere guess or conjecture. Although the plaintiff is not required to prove the amount, he is required to prove the facts from which the jury can determine intelligently the amount that will fairly compensate him for the loss sustained. The mere proof of previous avocation and the character of his injuries will not suffice. *Railway Co. v. Bird* (Tex. Civ. App.) 48 S. W. 756."

In *Railway Co. v. Acker*, 44 Tex. Civ. App. 560, 99 S. W. 121, the plaintiff was a farmer and tomato grower. Whether as such he owned or rented land, and whether he cultivated one or a number of acres, did not appear. One of the injuries he had suffered was to his arm, stiffening it at the elbow, etc. In sustaining an assignment complaining of the action of the trial court in instructing the jury to consider the plaintiff's diminished capacity to labor in determining the amount of his damages, the



Court of Civil Appeals for the First District said: "There was no evidence to show that the plaintiff's earning capacity was before the injury, and any amount which the jury might fix as compensation for the diminution of that capacity would be purely speculative. In cases in which it is impossible to show definitely what the earning capacity of the injured person is no such proof would be required, but it is incumbent upon plaintiff seeking to recover damages of this kind to show the nature and character of his business or employment with that degree of certainty of which the case is susceptible, and this is not done by the evidence in the instant case."

In *Railway Co. v. Motwiller* (Tex. Civ. App.) 112 S. W. 795, the plaintiff was a stenographer, employed as such at the time she suffered the injuries complained of, resulting in a shortening of one of her legs, etc., rendering it difficult for her to get about, and therefore necessary to ride to and from her work on street cars, whereas before she sustained the injuries she could and did walk to and from her work. The evidence showed that the plaintiff after she had suffered the injuries and at the time of the trial was employed in her avocation as a stenographer, but it did not show what her earnings were as such either before or after she was injured. In her petition she had alleged that her injuries had impaired her capacity to earn money "at her ordinary occupation or any other for which she is qualified during all the balance of her future life." The trial court instructed the jury in estimating her damages to consider her impaired ability to earn money, and it was insisted that there was no evidence from which the jury could properly and intelligently ascertain the amount of her loss in this respect. The Court of Civil Appeals of the Fifth District, being of the opinion that the evidence showed "a general impairment of capacity to earn money, but failed to show what could be earned in any particular avocation," certified to the Supreme Court the question: Was it "error for the court to charge the impairment of capacity to earn money as an element of damages"? At the same time and in connection with their question to the Supreme Court, said Court of Civil Appeals suggested: "There seems to be a conflict in the decisions of the Courts of Civil Appeals on this question"—citing as holding one way *Railway Co. v. Bowlin*, *supra*, and as holding another way the other cases, to wit, *Railway Co. v. Bird*, *Railway Co. v. Smith*, and *Railway Co. v. Acker*, mentioned above. In answering the question the Supreme Court (Dallas Consol. Electric St. Ry. Co. v. *Motwiller* [Tex.] 109 S. W. 921) stated that it was not clear that there was any conflict in the decisions referred to, and further stated that it was not practicable "to lay down a general rule such as is called

for" by the question. The Supreme Court further said: "The question being whether or not there was any evidence authorizing the submission of the element of damage from impairment of capacity to earn money, its decision must depend upon the evidence in the case in which the charge is given, and if there be anything in the evidence upon which the allowance of any sum, however small, can properly be made for such damages, the objection to the charge is met. There are several elements of damage to be considered in suits for personal injuries. As to some of them, it is practicable to prove the loss sustained with some degree of exactness. Such are doctor's bills, medicines, and the like. Of these the law requires such proof. In many cases the value of the time lost by the plaintiff may also be so proved, while in some such proof cannot be made, as in case of a wife and mother performing the various duties of housekeeper. This is true also of earning capacity and of injury to it. The law only exacts the kind of proof of which the fact to be proved is susceptible, but it does exact that. The earning capacity of the plaintiff in this case as a stenographer was probably susceptible of definite proof. If it was otherwise, the facts which made it so should have been shown to have entitled her to have the jury estimate it in their own judgment without fuller proof, and to allow full compensation as for a diminution in the amount of her earnings. Nevertheless, if there is evidence to show with sufficient definiteness the loss of any part of that which she would have earned but for her injuries, the submission of the element was justified. It appears that, before she was hurt, she could and did walk to and from her work, and that since her injuries she has been compelled to ride upon street cars. From their own general knowledge and experience the jury could say that this diminished to some extent the returns from her employment, and we think this evidence was as definite as should be required to show loss of earning power to the extent indicated by it. Evidence is adduced to put the jury in possession of facts from which they can determine the extent of impairment of earning power, and is not intended in itself to establish a fixed measure of damages. When the jury are informed of such a fact as that just stated, they have enough to enable them to allow something upon that score. That they are not so informed as to permit them to allow for the full extent of such loss is no reason for saying that they cannot allow for the part of which they are sufficiently informed." In overruling the assignment, after this question had been so answered, the Court of Civil Appeals said: "The allegation of impaired capacity is to 'earn money at her ordinary occupation, or any other for which she is qualified, during the balance of her future life.' At the time

of the trial she was engaged as a stenographer, but the proof does not show what salary she received before and after the injury. This would preclude a recovery for any special damages for impaired ability in that particular avocation, but we see no reason why a recovery could not be had for general impairment to earn money. *For-dyce v. Withers*, 1 Tex. Civ. App. 545, 20 S. W. 766. \* \* \* When a diminished capacity to earn money in a particular avocation is alleged to arise from a wrongful act, it is necessary to prove some facts from which the jury would be justified in determining the probable loss that would flow from such diminished capacity. *Railway Co. v. Bird* (Tex. Civ. App.) 48 S. W. 756; *Railway Co. v. Smith* (Tex. Civ. App.) 86 S. W. 946. But, where there is a general allegation that the injury caused a diminished capacity to earn money in all ways, and the evidence shows the party is so injured, is it not a proper element of damage to be submitted to the jury for them to determine from their general knowledge and experience the amount of such damages? To illustrate: Take a young man who has attended school up to his majority, and before he has time to pursue any avocation he is wrongfully injured to such an extent his ability to earn money is diminished, and that fact is fully established, could it be said that some particular facts should be further proven to form a basis from which the jury might reach a conclusion before the court would be authorized to submit such an issue? To do so it seems would deprive such a party of the benefit of an element of damages that is allowed by law. It is true that the evidence in this case does not show any basis for the recovery of any special amount for diminished capacity in the avocation of stenographer, but it did show in a general way that appellee's capacity was diminished for that as well as for all other avocations."

We have quoted at such length from the opinion of the courts in the cases cited, as illustrative of the fact made evident, we think, by a consideration of them that adjudicated cases in this state furnish little aid in determining the question made on this appeal, and as emphasizing, perhaps, the statement of the Supreme Court that it is not practicable to lay down a general rule in such cases. It will be noted that the facts in the *Bowlm* Case did not appear to be materially different from those in the *Smith* and *Acker* Cases. In each of them there was evidence showing the plaintiff's avocation in life and the infliction of injuries on him which in any avocation reasonably could be expected to so operate as to more or less diminish his capacity to earn money. In each of them there was an absence of any other evidence entitled to weight in estimating the damages he had suffered on account of such diminished ca-

capacity to earn money. Yet in the one a recovery was allowed, while in the other a recovery was denied. It also will be noted that the facts in the *Bird* Case, where a recovery for such damages was denied, were not materially different from those in the *Motwiller* Case, where the Supreme Court held it not to be error to submit to the jury an issue as to the plaintiff's lessened earning capacity. In neither the *Bird* nor the *Motwiller* Case was there any evidence showing the earning capacity of the plaintiff either before or after the injury. It is true that in the *Motwiller* Case it appeared that, as the result of injuries incapacitating her from walking without difficulty, it became necessary for the plaintiff to ride on street cars to and from her work, and so incur an expense she was not subject to before she sustained the injuries, and the Supreme Court seems to have given controlling weight to this fact in answering the certified question. But it occurs to us that such expense should not be taken into account on an issue as to diminished earning capacity. It created an additional demand on the plaintiff's earnings, but may not in the least have diminished the sum she was capable of earning.

Recurring to the case before us, it is clear, we think, that, if the reasoning which controlled in the disposition made of the *Smith* and *Acker* Cases should be applied to its facts, the judgment now before us for review should be reversed; for here, as in those cases, the evidence may be said to go no further than to show the age and the previous avocation of the plaintiff and the character of her injuries. On the other hand if the reasoning in the *Bowlm* and *Motwiller* Cases should be applied, the judgment in the instant case should be affirmed; for here, as in those cases, while the evidence failed to show the plaintiff to be entitled to recover any specific amount as damages on account of a lessened capacity to earn money in her avocation as a nurse, it was sufficient to show that her capacity to earn money in that or any other avocation in a general way had been diminished. We are of the opinion that the reasons which allow are more satisfactory than those which deny a right of recovery in such case. A lessened capacity to earn money is recognized by the law as a basis sufficient for the recovery of such damages. To support a finding of a specific sum as representing such damages resulting to the plaintiff in a particular avocation, it doubtless is correct to say that there should be other evidence than that which merely shows the avocation of the plaintiff and the character of his injuries. But, when the injuries suffered are shown to be of such a nature as fairly to justify the conclusion that the plaintiff's capacity to earn money in any avocation has been thereby lessened, it seems to us that the right to a re-

covery of some amount as damages should be held to have been sufficiently established. Whether in the event of a recovery the amount allowed should be held to be supported by such testimony is another question. But on such evidence the plaintiff should, we think, be held to be entitled to recover at least nominal damages, and, in the absence of an assignment attacking the verdict in such a case as excessive, we think it should be presumed in support of the judgment that the jury found only nominal damages. The evidence in this case we think was sufficient to support a finding that Mrs. Niblack's capacity to earn money had been lessened as a result of the injuries she had suffered, and therefore was sufficient to support a finding in plaintiff's favor for nominal damages. An assignment attacking the verdict as excessive not having been presented on this appeal, we will presume in support of the judgment that, if the jury found in plaintiff's favor on account of Mrs. Niblack's lessened earning capacity, they found only nominal damages.

The judgment therefore will be affirmed.

#### TEXAS & P. RY. CO. v. CRAWFORD.†

(Court of Civil Appeals of Texas. Feb. 25, 1909. Rehearing Denied March 11, 1909.)

##### 1. RAILROADS (§ 401\*)—INJURIES TO PERSONS NEAR TRACK—ACTIONS—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad for injuries to plaintiff through being struck by an engine, an instruction that if the jury found that defendant was negligent in propelling the engine against plaintiff, but if they also found that plaintiff was negligent in going on the ground, etc., they should find for defendant, was not erroneous as requiring the jury, if they believed that plaintiff was negligent in the particular referred to, to believe that defendant was also negligent, before they could find in its favor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1389; Dec. Dig. § 401.\*]

##### 2. APPEAL AND ERROR (§ 1033\*)—HARMLESS ERROR—INSTRUCTIONS—ERROR FAVORABLE TO PARTY COMPLAINING.

In an action against a railroad for injuries through being struck by an engine, an instruction that if defendant's servants in charge of the engine did not know of plaintiff's peril, or if they knew of it in time to have avoided striking him by the use of all effective means available, etc., the jury should, in either event, find for defendant, though erroneous, could not be complained of by defendant; the error being in its favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4036; Dec. Dig. § 1033.\*]

##### 3. RAILROADS (§ 401\*)—INJURIES TO PERSONS NEAR TRACK—PLEADING—ISSUES—DISCOVERED PERIL—INSTRUCTIONS.

Where the petition, in an action against a railroad for injuries through being struck by an engine, alleged generally that defendant negligently ran one of its engines against plaintiff, thereby knocking him down and injuring

him, an instruction as to discovered peril was authorized.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1390; Dec. Dig. § 401.\*]

##### 4. RAILROADS (§ 376\*)—INJURIES TO PERSONS NEAR TRACK—DISCOVERED PERIL—DUTY OF ENGINE FIREMAN.

It is the duty of a locomotive fireman, on discovering the peril of one near the track, to resort to all available means to avoid injuring him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1275; Dec. Dig. § 376.\*]

##### 5. RAILROADS (§ 400\*)—INJURIES TO PERSONS NEAR TRACK—DISCOVERED PERIL—QUESTIONS FOR JURY.

Where, in an action against a railroad for injuries through being struck by an engine, the evidence showed that plaintiff was walking from the train, and that it was moving towards him at about the speed he was walking, it could not be said that the injury might not have been avoided had the fireman on discovering plaintiff's position promptly warned him by ringing the engine bell, and the question was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1375; Dec. Dig. § 400.\*]

##### 6. DAMAGES (§ 216\*)—ELEMENTS—PLEADING—INSTRUCTIONS.

Where the petition, in an action for personal injuries, alleged that plaintiff's ability to earn a living was greatly lessened, an instruction permitting the jury to consider plaintiff's lessened earning capacity in the future in determining his damages was proper.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 553; Dec. Dig. § 216.\*]

##### 7. RAILROADS (§ 401\*)—INJURIES TO PERSONS NEAR TRACK—INSTRUCTIONS.

Where, in an action against a railroad for injuries through being struck by an engine, there was evidence that the fireman saw plaintiff near the track in a dangerous position, an instruction that if plaintiff went on the track so near the front end of the engine that the engineer could not and did not see him, and had no reason to suppose he was in danger, defendant was not liable, was properly refused as ignoring the duty of both the engineer and fireman to keep a lookout for persons who might be in danger ahead of the train, and also as ignoring the duty of the fireman to promptly act on discovering plaintiff's perilous position.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1388; Dec. Dig. § 401.\*]

##### 8. RAILROADS (§ 401\*)—INJURIES TO PERSONS NEAR TRACK—INSTRUCTIONS.

Where, in an action for injuries to plaintiff through being struck, while walking near a side track, by an engine, it was uncontroverted that plaintiff did not know that the engine was moving along the track behind him, and there was evidence that the fireman might have discovered him in time to have avoided the injury, an instruction that if the place from which plaintiff moved was a safe one, and the place to which he moved was a dangerous one, and it was not necessary for him to move in the way of the engine, and if the engineer did not see him in the place of danger, and had no reason to believe he was there, defendant was not liable, was properly refused.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1387, 1388; Dec. Dig. § 401.\*]

##### 9. TRIAL (§ 260\*)—INSTRUCTIONS.

The refusal of an instruction substantially covered by instructions given is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**10. RAILROADS (§ 398\*)—INJURIES TO PERSONS NEAR TRACK—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.**

In an action against a railroad for injuries to plaintiff through being struck by a train, while walking near the track, evidence held to support findings that defendant was negligent, and that plaintiff was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1356-1360; Dec. Dig. § 398.\*]

Appeal from District Court, Harrison County; W. C. Buford, Judge.

Action by J. R. Crawford against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This appeal is from a judgment for the sum of \$950 recovered by appellee, the plaintiff in the court below, against appellant, in an action for damages for personal injuries appellee alleged he had suffered as a result of negligence on the part of appellant.

It appeared from the evidence that the accident occurred at Woodlawn, a station on appellant's line of railroad. At that station it had two tracks, the main line track and a side track. The tracks were about 8 feet apart and ran north and south and parallel with each other. The side track was situated east of the main line track, the depot just east of the side track, and the post office a short distance east of the depot. The place provided by appellant for the purpose and used by persons entitled as passengers to be transported by its trains from which to get aboard the same was the space about 8 feet wide between the main and the side tracks. When a train was on the main track, and another train was opposite it on the side track, the space between them was about 4 feet. Appellee reached Woodlawn about 30 minutes before the south-bound passenger train was due. Seated on the steps of the post office about 30 yards from the main track, he was waiting for the coming of said south-bound passenger train, on which as a passenger he intended to go to Marshall. While he was so waiting, a freight train from the south, north bound, took the side track, stopping something like 25 or 30 yards south of the depot. As the passenger train approached the station, appellee walked from the post office to the depot and across the side track, and then turned north, walking between the two tracks and toward the point where passengers usually boarded south-bound passenger trains. The passenger train as it approached the station was moving rapidly, and as it was about to reach the point where he was walking appellee, still walking north, veered towards the east and was struck by the beam of the pilot on the freight train, which in the meantime, without his knowledge, had begun slowly to move north on the side track. The verdict of the jury in appellee's favor should be held

to include a finding that appellant was guilty of negligence in so moving its train, and that appellee was not guilty of negligence which contributed to the injuries he suffered; or, if he was guilty of such negligence, that appellant's employes in charge of its said freight train discovered him in the perilous position he occupied in time by means available to them to have averted the accident. The evidence, we conclude, was sufficient to support such findings by the jury. From the testimony of appellee it further appeared: That at the time he was injured he was 60 years of age, was a millwright, saw filer, and machinist, and was earning \$100 per month; that until a short time before the accident he had been earning \$150 per month; that he had a lame ankle, but otherwise was "stout" and "all right"; that as a result of the injuries he received he suffered from his head, back, side, hip, and shoulders, vomited up blood, and was confined to his bed about five weeks, had paid for medicines and services of physicians about \$25, and at the time of the trial, about 18 months after the accident, was barely able to be up and about.

F. H. Prendergast, for appellant. Scott & Lane and L. P. Willson, for appellee.

WILLSON, C. J. (after stating the facts as above). The court instructed the jury: "If you find from the evidence that the defendant was negligent in propelling the engine against plaintiff as above set out, but you also find that plaintiff was negligent in going upon the ground at the point and putting himself in a position of peril in which he would likely suffer injury by the movement of the defendant's train, then you will find for the defendant." The instruction is assigned as error, on the ground that it required the jury, if they believed appellee was negligent in the particular referred to, before finding for appellant, to believe that it also was negligent; whereas, if appellee was negligent, the verdict should have been in its favor, whether it was negligent or not. The instruction, we think, is not justly subject to such criticism. The effect of the language used by the court was to tell the jury, if they believed appellee was guilty of negligence, to find for appellant, notwithstanding they might also believe that it was guilty of negligence.

The court further instructed the jury: "If the jury shall find from the evidence that defendant's servants in charge and control of the operation of its engine did not actually know of the plaintiff's peril, if any, or if they knew of it in time to have avoided striking him with said engine by use of all effective available means then at hand, consistent with the safety of the engine and its operation, then, in either event, you will find for defendant company." The criticism made

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the instruction is that it told the jury to find for defendant if they believed its employees in charge of the engine either knew or did not know that appellee was in a position rendering it perilous to him for them to neglect to use the means at hand to prevent injury to him by the movement of the engine. It is apparent that the instruction—doubtless because of the failure of the court to use language he intended to use to express his meaning—was erroneous; but the error was favorable to appellant, and therefore it should not be heard to complain of it.

The instruction last quoted was followed by one in the court's charge, as follows: "On the other hand, if you find from the evidence that the plaintiff was not negligent in going to the place near the track where he was struck and in the manner of his doing so, or, if negligent, yet if you are satisfied that the plaintiff was discovered near the track by defendant's servants in charge of the engine, and that said servants negligently failed to use ordinary care to stop or check the train and avoid striking the plaintiff after it became reasonably manifest to them that the plaintiff would not move far enough away from the track to keep from being struck, and if the plaintiff received his injuries through the negligence of such servants as above defined, then find for the plaintiff." The specific objection urged to this instruction is that neither the pleadings nor the evidence made an issue as to discovered peril. The allegation in the petition was a general one that appellant carelessly and negligently "moved and ran one of its engines against plaintiff, thereby knocking him down and thereby greatly and seriously and permanently hurting and injuring him," etc. We think the allegation was sufficient to support the charge. *Railway Co. v. Dyer*, (Tex. Civ. App.) 38 S. W. 218; *Railway Co. v. Meeks* (Tex. Civ. App.) 74 S. W. 329; 2 *Abbott's Brief on Pleadings*, 1500. The engineer operating the locomotive drawing the freight train testified that he did not see appellee at all before the pilot beam struck him. He further testified that at the time the engine was moving about as slow as it could be operated and move the train—"about as slow," he added, "as an ordinary man would walk." Appellee testified he was walking towards the north, the direction in which the freight train was moving, at the time the pilot beam struck him. The fireman of the locomotive drawing the freight train testified as follows: "As I started to pull out, I stopped to fire up, which would take me about 1½ or 2 minutes, and I got up and was standing by the seat box on the right-hand side of the switch going north, and as I leaned out of my cab window I see a man standing or walking very slowly in front of the engine, 12 or 15 inches from the engine, and I called to the engineer to look out, stop, and I called about three times, and the passenger engine had just

passed us, and the engine I was on was slipping along, and the engineer thought I was hallowing to some one on the passenger train, and I called about the third time before he stopped. I saw the engine get against him, but I could not see him. The freight engine when it hit him was going so slow I cannot tell how slow. It was going about as fast as you would go in going from here to the door in a walk. \* \* \* At the time I saw the man walking along in front of the engine, the passenger train had not stopped." It did not appear from the evidence that any effort was made, after the fireman discovered appellee's perilous position, either to stop the freight train, or, by blowing the whistle or ringing the bell of the engine, warn him of the danger threatening him from the approaching engine. We are not prepared to say that the evidence referred to was not sufficient to authorize the court to submit to the jury discovered peril as an issue in the case. It was the duty of the fireman at once, when he discovered that appellee was in peril from the moving freight train, to resort to all means available to him to prevent injury to appellee. In view of the testimony showing appellee to have been walking from the freight train, and that it was moving towards him at about only the speed he was walking, it should not be said that the injury to him might not have been avoided had the fireman when he discovered his position promptly warned him of the approach of the engine by ringing its bell. Whether the injury to him, under the circumstances, might have been so averted by the fireman or not, we think is a matter about which the minds of reasonable persons might differ.

On the ground that the pleadings did not authorize it, appellant assigns as error an instruction by the court to the jury telling them, if they found in favor of appellee, they might consider his lessened capacity to labor and earn money in the future in determining the amount of damages to which he was entitled. In this petition appellee alleged that he had "lost a great deal of time by reason of and on account of said injuries, his ability to earn and make a living was greatly impaired and lessened," etc. The assignment is without merit and is overruled.

Appellant requested the court to instruct the jury: "If the plaintiff went onto the side track so near to the front end of the engine of the freight train that the engineer on the freight train could not see him from his position on the engine, and said engineer did not see him, and had no reason to suppose plaintiff was in a place of danger, then the engineer would not be guilty of negligence, and the defendant would not be liable." The court did not err in refusing to instruct the jury as requested. The instruction was clearly erroneous, in that it ignored the duty on the part of both the engineer

and the fireman to keep a lookout for persons who might be in a position of danger ahead of the freight train, and ignored the duty on the part of the fireman to promptly act when he discovered appellee's perilous position. Nor did the court err in refusing to instruct the jury, as requested by appellant, that appellee would not be entitled to recover if he "was not in any place of danger when he moved over on the side track on which the freight train was, and the place to which he moved was a place of danger from the movement of the freight train, and the place from which he moved was not a place of danger, and it was not necessary for him to move in the way of the freight train, and if the engineer on the freight train did not see him in the place of danger and had no reason to believe he was there." The instruction as requested was erroneous in ignoring the uncontroverted fact that appellee did not know that the freight train was moving north on the side track, and therefore in the exercise of proper care may not have been negligent on going on or near the side track in front of it as it approached, and in ignoring the fact that the fireman may have discovered him in the place of danger occupied by him in time to have averted the injury to him, and may have negligently failed to do so.

We do not think the court erred in refusing the special instruction asked by appellant on the issue of contributory negligence on appellee's part. The instruction given by the court in his main charge on that feature of the case was substantially the same as the instruction refused. Nor do we think the court erred in refusing the instruction asked by appellant telling the jury that there was no evidence in the case on which to base a finding that appellant was guilty of negligence in its manner of handling the passenger train. As remarked by appellant in its brief, it was "plain that the plaintiff could not recover for any negligence in handling the passenger train"—so plain, we think, that it was unnecessary to so instruct the jury. Certainly without entirely ignoring the instructions given them, the jury could not have based their finding on negligence of appellant in that respect, if they thought it was so negligent.

The assignment of error remaining complains of the action of the court in not granting appellant a new trial on the ground that the verdict was contrary to the evidence, in that it appeared from the evidence that appellee was negligent in going to the place where he was when the engine struck him, and in that it did not appear that appellant was negligent. We think the evidence in both the respects specified was sufficient to support the findings of the jury.

The judgment is affirmed.

MISSOURI, K. & T. RY. CO. v. WOODS.  
(Court of Civil Appeals of Texas. Feb. 27, 1909.)

1. CARRIERS (§ 230\*)—CARRIAGE OF LIVE STOCK—INSTRUCTIONS—CONFORMITY TO PLEADINGS.

In an action against a carrier for cattle lost in transit, instructions based on the theory that the shipping contract required the shipper to select cars in suitable condition, and to see that they were securely fastened, were properly refused, where it was not alleged that he selected, or that he was required to select, the cars, nor that he agreed to see that the cars were kept fastened, since such provisions of the contract were matters of defense waived by failure to plead them; introduction of the contract to prove those provisions which were pleaded not warranting the instructions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 961; Dec. Dig. § 230.\*]

2. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL—PROPRIETY.

The court, having instructed fully on a defense, properly refused an instruction charging directly on particular features of the evidence under such defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-653; Dec. Dig. § 260.\*]

3. CARRIERS (§ 213\*)—LIVE STOCK—DELAYS—EXCUSES.

A carrier of live stock cannot escape liability for a delay because the engineer refused to continue the transportation for lack of rest, and the carrier used ordinary care to secure another engineer; the act of the first-mentioned engineer being that of the company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 920-922; Dec. Dig. § 213.\*]

4. CARRIERS (§ 229\*)—LIVE STOCK—LOSS—DAMAGE—MEASURE.

A shipper of cattle lost in transit could recover their actual value at the destination, where there was no market there.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 963, 964; Dec. Dig. § 229.\*]

Appeal from District Court, Grayson County; B. T. Jones, Judge.

Action by Lee Woods against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Coke, Miller & Coke, Head, Dillard, Smith & Head, and Jno. C. Wall, for appellant. Wolfe, Hare & Maxey, for appellee.

TALBOT, J. Appellee, as the surviving partner of the firm of Davis & Woods, instituted this suit against appellant to recover damages on account of unreasonable delays in the shipment of a large number of cattle over appellant's railroad from Durant, Ind. T., to Shawnee, Okl. T., and to recover the value of four heads lost in transit. It was alleged, in substance, that on or about January 4, 1907, said firm applied to appellant for cars in which to make the shipment of said cattle, and appellant agreed to furnish the requisite number of cars for such purpose, and to transport said shipment with reasonable care and dispatch between said stations; that said shipment was loaded and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ready for transportation at 10 p. m. on said date, and, although the distance between said stations is only about 128 miles, the cattle did not reach Shawnee until 7:30 a. m. January 6, 1907. The acts of negligence alleged are: Keeping the cattle in the cars and upon the road for so great a length of time, and rough handling of same; failure to furnish its crews handling the cattle the necessary orders for the movement of the same; failure to furnish suitable motive power; in furnishing an old, wornout and unsuitable locomotive; in furnishing old and worn-out cars, which had insufficient fastenings on their doors, and in failing to properly fasten the doors of said cars after the cattle were placed in the same, and to keep them fastened, on account of which the door of one of the cars came open and four of the cattle shipped were lost. Appellant answered by general demurrer, special exceptions, general denial, and then by special answer pleaded a written contract of shipment. By supplemental petition appellee pleaded a general denial of the allegations in appellant's answer, and also by special answer alleged various defenses in reply to the terms of the written contract pleaded by appellant. The case was tried before a jury on the 31st day of January, 1908, and resulted in a verdict in favor of appellee for \$1,300, and the railway company appealed. The evidence was amply sufficient to sustain the verdict and judgment, and the assignments of error relate only to the refusal of the court to give certain special charges requested by the defendant, and to one paragraph of the court's general charge.

Two of the special charges asked and refused are as follows: (1) "If you believe from the evidence that there was a loss of four head of cattle en route, and the same resulted from the use of an unsuitable car selected by the shipper, you cannot find in favor of plaintiff any amount therefor." (2) "In this case you are instructed that if you believe from the evidence that four head of cattle were lost en route, but if you further believe they were lost by some carelessness in the manner in which the door of the car was fastened, plaintiff would not be entitled to recover anything for the loss of said steers." We think these charges were properly refused. They were requested upon the theory that by the terms of the shipping contract entered into between appellant and appellee, which was introduced in evidence, the appellee agreed to select no car for the transportation of the cattle which was not in a suitable condition therefor, and that he agreed to load and unload the cars and see that the same were securely fastened; but we think defendant's answer was insufficient to authorize the giving of said charges. Certain parts of the written contract were specifically pleaded, but it was not alleged that appellee selected the cars in which the cattle were shipped, nor that, by any provision of

said contract, he agreed to select them; neither was it alleged that appellee agreed to see that the cars were kept securely fastened. Such provisions of the contract were matters of defense; and, in the absence of pleading setting them up, they must be regarded as having been waived. Proof of such provisions by the introduction of the contract, which was doubtless offered in support of those provisions which were pleaded, did not warrant the giving of the charges refused.

The third assignment of error complains of the court's refusal to give the following charge requested by appellant, namely: "In this case you are instructed that if you believe from the evidence that the defendant exercised ordinary care to furnish a reasonably good engine to haul these cattle from Phillips to Shawnee, and if you further believe from the evidence that at Phillips a leak was discovered, which permitted water to escape and fall into the fire box, and that because thereof there were delays along the road, and said engine did not make so good time as it should, and that because thereof the engine finally died at Maud, but if you further believe from the evidence that when the defendant started said engine to Phillips there was no leak about the same, or, if there was, defendant by the exercise of ordinary care would not have known of the same, and did not know of the same, and if you further believe that after said leak was discovered at Phillips by Engineer Wilson, the defendant exercised that care and caution to haul said cattle with reasonable dispatch that a person of ordinary care would have used under the same or similar circumstances, you cannot return a verdict against defendant for any amount on account of damages suffered by plaintiff by reason of any delays between Phillips and Maud which resulted from such leak." There was no error in refusing to give this charge, for the reason that it was, in so far as it correctly stated the law applicable to the facts, sufficiently covered by the fourth paragraph of the general charge of the court, which reads thus: "If you do not believe from the evidence that the defendant, in transporting over its line of railway the said cattle to the said town of Shawnee, failed to use reasonable diligence to transport said cattle over its said line within a reasonable time, and without unnecessary delay, you will find for defendant on this issue; or, if you believe from the evidence that said cattle were not transported over defendant's said line of railway within a reasonable time, but you do believe from the evidence that said delay, if any, was caused by insufficient motive power used by the defendant in the operation of the said train, and you further believe from the evidence that the defendant exercised the care and diligence that a person of ordinary prudence would have exercised, under the same or similar circum-

stances, to have sufficient motive power to transport said cattle over its said line without unnecessary delay, then you will also find for defendant on this issue; or, if you do not believe from the evidence that defendant failed to use proper care in handling said train while it was transporting same over its said line, you will find for defendant on this issue." This paragraph of the charge embraced all the phases of the defense sought to be submitted by the special charge, and all the law embodied in said special charge; and, having given instructions that fully comprehended and clearly included such defense, it was not error to refuse to select certain features of the evidence and charge directly upon them. *Erie Tel. Co. v. Grimes*, 82 Tex. 97, 17 S. W. 831.

It is further assigned that, inasmuch as there was testimony showing that the engineer, sent by appellant from Shawnee to Phillips to operate the engine, attached to the train of cattle, from that point to Shawnee, claimed rest and refused to haul them, the court erred in refusing to charge the jury, at defendant's request, that if defendant, after learning of such refusal, exercised that care and caution which a person of ordinary care would have exercised, under the same or similar circumstances, to furnish another engineer to haul the train, they could not allow plaintiff anything for any damages he suffered by reason of the delay so caused. We think there was no error in refusing this charge. Appellant could not escape liability on the ground that its engineer refused to continue the transportation of the cattle from Phillips to Shawnee, and that upon such refusal it exercised ordinary care to secure another engineer to perform that service. The engineer sent to Phillips to operate the engine and convey the train to Shawnee was such an agent of appellant, selected to carry out its contract with appellee for the transportation of the cattle, that his act or omission in failing or refusing to promptly transport the cattle must be regarded as the act or omission of appellant, and such failure constitutes no defense to plaintiff's cause of action.

Nor did the court err in charging the jury that the measure of plaintiff's damages for the cattle lost in transit was the value of said cattle in the town of Shawnee on the 6th day of January, 1907. The undisputed evidence was that there was no market for these cattle at Shawnee, the place of destination; and, in the absence of such value, plaintiff was entitled to recover their actual value there. This value was shown, without dispute, to be \$25 per head.

All the assignments of error have been carefully considered, and because we believe none of them point out reversible error, the judgment of the court below is affirmed.

### CALDWELL v. LANDER.

(Court of Civil Appeals of Texas. Feb. 27, 1909.)

#### APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS.

Error in giving an instruction on a plea unsupported by the evidence was not harmless on the ground that the evidence conclusively showed that the prevailing party was entitled to recover on other phases of the case, where the evidence on such phases was conflicting.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

Error from District Court, Dallas County; Thos. F. Nash, Judge.

Action by E. A. Caldwell against Wiley Lander. From a judgment for defendant, plaintiff brings error. Reversed and remanded.

R. D. Coughanour and Spence & Baker, for plaintiff in error. Whitehurst & Whitehurst, for defendant in error.

RAINEY, C. J. This is a boundary suit brought by plaintiff in error against defendant in error to establish the ownership of a strip of land claimed by and in the possession of defendant in error. Both parties plead the three, five, and ten year statutes of limitation. The court charged upon all three of said periods, and plaintiff in error bases his assignments of error upon limitation being charged as to the defendant in error.

Defendant in error claimed under only one muniment of title—that is, a deed from one Winfrey to himself of date November 11, 1876—and there was no evidence to connect his title with the sovereignty of the soil. The evidence fails to show defendant in error held adverse possession of the land for three years under a title or color of title from the sovereignty of the soil. There being no evidence supporting said plea of three-year limitation, the court erred in giving said charge. Defendant in error insists that this was harmless error, as the evidence conclusively shows that he was entitled to recover on other phases of the case. We do not agree to this contention, as the evidence was conflicting, and was such that the charge was calculated to impress the jury that the defendant could hold under three years' possession, and we cannot say that the charge was not prejudicial to plaintiff in error.

The judgment is reversed and cause remanded.

### BOOTH v. BURSEY et al.

(Court of Civil Appeals of Texas. Feb. 20, 1909.)

#### TRIAL (§ 260\*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS COVERED BY GENERAL CHARGE.

In a suit by administrators to recover money belonging to the estate, in which defendants pleaded a set-off for boarding and for advancements to heirs, a requested instruction that de-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



pendants had no authority to make distribution among the heirs after administration upon the estate was begun was not covered by a general charge, which applied the limitation as to defendants' authority only to the payment of debts against the estate, and not to the distribution among the heirs.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Appeal from Tarrant County Court; John L. Terrell, Judge.

Action by W. R. Booth, as administrator, against W. A. Bursey and others, for money belonging to decedent's estate. From an insufficient judgment for plaintiff, plaintiff appeals. Reversed and remanded.

James C. Scott, for appellant. J. C. Smith and Jo. W. Burney, for appellees.

SPEER, J. This case has been twice before reversed, and will be found reported in 91 S. W. 817, and 107 S. W. 357. The case is substantially the same as it was on the last appeal, and must be again reversed because, under the evidence, appellant as administrator was entitled to recover a greater sum than was awarded to him by the verdict of the jury. There is nothing in the evidence to warrant the verdict in appellees' favor as to \$50 of the sum alleged to have been paid by appellees to Felix Bouvet which the jury evidently allowed. Furthermore, the court ought to have instructed the jury, as requested by appellant, that appellees had no right or authority to make distribution amongst the heirs of John Bouvet, deceased, after administration upon his estate was begun. This charge was refused, it appears, because given in the main charge, but an examination of the main charge discloses that this limitation was made to apply only to the payment of debts against the estate, and not to a distribution among the heirs. We do not think the appellees were chargeable with the money checked out of bank by William Bouvet prior to the death of his father, John Bouvet.

For the errors indicated, the judgment is reversed, and the cause remanded for another trial.

# MISSOURI, K. & T. RY. CO. OF TEXAS v. TRIPIS.

(Court of Civil Appeals of Texas. Feb. 24, 1909. Rehearing Denied. March 17, 1909.)

## 1. CARRIERS (§ 121\*)—CARRIAGE OF FRUIT—REFRIGERATOR CARS—USE FOR STORAGE—DUTY OF CONSIGNEE TO REPAIR.

Where a carrier allowed a consignee to retain exclusive possession of a refrigerator car for the storage of fruit shipped for a consideration, after the relations of carrier and warehouseman had ended by acceptance of goods and payment of freight, the duty did not devolve upon the consignee to repair the car to prevent damage to the fruit.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 531; Dec. Dig. § 121.\*]

## 2. CARRIERS (§ 117\*)—CARRIAGE OF FRUIT—REFRIGERATOR CARS—DUTY OF CARRIER TO REPAIR—NOTICE.

Where the consignee had possession of a refrigerator car, and only he and those authorized by him had access to its interior, the carrier was not bound to repair defective drain pipes therein, unless it had knowledge of the defective condition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 510; Dec. Dig. § 117.\*]

## 3. CARRIERS (§ 121\*)—CARRIAGE OF FRUIT—DAMAGE FROM DEFECTIVE REFRIGERATOR CAR—CONTRIBUTORY NEGLIGENCE.

In an action by a consignee against a carrier for damages to fruit from defective drainpipes in a refrigerator car used by plaintiff for storage after the relations of carrier and warehouseman had terminated, where it appeared that, if the fruit had been removed from the car, it would have spoiled immediately because the consignee had no cold-storage facilities, the consignee would not be negligent in failing to do what would inevitably have destroyed the fruit.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 531; Dec. Dig. § 121.\*]

## 4. CARRIERS (§ 136\*)—CARRIAGE OF FRUIT—DAMAGES FROM DEFECTIVE REFRIGERATOR CAR—QUESTION FOR JURY.

In an action by a consignee against a carrier for damages to fruit from defective drainpipes in a refrigerator car, after the car had arrived at destination and had been delivered to plaintiff, the consignee, so that the relations of carrier and warehouseman had terminated, the questions of the carrier's knowledge of the defects, its negligence in failing to repair, whether such negligence was the proximate cause of the loss, and plaintiff's contributory negligence in using the car was held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 596; Dec. Dig. § 136.\*]

## 5. CARRIERS (§ 131\*)—CARRIAGE OF FRUIT—DAMAGES FROM DEFECTIVE REFRIGERATOR CAR—ACTIONS—PLEADINGS.

In an action against a carrier for damages to fruit from defective drainpipes in a refrigerator car, which plaintiff, the consignee, after the relations of carrier and warehouseman had terminated, had rented for the storage of fruit at the destination, a petition alleging defendant's negligence in failing to repair the pipes was sufficient to admit proof of any facts going to show the negligence, including the promise of defendant's agent to repair, though no such promise was mentioned in the pleadings; the duty to repair not depending on a specific promise to repair, but arising from the fact that the pipes were defective after defendant received knowledge of the defect.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 574; Dec. Dig. § 131.\*]

Error from Bexar County Court; P. H. Shook, Judge.

Action by G. C. Tripis against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Coke, Miller & Coke, F. C. Davis, and B. W. Teagarden, for plaintiff in error.

JAMES, C. J. G. C. Tripis, by his amended original petition, asked for judgment against plaintiff in error for damages to a car load of green peaches and prunes shipped to him from Provo, Utah, to San Antonio,

Tex., upon substantially the following allegations: That the car reached San Antonio about September 8, 1905, over plaintiff in error's line, and the fruit arrived in good condition; that it was agreed between him and the defendant that the fruit could remain in the car under refrigeration until plaintiff could dispose of the same by sales of the fruit, in consideration for which plaintiff agreed to and did pay defendant the sum of \$1 per day for the detention of the car, and for the use of the same to store and keep said fruit and remove same therefrom, and to allow plaintiff to furnish the bunkers of the car with ice in order to keep the fruit under refrigeration; that it was the custom of railway companies at San Antonio, independent of such agreement, to permit such use of the car; that the car, on arrival at San Antonio, was defective and out of repair, and was wholly insufficient for use as a refrigerator car, by reason of which defective condition the water from the ice would flow into and remain in the car, causing the fruit to decay, the defect consisting in the choking of the drainpipes; that plaintiff from the time of the arrival of the car kept the bunkers supplied with ice sufficient, but for the defect in the car, to have kept the fruit in good merchantable condition, but that defendant negligently permitted said car to remain in said defective condition, which caused the fruit to become damaged, and that the defective condition of the car was known to the defendant. By a supplemental petition plaintiff alleged that the car was consigned to him, he being named in the bill of lading as the consignee; that at that time R. T. Pruitt and Ed Lamm were, and are now, owners of a half interest in said shipment; that after the filing of this suit plaintiff went into bankruptcy; that his half interest is now owned by M. L. Oppenheimer; and that plaintiff is prosecuting this suit for the use and benefit of said Pruitt, Lamm, and Oppenheimer. The verdict and judgment were for plaintiff for the sum of \$370; he recovering in the right of M. L. Oppenheimer, Ed Lamm, and R. T. Pruitt.

The first assignment of error is that a requested peremptory instruction for defendant should have been given. It appears in the evidence that plaintiff had 48 hours after the arrival of the fruit to remove it, and that there existed a custom of long standing of allowing fruit cars to remain on the delivery track after that time and until the fruit was sold by the consignee, subject to a charge of \$1 per day for the use and detention of the car. The charge for the excess time was collected. It appears that the consignee during the time had exclusive control of the car, having his private lock and key to it, and from time to time he and those authorized by him had access to it.

The first question to consider is the relation or duty of the railway company to the consignee with respect to defects in a car

held and used by the latter under these circumstances. The relation of carrier had ended; the goods having been delivered and accepted at destination and the freight paid. The relation of warehouseman could hardly be said to exist, as the carrier had parted with the possession and control of the goods to the consignee. The fact that the defendant allowed the continued use of the car on the delivery track, collecting a rate therefor, would seem to create the duty on its part to exercise ordinary care to keep the car in condition fit to be used for the purpose for which it was let. It is immaterial whether this obtained through a contract or by usage. It is contended by appellant that the relation was in the nature of landlord and tenant, and that by analogy to the law of landlord and tenant it was plaintiff's duty to make repairs; but we think that plaintiff was not authorized to make repairs of cars, and such duty did not devolve on him. However, as the car was in the possession of plaintiff, and only he and those authorized by him appear to have had access to its interior, it could not be expected of the railway company that it should repair defective pipes therein, unless it had knowledge of the defective conditions, and in our opinion no duty devolved on it whatever to repair these pipes until it was shown to have had such knowledge. The petition was careful to allege such knowledge, and there was proof that no defect was developed until the second day after the arrival of the car, when plaintiffs discovered that the drainpipes were not working properly, and permitted the water to run into the car, instead of being conducted off; that Knight, the chief clerk of the local agent, was then notified and frequently afterwards; and that he promised to attend to the same immediately, but never did. Plaintiff, and the other interested parties regarded Knight from his position the proper person to deal with, and such appeared to have been his ostensible authority. Under these circumstances and evidence it was proper for the court to submit the case to the jury as it did upon the issue of defendant's negligence, and whether or not it was the proximate cause of the injury to the fruit, and did not err in refusing to give the peremptory instruction.

The third, fourth, and fifth assignments complain of the refusal of charges, which were as follows:

"(3) You are charged that there was a delivery and acceptance of the fruit to plaintiff, and if the plaintiff, after he acquired knowledge of the defective condition of the car, if he had acquired such knowledge, then and in that event, if you find he had knowledge of defects in the car, it devolved upon plaintiff to take such steps as an ordinarily prudent person would have taken under the circumstances to prevent damage to the fruit. And if you find that plaintiff failed to exercise such care, and that this was the prox-

mate cause of damage to plaintiff, then plaintiff cannot recover.

"(4) You are charged that if after plaintiff discovered that the fruit was likely to become damaged because of defective condition of cars, and he made such discovery, then it devolved upon plaintiff to take such steps as an ordinarily prudent person would have taken under the same or similar circumstances to remove said fruit from the car; and if you believe that plaintiff did not take such step, and did not remove the fruit from the car in the time that an ordinarily prudent man would have done, and that such failure to remove the fruit from the car, if there was such failure to so remove, was the proximate cause of the damage to the fruit, then you will find for defendant.

"(5) You are instructed that it was not the duty of the defendant to ice said car, and if plaintiff did ice said car, and that said icing of the car was the proximate cause of the damage to the fruit, then you will find a verdict for the defendant."

The court's charge was silent upon the subject of contributory negligence of plaintiff.

It was proper to refuse the second of the above instructions, for the reason that it was uncontradicted that, if the fruit had been removed from the car, it would have spoiled immediately, and plaintiff and his associates had no cold-storage place to put it in. They could not be declared negligent in not doing what would inevitably have destroyed the fruit. The last of the above charges was not worded so as to leave the question of negligence to the jury and it was properly refused. As to the first of the charges, it was testified to by plaintiff and also by Pruitt and Lamm that the car on its arrival had ice in its bunkers; that said ice would melt in about 24 hours; that they re-stored the bunkers with ice, and, if they had not done so, the fruit would not have rotted, since it had been refrigerated for about 10 days. Lamm testified that the fruit was not damaged until 48 hours after they received the car; that the defective condition of the car was discovered on the second day after its arrival. A little water was then seen to run out of the car door. They then notified Mr. Knight of this and that the car would be ruined by water, and he promised to repair the pipes at once. On the third morning, the car not being repaired, there were two or three inches of water on the car floor, and this was the condition every morning thereafter, but that they relied upon his promise to fix the drainpipes. He also testified that notwithstanding they knew the railroad company had not repaired the pipes they continued to store the bunkers with ice and knew the fruit was being damaged from day to day. All of the witnesses, plaintiff, Lamm, and Pruitt, were in the fruit business, and were presumed to under-

stand the business, and they evidently knew what they testified to, viz., that to keep the bunkers filled with ice while the floor of the car was flooded would cause the fruit to decay, and that such decay could have been avoided by their not refilling them with ice. It was admissible for the jury to have found from the testimony that plaintiff and his associates did not exercise the prudence of an ordinarily careful person by keeping the bunkers supplied with ice, while the pipes were in the condition described, after the discovery of that condition, and that to such want of care the damage sustained by them was due. On the other hand, the jury may have found that the conditions and circumstances made it the act of a prudent person to keep the bunkers filled. We think defendant was entitled to have the first of the above charges given.

The sixth assignment complains of proof being admitted to show the promise of Knight to repair, as no such contract was mentioned in the pleadings. The petition alleged negligence of defendant in regard to the repairing of the pipes. This general pleading was sufficient to admit proof of any facts that went to show negligence. Defendant's duty to repair did not depend on any specific promise to repair. It arose from the fact that the pipes were defective after it received knowledge of the defect.

What has been said we think covers substantially all the questions made, except the question of plaintiff's right to recover, in this action, the entire damages. It is true that the relation of carrier had terminated, and that the injury to this shipment arose after its termination. But, according to the evidence, the consignee, Tripis, by reason of his original relation to defendant, had the right to keep the fruit in the car upon the delivery track, paying \$1 per day for the privilege, until the fruit was taken away by sales from day to day. He had this right with reference to the entire car load of fruit, and he was the one, as consignee, to whom the defendant owed any duty which arose by the relation it continued to sustain to this shipment while the car was there under demurrage. We think he had the right to sue for and recover all the damages.

Reversed and remanded.

TEXAS & P. RY. CO. v. FORD.  
(Court of Civil Appeals of Texas. March 4, 1909.)

1. WATERS AND WATER COURSES (§ 125\*)—  
FLOODING LANDS—SURFACE WATERS—OB-  
STRUCTION—DAMAGES.

In an action for damages to land by the construction by a railroad company of a drain box insufficient to drain the land as it had previously been drained, the measure of damages is the value of the land, if rendered valueless, its decreased value, if merely injured, or its rental

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

value in a proper case together with interest from the time the cause of action arose; but recovery cannot be had for the total market value of the land if it was rendered valueless, and at the same time for its rental value, nor if it was injured merely could recovery be had both for its depreciated value and its rental value.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 140; Dec. Dig. § 125.\*]

## 2. LIMITATION OF ACTIONS (§ 55\*)—ACCRUAL OF RIGHT—TORTS—FLOODING LANDS.

Limitations begin to operate against a cause of action for damages to land caused by the construction by a railroad company of a drain box which was insufficient to drain the land as it had previously been drained, at the time the waters diverted or impounded, because of the insufficient drain box, actually produced the injury complained of, and not at the time the insufficient box was constructed.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 305; Dec. Dig. § 55.\*]

## 3. WATERS AND WATER COURSES (§ 125\*)—SURFACE WATERS—DIVERSION—DAMAGES.

It being the duty of a railroad company not only to so construct its roadbed as not to divert to the injury of adjoining lands waters from their natural course, but also after the construction of the roadbed to keep it in such condition as not to so divert such waters, the measure of damages for injuries caused by the diversion of waters to the injury of adjoining lands should not be based on the difference in value or the difference in the rental value of the land just before and after the construction of the roadbed or the making of a change therein, but the difference immediately before and immediately after the land was actually injured by the diversion of waters.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 140; Dec. Dig. § 125.\*]

Appeal from District Court, Harrison County; W. C. Buford, Judge.

Action by Samuel Ford against the Texas & Pacific Railway Company for injuries caused by wrongful diversion of water on plaintiff's land. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Appellant's line of railroad ran east and west on an embankment three or four feet high, constructed for the purpose along the south boundary line of a tract of land, containing nine acres, belonging to appellee. The natural lay of the land, appellee contended, caused it to drain south and southeast. When appellant constructed its roadbed in 18—, it left an opening about twenty-eight feet long in the embankment, and across the opening constructed a bridge or trestle. The opening so left was sufficient as a passway to the south side of its track for all the water draining to the south and southeast over appellee's land. At a time not certainly fixed by the testimony, but during or between the years 1898 and 1903, appellant removed the trestle spanning the opening left in its roadbed, placed in the opening a drain box or culvert two by three feet in size, and then by filling in the opening with dirt extended the embankment across the same. Appellee con-

tended that the drain box was not sufficient as a passway for water naturally flowing to it over his land, and that because it was not sufficient such water was impounded on his land, whereby it was injured, etc. He commenced an action for damages, and as the measure of the damages he sought to recover alleged in his petition, filed June 28, 1907, as follows: "The plaintiff lost the crops of 1904, 1905, 1906, and 1907 by reason of the fact that he was unable to cultivate said land, because of repeated overflows. The use of the land for each of said years is and was reasonably worth \$200 for each year. The plaintiff avers that the land was worth \$1,000, and unless the defendant is compelled to put the original trestle or opening in and under the track, or unless it is compelled to put a sufficient ditch down the north side of the track, the land will be destroyed, and plaintiff will be damaged \$1,000." In a trial amendment filed by appellee March 3, 1908, he alleged that as a result of the waters being so impounded on his land sand had been deposited thereon to a "depth of three feet or more," and then further alleged: "And so the plaintiff avers that before said trestle was filled in the land was worth \$1,000, and since same and by reason of said filling in and raising the embankment the land has become worthless." The prayer in appellee's petition was for a judgment for the damages suffered by him and for a mandatory injunction requiring appellant to make proper provision for the passage from his land of water impounded thereupon by appellant's roadbed. The appeal is from a judgment in appellee's favor for the sum of \$250, and awarding the injunction as prayed for.

F. H. Prendergast, for appellant. T. P. Young, for appellee.

WILLSON, C. J. (after stating the facts as above). The court instructed the jury as follows: "If you find for the plaintiff, the amount of your verdict will be the reasonable rental value of said land for a time including a period extending from two years next before the filing of the petition, which was filed June 28, 1907, to the present time, and you may also consider as an element of his damages the decrease in the value of said land, if any, occasioned by the deposit of sand on the same, and if you find that said deposit, if any was made, was caused by the act of defendant in filling said trestle and placing the said drain box or wooden culvert as above explained to you; but in this connection you will only consider such damages and injury as was caused by deposits of sand made two years next before the 3d day of March, 1908." The instruction is attacked by appellant as erroneous on the ground that it did not correctly state the true measure of damages, and on the further ground that it authorized

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the jury to find for both the rental and the decreased market value of the land. On the ground last mentioned, the instruction, we think, was erroneous. If the substitution of the drain box for the trestle rendered the embankment a nuisance permanent in its nature, in the sense that with respect to the rights of appellant it could not be abated, and because the effect of its maintenance was to cause constant or regularly recurring injury to appellee's land, a cause of action at once arose in appellee's favor for all damages suffered or which might in the future be suffered by him as the direct consequence thereof. In such a case the measure of his damages would be the market value of his land if it was rendered valueless; and if it was merely injured, the difference in its market value immediately before and its market value immediately after it was injured—together with interest on the sum found to represent such total or decreased value from the time the right of action accrued. Against such a cause of action the statute of limitations would begin to operate in appellant's favor at the time the substitution was made; but if the substitution of the drain box for the trestle did not render the embankment a permanent nuisance, because with proper respect to appellant's rights it could be abated, or because the injury it caused to appellee's land was not constant or regularly recurring, but was suffered only occasionally and at irregular intervals, the appellee's cause of action would be for damages resulting to him from such occasional injuries, and same would accrue as they were suffered, and not at the time the substitution was made. The measure of his damages in such a case might be the value of his land, if rendered valueless, its decreased value, if merely injured; or its rental value, in a proper case—together with interest from the time the cause of action arose. Against a cause of action so arising in his favor, the statute of limitations would begin to operate in appellant's favor at the time the diverted or impounded waters actually produced the injury, and not at the time the insufficient drain box was substituted for the trestle. *Railway Co. v. Long* (Tex. Civ. App.) 113 S. W. 316; *Rosenthal v. Railway Co.*, 79 Tex. 325, 15 S. W. 268; *Railway Co. v. Barry*, 98 Tex. 251, 83 S. W. 5; *Railway Co. v. Anderson*, 79 Tex. 427, 15 S. W. 485, 23 Am. St. Rep. 350; *Bonner v. Wirth*, 5 Tex. Civ. App. 560, 24 S. W. 306; *Railway Co. v. Davis* (Tex. Civ. App.) 29 S. W. 484; *Railway Co. v. Goldman*, 8 Tex. Civ. App. 257, 23 S. W. 267; *Gramann v. Eicholtz*, 36 Tex. Civ. App. 309, 81 S. W. 756; *Railway Co. v. Lensing* (Tex. Civ. App.) 75 S. W. 826; *Railway Co. v. Kyle* (Tex. Civ. App.) 101 S. W. 272; *Railway Co. v. Caldwell* (Tex. Civ. App.) 102 S. W. 461; *Clark v. Dyer*, 81 Tex. 343, 16 S. W. 1061; *Railway Co. v. Helsley*, 62 Tex. 593; *Railway Co. v. Schofield*, 72 Tex. 496, 10 S. W. 575; *Railway Co. v. Joachimi*, 58 Tex. 460; *Railway Co. v.*

*Cook*, 57 Ark. 387, 21 S. W. 1066; *Broussard v. Railway Co.*, 80 Tex. 329, 16 S. W. 30.

It is, we think, apparent from what has been said that a recovery cannot be had for the total market value of land destroyed and at the same time for its rental value; or, if injured merely, for its depreciated market value and at the same time for its rental value. The total market value recoverable in the one case, and the decreased market value recoverable in the other case, would be determined with reference to the time the wrong giving a right to same occurred. If the land should be destroyed, in the sense that it was deprived of market value, in its worthless condition it could not have a rental value. If it should be merely injured, its market value would be depreciated, because the injury rendered it less useful than it was before the injury was suffered; in other words, because its rental value had been lessened as an effect of the injury. In the one case a recovery of the market value would include, as an element determining it, the rental value; and in the other case a recovery of the depreciated market value would include, as an element determining it, the depreciated rental value. So to permit a recovery of the market and rental values in the one case, and of the decreased market and rental values in the other case, would be to permit a double recovery for the same element of damages. In the respect that it authorized the jury to find such double damages, we think the portion complained of of the court's charge is erroneous. The error will necessitate a reversal of the judgment.

With reference to the other objection made to the court's charge, appellant insists that the true measure of appellee's damages was "the difference between the rental value of the land before the drain box was put in and its rental value after the drain box was put in." Appellant cites no instance where such a measure of damages has been applied in a case like this one. If the cause of action arose at the time the drain box was substituted for the trestle, it arose then because a permanent nuisance affecting the market value of the land was thereby created, and the measure of damages would be as we have indicated above. If a permanent nuisance was not so created, then the cause of action arose only when by a diversion or impounding of waters caused by the insufficiency of the drain box appellee's land was injured. If the difference in its rental value should be applied as the measure of damages in such a case, then it should be the difference in such rental value immediately before and the rental value of the land immediately after it was so injured, and not the difference in its rental value before and after the drain box was put in. It may not have been apparent or even appeared probable, at the time the drain box was substituted for the trestle, that it would not be amply sufficient to properly drain the land. Indeed, if kept

open and in proper condition to perform its best service, it may have been sufficient. The injury, if any, suffered by appellee, may have been due to appellant's failure to keep the box properly cleaned out and suffering it to become so filled up with weeds, trash, sand, etc., as to fail utterly to act as a passway for waters flowing towards the embankment from appellee's land. It would hardly be contended in such an event that appellee's recovery should be limited to the difference in the rental value or other value of his land immediately before and immediately after the drain box was put in. It was appellant's duty not only to originally so construct its roadbed as to not divert to the injury of appellee's land waters from their natural course, but also, after so constructing its roadbed, to keep it in such a condition as to not so divert such waters. *Clark v. Dyer*, 81 Tex. 343, 16 S. W. 1061; *Railway Co. v. Davis* (Tex. Civ. App.) 20 S. W. 483; *Sellers v. Railway Co.*, 81 Tex. 458, 17 S. W. 32, 13 L. R. A. 657.

The assignments of error, in so far as they present questions likely to arise on another trial and not disposed of by what we have said, relate to the sufficiency of the evidence, and will not be considered.

The judgment is reversed, and the cause is remanded for a new trial.

**RIO GRANDE & E. P. RY. CO. v. GARCIA.**  
(Court of Civil Appeals of Texas. March 3, 1909.)

**RAILROADS (§ 411\*)—OPERATION—INJURIES TO ANIMALS ON TRACKS—ACTIONS—DAMAGES.**

Where an animal is killed on an unfenced portion of a railroad track, the company is liable to the owner for its value, as provided by Rev. St. 1895, art. 4528, regardless of the degree of care or negligence which may have attended the killing.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1411; Dec. Dig. § 411.\*]

Appeal from District Court, Webb County; J. F. Mullally, Judge.

Action by J. M. Garcia against the Rio Grande & Eagle Pass Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. Winslow, for appellant. O. C. Pierce, for appellee.

**FLY, J.** This is a suit for the value of a jack killed by appellant's locomotive, which was instituted by appellee in the justice's court. This is an appeal from a judgment of the district court for \$150.

The jack was killed while on the track of appellant, which was not fenced. The jack had his forefeet hobbled at the time, which impeded his locomotion. At the point where the jack was killed, the railroad track ran across land held by appellee under a

lease for pasturage purposes. The evidence does not show that any effort was made by the jack to leave the track, or that he was prevented from so doing by the hobbles. The track was not fenced at the point where the animal was killed, and appellant was liable to the owner for its value, regardless of the degree of care or negligence which may have attended the killing. Rev. St. 1895, art. 4528; *Railway v. Muldrow*, 54 Tex. 233; *Railway v. Childress*, 64 Tex. 346. There was no evidence to show that the hobbling of the animal tended in any manner to contribute to his death. He was in his master's inclosure, and but for the failure of appellant to fence its track the animal would not have been killed.

The judgment is affirmed.

**STRINGFELLOW et al. v. BRASELTON.**

(Court of Civil Appeals of Texas. Feb. 13, 1909.)

**1. PRINCIPAL AND AGENT (§ 178\*)—NOTICE TO AGENT—SCOPE OF AGENCY.**

Where plaintiff's husband agreed with defendant to convey property in payment of a debt, and nothing remained to be done by plaintiff and her husband to consummate the arrangement except to execute, acknowledge, and deliver the deed, the authority previously given the notary as attorney for defendant to collect the debt in money would not constitute the notary the agent of defendant in procuring the deed, so that notice to the notary that plaintiff understood the deed to constitute a mortgage, and that plaintiff was not examined privily, would be notice of those facts to defendant.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 680-684; Dec. Dig. § 178.\*]

**2. TRIAL (§ 296\*)—INSTRUCTIONS—CURING ERROR BY OTHER INSTRUCTIONS.**

The error in an instruction that a grantee in a deed would, under specified circumstances be bound by knowledge of the notary of infirmities in the deed acquired in taking the acknowledgment was not cured by a further instruction that the grantee would not be bound by knowledge or conduct of the notary, unless the notary was authorized to act for him, or unless the grantee had knowledge of irregularities in the deed and accepted the benefit thereof, where there was no evidence that the grantee had any actual knowledge of any irregularities in the deed or in its acknowledgment.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-718; Dec. Dig. § 296.\*]

**3. TRIAL (§ 229\*)—INSTRUCTIONS—REPETITION—UNDUE PROMINENCE OF ISSUE.**

It is error to repeat an issue in several instructions so as to give it undue prominence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 513; Dec. Dig. § 229.\*]

**4. ACKNOWLEDGMENT (§ 25\*)—MARRIED WOMAN—SUFFICIENCY.**

Since the statute requires the officer taking the acknowledgment of a married woman to explain the instrument to her privily, a failure to do so renders the instrument void, though she in fact fully understood it.

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. §§ 136-143; Dec. Dig. § 25.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**5. MORTGAGES (§ 34\*) — ABSOLUTE DEED AS MORTGAGE.**

A deed absolute in form signed with the understanding that it was given in extinguishment of a debt is not a mortgage, though it was understood that the grantor's husband should have the option of repurchasing the property within a specified time for the amount of the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 83; Dec. Dig. § 34.\*]

**Appeal from District Court, Hale County; L. S. Kinder, Judge.**

Action by Ella Braselton against R. L. Stringfellow and another. From a judgment for plaintiff, defendants appeal. Reversed.

L. W. Dalton, L. G. Wilson, Bern Wilson, and Cooper & Stanford, for appellants. Geo. L. Mayfield, T. T. Bouldin, and Mathes & Williams, for appellee.

**DUNKLIN, J.** This was an action of trespass to try title brought by the appellee against appellant R. L. Stringfellow to recover lots Nos. 9, 10, and 11, in block 7, in the town of Plainview. Appellee further pleaded that on or about the 18th or 19th of July, 1907, she and her husband, J. M. Braselton, executed a deed to the property to appellant Stringfellow, and she sought to cancel the deed as a cloud upon the title on the ground that she was induced to believe that the deed was a mortgage at the time she executed it, and further upon the ground that she did not acknowledge said deed in accordance with the requirements of the statute in such cases made and provided. She further alleged that the property was her homestead at the time of the execution of the deed, and that Bern Wilson, who took her acknowledgment as notary, was the agent of R. L. Stringfellow in procuring the execution of said instrument, and that he was informed of the fact that she understood the deed to be a mortgage at the time she executed it. Defendant R. L. Stringfellow answered by general denial and plea of not guilty. The Amarillo National Bank intervened in the suit, and adopted the answer of defendant Stringfellow, and also pleaded that at the time of the execution of the deed J. M. Braselton was indebted to the intervenor in the sum of \$4,000 for money loaned, evidenced by a promissory note, and that the deed was executed in consideration of a credit of \$2,000 on said note; that the deed was executed in compliance with a contract made by Braselton with Stringfellow as president of the bank, by the terms of which the property described in the deed should be conveyed in consideration of the cancellation of \$2,000 of said indebtedness; that, upon receipt of the deed, the bank entered a credit, as agreed, without any notice of undue influence or fraud having been practiced on the plaintiff, if any was so practiced. The bank further alleged that no one was authorized

to act as agent for the bank in said negotiations except R. L. Stringfellow, and that Stringfellow had no actual or constructive notice of any fraud or duress having been practiced in the procurement of said deed and its acknowledgment. From a judgment in favor of the plaintiff in the trial court, the defendant and intervenor have appealed.

The evidence of plaintiff that the property described in the deed was the homestead of J. M. Braselton and family at the time the deed was executed was not controverted, and the theory upon which the case was tried, and the correctness of which appellants do not challenge, was that the deed of conveyance sought to be annulled is effective to vest title in Stringfellow for the use and benefit of the bank, unless Stringfellow and J. M. Braselton agreed that it should be a mortgage to secure the payment of \$2,000 or unless Mrs. Braselton signed and acknowledged it, believing it to be only a mortgage, the amount which Braselton owed the bank, and Stringfellow, with notice of such understanding on her part, procured her signature thereto, or unless the certificate of Mrs. Braselton's acknowledgment was false in the particulars alleged and taken by one employed by Stringfellow to procure the execution of the deed.

Plaintiff sought to prove that Bern Wilson, the notary who took her acknowledgment to the deed, was the agent employed by Stringfellow to procure the execution of the deed, and in this manner she sought to fix upon Stringfellow notice of the alleged falsity of the certificate of acknowledgment and of her alleged misunderstanding of the legal effect of the deed she executed. In several paragraphs of the charge, the court, in effect, instructed the jury that if at the time Mrs. Braselton's acknowledgment to the deed was taken Bern Wilson, the notary who took it, or the firm of Wilson, Dalton & Wilson, of which he was a member, were the agents or attorneys of Stringfellow or the Amarillo National Bank for the collection of \$2,000 owing by Braselton to the bank, then Stringfellow and the bank would be chargeable with knowledge of any failure of the notary to correctly take Mrs. Braselton's acknowledgment to the deed, and also with any notice which the notary had that Mrs. Braselton understood the deed to be a mortgage. In this we believe there was error. An agent or attorney employed to collect a debt has no authority to receive property in lieu of money in satisfaction of the debt. Mechem on Agency, arts. 375, 819. And, if it be true, as contended by appellants, that prior to the execution of the deed Braselton had agreed to sell Stringfellow the property in consideration of a credit to be given on the indebtedness Braselton owed the bank, and that nothing was left to be done by Braselton and wife to consummate the trade except to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

execute, acknowledge, and deliver the deed, the authority previously given the attorney to collect the debt in money would not of itself be authority to act as the agent of Stringfellow in procuring the execution of the deed by Mrs. Braselton. *M. & T. Ry. Co. v. Belcher*, 88 Tex. 549, 32 S. W. 519.

The reasoning above advanced applies with equal force to the first paragraph of the court's charge, wherein the jury are, in effect, instructed that notice to Bern Wilson that plaintiff did not willingly execute the deed would be notice to the appellants of that fact, if at the time Bern Wilson or his firm of attorneys were the attorneys of appellants generally without any reference to the scope or character of such employment. Appellee contends, in effect, that, if such an error occurs in some paragraphs of the charge, the same was cured by instructions given in the seventh paragraph, wherein the jury were instructed in substance that Stringfellow would not be bound by the act, declaration, or conduct of any person unless such person was authorized to do and perform same, or unless Stringfellow afterwards learned of such act or declaration, and with such knowledge accepted the benefits or fruits thereof. Our attention has not been called to any evidence in the record, nor have we been able to find any, tending to prove that Stringfellow was notified of any irregularities in the matter of taking the acknowledgment of Mrs. Braselton to the deed, nor of her understanding that it was a mortgage at the time she executed and acknowledged it, unless notice to Bern Wilson was in law notice to Stringfellow. The charge of the court is also subject to the criticism by appellant that the issue of whether or not Mrs. Braselton acknowledged that she had willingly signed the deed was submitted in the third paragraph and repeated in the fourth paragraph of the charge, and that the plaintiff's contention that Bern Wilson had been employed by Stringfellow to procure the execution of the deed was presented with unnecessary frequency, thereby giving it undue prominence.

Under their fourth assignment of error appellants contend that the failure of the notary to explain the deed to Mrs. Braselton privily and apart from her husband would be immaterial if she in fact fully understood it at that time from some other source. To hold with this contention would be to dispense with one of the statutory requirements in taking the acknowledgment of a married woman to a deed conveying her homestead, and the contention is overruled. *Kopke v. Votaw* (Tex. Civ. App.) 95 S. W. 15.

In view of another trial, we suggest, further, that, if plaintiff signed the instrument with the understanding that it was a deed, the fact that she also understood that her husband should have the option to repurchase

the property for \$2,000 within a given period of time would not furnish the basis for a recovery. *Miller v. Yturria*, 69 Tex. 549, 7 S. W. 206; *Rotan Grocery Co. v. Turner* (Tex. Civ. App.) 102 S. W. 932.

For the errors above indicated, the judgment of the trial court is reversed, and the cause remanded for a new trial.

#### INTERNATIONAL & G. N. R. CO. v. GARCIA.†

(Court of Civil Appeals of Texas. Feb. 18, 1909. Rehearing Denied March 18, 1909.)

##### 1. TRIAL (§ 256\*)—REQUESTS FOR INSTRUCTIONS—NECESSITY.

The omission from an instruction of a material part of defendant's pleadings containing some of his defenses is not of itself affirmative error, in absence of a special charge requested covering the omission.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628, 630; Dec. Dig. § 256.\*]

##### 2. TRIAL (§ 203\*)—INSTRUCTIONS—REQUESTS—NECESSITY.

The court need not state the entire pleadings in the instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.\*]

##### 3. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—QUESTION FOR JURY.

In an action for injuries to a section hand by being thrown from a hand car which was derailed by running over the foreman, who fell from the car while attempting to knock rocks from the rail in front of the moving car, whether the foreman was negligent was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1032, 1033; Dec. Dig. § 286.\*]

##### 4. NEGLIGENCE (§ 136\*)—QUESTION FOR JURY—SUFFICIENCY OF EVIDENCE.

Acts forming the basis of an action for injuries alleged to have been negligently inflicted need not be affirmatively characterized by the witnesses as negligent in order to make a case for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 282, 293; Dec. Dig. § 136.\*]

##### 5. EVIDENCE (§ 472\*)—OPINION EVIDENCE—CONCLUSIONS.

In an action by a section hand for injuries caused by the derailment of a hand car by running over the foreman, who fell off while attempting to kick rocks from the track, testimony that the foreman's act was careless or negligent would not be admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2248; Dec. Dig. § 472.\*]

##### 6. MASTER AND SERVANT (§ 90\*)—INJURIES TO SERVANT—NEGLIGENCE—TEST.

The test of negligence, in a servant's action for injuries claimed to have been caused by his foreman's negligence, was a failure to exercise that degree of care and caution which a person of ordinary prudence would have exercised under the same or similar circumstances, and not what an ordinarily prudent foreman would have done under the circumstances; the care required of his foreman being the same as that required by others similarly situated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 139; Dec. Dig. § 90.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.



**7. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—PROPOSITIONS.**

The court rules require assignments of error to be followed by distinct propositions, and simply designating an assignment a proposition does not make it one.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

**8. MASTER AND SERVANT (§ 285\*)—INJURIES TO SERVANT—PROXIMATE CAUSE—QUESTION FOR JURY.**

In an action by a section hand for injuries caused by the derailment of a hand car, the evidence showed that the derailment was caused by the foreman, who sat on the front of the car, attempting to kick rocks from the rail, when his clothes caught in the wheels throwing him off, or he lost his balance and fell under the car, derailing it. *Held*, that a peremptory instruction for defendant, on the ground that the foreman's acts were not the proximate cause of the injuries, was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1035; Dec. Dig. § 285.\*]

**9. MASTER AND SERVANT (§ 291\*)—INJURIES TO SERVANT—INSTRUCTIONS—ASSUMPTION OF RISK—APPLICABILITY TO ISSUES.**

In an action by a section hand for injuries caused by the derailment of a hand car by running over the foreman, who fell from the front of the car, where the only allegation as to assumed risk was that plaintiff assumed the risk of danger from a derailment by some one accidentally falling from the car, an instruction was not justified that he assumed the risk of injuries from the acts and practices of defendant and its agents which were known to him before the happening of the acts complained of.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1138; Dec. Dig. § 291.\*]

**10. MASTER AND SERVANT (§ 262\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—NECESSITY OF PLEADING.**

Assumption of risk from danger caused by the master's negligence, or arising from a faulty manner of work, must be pleaded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 858; Dec. Dig. § 262.\*]

**11. MASTER AND SERVANT (§ 264\*)—INJURIES TO SERVANT—PROOF—ASSUMPTION OF RISK.**

While in some cases the assumption of a particular risk may be shown under a general plea alleging the assumption of risks of the danger from which the injuries resulted, when the particular risk is specified no other risks may be shown.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 868, 870; Dec. Dig. § 264.\*]

**12. MASTER AND SERVANT (§ 226\*)—ASSUMPTION OF RISK—RISKS ASSUMED—MASTER'S NEGLIGENCE.**

A servant does not assume the risk of injuries from the negligent acts and practices of the master or his representatives of which he knew before the happening of the act complained of.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 662; Dec. Dig. § 226.\*]

**13. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.**

An instruction submitting an issue not raised by the evidence was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 596; Dec. Dig. § 252.\*]

**14. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMPTION OF FACTS.**

In an action by a section hand for injuries caused by the derailment of a hand car

by running over the foreman, who fell in front of the car while attempting to knock stones from the rail, a requested charge was erroneous which assumed that the foreman's act was not negligent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 428-430; Dec. Dig. § 191.\*]

Appeal from District Court, Hays County; L. W. Moore, Judge.

Action by Cayetano Garcia against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

S. R. Fisher, J. H. Tallichet, S. W. Fisher, N. A. Steadman, and Jno. M. King, for appellant. Will G. Barber and B. G. Neighbors, for appellee.

**HODGES, J.** The appellee was a section hand in the employ of the appellant company. On the 13th day of June, 1906, he was injured by the derailment of a hand car upon which he and other employes were at the time riding. The accident was caused by the section foreman falling from his seat on the front end of the car, across the track, and throwing the car off. It is charged that the section foreman was negligent in permitting his feet to become entangled or caught by the wheel of the car, thereby causing his body to be jerked or thrown in front of the car and run over by the wheels. A trial before a jury resulted in a verdict for the appellee for \$1,000.

Appellant insists that there was a fatal variance between the allegations and the proof as to the acts of negligence relied on. That portion of the petition which undertakes to state the cause of action is as follows: "The section foreman was seated upon said car, with his feet and legs hanging from off and in front of the car; and while in this position the said foreman carelessly, recklessly, and negligently slid his feet and legs in front of the wheels of said car so being propelled by plaintiff and other section hands, and while said car was in motion, in such a manner that his feet and legs became entangled and were caught under and by the wheels of said car belonging to defendant, and thereby caused said car to be derailed from off the track and throwing plaintiff violently upon the ground in such a manner and with so great force as to seriously and permanently injure him," etc. The plaintiff in the case testified that he was standing near the center of the car and immediately behind Little, the foreman. Little was at the time of the derailment trying to kick dirt off the track with his foot, and had been in that position for some time. The cause of the derailment was occasioned by Little's foot being caught in the wheels. The car passed over Little's body and was derailed thereby, and as the result of the derailment the plaintiff fell to the ground. Rodriguez, another witness, testified that, as they ran down to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the place where they were thrown from the track, he saw a small rock on the rail, and that there were three rocks about the size of an egg. He did not remember how far he was away from them when he first saw them, probably about six steps. As they approached these rocks, Mr. Little tried to remove them with his foot by kicking at them. At the time he kicked witness thought the wheel caught his pants. He saw that. The car was not going very fast. On cross-examination, in speaking of the rocks, he stated: "They were about the size of a hen's egg. He thought the boss knocked all three of them off, and thought that it was about the time he knocked them off that his pants were caught in the wheels. He saw the boss when he started to kick them off. Didn't know how far off he was from them when he began hanging his feet. The boss was in the habit of doing that." Little, the foreman, in speaking of how the accident occurred, says that they were going at the time at about from 6 to 10 miles an hour. The position he took on the front end of the car was one usually taken by a foreman. He was looking ahead for obstructions, and saw a small rock on the track ahead of them as large as a hen's egg, or larger. They had approached to within 15 or 18 feet of it when he saw it. He did not think it would have been possible to stop the car in that space, running at the rate of speed they were. They were probably about 20 feet from it when he saw the rock. He kicked at the rock to get it off the rail, and was not quick enough, or something, and lost his balance and fell off. The hand car ran over him and went about 60 feet beyond. He had frequently kicked at rocks before. There is no material variance between the pleadings and this evidence. The gist of the allegations was that the foreman negligently permitted his feet and legs to be caught by the wheel, and his body jerked in front of the car, thus causing the derailment and the alleged injury to the appellee. It was only necessary that the substance of the issue be proven. *Hicks v. Railway Co.*, 96 Tex. 355, 72 S. W. 835.

The proposition under the second and third assignments of error attacks the charge of the court in failing to state all the defenses relied on by the appellant, contending that inevitable accident was one of the defenses pleaded as the cause of the derailment of the car. We do not so construe the pleadings. Neither do we think the charge subject to the criticism urged. If the court had omitted a material portion of the pleadings of the appellant in the statement of its defenses, this would not of itself have been an affirmative error, and, in the absence of a refusal to give a special charge covering the omission, there was no ground for complaint. A court is not required to state any more of the pleadings of the parties than he deems necessary, and, if there should be an omission, the party complaining should request a special charge before he will be heard to

urge this omission on appeal as a ground for reversal. *Railway Co. v. Lehmberg*, 75 Tex. 66, 12 S. W. 835.

As to the fourth assignment, we deem it only necessary to say that in our opinion there was sufficient evidence of negligence on the part of the foreman to authorize the court to submit that issue to the jury. It was not essential to proof of negligence that some witness should have testified that the acts done by the foreman were careless or negligent. Such evidence, if offered, would not have been admissible. It was for the jury to say whether the foreman's conduct in undertaking to kick the rocks from the rail in front of the car at the time and under the circumstances then existing was prudent and free from negligence. This also disposes of assignments Nos. 10 and 12.

We think the court submitted the proper test in telling the jury that "negligence was the failure to exercise that degree of care and caution which a person of ordinary prudence would exercise under the same or similar circumstances," and properly refused the charge requested by the appellant giving as the test what an ordinarily prudent foreman would have done under the circumstances. We know of no rule that permits the exercise of less care on the part of a section foreman, in order to escape the charge of negligence, than is exacted of others similarly situated.

Assignments Nos. 7, 8, and 9 are too general to be considered as propositions within themselves, and are not followed by any distinct propositions as required by the rules. Simply labeling an assignment a proposition does not make it one.

The thirteenth assignment is based on the refusal of the court to give a peremptory instruction to find for the defendant below upon the assumption that the acts of the foreman were not the proximate cause of the injury. The charge was properly refused.

Special charge No. 6 requested and refused, submits a defense not pleaded as one of the risks assumed by appellee. The charge seeks to exonerate the appellant from liability upon the ground that the appellee assumed the risk of injuries from the acts and practices of the appellant and its agents which were known to him "before the happening of the acts" complained of. No such defense as this was pleaded. It was alleged by the appellant that the appellee assumed the risk or danger of the car's being derailed by some one falling from the car by accident and through no want of ordinary prudence, but that issue is not presented in the requested charge. The assumption by the servant of the risk of being injured from a danger caused by the negligence of the master or his representative, or that arising from a faulty system of doing business, is a special defense and must be pleaded in order to be made available. While in some instances the assumption of a particular risk or danger may

be urged as a defense under a general plea charging that the plaintiff in the case assumed the risks of the dangers from which his injuries resulted, yet when the particular risk is specified this defense is restricted to those alleged. In this case there is no general plea of assumed risk, nor is the particular risk here sought to have been brought to the attention of the jury mentioned in the pleadings of the defense. Besides, the charge does not announce a correct proposition of law. In *G. C. & S. F. Ry. Co. v. Brentford*, 79 Tex. 619, 15 S. W. 561, 23 Am. St. Rep. 377, our Supreme Court says: "When the cause of the injury is the direct act of the master, or his representative, it cannot be said that the servant's remaining in the employment is the proximate cause of the injury, even though the servant may have known that the master or his representative had frequently done the same or similar acts which imperilled his safety, for the act which in such case causes the injury is the wrongful act of the master or of his representative, the result of the exercise of the will of the one or the other, and hence the proximate cause of the effect from which the master ought not to be permitted to go free from liability on the ground that the servant knew he had, before the happening of the injury, done acts such as that from which the injury resulted, but still remained in his service."

Special charge No. 7 requests the court to submit an issue not raised by the evidence. There was no testimony that the foreman thought that the rocks at which he claims to have kicked would derail the car, or that he did so to avert a peril. This special charge is also erroneous in assuming to tell the jury as a matter of law that, if he attempted to remove the obstruction under those conditions, his act was not negligent.

The remaining assignments are overruled, and the judgment is affirmed.

### SWIFT & CO. v. MARTINE.

(Court of Civil Appeals of Texas. Jan. 30, 1909.)

#### 1. MASTER AND SERVANT (§ 293\*)—INJURY TO SERVANT—ACTIONS—INSTRUCTIONS—IMPOSING A GREATER DEGREE OF CARE THAN REQUIRED BY LAW.

In an action against a master for injuries to a servant by falling down an elevator shaft, a charge that if the jury believed that the servant stepped into the shaft not knowing it to be a shaft, but believing that he was stepping upon a floor, and that there was not sufficient light in the shaft to render the danger open to the common observation of persons possessing the experience and discretion of the servant, and that the failure to have the shaft so lighted was a failure to exercise that degree of care for the safety of employes which a person of ordinary prudence would have exercised, under the same circumstances, etc., plaintiff should recover, did not impose on defendant a greater burden than authorized by law by requiring it to so light

the elevator shaft that the danger of falling into it would be patent and open to the servant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.\*]

#### 2. MASTER AND SERVANT (§ 296\*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action for injuries to a servant by falling into an elevator shaft, a charge that if there was on the shaft door a notice indicating that it was a door to an elevator shaft, and a person of ordinary prudence, possessing the same experience and capacity to appreciate danger as the injured servant, would under the circumstances have observed the notice before entering the shaft, and would not thereafter have entered it in the absence of the elevator car, the servant was guilty of contributory negligence, was not objectionable as stating facts which would constitute contributory negligence as matter of law and then leaving the question of whether the facts constituted contributory negligence to the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 296.\*]

#### 3. MASTER AND SERVANT (§ 217\*)—ASSUMPTION OF RISK—KNOWLEDGE.

If a servant stepped into an open elevator shaft when there was sufficient light in the shaft to render the danger of so doing patent and open to the common observation of persons possessing the experience and discretion to appreciate such a danger which the servant possessed, the injuries would be the result of an assumed risk, and there could be no recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

#### 4. APPEAL AND ERROR (§ 1067\*)—REVIEW—HARMLESS ERROR—FAILURE TO GIVE INSTRUCTION.

In an action for injuries to a servant by falling down an elevator shaft, the failure to charge to find for defendant, if the sole proximate cause of the injury was the negligence of a co-employe in leaving the elevator door open, was not prejudicial error, where the court, by directing a verdict for defendant if the jury found that it was not negligent in failing to light the shaft or in failing personally to warn the injured servant, in effect assumed that defendant would be entitled to recover in such a case, and the charge nowhere permitted a recovery for negligence in leaving the elevator door open.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1067.\*]

#### 5. TRIAL (§ 260\*)—REFUSAL OF REQUESTS—SPECIAL CHARGES EMBRACED IN CHARGES GIVEN.

Where the defense of contributory negligence was fairly presented by the court's charge, there was no error in refusing special charges thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

#### 6. WITNESSES (§ 331½\*)—IMPEACHING TESTIMONY—FOUNDATION.

Where no proper predicate was laid for impeaching testimony, it was properly excluded.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 331½.\*]

#### 7. TRIAL (§ 183\*)—CONDUCT OF COUNSEL—ARGUMENT—ACTION OF COURT.

In an action against an employer for personal injuries to plaintiff's son, plaintiff's counsel, in his address to the jury, said: "Lay aside the fact that this man—you cannot give him compensation for suffering he undergoes when he sees his boy crippled for life. Your hearts

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rush out to him in sympathy, but you cannot do that. But you can compensate him for his pecuniary loss, and you can do something that will perhaps make it more safe for me, and your boy, and mine, and everybody else that has occasion to deal with these people, to see that they treat us as reasonably prudent men ought to treat others." *Held*, that the language was not so inflammatory as to be ground for reversal, where the jury were pointedly charged not to consider it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 303; Dec. Dig. § 133.\*]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by Joseph A. Martine against Swift & Co. Judgment for plaintiff, and defendant appeals. Affirmed

Lassiter & Harrison, for appellant. Bell & Milam, for appellee.

SPEER, J. This is an action by Joseph A. Martine against Swift & Co. to recover damages growing out of personal injuries received by his son, Thomas, by reason of falling into an open elevator shaft at the packing establishment of the defendant, in whose employment both father and son were at the time of the accident. The defendant pleaded the general issue, contributory negligence, and assumed risk. There was judgment for the plaintiff in the sum of \$1,700, and the defendant has appealed.

Since the assignments for the most part relate to charges given or refused, we here set out the court's charge, so far as the same is pertinent:

"(1) If you believe from the evidence that on the occasion in controversy, plaintiff's son, Thomas Martine, stepped into defendant's elevator shaft not knowing that the same was an elevator shaft, and believing that he was stepping upon a floor, and that he was thereby caused to fall and sustain injuries, and if you further believe from the evidence that when said Thomas Martine stepped into said shaft there was not sufficient light in said shaft to render the danger of stepping into the same, in the absence of the elevator car, patent and open to the common observation of persons possessing the experience and discretion to appreciate such dangers which you believe from the evidence said Thomas Martine possessed at the time, and that the failure of the defendant to have said shaft so lighted, without warning said Thomas Martine in person of the location of said elevator, was a failure to exercise that degree of care for the safety of its employes which you believe a person of ordinary prudence would have exercised under the same circumstances, and that such failure, if any, of the defendant, was the proximate cause of the injuries so sustained by said Thomas Martine, then you will return a verdict in favor of the plaintiff against the defendant.

"(2) The foregoing instruction, however, is given subject to the qualification contained in

this further instruction, to wit: If you believe from the evidence that there was on the door of said elevator shaft, through which plaintiff's son entered the shaft, a printed sign or notice indicating that the same was the door to an elevator shaft, and that a person of ordinary prudence, possessing the same experience and capacity to appreciate danger which you believe from the evidence said Thomas Martine possessed at the time, would, under the same circumstances, have observed said sign or notice before entering said shaft, and, after discovering the same, would not have entered it, in the absence of the elevator car, then you will find that plaintiff himself guilty of negligence proximately contributing to his injury.

"(3) On the contrary, if you believe from the evidence that a person of ordinary prudence, of the same experience and capacity to appreciate danger which you believe from the evidence that Thomas Martine possessed at the time, would not, under the same circumstances, have observed said sign or notice, and would, under the same circumstances, have stepped into said open shaft, just as plaintiff's son stepped into it, then you will find that said Thomas Martine was not guilty of negligence proximately contributing to his injury.

"(4) If, under foregoing instruction, you find that said Thomas Martine was himself guilty of negligence proximately contributing to his injury, then you will return a verdict in favor of the defendant, independent of any finding you may make upon any issue submitted to you in the first paragraph of this charge.

"(5) You are further instructed that if you believe from the evidence that, when said Thomas Martine stepped into said shaft, there was sufficient light in said shaft to render the danger of so doing patent and open to the common observation of persons possessing the experience and discretion to appreciate such a danger, which you believe from the evidence said Thomas Martine possessed at the time, then you will return a verdict in favor of the defendant.

"(6) The defendant was not an insurer of the personal safety of Thomas Martine while he was engaged in its service, and the extent of its duty to him was to exercise that degree of care for his personal safety which a person of ordinary prudence, in the same situation, would use under the same or similar circumstances; and if you believe from all the facts and circumstances in evidence that a person of ordinary prudence, in defendant's situation, would not, under the same circumstances, have lighted said elevator shaft artificially, and would not have personally notified said Thomas Martine of the location of said shaft, then you will return a verdict in favor of the defendant."

It is first insisted that the first paragraph

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the charge imposed upon appellant a greater burden than authorized by law, in that it required appellant to so light the elevator shaft as that the danger of falling into it would be patent and open to the injured employé; but it will be observed that the jury are further required to find that the failure of appellant to have its said shaft so lighted—whatever the extent of that failure—was a failure to exercise that degree of care for the safety of its employés as they believe an ordinarily prudent person would have exercised under the same circumstances, i. e., that the defendant, in failing to light its elevator shaft so that the danger would be apparent to its employés, was guilty of negligence. In such case we think necessarily the verdict should be for the plaintiff.

The second paragraph of the charge is next attacked upon the ground that if Thomas Martine, after having seen the sign on the door and having discovered the elevator shaft, should have walked into it, he would necessarily be guilty of contributory negligence, and it was therefore improper to leave the determination of that question to the jury; but the charge as given was favorable to the appellant, and we see no merit in the criticism made.

The criticism of the fifth paragraph of the charge is predicated on the assumption that the court was there dealing with the issue of contributory negligence; whereas it is apparent that another and different defense, to wit, that of assumed risk, was presented. As a charge on assumed risk, the paragraph appears to be unobjectionable.

The greatest show of merit is presented in appellant's fourth and fifth assignments of error, to the effect that the jury should have been instructed to find for appellant if the sole proximate cause of Thomas Martine's injury was the negligence of a co-employé in leaving the elevator door open. An examination, however, of the sixth paragraph of the court's charge, will show that the court in effect assumed that appellant would be entitled to a verdict in such a case by directing a verdict in its favor if the jury found that it was not negligent in failing to light the elevator shaft, or in failing personally to warn the said Thomas of the location of said shaft. It is also to be remarked that the charge nowhere permitted a recovery upon negligence in leaving the elevator door open.

The defense of contributory negligence appears to have been fairly presented, and there was therefore no error in refusing the various special charges requested.

There was no error in excluding the testimony of the witness Robert Erwin. The effect of this testimony, if admitted, would have been to impeach the witnesses Sligh and Hare, and no proper predicate was laid for the introduction of such impeaching testi-

mony. *Smith v. Jones*, 11 Tex. Civ. App. 18, 31 S. W. 306.

Counsel for appellee, during his address to the jury, made use of the following language: "Lay aside the fact that this man—you cannot give him compensation for suffering he undergoes when he sees his boy crippled for life. Your hearts rush out to him in sympathy, but you cannot do that. But you can compensate him for his pecuniary loss, and you can do something that will perhaps make it more safe for me, and your boy, and mine, and everybody else that has occasion to deal with these people, to see that they treat us as reasonably prudent men ought to treat others." It is insisted that this language was of such inflammatory character as that its use should work a reversal of the case, notwithstanding the trial court pointedly instructed the jury not to consider it; but we think otherwise. It is doubtful if the language is objectionable at all in view of the issues in the case; but, if so, clearly the instruction was sufficient.

The verdict and judgment are supported in the evidence, not only upon the issue of appellant's negligence, but upon the defensive issues of contributory negligence and assumed risk.

We find no error in the judgment, and it is affirmed.

#### GALVIN v. McCONNELL et al.

(Court of Civil Appeals of Texas. Jan. 30, 1909.)

#### 1. RECEIVERS (§ 1\*)—APPOINTMENT—NATURE OF REMEDY.

The remedy of a receivership is in all cases to be cautiously applied.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

#### 2. CORPORATIONS (§ 553\*) — RECEIVERSHIP — GROUNDS—INSOLVENCY.

A creditor, having a valid debt against an insolvent corporation, secured by lien, is entitled to collect it in a legal way, without the appointment of a receiver, unless the statute or equitable principles authorize a receivership under the circumstances; it not being presumed that the property will be needlessly sacrificed in enforcing the lien.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.\*]

#### 3. CORPORATIONS (§ 559\*) — RECEIVERS — APPOINTMENT—EFFECT—EXISTING LIENS.

The appointment of a receiver for an insolvent corporation, on the intervention of creditors in a suit by a director thereof on notes owned by himself, secured by a lien, on the ground that the director had negligently permitted the corporation to become insolvent, would not destroy the director's lien for security of his notes.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2248; Dec. Dig. § 559.\*]

#### 4. CORPORATIONS (§ 553\*)—APPOINTMENT OF RECEIVER—INSOLVENCY.

Mere insolvency of a corporation is not sufficient in equity to authorize the appointment of a receiver.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

# 5. CORPORATIONS (§ 566\*)—CREDITORS' LIENS—NATURE.

General creditors of an insolvent corporation have a lien on its assets, if at all, only after the payment of debts having priority.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 566.\*]

# 6. EXECUTION (§ 224\*)—SALE—SALE IN PARCELS.

In an action by corporate creditors to subject land on which a director had a lien to the payment of corporate debts, the land could be sold in quantities less than the whole, without the appointment of a receiver for the corporation; Rev. St. 1895, art. 2383, permitting defendant in execution to designate the size of the parcels and order of their sale.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 638-640; Dec. Dig. § 224.\*]

# 7. CORPORATIONS (§ 553\*)—RECEIVERS—NECESSITY.

In an action by general creditors of an insolvent corporation to subject land and other property on which a director had a lien to the payment of corporate debts, on the ground that its insolvency was caused by the director's negligence, the securities could be marshaled without the appointment of a receiver.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 553.\*]

# 8. CORPORATIONS (§ 256\*)—STOCKHOLDERS—ADDITIONAL LIABILITY.

By the direct provisions of Rev. St. 1895, art. 671, where execution has been issued against a corporation, with certain exceptions, and no property is found, execution may issue against any stockholder to the extent of his unpaid stock subscription.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1036-1048; Dec. Dig. § 256.\*]

# 9. CORPORATIONS (§ 553\*)—APPOINTMENT OF RECEIVER—GROUND—MISMANAGEMENT OF DIRECTORS.

In an action by the director of an insolvent corporation on notes secured by lien on land, upon which the corporation was doing business, corporate creditors intervened to have a receiver appointed for the corporation, alleging that the director fraudulently permitted himself to be held out as director of the corporation, and because of his gross negligence and inattention the company became insolvent; but no affirmative act of fraud or mismanagement was alleged from which fraud or liability could be deduced, nor was it alleged that the original incorporators were insolvent, and the extent of the corporate indebtedness was not shown, and no facts were alleged to show why it could not continue its ordinary business. The director was not the managing officer of the corporation, which conducted its business in the county of the principal intervenor's residence, and the director's lien was recorded in that county before intervenors' claim accrued. *Held*, that the fact that plaintiff was, or permitted himself to be held out to be, a director, did not justify the appointment of a receiver for the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.\*]

# 10. APPEAL AND ERROR (§ 846\*)—FINDINGS—CONCLUSIVENESS—CONFORMITY TO PLEADINGS.

A finding not authorized by the pleadings will be disregarded on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 846.\*]

Appeal from District Court, Jack County; J. W. Patterson, Judge.

Action on a note and to foreclose a trust deed and chattel mortgage by J. W. Galvin against B. R. McConnell and others, in which A. J. Birdsong and others intervened to have the mortgaged property decreed that of a corporation of which plaintiff was director, and for a receiver for the corporation. From an interlocutory order appointing a receiver for the corporation, plaintiff appeals. Reversed and order vacated.

Nicholson & Fitzgerald, for appellant. Sporer & McClure, for appellees.

CONNER, C. J. This is an appeal from an interlocutory order of the district court appointing a receiver of the property of the Jacksboro Stone Company in a suit instituted by appellant against B. R. McConnell, Mrs. Jeanette D. McConnell, and Mrs. Lou McConnell upon a promissory note executed by the latter-named persons for \$10,000, with interest and attorney's fees, and for a foreclosure of the lien given to secure the same, which was evidenced by certain trust deeds conveying to a trustee all of the property described in the plaintiff's petition. It was alleged that the note and lien had been made to Ella Dilworth and later acquired by appellant in due course of trade. After the institution of the suit, the Jacksboro Stone Company, doing business upon the land described in the trust deed, A. J. Birdsong, and numerous other creditors of the Jacksboro Stone Company were permitted to intervene upon petitions therefor praying for the appointment of a receiver. So far as necessary to state, the intervening creditors alleged that appellant had permitted himself to be held out as one of the directors of the Jacksboro Stone Company, that he had failed to perform any of the duties of such director, that he had permitted the company to become insolvent on account of his gross negligence and inattention, and that the advances and credits specified in the petition for intervention had been extended to the stone company upon the faith that appellant, who was known as a man of means, business energy, and discretion, was such director. It was further charged that the cattle upon which appellant's lien rested numbered between 75 and 100 head, of value from \$50 to \$100 each, that the land consisted of a little more than 1,000 acres of the value of \$20 to \$25 per acre, if properly sold, and it was insisted that appellant should exhaust his lien upon the cattle before resorting to the land, and that he should not be permitted to sacrifice the land, "but that it should be cut up and sold advantageously, as well as the other property, so that the rights of the intervenors should be protected, \* \* \* and that in order to accomplish this a receiver should be appointed for that purpose as well as to operate said plant during this suit." The court found that the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Jacksboro Stone Company was an insolvent corporation, that the interveners Birdsong and others were creditors of the corporation, and that the corporation is unable to operate its plant, viz., the business of quarrying and crushing stone for sale. The court further found that appellant's lien was prior to any lien of the interveners, which is, as stated by the court in his findings, "no other lien except such as law gives to creditors of an insolvent corporation upon the assets of the same," but that "it is to the interest of said interveners' creditors as well as to the intervener Jacksboro Stone Company, that a receiver be appointed to operate the same under the directions of this court," and thereupon proceeded to make the order appealed from. It should perhaps in this connection be further stated that interveners further alleged that the Jacksboro Stone Company had been incorporated with a capital stock of \$30,000, represented to have been paid in full, that appellant was one of its original incorporators, and that in fact no part of said capital stock had ever been paid up.

We have very carefully considered the several petitions for intervention, as well as the court's findings, and have been unable to adopt the view represented by the judgment of the trial court. In all cases, as we understand the law, the remedy of a receivership is to be cautiously applied. See 5 Pom. Eq. § 117. A creditor having, as here, a valid debt and lien on property of a corporation, is entitled in the legal way to proceed in the collection of his debt without being incumbered with the delays and unavoidable costs of a receivership in all cases save in those where by the statute or principles of equity a receiver for the incumbered property is authorized. Mere insolvency of a corporation in equity is no ground for the appointment of a receiver (5 Pom. Eq. § 116), though by our statute in general terms it seems to have been made so. See Rev. St. 1895, art. 1465, cl. 3. Another clause of the same article of the statute in like general terms, however, was held by our Supreme Court not available for a mere creditor of an insolvent corporation without specific lien. See *Carter Bros. v. Hightower*, 79 Tex. 135, 15 S. W. 223. See, also, *New Birmingham Iron & Land Co. v. Blevens*, 12 Tex. Civ. App. 410, 34 S. W. 828; *Espuela Land & Cattle Co. v. Bindle*, 5 Tex. Civ. App. 18, 23 S. W. 819; *People's Inv. Co. v. Crawford* (Tex. Civ. App.) 45 S. W. 738; 5 Pom. Eq. §§ 112, 118—it being stated in the last section "that it is error for the court to appoint a receiver of a corporation on its own petition alleging its insolvency." It cannot be contended that the court by receivership proceedings can destroy appellant's lien. Indeed, the court expressly recognized his lien as valid and prior in point of time to any lien that could be asserted by appellees. Appellees' lien, at best, is but a lien upon the assets, if any, of

the insolvent corporation after the payment of debts having priority. It is not to be presumed that in lawfully subjecting the property upon which appellant has a lien to the payment of his debt it will be needlessly sacrificed. Without the appointment of a receiver, securities may be marshaled, and the land upon which the lien exists may be sold in quantities less than the whole; our statute expressly providing that a defendant in execution may designate the size of the parcels and order of their sale. Rev. St. 1895, art. 2363. If the property has the value alleged by appellees, it would seem that there is more than is necessary to satisfy appellant's debt, besides the right the interveners undoubtedly have to resort to the unpaid capital stock as assets to which they may look in satisfaction of their claims. See *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 222. See, also, Rev. St. 1895, art. 671, which expressly provides that where an execution "shall have been issued against property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then the execution may be issued against any of the stockholders to an extent equal to the amount of the stock unpaid," etc.

It is not alleged that the original incorporators are insolvent, and, while it is charged that the Jacksboro Stone Company is indebted in sums other than those stated in the several petitions, no statement of the amount of such other indebtedness is given, so as to enable the court to determine whether the total indebtedness exceeds the assets of the corporation. Nor is any fact alleged showing why the corporation is unable to pursue its ordinary business. Nor do we think the allegation that appellant permitted the company to hold him out as a director sufficient ground for the appointment of a receiver, for, while the allegations that appellant acted fraudulently in so permitting himself to be held out are several times repeated, no affirmative act on appellant's part of fraud or of mismanagement of the affairs of the corporation is charged from which fraud or liability for loss can be deduced. He was not the managing officer of the corporation. The corporation, according to the allegations, operated its business within the county of the principal intervener's residence. It was alleged that appellant's lien had been duly recorded in that county on a day antedating the accrual of interveners' claims, and the mere fact that interveners may have understood, as they alleged, that appellant was one of the directors, could not, under the circumstances of this case, operate as such fraud or mismanagement as authorizes a receivership. It is true that the court found that it was to the "interest" of the interveners that a receiver be appointed, but this can hardly be construed

as an express finding of a necessity, or, if so, it is a finding not authorized by the pleadings, and hence is not controlling.

On the whole we think there was no sufficient cause for the appointment of a receiver shown, and it is accordingly ordered that the judgment be reversed, and the order for the appointment of the receiver be in all things vacated and set aside.

**SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. SOLOMON et al†**

(Court of Civil Appeals of Texas. March 4, 1909.)

**1. NEGLIGENCE (§ 2\*)—DUTY TO USE CARE—CONTRACTUAL RELATIONS.**

To entitle one to sue for negligence in performing a contractual duty, no injury to person or property being shown, it must appear that the contract was made by him or was made to inure to his benefit.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 3; Dec. Dig. § 2.\*]

**2. DAMAGES (§ 23\*)—MEASURE—BREACH OF CONTRACT.**

The measure of damage for breach of contract includes such damage as may reasonably be considered as arising naturally from the breach or as may reasonably be supposed to have been contemplated by the parties when they contracted.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 58; Dec. Dig. § 23.\*]

**3. DAMAGES (§ 56\*)—BREACH OF CONTRACT—INJURY TO FEELINGS.**

There is no right of recovery for mere injury to feelings caused by breach of contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 104; Dec. Dig. § 56.\*]

**4. DEATH (§ 15\*)—DAMAGES—BREACH OF CONTRACT—RIGHT TO SUE.**

Decedent, had she lived, could not have recovered from a telephone company for breach of a general contract to provide telephone service, resulting in a delay in procuring a physician's attendance at her childbirth, since such damage could not have been reasonably foreseen to follow a breach of contract by, or negligence of, the company, and hence her husband and children cannot recover for her death, which was caused by hemorrhage, since the statutory right to sue for wrongful death depends upon decedent's right to have sued.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 17; Dec. Dig. § 15.\*]

Appeal from District Court; Harrison County; W. C. Buford, Judge.

Action by C. S. Solomon and others against the Southwestern Telegraph & Telephone Company. From a judgment for plaintiffs, defendant appeals. Reversed and rendered.

The suit is by C. S. Solomon, Sr., and his minor children, for damages alleged to have been sustained through the negligence of the appellant company which resulted in the death of Mrs. Solomon, the wife and mother. By the petition it is claimed: That appellant operated a system of telephones in Marshall, Tex., and that on July 17, 1901, C. S. Solomon, Sr., plaintiff, had a telephone instru-

ment installed in the house of Mrs. Godbold, his mother-in-law, and that he had a contract with the defendant company to maintain said instrument in said house for the purpose of plaintiff's communicating with other subscribers, and plaintiff paid a part of the monthly rental for such service; that defendant agreed to furnish telephone connection with all of the other subscribers to the system in Marshall, and among whom were about 20 physicians; that appellant had obligated itself to properly construct, equip, maintain, and keep in repair the said telephone; that on the night of February 5, 1906, the wife of C. S. Solomon and mother of the other plaintiffs was taken ill with childbirth, and it became necessary to have a physician to give her medical and surgical attention; that C. S. Solomon, Sr., about 2 a. m. on said date, went to the said telephone and rang the central office for the purpose of getting connection with Dr. Rosborough, who was plaintiff's family physician, and who also had in his residence a telephone and was connected with the system as a subscriber; "that the instruments, batteries, circuits of electricity, and wires were so out of order, unsuitable, and unfit for the purpose for which they were intended that the said plaintiff could not secure any telephonic connection with the central office of the system, the wires were not properly insulated or stretched, and ran through tree tops and bushes, and were in contact with other objects, not insulators, and were grounded improperly, and with reference to the instrument of plaintiff, was unfit for the use to which it was placed and put;" that the plaintiff could not get connection with the central office, and thereby make connection with the residence of Dr. Rosborough, so that plaintiff could notify the said doctor to come and attend his wife in her sickness; that plaintiff tried in this way some 30 minutes or more to reach the residence of the said doctor, and finally abandoned the idea of getting the central office, and proceeded on horseback to the home of the said doctor, distant about two miles from his home; that when the plaintiff reached the home of Dr. Rosborough he found the said doctor sick in bed and unable to respond to said call and attend his wife; that plaintiff then tried at the doctor's residence to get connection with the central office, but failed, and from there proceeded to the central office of the defendant to get connection from there with the residence of Dr. Hilliard, and on reaching the central office found all the doors closed and locked; that he then went to a saloon and there got connection with the central office and telephoned Dr. Hilliard to come immediately to see his wife, explaining her condition; that the said doctor lived two miles from plaintiff's residence; that when plaintiff arrived home he found that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.



his wife had delivered the child, and she was flooding, and died in a few minutes after Dr. Hilliard arrived; that Dr. Hilliard, upon receiving the summons, started immediately and came with all dispatch; and that, if the telephone system had been properly constructed and maintained, plaintiff would have been able to secure telephone connection with a physician sooner and so saved the life of the deceased. Appellant answered by demurrer, general denial, and contributory negligence. The case was tried to a jury, and in accordance with their verdict a judgment was rendered in favor of the children and against C. S. Solomon, Sr. From the judgment appellant has brought the case on appeal, seeking to have the same revised for the errors assigned.

It was substantially shown by the evidence that about 2 a. m. of February 5, 1906, Mrs. Solomon was taken violently sick in childbirth, and that her husband tried to call the family physician over the telephone of appellant in which he had a rental interest, but could not get connection with the central office because the telephone was out of order, due to the negligent condition of the ground wire. Solomon then got on his horse and went to the house of the family physician, the one he had been trying to get over the telephone, and found him sick and unable to go. He then tried to get the central office from this physician's house to get another doctor, but could not get central from there. He then went to the central office, found it locked, and tried to get in, but could not. He then went to a nearby telephone, called central, and summoned another physician, who went to the house, but got there too late to save Mrs. Solomon's life. She had given birth to a child and died from hemorrhage of the womb, which might have been stopped if a doctor had arrived sooner. The doctor testified that she was in a dying condition when he arrived, and, "if I had been there a few minutes after the birth of the child, in my opinion I could have saved the woman's life."

F. H. Prendergast, D. A. Frank, and A. P. Wozencraft, for appellant. James Turner, Y. D. Harrison, T. W. Davidson, and T. P. Young, for appellees.

LEVY, J. (after stating the facts as above). We think the controlling question of the case is presented by the several assignments of error complaining of the action of the court in overruling the demurrer to the petition.

The statute under which this suit is brought provides that an action for actual damages may be brought when the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another. By further terms of the statute the liability in such cases is declared to depend upon the condition that the act complained of "be of such a character as would, if death

had not ensued, have entitled the party injured to maintain an action for such injury." The petition does not charge that the injury causing the death was from any violence to the person of the deceased. As can be seen, the petition predicates the right of appellees to recover upon the claim of a general contract with appellant for general telephone service over its system in the city of Marshall, which service they did not get at the particular time in question because of negligent maintenance and equipment of the telephone apparatus, and on account of such failure to get telephone service at the particular time in question failed to get a doctor in time to attend the deceased, who at the time was violently sick in childbirth, and who died from flooding or hemorrhage in giving the birth, which might have been stopped if a physician had arrived sooner than he did to attend her in the delivery of the child. The contract for the telephone service was made August 1, 1902, and was for no specified time, but continued generally and to the death of the deceased on February 5, 1906. There was no specific contract with the appellant by which it agreed to transmit or to furnish facilities for transmitting this particular message to the physician expected to be called by appellee to attend the deceased in her confinement. The contract made between the husband and the appellant for general telephone service is therefore to be considered as the basis of this action. By the condition imposed by the statute must the right of the appellees to maintain an action against the appellant be determined. The inquiry is: Had the deceased lived, could she have maintained an action against the appellant, in the circumstances stated in the petition, for damages for the injury? The act complained of is the negligent failure to give telephone service under a general contract to do so. To have entitled the deceased to maintain an action for the negligence in the performance of the duty founded on a contract which raised the duty, no personal injury to the person or injury to her property being shown, it must appear that the contract was made by her, or was made to inure in fact to her benefit. It may be conceded, as a reasonable construction of the contract set up in the petition in this case, that the contract as to general service of the telephone for the use of all of the family of the husband was made at the time to inure in fact for the benefit of the wife. In such action, had she lived, it would have appeared in the circumstances that her damage was the mental anxiety occasioned to her from the delay in procuring a physician's attendance upon her in her then natural sickness of childbirth. Could she recover such damages in the circumstances?

The measure of her recovery must, we think, be determined by the general rule of law which applies to all cases of breach of

contract, which rule is thus expressed in the case of *Telegraph Co. v. Edmondson*, 91 Tex. 209, 42 S. W. 549: "When two parties have made a contract, which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as arising naturally—that is, according to the usual course of things—from such breach of the contract itself, or as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it." Tested by this rule, we think the damages in the circumstances are too remote and are not such as both parties would reasonably have understood and contemplated as likely to result from the breach of the contract or the negligence of the company. If there had been a specific contract with the telephone company by which it had agreed to transmit or to furnish facilities for transmitting this particular message to the physician, or if the object and purpose of the deceased in having the physician summoned over the telephone to immediately attend her was previously made known in proper time to appellant under the general contract of telephone service, they we may have found some analogy between this case and the various telegraph cases where telegraph companies have been held responsible for such damages for failure to promptly transmit and deliver the message; but here the unusual situation and condition of the deceased was not known to the appellant, and it had no notice or previous notice of the importance or urgency of a communication to a physician and his summons to come at the time to attend her. Considered therefore from the standpoint of the appellant company, there was nothing to indicate, at the time or previous to the time, that she was sick in childbirth, and that she had no physician present and could not get one near at hand and could only get one by summoning him two miles away, and that when summoned he would be sick in bed and unable to attend, and that another physician a mile further distant would have to be gotten in his place, and that the deceased would suffer anxiety and suspense because of the fact that a physician failed to reach her sooner than he did. Such suspense and anxiety could not fairly and reasonably be considered in the circumstances as arising naturally and in the usual course of things from the failure of general telephone service, in the absence of notice to appellant of the object and purpose of the deceased in having the physician summoned to come and attend her. Her sickness necessarily caused her to feel some anxiety, and the delay of the physician in coming to attend her would naturally add increased suspense and anxiety. But "some kind of unpleasant emotion in the mind of the injured party is probably the result of

a breach of the contract in most cases, but the cases are rare in which such emotion can be held an element of the damages resulting from the breach. For injury to the feelings in such cases the courts cannot give redress. Any other rule would result in intolerable litigation." *Rowell v. Tel. Co.*, 75 Tex. 26, 12 S. W. 534.

It is argued by appellee that, where the apparatus is installed in a house, the contract for telephone service is to keep the system in working order, so that when one subscriber wants to transact any business with another subscriber to the system the company will put the party wanted to the telephone and make such connections so that the two can transact the business they desire by talking over or through the telephone, and that the contract does not contemplate that the company is to have notice of the nature of the conversation or business. Even so, the contract is one of lease of the instrumentalities, and not of indemnity against any and all loss or damage that might result to or befall the renter of the instrumentalities from failure to get proper telephone service. As a necessary deduction from the rule of law that damages are recoverable only if they flow from the breach in the natural course of events or within the contemplation of the parties, it follows that damages so remote as to fall without these rules cannot be recovered. It would be without warrant of law, and would work injustice, to rule that where a party to a contract is not advised of a special course of circumstances he would be liable for the damages which follow breach by reason of such special course. If such damages could be allowable in the instant case, then with as much reason and force could it be claimed by such rule that a cattle dealer could recover the market decline in value of his cattle because he failed to get telephone service with his agent in the town to instruct him to sell at a particular hour, or where a sheriff having a telephone contract failed to get telephone service with another subscribing officer to instruct arrest of a person accused of crime and thereby lost a reward for the capture. Many other instances of business delay arising could be mentioned, where the damages are remote. As was said by Justice Brown, speaking for the court, in the case of *Telegraph Co. v. Edmondson*, supra: "And we have neither authority nor inclination to extend the right of recovery in this class of cases (meaning recovery for mental anguish alone) beyond the limits already fixed by the decisions of this court."

It follows from this discussion that the deceased, had she lived, could not have maintained an action for the injury claimed. Unless she could maintain the suit under the condition of the statute, the appellees cannot maintain the one brought by them. If the damages in the one instance were too remote, then the death of the deceased was

not the natural and probable consequence of any negligence on the part of appellant and could not have been foreseen in the light of the circumstances. In the case of *Scheffer v. Railway Co.*, 105 U. S. 251, 26 L. Ed. 1070, where a man was hurt by the negligence of the railway company, so that he became mentally deranged and committed suicide, it was held that the negligence of the company in causing the injury was not the proximate cause of the death. In *Telegraph Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772, a telegram was sent to a doctor to come to see Mrs. Cooper, who was sick in childbirth. The defendant had full notice of the arrangement to have Dr. Keating with Mrs. Cooper during confinement. The telegram was not delivered. Among other elements of damage, it was alleged the life of the child was lost. It was held that the death of the child, the bereavement of the parents, and their grief for its loss could not be considered as an element of damages because too remote. In *Railway Co. v. Addison*, 100 Tex. 241, 97 S. W. 1038, 8 L. R. A. (N. S.) 880, it was held that the failure of the defendant company to stop its train at a station was not the proximate cause of plaintiff's physical suffering in travelling overland to his destination, because the damages that he suffered were too remote and could not have been anticipated by the company. In *Palace Car Co. v. McDonald*, 2 Tex. Civ. App. 322, 21 S. W. 945, a passenger was ejected for failure to pay fare, and he claimed mental distress suffered for fear that the delay in the trip would cause his discharge from his employment. It was held that, in the absence of knowledge of the facts causing the distress at the time of the contract, such damages were not within the contemplation of the parties when a ticket was purchased. We are of the opinion that to overrule the demurrer in this case, and allow the action to be maintained, would be to make an exception to well-settled legal principles not warranted by any precedents we have found. This ruling disposes of the appeal.

As it appears unlikely from the case that a cause of action which could be sustained can be averred, the judgment will be here reversed and rendered for the appellant company, with all costs against the appellees herein.

#### HILL v. HOELDTKE et al.

(Court of Civil Appeals of Texas. Feb. 25, 1906.)

#### 1. VENDOR AND PURCHASER (§ 265\*) — PURCHASE-MONEY NOTES—ASSUMPTION OF DEBT—LIABILITY.

Though defendant agreed to pay to a third person the amount of vendor's lien notes as a consideration for a conveyance of the land to

him by such person, he could defend against personal liability to the holders of the notes on the ground that he and such person afterwards rescinded their trade, and that he reconveyed to such person, who agreed to pay the notes and release him, before the holders accepted or became a party to defendant's promise, since defendant's promise did not vest an immediate interest and right in the holders as if the promise had been made direct to them, and until acceptance by them he and such third person could rescind.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 265.\*]

#### 2. VENDOR AND PURCHASER (§ 85\*) — CONTRACTS—RESCISSION.

A contract respecting land may always be rescinded by voluntary act of the parties, either by novation or simple agreement, where they continue to occupy their original relations, though such rescission affects the interest of third persons, if no substantial rights are impaired.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 141; Dec. Dig. § 85.\*]

#### 3. VENDOR AND PURCHASER (§ 265\*)—SPECIFIC PERFORMANCE.

In an action on vendor's lien notes which the holders claim defendant agreed to pay as a consideration for a conveyance to him, he is entitled to specific performance of an agreement for a rescission of the first-mentioned agreement, where the agreement for rescission had been partly performed, and to have the rescission operate as a defense to his personal liability on the notes.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 265.\*]

#### 4. VENDOR AND PURCHASER (§ 265\*)—PURCHASE-MONEY NOTES—ASSUMPTION OF PAYMENT—PERSONAL LIABILITY.

One who assumed payment of vendor's lien notes as part consideration for a conveyance to him can defend against personal liability on the notes by tendering back the land and showing that he was induced to accept the conveyance and assume the notes through fraud of his vendor in falsely representing that the land was free of other liens, if on discovering the fraud he acts promptly in rescinding and before he induces the holders to rely upon the assumption to their injury.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 265.\*]

Error from District Court, Fannin County; Ben H. Denton, Judge.

Action by H. C. Hoeldtke against L. C. Hill and others. From the judgment, Hill brings error. Reversed and remanded.

Defendant in error, Hoeldtke, sued Horstman, McLeary, Leach, and plaintiff in error upon a note and to foreclose a vendor's lien on land. The petition claimed that defendant McLeary had bought the land in question from defendant Horstman, and as a part of the consideration assumed the payment of the note sued on by plaintiff and held by plaintiff against the land, and then sold the land to the plaintiff in error, Hill, who, as a part of the consideration, assumed the payment of the note held by plaintiff. The same facts were alleged as to the note held by Leach in suit.

The plaintiff in error by his answer pleaded, in defense of the cause of action against

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

him: That on October 17, 1906, B. S. McLeary, acting in the name of his wife, L. T. McLeary, made a trade with plaintiff in error, whereby the plaintiff in error sold to McLeary a stock of goods and fixtures, in consideration of which McLeary executed to Hill two notes and a mortgage on the fixtures and a deed to the land in question; plaintiff in error assuming to pay the note sued on by defendant in error Hoeldtke and the note sued on by Leach, and said deed retaining the vendor's lien to secure payment of the said notes. That McLeary took charge of the goods and fixtures and ran the store till July 11, 1907, at which time said notes and the rents past due amounted to \$512, which McLeary owed plaintiff in error, and they made another trade, by which McLeary sold and delivered to Hill the stock of goods and fixtures in payment of said \$512, and that McLeary took back the land he had deeded to plaintiff in error and released plaintiff in error from the payment of said two vendor's lien notes against it, and McLeary assumed their payment, and McLeary also promised to pay Hill \$307.50 due October 1, 1908, as a balance owing by McLeary to plaintiff in error in this trade, and plaintiff in error executed a deed to McLeary for the land in accordance with said trade, and at the time of this trade, July 11, 1907, neither defendant in error Hoeldtke nor Leach had accepted the promise of plaintiff in error to pay said land notes as contained in the assumption thereof in the deed from McLeary to plaintiff in error of October 17, 1906, nor did plaintiff in error ever pay anything on said land notes, nor take possession of the land, nor promise the holders to pay them, nor in any way injure the rights or securities of the holders. That in the trade of July 11, 1907, the consideration received by plaintiff in error was less in value than the amount McLeary owed plaintiff in error as settled in that trade. Plaintiff in error also alleged that if the trade of July 11, 1907, was not completely executed, still it was a binding contract upon a valuable consideration, and he had tendered performance upon his part and had taken possession of the property he got in the trade, and alleged facts showing it inequitable for McLeary not to perform same, and asked for a specific performance. Plaintiff in error further alleged: That said land was deeded to McLeary November 6, 1905, in consideration of two notes executed by McLeary to Horstman for \$140 and \$195 with 8 per cent. interest, and McLeary assumed to pay the note held by plaintiff, all of which notes were recited in the deed as vendor's liens on the land; that to induce plaintiff in error to accept said deed to the land in said trade of October 17, 1906, and assume payment of the note sued on, McLeary falsely represented to him that said \$140 note had been paid off, which plaintiff

in error believed and relied on and would not have accepted said deed nor assumed said other notes had he known said \$140 note was unpaid; that plaintiff in error learned, one week before the trial, the fact to be that said \$140 note was unpaid and now owned by one Ernest McLeary; that on account of the said fraud, which was not discovered till the time mentioned, plaintiff in error repudiated said deed and trade of October 17, 1906, and tendered the deed into court for cancellation, and denied liability to defendants in error Hoeldtke and Leach. The court sustained a general demurrer to this answer.

The case was tried before the court without a jury, and judgment was rendered in favor of defendant in error Hoeldtke against Horstman, McLeary, and Hill for the amount he sued for, with the foreclosure of the first vendor's lien on the land described, and in favor of defendant in error Leach against McLeary and plaintiff in error for the amount he sued for, with foreclosure of the second lien on the land. Plaintiff in error brings the case here by writ of error to have same revised for the errors assigned.

McGady & McMahon, for plaintiff in error.  
Gross & Armstrong, for defendants in error.

LEVY, J. (after stating the facts as above). We are of the opinion that there was error in sustaining the demurrer to plaintiff in error's answer. Though plaintiff in error had assumed to pay to McLeary the notes against the land held by defendants in error as a consideration of the conveyance of the land to him by McLeary, he was entitled to defend against his personal liability to defendants in error on the ground that he and McLeary had afterwards in good faith rescinded such trade and he had reconveyed said land to McLeary, who assumed to pay such lien notes and release plaintiff in error therefrom before defendants in error had accepted or become a party to plaintiff in error's promise. *Morrison v. Barry*, 10 Tex. Civ. App. 22, 30 S. W. 376; *Huffman v. Western Mortgage Co.*, 13 Tex. Civ. App. 169, 36 S. W. 306. The allegations are that the mutual rescission was prior to acceptance by the mortgagees. Such promise does not vest an immediate interest and right in the mortgagees, as though the promise had been made direct to them. Until the acceptance by the mortgagees of the promise of the third person, the parties to the agreement had the right to rescind. *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 671. A rescission may always be effected by the voluntary act of the parties either by novation or simple agreement to rescind, where they continue to occupy their original relations; and, even though such rescission may affect the interest of third persons, the privilege cannot be denied, provided no substantial rights are impaired. 2 Warvelle on

Vendors, § 826. After acceptance of and reliance upon the agreement by the mortgagee, the right of rescission might probably be precluded, and the parties by their act estopped. The mere fact of itself that defendant in error had the superior title to the land did not preclude or deny the right of rescission to plaintiff in error and McLeary.

Plaintiff in error alleged that if the trade of July 11, 1907, between himself and McLeary, was not completely executed, still it was a binding contract upon a valuable consideration, and he had tendered performance upon his part and had taken possession of the property he got in the trade, and alleged facts showing it inequitable for McLeary not to perform same, and asked for a specific performance, and that it operate as a defense against his personal liability to defendants in error. As an equity right we think it could be enforced in the case. The right of action of defendants in error is subordinate to their rights, and, if defendants in error avail themselves of the contract, they will be affected by the equities growing out of the contract between them. In *Dunning v. Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617, the court said: "There is no justice in holding that an action on such promise is not subject to the equities between the original parties springing out of the transaction or contract between them." In *Malanaphy v. Manufacturing Co.*, 125 Iowa, 719, 101 N. W. 640, 106 Am. St. Rep. 332, it was said: "Among other limitations the party to be benefited becomes subject to all inherent equities arising out of the contract as affecting the principal parties one with the other." In *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198, the court said: "It is clear on principle such right cannot be broader than the party to the contract, through whom the right of action is derived, would have in the event of its breach. \* \* \* Such beneficiary cannot acquire a better standing to enforce the agreement than that occupied by the contracting parties themselves." The fact that suit was brought by defendants in error cannot affect the applicability of the rule.

We think it is also clear that plaintiff in error is entitled to defend against personal liability on the notes by tendering back the land and showing that he was induced to accept the conveyance and assume the notes through the fraud of McLeary, his vendor, in falsely representing that the land was free of other liens, if upon discovering the fraud he acts promptly in rescission, and before he induces defendants in error to rely upon the assumption to their injury. *Heath v. Coreth*, 11 Tex. Civ. App. 91, 32 S. W. 56; *Loeb v. Willis*, 100 N. Y. 231, 3 N. E. 177; *Drury v. Hayden*, 111 U. S. 223, 4 Sup. Ct. 405, 28 L. Ed. 408; *Dry Goods Co. v. Swaf-*

*ford Bros.*, 65 Kan. 572, 70 Pac. 582. To same effect: *Kellar v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; *Clay v. Woodrum*, 45 Kan. 116, 25 Pac. 619; *Greene v. McDonald*, 75 Vt. 93, 53 Atl. 332.

We do not pass upon the evidence, simply the allegations to determine the demurrer.

The case was ordered reversed and remanded.

#### STARNES et al. v. HATCHER et al.

(Supreme Court of Tennessee. May 18, 1908.)

##### 1. SPECIFIC PERFORMANCE (§ 114\*)—PLEADING—CONSTRUCTION.

In a suit for specific performance, the bill alleged that decedent and his wife, being childless, applied to the judge of the county court for the custody and control of complainants, whom the judge gave into decedent's possession upon the distinct understanding and agreement that decedent would legally adopt them as his own children, and that at his death they should receive his property; that the verbal contract was reduced to writing, read to decedent, fully understood and agreed to by him, and signed by him, the contract being embraced in a petition to the county court for the adoption of complainants; that under the agreement in writing decedent undertook, in consideration of receiving complainants, to rear and adopt them, treat them as his own children, and give them his property as if they were his heirs; and that with that understanding complainants were delivered to decedent and his wife, and accepted, in pursuance of the contract. *Held*, that the bill did not merely allege an oral agreement, put into writing only in the form of a petition to the county court for adoption of complainants, but that the agreement, verbal in the beginning, was reduced to writing, and read to, understood by, and signed by decedent, and was contemporaneously embodied in the petition to the county court.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 114.\*]

##### 2. SPECIFIC PERFORMANCE (§ 10\*)—CONTRACTS ENFORCEABLE—CONTRACTS TO DO TWO ACTS, ONE IMPOSSIBLE OF PERFORMANCE.

If a person contracted to adopt children and also to leave them his property as his heirs, the fact that he had died without adopting them, thus rendering that part of the contract impossible of performance, would not preclude them from obtaining specific performance of the other part of the contract to leave them his property; the two obligations being distinct in character.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 20-25; Dec. Dig. § 10.\*]

##### 3. SPECIFIC PERFORMANCE (§ 86\*)—CONTRACTS ENFORCEABLE—CONTRACTS TO DEVISE PROPERTY.

If a person agreed in writing to adopt certain children and leave them his property at his death, took the children into his possession, and they lived with him for years, believing him their father and rendering him all the services that duty required, and the person failed to adopt them, and did not leave his property to them at his death, they would be entitled to specific performance of the agreement to leave them the property.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 223, 224; Dec. Dig. § 86.\*]

Appeal from Chancery Court, Williamson County; John Allison, Chancellor.

Bill by Hugh S. Starnes and others against Henry Hatcher, administrator of Samuel W. Starnes, and others. Decree of dismissal on demurrer, and complainants appeal. Reversed and remanded.

Harry S. Stokes, John T. Allen, and A. B. Watkins, for appellants. C. R. Berry, R. H. Crockett, B. L. Ridley, and Henderson & Henderson, for appellees.

BEARD, C. J. The bill in this cause was filed by the complainants, Hugh S. Starnes and his sister, Esta Rosa Newsom, praying for specific performance of a contract, which they alleged was made by Samuel W. Starnes, the intestate of the defendant Henry Hatcher, and the ancestor of certain of his codefendants, by which the deceased obligated himself to adopt these two complainants, and at his death leave to them his estate, both real and personal. The bill was dismissed on demurrer, and the case is before us on assignment of error to this action of the chancellor.

The facts alleged by the bill, and as such admitted by the demurrer, are that some years after the marriage of Samuel W. Starnes and his wife, no children having been born to them, and realizing none were likely to be born as the result of their union, they applied to Judge Ferriss for the custody and control of the complainants. Prior to this the mother of the latter (having survived their father), being in extremis, requested that he take charge of the complainants and find for them a home with some gentleman and his wife who were childless, and who would rear them as their own children. Acting on this request, Judge Ferriss arranged with the deceased to take them, "upon the distinct understanding and agreement that he would legally adopt them as his own children, and at his death they should receive his property."

Under and by virtue of the terms of this agreement the complainants were taken into the home of Mr. Starnes and given his name. He clothed, sheltered, and educated them. They were taught for years to consider and to feel that Mr. Starnes and his wife were their real parents. Both of these parties were deeply attached to the complainants, and exhibited their love in many ways. This affection was reciprocated by the complainants, who continued to render to their foster parents all the services that duty required or affection suggested. When the complainant Mrs. Newsom grew into womanhood, and she was sought in marriage by her present husband, he solicited her hand from Mr. Starnes, whom he supposed to be her father in fact. The latter consented to the marriage, and when the ceremony took place he gave her away to the man of her choice. In 1888 Mrs. Starnes died, and the complainants were left to the sole care of the sur-

living husband. They waited on him and attended to all his wants. They rendered many and divers services in the home and about the farm, believing that they were his children. After her marriage, Mrs. Newsom went to the home of her husband, but frequently returned as a visitor to that of Mr. Starnes, and was at all times received by him as his daughter. The complainant Hugh remained with his foster father and looked after him and his interests with affectionate attention, as he grew feebler with increasing years, up to the time of his death. This occurred when he was in his seventy-ninth year.

After his death it was ascertained that adoption proceedings were never instituted by the deceased, or, if so, were never perfected, and the result is that the defendants, related to him collaterally, and who were at no time attentive to or thoughtful of his welfare, have made claim to his estate, and have taken possession of all of it that is not in the hands of the administrator, and are now insisting that the complainants have no right to share in or receive anything from the same. The question, then, is: Upon these facts, are the complainants entitled to a specific performance of the contract alleged?

That this case is one of strong natural equity cannot be denied. Independent of the contract, the services rendered by the complainants for a long series of years, the tender and affectionate relations existing between the parties, and the continued recognition by Mr. Starnes and his wife of the complainants as their children, establish a strong moral claim in their favor as against the defendants, who, so far as this record shows, have no equity, but, if they take the estate of the deceased at all, do so as a matter of strict law. These considerations, however, while they give emphasis to the claim set up in the bill, would not of themselves be sufficient to warrant the relief which is sought thereon. Such relief must be had upon the ground of contract obligation.

It is insisted by the demurrants that redress cannot be given, even conceding the existence of such an obligation, because the case is one within the statute of frauds, and is not embodied in writing as required therein. This insistence, however, grows out of a misapprehension of the allegations of the bill on this point. After setting up the agreement between Judge Ferriss and Mr. Starnes, at the time the complainants were delivered into the possession of Mr. Starnes, the bill proceeds as follows: "Said verbal contract was then reduced to writing, which was read over to the said Starnes, fully understood and agreed to by him, and to which he attached his name; the same being embodied in a petition to the county court asking that he be permitted to adopt the complainants. Judge John C. Ferriss, who had the custody and control of said children, and was acting

in loco parentis, read over the paper writing to Mr. Starnes, and saw him sign and execute the same. Under said agreement in writing Mr. Starnes undertook, in consideration of receiving the children, to rear, educate, nurture, and adopt the complainants, treat them as if they were his own children, and they were to receive his property as if they were the heirs of his body, and born in legal wedlock," and that "it was with this understanding the complainants were delivered to the obligor, Samuel W. Starnes and his wife, and were by them accepted under and in pursuance of this contract."

The contention of the demurrants is that in the paragraph just quoted the complainants do no more than allege an oral agreement, put into writing in the form of a petition to the county court, asking that Starnes and his wife be permitted to adopt the complainants, and that, this being so, the agreement, in view of the statute of frauds, if for no other reason, is not enforceable. We think this a mistaken view. We understand, from the allegations just quoted that the contract, in the beginning verbal, was reduced to writing, which, when read over to Mr. Starnes, was fully understood by him, and that to this he attached his name. This writing not only embraced the terms of the contract set forth, but these were contemporaneously embodied in the petition to the county court, asking permission on the part of Samuel W. Starnes to adopt these infants. The last paragraph, or sentence, of the excerpt, given above, adds emphasis to this construction. There it is distinctly alleged that under the written agreement Mr. Starnes undertook to adopt the complainants, take them into his home, nurture and educate them, and at his death leave them his property, as if they were heirs of his body and born in legal wedlock.

But, if it were true, as urged by the demurrants, that the agreement was to be found alone in the petition prepared for and signed by Starnes, to be submitted to the county court for the purpose of obtaining its permission to the act of adoption of these parties, and that petition given into the hands of the petitioner with the view of carrying out that plan, it might be argued with much force, and possibly be found sustained by authority, that even that writing itself would be a sufficient compliance with the requirement of the statute of frauds. This, however, is simply suggested, because we do not regard the question, in the view which we take and have expressed with regard to the averments of the bill, as necessary for decision.

We think, also, the insistence of the demurrants that the import of the bill is alone to require a specific performance of an agreement to adopt is unsound. While such relief is prayed for, the scope is far beyond that, inasmuch as it is distinctly asked that, upon the ground of the agreement alleged,

the complainants be let into the estate of the deceased. Unquestionably, so far as the contract contemplated fixing a status for these complainants as heirs by statutory adoption, this now cannot be done. By the death of Starnes, who failed during life to comply with his obligation to adopt these parties, it is made impossible for the courts to do what he should have done in this regard. But it does not follow from this that the complainants are to be cut off from all relief. As we have seen, his agreement was not only to adopt, but to leave these parties at his death his estate. Thus it covered two different duties, which he obligated himself to discharge. These were as distinct in character as if he had bound himself in a strictly legal manner, upon a valuable consideration, to convey two tracts of land to another. To a bill to enforce specific performance of such a contract, he would not be permitted to repel one seeking its enforcement upon the ground that, subsequent to the contract, he had incapacitated himself from a performance of it in its entirety by selling to a third party one of the tracts covered by his covenant. In such case, upon the election of the complainant, relief would be granted, at least to the extent of the tract remaining unsold. Story's Equity Jurisprudence, § 779. This principle, so evidently just, invoked by the complainants, has been applied by the courts in many cases, which furnish analogies to, and in others embracing facts very similar to, the present. In *Rhodes v. Rhodes*, 3 Sandf. Ch. (N. Y.) 279, there was an agreement made between two brothers, who had always lived together and owned their property in common, by which the one having a family agreed to provide for and take care of the other, who had no family, and who was subject to epileptic fits, during his life, in consideration that the former should have all the real and personal estate of the latter. The former performed to the letter his part of the agreement, and at the death of the latter, as against his heirs, it was held that this part performance of the parol agreement between the two relieved the case from the operation of the statute of frauds, and made it one in which the court was authorized to grant a specific performance. In *Rivers v. Rivers*, 3 Desaus. (S. C.) 190, 4 Am. Dec. 609, the chancellor says: "It appears to me that to make a will in a particular way on proper considerations is as much a subject of contract as any other, and he who makes a contract on this subject is as much bound thereby as he would be by any agreement on any other subject. \* \* \* I conclude, therefore, that the party had a right to bind himself to make his will in a particular way by an agreement, and the court has the power to enforce the agreement." In *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773, it is said: "There can be no doubt but that a person may make a valid agreement binding himself legally to make a disposition of

his property by his last will and testament. The law permits a man to dispose of his own property at his pleasure, and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by conveyance, to be made at some specified future period or upon the happening of some future event. It may be unwise for a man in this way to embarrass himself as to the final disposition of his property; but he is the disposer by law of his own fortune, and the sole and best judge as to the time and manner of disposing of it. A court of equity will decree the specific performance of such an agreement, upon the recognized principle by which it is governed in the exercise of this branch of its jurisdiction. "In *Jaffee v. Jacobson*, 1 C. C. A. 24, 48 Fed. 24, 14 L. R. A. 352, it is said: "We concede the law to be that a court of equity will specifically enforce a promise to leave to another the whole, or a definite portion, of one's estate as a reward for peculiar personal services rendered, or other acts done by the promisee, which are not susceptible of a money valuation, and were not intended to be paid in money, provided the consideration has been substantially received at the promisor's death." To the same effect is *Townsend v. Vanderwerker*, 160 U. S. 171, 16 Sup. Ct. 238, 40 L. Ed. 383.

As has been said, the principle has been applied by many courts in cases with facts like the one at bar. In all of the cases where the relief sought has been given, it will be found that the defense was largely put upon the ground that the agreement rested in parol, and therefore was unenforceable under the statute of frauds. These cases are found in jurisdictions where the rule prevails that a partial performance relieves the party seeking specific relief from the operation of the statute. It would seem from this that it had been practically conceded by the profession everywhere that, the agreement being in writing and distinct in its terms, no doubt of the right and the power to decree specific performance thereof had been, or could be, entertained. In the present case we have, as has already been seen, an agreement duly reduced to writing and signed by the party to be charged, with a full performance of their duty upon the part of the complainants, who come into a court of equity seeking the benefit of a remedy clearly within its jurisdiction.

Upon an examination it will be found that the courts have gone very far in reaching the equity growing out of contracts such as the one set up in the bill in this cause. In *Van Dyne v. Vreeland*, 11 N. J. Eq. 370, an uncle had made an agreement with the father of an infant child that he would adopt the boy, and after the death of himself and wife all the property should go to him. There was no formal adoption; but the child lived in

the family for 25 years, assumed the family name, and treated these parties as parents. Upon these facts the court held there was a performance upon the part of the child, and the implied agreement as to his inheritance could be enforced. In *Van Tine v. Van Tine* (N. J. Eq.) 15 Atl. 249, 1 L. R. A. 155, the principle is carried very far. In that case there was no agreement to adopt, or to leave the estate to the infant; but it was held that a parol obligation assumed by one to treat the child of another as the obligor's own child, accompanied by a virtual, although not formal, adoption of it, acted upon by both parties during the obligor's life, without more, would be enforced on the death of the obligor, by adjudging the child entitled as a child to the property of the obligor which was undisposed of by will. In *Wright v. Wright*, 99 Mich. 170, 53 N. W. 54, 23 L. R. A. 196, the facts were that the claimant in question entered the family of the deceased when about 1½ years old, under an agreement entered into between the superintendent of the poor, under whose charge he then was, and the deceased, by which the infant was bound to the deceased until he became 21 years old; that subsequently the family name of the deceased was given to the claimant, and that then a petition was filed by the deceased and his wife in one of the courts of Michigan declaring their intention to make the claimant their heir at law, and in accordance with this petition an order to that effect was then made; that from the time of this order until the death of his parents by adoption the claimant had remained a member of their family, performing duties as if a child born to them. Later the statute under which this effort at adoption was made was held unconstitutional; but, as it was apparent that the adopting parties supposed that the act of adoption had been successfully accomplished by the proceeding taken for that purpose, and the relation thereafter between the parties was like that of parent and child, it was held that the contract might be implied, and would be enforced in equity, to leave to the claimant, as an heir, the property of the adopting parent. It will be observed in that case, as in the New Jersey case of *Van Tine v. Van Tine*, just referred to, there was no agreement in the beginning to adopt, nor at any time was there an expressed purpose to leave claimant the property of the adopting father. The obligation to leave to the complainant this property at the death of the adopting father was implied from the facts of the case, and enforced as against his collateral kindred. It may be that the authority of *Wright v. Wright*, in its general effect, is somewhat weakened by the later cases of *Albring v. Ward*, 137 Mich. 352, 100 N. W. 609, and *Bowins v. English*, 138 Mich. 178, 101 N. W. 204; but we do not understand them as affecting the rule invoked in the case at bar and applied in other cases which have been



and will now be referred to. In *Kofka v. Rosicky*, 41 Neb. 328, 59 N. W. 788, 25 L. R. A. 207, 43 Am. St. Rep. 685, a girl about 17 months old was given by her parents to her uncle and aunt, under an agreement that they would adopt, rear, nurture, and educate her, and that she was to be their only child, and at their death should receive or be left all the property which they might own. She took their name and lived with these parties until they died. She did not recognize or know her own father and mother in the true relation, but rather as uncle and aunt, and recognized her uncle and aunt as her father and mother. The uncle and aunt died possessed of real estate in the city of Omaha, the title to which they did not, by deed or will, transfer to this child. Although there had been no adoption of the child, and no writing evidencing the agreement of the parties, yet it was held that there was such a part performance of the contract on her part as entitled her to a decree giving her this property by way of specific performance. In *Nowack v. Berger*, 133 Mo. 24, 34 S. W. 489, 31 L. R. A. 816, 54 Am. St. Rep. 663, there was an oral contract for the adoption of a child and to make it an heir, which was enforced by the court; the evidence showing a performance by the child of the obligation resting upon it, and the court saying "that such contracts as the one here in litigation, in so far as they relate to the adoption of the child and making him an heir, have often been recognized and enforced in this state and elsewhere." For authority reference is made to *Sutton v. Hayden*, 62 Mo. 101, *Gupton v. Gupton*, 47 Mo. 37, *Sharkey v. McDermott*, 91 Mo. 641, 4 S. W. 107, 60 Am. St. Rep. 270, and quite a number of other cases. In *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369, while under the peculiar facts of the case the contract in question was not sustained, the principle was recognized as being well established that an oral contract to give another all one's property at death, in consideration of care and service, will be enforced in equity, upon evidence of the performance of his or her part of the contract by the obligee. *Chehak v. Battles*, 133 Iowa, 107, 110 N. W. 830, 8 L. R. A. 1131, *Quinn v. Quinn*, 5 S. D. 328, 58 N. W. 808, 49 Am. St. Rep. 875, *Winne v. Winne*, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647, and *Dally v. Minnick*, 117 Iowa, 563, 91 N. W. 913, 60 L. R. A. 840, will be found equally in point.

It is contended by the demurrants that the statutes relating to adoption are exclusive, and that no right to take the property, as an adopted child, can spring otherwise than from statutory adoption. It is to be observed, however, that the complainants are not claiming the right to be let into the estate of the deceased as adopted children; but they are asking for the enforcement of a con-

tract, placing their right to relief entirely upon the obligation assumed by the deceased in that contract. The same defense was made in *Chehak v. Battles*, supra, where the parties resisting recovery relied, as do the counsel for demurrants in this case, upon certain earlier Iowa cases which seem to sustain that view. In the *Chehak* Case, however, those cases are explained and limited so as not to conflict with the principle announced in the case then in hand and recognized here. It is there said: "The authorities upholding the right to specific performance never decree that the child is entitled to the right of inheritance as an heir. They do not undertake to change the status of either party, but merely to enforce a contract which has been fully performed on one side." To the same effect are the cases of *Burns v. Smith*, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653, and *Winne v. Winne*, supra.

It is further contended that the complainants should be repelled upon the ground of laches. If they were here setting up a right by virtue of adoption, or if they were seeking through the court to have done now what the deceased undertook in his lifetime to do—that is, have a decree of adoption—this contention might with some plausibility be relied upon. But, as has been seen, this is not the real purpose of the bill, although the prayer does embrace such relief. What is sought is that a performance of the contract to leave his estate to the complainants be enforced as against the defendants, who stand in the place of their ancestors. This feature of the contract was breached only at the death of Mr. Starnes, and upon the face of this bill it is clearly inferable that it was filed within a short time after that event occurred.

We are satisfied that error was committed by the chancellor in his disposition of this case. His decree is therefore reversed, and the cause is remanded for answer and proceedings.

#### STATE ex rel. COLLIER et al. v. ENLOE et al.

(Supreme Court of Tennessee. March 10, 1909.)

#### 1. MANDAMUS (§ 187\*)—ACTION BY STATE—SUSTAINING DEMURRER TO BILL—REVIEW ON APPEAL.

In determining whether the public interest will justify a litigation along the lines laid down in a bill for mandamus by the state, it is incumbent on the Supreme Court to inquire into the nature of the contest into which the state would be plunged on overruling a demurrer thereto, sustained below, and remanding the cause for trial.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 187.\*]

#### 2. JUDGMENT (§ 604\*)—RES JUDICATA IN TAX CASES.

The plea of res judicata in tax cases is to be limited to the taxes actually in litigation, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the judgment is not conclusive in respect to taxes assessed for other and subsequent years.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 604.\*]

**3. MANDAMUS (§ 112\*)—BILL BY STATE IN BEHALF OF COUNTIES—DETERMINATION ON DEMURRER—CONSIDERING EFFECT AS TO STATE GRANTING WRIT.**

On appeal from a decision sustaining a demurrer to a bill by the state, in behalf of certain counties, to compel an assessment of the property of a railroad company, it appeared that the legitimate effect of granting the writ would be to deprive the state of the great benefit it had obtained in inducing the company to waive its exemptions and go on the tax list as other railway companies, and of a large amount paid yearly by the company, which the state would be bound in honor to refund as being received under a repudiated contract, but which, if it did not willingly return, would have to be credited on any taxes recovered by litigation. Another effect would be to open up a similar and much larger controversy with another company that settled its litigation over its exemption by an agreement to pay yearly a certain sum up to a date fixed, and then go on the tax list as other railroad companies. In exchange for these great losses the state would obtain, under the bill, simply the right to institute and maintain many lawsuits against railway companies, all of which might prove fruitless. *Held* that, whether the state was really a party to the controversy or not, the counties complaining in such case should not be permitted to force the state into such a position, and the trial court, in the exercise of its discretion in such case, properly sustained a demurrer to the bill.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 112.\*]

**4. MANDAMUS (§ 146\*) — PROCEEDINGS BY COUNTIES—SUING IN NAME OF STATE.**

The use of the state's name in a bill for mandamus in behalf of certain counties to compel an assessment of railroad property is altogether unnecessary; the counties having the right to sue in their own name, being the real parties complainant, and the appearance of the state in such a case being merely nominal.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 146.\*]

**5. MANDAMUS (§ 146\*) — PROCEEDINGS BY COUNTIES—USE OF STATE'S NAME.**

The right of counties to use the name of the state in suing for mandamus to compel the assessment of a tax is not authorized by Shannon's Code, § 495, which regulates suits in the name of the state for the counties; and it does not fall within sections 5165-5187, which regulate proceedings in the name of the state against corporations and to prevent the usurpation of office, and there is no statute authorizing the use of the state's name in such a case.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 146.\*]

**6. STATES (§ 205\*)—ACTIONS—APPEARANCE.**

When the state is to be bound by proceedings to collect taxes or other debts due it by suits at law or in equity, it must appear by the Attorney General of the state, pursuant to Shannon's Code, § 5756, subsec. 3.

[Ed. Note.—For other cases, see States, Cent. Dig. § 198; Dec. Dig. § 205.\*]

Appeal from Circuit Court, Davidson County; W. H. Williamson, Special Judge.

Bill for mandamus by the State, on the relation of A. D. Collier and others, against B.

A. Enloe and others. Demurrer thereto was sustained, and complainants appeal. Affirmed.

Henry Hudson, R. A. Sanson, R. E. L. Mountcastle, J. W. Culton, and Harry Stokes, for appellants. Charles T. Cates, Jr., Atty. Gen., for appellee Board of Railroad Commissioners. Jourolmon, Welcker & Smith, for appellee Southern Railway Company.

NEIL, J. The bill in the present case was filed by the state of Tennessee, upon the relation of A. D. Collier, county judge of Knox county, Clem. J. Jones, county judge of Anderson county, and William Allen, county judge of Campbell county, acting for and on behalf of the said counties of Knox, Anderson and Campbell, and upon the relation of the said counties of Knox, Anderson, and Campbell, against B. A. Enloe, Harvey H. Hannah, and Frank Avent, constituting the Tennessee State Board of Railroad Commissioners, and ex officio assessors for the state of Tennessee of railroad properties for taxation.

The purpose of the bill is to compel by the writ of mandamus the railroad commissioners to assess for taxation the property of the Knoxville & Ohio Railroad Company, a line of railway running from the city of Knoxville, through the three counties named, to the Kentucky line at Jellico.

The bill was filed in the circuit court of Davidson county on the 8th of October, 1907. It prayed for an alternative writ of mandamus, directing the defendants to assess the property of the railroad company for the year 1907, and to back assess the property for the 10 preceding years, or to show cause at the next term of the court for not doing so. There was also a prayer that the defendants be required by the alternative writ to continue and remain in session as the State Board of Tax Assessors, "pending and until the final determination of this case, so that such writ of mandamus to assess said railroad property above prayed for, if made permanent upon the hearing, may be operative as against said defendants." It was charged in the body of the bill, under an amendment allowed, that the defendants were in session as a board at the time the bill was filed.

The bill was signed by the several county judges, and by the attorneys for the counties. At the bottom of the bill was the following entry:

"I hereby consent, on behalf of the state of Tennessee, to the filing of the foregoing petition for writ of mandamus, in the name of the state of Tennessee, upon the relation of the counties of Anderson, Campbell, and Knox, and Clem. J. Jones, William Allen, and A. D. Collier, county judges of said counties, against B. A. Enloe, Harvey H. Hannah, and Frank Avent, State Board of Railroad

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Commissioners, and State Board of Tax Assessors, this October 8, 1907.

"[Signed] F. M. Bass,

"Attorney General for Davidson County."

The defendant railroad commissioners filed a demurrer, and also an answer, to the bill.

The Southern Railway Company, although not named in the caption as a defendant, seems to have been admitted as a defendant and allowed to file a demurrer and answer to the bill, as the real party in interest; that company being now the owner of the property of the Knoxville & Ohio Railroad Company.

The demurrers were sustained in the court below, and the complainants thereupon appealed to this court, and have here assigned errors.

Before stating the substance of the bill, it is proper that we should enunciate certain principles that control in controversies wherein the writ of mandamus is asked of the court.

In the case of *State v. Wilbur*, 101 Tenn. 211, 47 S. W. 411, this court quoted with approval the following excerpt from *High on Extraordinary Legal Remedies* (3d Ed.) § 39:

"The right of mandamus being justly regarded as one of the highest rights known to our system of jurisprudence, it issues only when there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and legal remedy. The right which it is sought to protect must therefore be clearly established, and the writ is never granted in doubtful cases. The person seeking the relief must show a clear legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced. The writ, if granted, must also be effectual as a remedy, and must be within the power of the respondent, as well as his duty, to do the act in question. It follows, also, from the important position which this writ occupies as a remedial process, as well as from its nature as an extraordinary remedy, that the exercise of the jurisdiction rests, to a considerable extent, in the sound discretion of the court, subject always to well-settled principles, which have been established by the courts or fixed by legislative enactments. Causes may therefore arise where the applicant for relief has an undoubted legal right for which mandamus is the proper remedy, but where the court may, in the exercise of a judicial discrimination, still refuse the relief."

In the case of *Harris v. State ex rel.* the court had under consideration a case wherein the writ of mandamus was sought against the State Board of Tax Assessors, to compel them to perform certain duties in respect of obtaining information needed for proper assessment of the railroads of the state. At the time the application was made,

or at least when it came before the court, the assessment had been passed into the hands of the various county officials having charge of the matter, and a very large part of the taxes which fell under the assessment had been paid, and the court held that although the State Board of Tax Assessors had been guilty of a breach of duty in not obtaining the information referred to, yet that under the facts stated, and other facts referred to in the opinion, it would not be to the interest of the state that the question should be overhauled, and the writ was denied. Speaking with reference to the powers of the court upon this subject, it was said in the opinion:

"Without further analysis of the pleadings we have, then, a record before us in which the assessors admit, either in express terms or by necessary implication, serious official delinquency, a negligence and indifference in the discharge of statutory duties which is inexcusable, and threaten to render abortive a system of assessment the work of years of legislative experiment. But the question still remains, even in view of this, will the court, while it has the power, interfere by the writ of mandamus? It is well settled that 'the courts have a discretion whether they will issue or refuse the writ, even where a prima facie right thereto is shown.' *Merrill on Mandamus*, § 62. 'In exercising such discretion, the court will consider all the circumstances reviewing the whole case, with due regard to the consequences of its action.' *Merrill on Mandamus*, § 63. *Alger v. Seaver*, 138 Mass. 331; *People v. Ketchum*, 72 Ill. 212; *People v. Genesee County Circuit Judge*, 37 Mich. 281. \* \* \* To the same effect is the text of *Spelling on Extraordinary Relief*, vol. 2, § 1372: 'The writ will usually be refused, notwithstanding a clear right is shown, if, by granting it, public interest would be seriously prejudiced or public transactions hindered, or the rights of third parties interfered with injuriously.' 96 Tenn. 496, 516, 517, 518, 34 S. W. 1017, 1022.

In *State ex rel. v. Taylor*, 119 Tenn. 229, 258, 259, 264, 276, 277, 104 S. W. 242, it was held that where a demurrer to the petition or bill for mandamus is overruled the court will ordinarily award a peremptory writ at once, but will sometimes allow an affidavit showing the defense which the party desires to interpose, or a sworn answer containing these defenses; and if, upon examination of these papers, it conceives that a reasonable defense is offered, it will remand the cause for answer and further proceedings. In the present case the defendants filed their answers along with their demurrers. It is apparent, under the rule just stated, that it will be incumbent upon this court, in determining whether the public interest would justify a litigation along the lines laid down in the bill, to inquire into the nature of the contest into which the state would be plunged upon

overruling the demurrer and remanding the cause for trial.

With these preliminary observations, we shall now state the substance of the controversy. In doing this we not only refer to the language of the bill and exhibits thereto attached, but also to the history of the controversy as disclosed by the authorities referred to in the bill.

It appears from the bill that the Lexington & Knoxville Railroad Company was duly chartered by the state of Tennessee by and under chapter 244, p. 385, of the Acts of the Legislature of 1851-52. The name of this company was thereafter, by chapter 324, p. 762, of the Acts of 1853-54, changed to the Knoxville & Kentucky Railroad Company, and the charter was amended accordingly; and thereafter by chapter 217, p. 434, of the Acts of 1855-56, the Legislature further amended the charter by adding thereto the following provisions, viz.:

"Be it further enacted: That the capital stock of the said company, the dividends thereon, and the road and fixtures, depots, workshops, warehouses and vehicles of transportation belonging to said company, shall be forever exempted from taxation; and it shall not be lawful for the state, or any corporation or municipal police or other authority thereof, or of any town, city, county or district thereof, to impose any tax upon such stock or dividend, property or estate: Provided, the stock or dividend, when the said dividends shall exceed the legal interest of the state, may be subject to taxation by the state in common with and at the same rate as money at interest; but no tax shall be imposed so as to reduce the part of dividends to be received by stockholders below the legal interest of the state."

By the act of 1851-52, known as the "Internal Improvement Law of Tennessee," the Legislature of Tennessee furnished certain state aid to said Lexington & Knoxville Railroad Company. Thereafter, upon said railroad company becoming in default to the state, and because of the nonpayment by it of its indebtedness to the state, pursuant to certain acts of the Legislature, to wit, chapter 79, p. 126, of the Acts of 1870, and chapter 23, p. 25, of the Acts of 1870-71, certain proceedings were instituted by the state of Tennessee against said Knoxville & Kentucky Railroad Company, and other delinquent railroad companies, in the chancery court of Davidson county, under the name and style of State of Tennessee v. Edgefield & Nashville Railroad Company; and such proceedings were had in said cause as that the interest of the state in said Knoxville & Kentucky Railroad Company was duly sold and bought in by W. B. Johnson and others, who thereafter, in compliance with the authority conferred by the state of Tennessee by legislative acts thereto appertaining, duly incorporated themselves under and by a decree of the chancery court of Knox county

under the name and style of the Knoxville & Ohio Railroad Company, which said company has, since said incorporation, down to the date of its conveyance of its property to the Southern Railroad Company, claimed to own and operate said railroad properties and to be entitled to all of the exemptions from taxation set forth in the said act amending the charter of the said Knoxville & Kentucky Railroad Company.

The preamble and the first and tenth sections of the act of 1870-71 were as follows:

"Whereas, in the recent attempt to sell the state's interest in said road, various legal questions arose, presenting serious obstacles to a sale under the act of 1870, which it is deemed expedient and necessary to obviate before the interest of the state in said roads shall be again offered for sale; and whereas, by the act of 1852 (chapter 151, section 12) the right is extremely reserved to the state to enact all such laws in the future as shall be deemed necessary to protect the interest of the state, and to secure the state against any loss in consequence of the issuance of bonds under the provisions of said act, in such manner as not to impair the vested rights of stockholders of the company; therefore,

"Be it enacted, by the General Assembly of the state of Tennessee, that a bill shall be immediately filed in the chancery court at Nashville, in the name and behalf of the state, to which all the delinquent companies, the respective stockholders, holders of the bonds, creditors and all persons interested in the said several roads shall be made parties defendants, and shall be brought before the court in the mode prescribed by the rules of practice in Chancery established in the state, except as otherwise herein provided. And said court is hereby invested with the exclusive jurisdiction to hear, adjudicate and determine all questions of law and matters of controversy of whatever nature, whether of law or of fact, that have arisen or may arise touching the rights and interests of the state, and also of the stockholders, bondholders, creditors and others in said road, and to make all such rules, orders and decrees, interlocutory and final, as may be necessary in order to a final and proper adjustment of the rights of all the parties, preliminary to a sale of the interest of the state in said roads. Also to declare the exact amount of indebtedness of each of said companies to the state; and likewise to define, as may be thought proper, what shall be the rights, duties and liabilities of a purchaser of the state's interest in said roads, or either of them, and what shall be the reserved rights of said companies, stockholders and others, respectively, as against said purchasers after such sale, under the existing laws of the state."

"Sec. 10. That, upon the sale of any of the franchises of either of the railroad companies by the commissioners under the provisions of this act, all the rights, privileges

and immunities appertaining to the franchise so sold, under its act of incorporation and the amendments thereto, and the general improvement law of the state, and acts amendatory thereof, shall be transferred to and vest in said purchaser, and the purchaser shall hold said franchise subject to all liens and liabilities in favor of the state as now provided by law against the railroad companies."

Another act was passed January 26, 1871 (Acts 1870-71, p. 63, c. 54), providing "that, whenever any person or persons shall hereafter become purchasers of any of the existing railroads on which the state has a lien, or is in any way interested that may be sold under the laws of the state as they are now, or may hereafter be enacted, said person or persons so purchasing may file their petition in the chancery court of either of the counties through which said railroad runs, asking to be substituted to all the rights, privileges and immunities, and subject to all the liabilities of the act of incorporation, under which said railroad company was organized, and amendatory thereof, and for such a change of name or privilege as they may desire; and upon satisfactory evidence being produced of the fact of the purchase and the propriety of the changes proposed, then the chancellor may so adjudicate and decree; and the purchaser or purchasers will be thereby fully clothed with the powers, privileges and immunities of the original act of incorporation, and acts amendatory thereof, and subject to all the liens and liabilities thereby created or incurred."

These are the acts referred to in the bill in the present case, under which the road, with its rights, privileges, and immunities, was sold and was purchased by Johnson, and under which the Knoxville & Ohio Railroad Company was organized, under that name.

It does not appear that any attempt was made to tax the Knoxville & Ohio Railroad Company, or to question its immunity from taxation under the purchase which it made under the court proceedings referred to, until 1877. The history of this effort appears in *Railroad v. Hicks*, reported in 9 Baxt., at page 442 et seq. In that year it appears that Anderson county undertook to collect taxes from the road, which it paid under protest and then sued to recover. The court held in that case that under the decree of the chancery court of Davidson county, under which the purchase was made, the immunity from taxation passed to the purchaser, and that, the state having provided for the adjudication of these questions, and the purchase having been made on the faith thereof, it could not question the validity of adjudication. Upon this subject the court said:

"The bill was accordingly filed, and by decree before the sale the amount of the state's debt was ascertained and adjudged, and also that the same was a lien upon the entire property, rights, privileges, and fran-

chises of the companies; that a sale would transfer all the interest, leaving none in the stockholders or corporation; that a sale of any of the franchises of said company would vest the purchasers with all the rights, privileges, and immunities appertaining to the franchises by the charter and amendments. A sale was made, reported, confirmed, and title vested, as before stated. Without reciting the parts of the various decrees and proceedings bearing upon the question, it is sufficient to say that it is distinctly adjudged that not only the property of the old company, but all its rights, franchises, privileges, and immunities, as defined by the charter and laws and the decrees in the cause, passed to and vested in the new company. We are of the opinion that, the state having expressly provided for the adjudication of all these questions by the tribunal appointed, and the purchase having been made upon the faith thereof, the validity of the adjudication cannot be now questioned by the state."

The matter then rested until the year 1891, when an attempt was made by the State Tax Assessors, having charge of the assessment of railroad properties, to assess the property of this same railroad company for taxation. Thereupon a bill was filed in the Circuit Court of the United States for the Middle District of Tennessee to enjoin such assessment proceedings. The case was decided in that court, and thence appealed to the Circuit Court of Appeals for the Sixth Circuit, and resulted in a decree enjoining the assessment. See this case reported under the name of *Buchanan v. Knoxville & Ohio Railroad Co.*, 71 Fed. 324, 18 C. C. A. 122.

The next effort on the part of the state was to collect a privilege tax on the franchises of the company. The state, through James A. Harris, Comptroller of the Treasury, demanded of the company privilege taxes for the years 1893, 1894, 1895, and 1896—in all, for \$4,820. The company paid the sum demanded under protest and sued to recover it back. This case finally reached this court and is reported under the name of *Railroad v. Harris*, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921. It was held in that case that the company was liable to privilege taxation. This case was then carried to the Supreme Court of the United States by writ of error, and while pending there, undetermined, the Legislature of this state, in its general revenue bill (chapter 432, p. 1044, of the Acts of 1899), provided as follows:

"Each railroad company not paying an ad valorem tax to this state, and operating or controlling a railroad in this state, for taking up and transporting freight or passengers from one point in this state to another point in this state, shall pay annually a privilege tax, of \$120.00 for each mile of railroad so operated or controlled in this state.

"This tax shall not apply to any railroad exempted by legislative contract of this state from the payment of a privilege tax: Pro-

vided, that any railroad company to which the foregoing privilege tax would attach or apply shall be relieved and released from the payment of the same by obligating itself to pay to the Comptroller of the State, in lieu of all other taxes, \$4,500.00 annually for the term of ten years, beginning with the year 1899, and ending January 1st, 1909, and which shall agree and contract that thereafter the property and franchises of such railroad or railway company shall be liable and subject to ad valorem taxation; and agreeing that any litigation now pending in any of the courts of the state of Tennessee, or of the United States, the purpose of which is to prevent or restrain the enforcement of the collection of privilege taxes on such railroad, or to recover money already paid for such privilege taxes, shall be dismissed at the cost of such railroad company.

"And the Governor and Comptroller of the State are hereby authorized, empowered, and directed as the representatives of and for, and on behalf of the state, to make and execute a contract according to the terms and provisions hereinbefore set out, with any railroad company, to which the same shall apply, and which shall profess a willingness to enter into such contract. But in the event such a contract is not consummated as herein provided, the privilege tax herein provided for shall remain in full force."

On the 1st day of November, 1899, an agreement was entered into which appears as Exhibit No. 1 to the bill in this case, between the railroad company and the state, to carry out and effectuate the purposes of the act above quoted; the state being represented, as provided in the act, by Hon. Benton McMillan, then its Governor, and by Hon. Theodore F. King, then Comptroller of the State.

This contract, after reciting the chartering of the road in its original form, the changes through which it had passed, and the purchase under the chancery court at Nashville pursuant to legislative authority, and the organization under the name of the Knoxville & Ohio Railroad Company, the proceedings in the case of Railroad Company v. Hicks, and in Buchanan v. Knoxville & Ohio Railroad Company, and Railroad v. Harris, and that the latter case had been carried to the Supreme Court of the United States by writ of error on application of the railroad company, and also after reciting the above-mentioned act, and that the contract was entered into pursuant thereto, then continues:

"Now, therefore, this agreement witnesseth: That the railroad company, party of the first part, in consideration of the premises and the covenants on behalf of the state hereinafter contained, hereby covenants and agrees to and with the state as follows:

"(1) That it will forthwith upon demand pay unto the Comptroller of the State of Tennessee the sum of \$4,500, and thereafter will upon like demand pay annually during

each succeeding year for the full term of ten years, beginning with the first payment of 1899, and ending January 1, 1909, a like sum of \$4,500, provided that the same shall be accepted by the state in lieu of all other taxes imposed or hereafter to be imposed by the state of Tennessee, or any city, county, or municipality thereof, during said term of ten years, upon the railroad company or any of its property, or upon the franchises of the railroad company, or for a license or privilege to the railroad company to do business authorized by its charter in the state of Tennessee, or for any other form of taxation which may be at any time thereafter devised.

"(2) That on and after the 1st day of January, 1909, the property and franchise of the railroad company shall and may be liable and subject to ad valorem taxation on the same basis as may be at any time lawfully imposed on other railroad property in the state of Tennessee; the railroad company hereby waiving as of and after the said 1st day of January, 1909, all exemptions as to ad valorem taxes contained in its charter.

"(3) That it will forthwith cause to be dismissed at its own cost any and all litigation now pending in any of the courts of the state of Tennessee, or of the United States, the purpose of which is to prevent or restrain the enforcement or collection of a privilege tax upon it, the railroad company, or to recover money already paid by it, the railroad company, for such privilege taxes to the state of Tennessee."

Referring to the foregoing act of 1899 and the contract based thereon, the bill contains the following allegation:

"By chapter 432, Acts of 1899, the Legislature of Tennessee assumed to impose a privilege tax upon the railroad companies in Tennessee which did not pay an ad valorem tax to the state. The Knoxville & Ohio Railroad Company assumed and pretended, and by its fraudulent misrepresentation and concealment of the facts, all as hereinafter will be shown, led the state officials to believe, that it came within such class and designation, and accordingly it paid such privilege tax as assessed, and after paying said tax in accordance with the provisions of said legislative enactment, brought suit in the chancery court of Knox county, Tennessee, against the State Comptroller of the Treasury to recover the same, basing its contention upon the amendment to the charter of the Knoxville & Kentucky Railroad Company hereinabove set forth and an alleged charter exemption from all taxation at all times by virtue thereof. After the Supreme Court of Tennessee, in considering said case upon appeal (said case being reported under the style of Railroad v. Harris, 99 Tenn. 634, 43 S. W. 115, 53 L. R. A. 921) held said privilege tax legal, and said case had been transferred by writ of error to the Supreme Court of the United States, the state of Tennessee assumed, in violation of section 28, art 2, and section 8, art. 11,

of the Constitution of Tennessee of 1870, to enter into a contract with said Knoxville & Ohio Railroad Company by and under which, upon the payment by said railroad company to the state of Tennessee of the sum of \$4,500 annually for ten years, in lieu of all other privileges and ad valorem taxes, said railroad company was to be for all time relieved of the payment of any and all privilege taxes which might at any time be assessed against said property or company by the state or any municipality or county thereof, but should at the end of ten years be subject to an ad valorem taxation for the benefit of the state of Tennessee and its constituent counties and cities through which said line of road passes. A true copy of said agreement thus assumed to be entered into is herewith filed as Exhibit 1, and is prayed to be taken as part hereof as fully as though herein copied, but it need not be copied in issuing process. Petitioners will insist that said contract is null, void, and unconstitutional, as assuming to create an exemption not theretofore existing, in violation of the Constitution of Tennessee. Petitioners will further insist that said agreement is null, void, and unconstitutional, as assuming to contract away the rights of said counties of Anderson, Campbell, and Knox, and the municipalities thereof through which said road passes, without the consent of or any consideration to said counties and municipalities.

"Petitioners further show unto the court that said agreement and effort to create a contractual right of exemption from taxation in favor of said Knoxville & Ohio Railroad is unconstitutional, void, illegal, and not of force and effect for these further reasons: As hereinbefore briefly stated, it was assumed by both that said Knoxville & Ohio Railroad Company was not and could not be required to pay an ad valorem tax to the state of Tennessee and that it came within the terms and provisions of said act of 1899, imposing a privilege tax; whereas, as a matter of fact, it was the precise and specific provision of said amendment to the charter of the Knoxville & Kentucky Railroad Company thus relied upon, and as hereinbefore quoted, that said exemption from taxation should only continue until and no longer than said railroad company should earn net revenues and profits in excess of 6 per cent. upon its capital stock. In fact said company had for many years theretofore, as petitioner is informed and thereupon avers, earned net revenues and profits yearly far in excess of 6 per cent. or the legal rate of interest in Tennessee, upon its capital stock, and had earned net revenues and profits of such an amount as that the fund available with which to pay dividends upon said stock would still, after the payment of ad valorem taxes upon said property at a proper valuation at the same rate of taxation as that paid by other railroads, exceed the amount of 6 per cent. upon

said capital stock. In addition to this, as petitioner is informed and thereupon avers, said Knoxville & Ohio Railroad Company, for the purpose of fraudulently concealing its true condition and earnings, and of preventing, if possible, the incurring of an obligation upon its part to pay an ad valorem tax upon its property, and of at least concealing such obligations, entered upon its books numerous and sundry charges which would appear to be charges against the revenue of said road, but which were not proper to be so entered or charged, but were in fact incurred, if at all, for the sole benefit, use, and profit of the Southern Railway Company, which was assuming to operate said Knoxville & Ohio property. All of these facts were carefully concealed from, and, as petitioner is informed and thereupon avers, misrepresented to, the state of Tennessee and its officials, and to the Board of Railroad Commissioners and of State Assessors of Railroad Taxes for Tennessee. And petitioner further avers that it was alone because of and as a result of such fraudulent concealments the Legislature was induced to go through the form of entering into said contract, Exhibit 1, hereinbefore referred to. And petitioner specifically avers that at and prior to the time of making said contract said Knoxville & Ohio Railroad Company did not come in fact within the provisions of said act of 1899, and was not one of the railroad companies of the state of Tennessee which did not or should not at that time pay an ad valorem tax to the state of Tennessee, and for this reason said contract is illegal, void, and unenforceable."

Further upon the same subject it is alleged in the bill:

"That the amendment to the charter of the Knoxville & Kentucky Railroad above cited and quoted, which, as petitioner is informed, is relied upon as creating a charter exemption from taxation in favor of the Knoxville & Ohio Railroad Company, and the Southern Railroad Company, the present alleged owner of said railroad property [it being alleged in the bill that the Southern Railway Company bought the property in 1903], provides specifically that 'the stock or dividends, when the said dividends shall exceed the legal interest of the state, may be subject to taxation by the state in common with and at the same rate as money at interest; but no tax shall be imposed so as to reduce the part of the dividend to be received by the stockholders, below the legal interest of the state.' The relators and petitioners have been credibly informed, and thereupon aver, that at the time said Knoxville & Ohio Railroad Company assumed to sell to the Southern Railway Company said railroad property, as shown by the said deed, Exhibit 2, said Knoxville & Ohio Railroad Company had outstanding capital stock to the amount of \$1,122,200, and that the net earnings of said line of railroad over and above all operating

expenses and charges that were actually or could have been or could be ordered against the same, exceeded the sum of 6 per cent. (the legal rate of interest in Tennessee) upon said capital stock, and would for the year 1899 and each subsequent year, and will so exceed for the years 1906 and 1907 and 1908, said 6 per cent. on said capital stock by \$100,000 or more yearly."

It is further alleged:

"That it was the specific contemplation and requirement set forth in said amendment to the charter of the Knoxville & Kentucky Railroad Company quoted that when the net revenue of said railroad property should yield a sum sufficient to pay 6 per cent., the legal rate of interest, on said capital stock, said capital stock itself should be assessed for taxation and taxes thereon should be paid by said railway company. Petitioner again avers that ever since prior to 1899, down to and including the years 1906 and 1907, the net revenues of said road have yearly exceeded said sum. Accordingly petitioners show unto the court and will insist that the capital stock of said Knoxville & Ohio Railroad Company, to wit, \$1,122,200, be subject to assessment by the defendant board of tax assessors, and to taxation for the benefit of the state of Tennessee and said counties of Anderson, Campbell, and Knox; that not only is this amount of capital stock or capitalization of said railroad subject to assessment, and that taxes must be paid thereon by said railroad company, but, further, that whatever force or validity there may originally have been in said charter amendment to relieve the original owner of said property from the payment of taxes until the earnings should reach said sum, since said road had earned and is earning a sum in excess of 6 per cent. upon its capital stock, and said railroad property itself, and the surplus of net earnings therefrom, as well as the capital stock, are each and all subject to assessment for the payment of taxes; and it is the duty of defendants, which defendants are refusing to perform, to assess said railroad property, surplus, and capital stock for such taxation purposes."

It is further alleged, "upon information and belief":

"That the Southern Railway Company, which is operating said Knoxville & Ohio Railroad property, has assumed to handle over said line of road, for the benefit of its other lines, many train loads of coal and other material. All of the expenses of handling these supplies, known as 'company material,' have, as petitioner is informed, and thereupon avers, been paid by and charged against said Knoxville & Ohio Road or division; but notwithstanding the fact that it has not had the use of such material, and in all equity is entitled to compensation at the regular rates for the handling of such coal and other material, no allowance or payment therefor has been made to it. The sum which thus [should] be passed to the credit of said

property and line of road would amount, as petitioner is credibly informed, and thereupon avers, to upwards of \$100,000 yearly; and petitioner will insist that, for the purpose, at least, of ascertaining the net revenues of said line of road, and of determining whether or not its net revenue, out of which dividends could and should be paid upon its stock exceeded the legal interest of the state, this line of road should receive compensation for all work done by it, as well that done for other property of the Southern Railway Company as that which was done for the outside public."

It was alleged that these matters had been brought to the attention of the Board of Railroad Commissioners, sitting as a Board of State Tax Assessors, and they had been requested to assess the property of the railway company for taxation for the years 1907 and 1908, and to back assess for the preceding years, but that they had refused to grant this prayer. There is exhibited with the bill a copy of the entry made by the State Board of Railroad Commissioners, setting forth their reasons for the refusal. The substance of this entry is that the matter had been laid before the Attorney General of the state, Hon. Charles T. Cates, Jr., and that he had submitted to the board his opinion advising against the action sought, on the ground that it was contrary to the interests of the state to reopen the controversy between the state and the railway company which had been settled by the compromise agreement, Exhibit 1 to the bill. The entry indicates that the members of the board sanctioned, as sound and just, the conclusion reached by the Attorney General and recommended to them.

On the refusal of the board to entertain the complaint of the counties, they prayed an appeal to the Board of Equalization, composed of the Governor, Treasurer, and Secretary of State. This appeal was denied, on the ground that the law did not provide for or authorize any appeal upon the refusal of the Board of Railroad Commissioners to assess property; the duty of the Board of Equalization being merely to examine assessments made by the Board of Railway Commissioners, acting as a State Board of Assessors, and to increase or diminish the valuation placed upon any property valued by the assessors, and to require of the assessors any additional evidence touching properties assessed.

After the appeal last mentioned was refused the present bill was filed, as alleged therein, to compel the State Board of Railway Commissioners to make the assessment, and to that end the writ of mandamus was applied for.

Several grounds of demurrer were filed, both by the State Board of Railway Commissioners and the Southern Railway Company. As already stated, the demurrers were sustained in the court below.

We deem it necessary to refer to only one



of the grounds of demurrer—this, in substance, that the bill does not state a case which would justify the court in granting the writ of mandamus.

Before stating our conclusions upon this matter, it is proper that we should pause to consider the attitude of the parties.

On the one hand, we find the Board of Railway Commissioners, in their capacity of State Tax Assessors, representing the whole state, supported and advised by the Attorney General of the state, likewise standing for the whole state, and both insisting upon preserving the status which was attained ten years ago by the state, represented by the General Assembly acting for it, and the Governor and the Comptroller acting in obedience to the Legislature. We find that this status was reached after years of litigation between the state and the railway company; that in two of these suits the state had sustained a decisive defeat as to ad valorem taxation, and that the third litigation embracing privilege taxation was suspended by writ of error, and pending undetermined, in the Supreme Court of the United States. On the other hand, we find three counties of the state insisting that the adjustment reached by the state and the railway company was all wrong and should be disregarded, and in effect that this should be done regardless of the consequences that might ensue to the state and the counties themselves hereafter.

We shall be better able to determine the course that should be pursued by this court in the use of its discretionary power to grant or withhold the writ, according to the public interest, when we shall have suggested some of the questions that must be considered and the position in which the state may be placed.

In the first place, the action sought involves a repudiation and annulment, or attempted annulment, of the contract entered into between the state and the railway company. This action would be certain to involve the state in expensive litigation with the railway company. Treating the agreement as annulled, the railway company would have the right to reassert its claim to exemptions to the full limit of its charter, and would start into that litigation with the advantage of two decisions upon the subject of ad valorem taxation in its favor; one a decision of this court reported in 9 Baxt. 442, above referred to, and the other a decision of the Circuit Court of Appeals of the United States for the Sixth Circuit, reported in 71 Fed. 324, 18 C. C. A. 122, likewise above referred to. To meet this initial advantage the state might contend, as insisted by counsel for complainants in the present case, that the exemptions were lost or forfeited by the sale of the property to the Southern Railway Company; the ground of this contention being that exemptions are a personal privilege and not transferable. In response to this however, the state would be compelled to face the inquiry

whether, under the legislative acts of 1870 and 1871, above referred to, and the chancery proceedings had thereunder, the immunities had not been sold as incidents to the property, and thus made transmissible, as seems to have been held in 9 Baxt. 442. Inquiry would likewise arise whether the railway company, having bought on the faith of that decision, would or would not be entitled to claim an estoppel against the state. The difficulty of overruling such a decision in this class of cases, as to the particular property involved, even if the decision should subsequently be deemed erroneous, is illustrated in the case of *State ex rel. v. Whitworth*, 8 Lea, 594, 606, et seq. Other cases that seem to be in line with *Railroad v. Hicks*, 9 Baxt. 442, are *State v. Railroad*, 12 Lea, 583; *State v. Butler*, 15 Lea, 104, 112; *State v. Railroad Company*, 86 Tenn. 438, 6 S. W. 880. The existence of these cases would increase the difficulty.

Treating the controversy, then, as reopened, and assuming that the decisions above referred to would stand as obstacles before the state on its road to relief—whether movable or immovable we need not consider—there would be still left to the state, as contended by counsel for complainant, the inquiry into the earnings of the road one year with another. The bill charges that these earnings exceeded 6 per cent. The inquiry, however, would not stop with that fact. The question would arise whether the court could compel the company to declare a dividend on its stock, in order that the state might tax the stock, or whether the railway company would have the right to manage the road for the benefit of its stockholders and apply the surplus earnings to betterments, or to the creation of a sinking fund to take up in time the two mortgages referred to in Exhibit 2 to the bill. It is to be observed that the bill does not charge that a dividend had been declared, but simply that more than 6 per cent. during certain years had been earned. But, passing beyond this, even if the position of complainant's counsel could be held sound in the very best view of the matter, the state would be involved constantly in litigation with the railway company to ascertain its earnings, year by year, and to compel their application to dividends in order that taxes might be assessed.

If every contention above referred to that might be advanced by the state in the supposed litigation ensuing upon an annulment of the contract of 1899 should be lost by the state, there would still remain to it the right to assess privilege taxes. Suppose the railway company should refuse to pay such taxes, could the judgment in *Railroad Company v. Harris*, supra, be treated as res adjudicata in a subsequent case involving taxes for another year? The rule in this state is that the plea of res adjudicata in tax cases is to be limited to the taxes actually in litigation, and that the judgment is not conclu-

sive in respect of taxes assessed for other and subsequent years. *Bank v. Memphis*, 101 Tenn. 154, 167, 46 S. W. 557. Although the rule of stare decisis would undoubtedly not apply, it is not clear that this would prevent the suing out of a writ of error to the Supreme Court of the United States to test the matter in that tribunal.

So it seems the legitimate effect of granting the mandamus prayed for in the present case would be to deprive the state of the great benefit it obtained in inducing the railway company to waive its exemptions and to go upon the tax list as other railway companies on January 1, 1909, and of the \$4,500 paid yearly by the railway company between the years 1899 and 1909. We mention the latter feature, because the state would be bound in honor to refund the sums received under a repudiated contract; but, if it did not willingly make this return, it would have to account for such sums as credits upon any taxes which it might be able to recover by litigation. Another effect, as the court judicially knows, would be to open up a similar and a much larger controversy with another railroad company, that settled its litigation over its exemptions with the state by an agreement to pay yearly a certain sum up to a date fixed, and then to go upon the tax list as other railroad companies. In exchange for these great losses, the state would obtain, under the bill, simply the right to institute and maintain many lawsuits against railway companies, all of which might prove fruitless—an exchange of useful and enduring benefits for useless and galling burdens.

Should the three complaining counties be permitted to force the state into this position? We think not. It is insisted, however, that the state is really a party to the present controversy, because the Attorney General for Davidson county consented that the name of the state might be used on the relation of the counties. The use of the state's name was altogether unnecessary. The counties might have sued in their own name. Moreover, the real parties complainant in the controversy are the counties. The appearance of the state in such a case is merely nominal. There is no statute authorizing the use of the state's name in such a litigation for the use of the counties. The right claimed does not fall under section 495 of Shannon's Code, which regulates suits in the name of the state for the counties; nor does it fall within sections 5165 to 5187, inclusive, which regulate proceedings in the name of the state against corporations and to prevent the usurpation of office. When the state is to be bound by proceedings to collect taxes by suits at law or in equity, or other debts due the state, it must appear by the Attorney General of the state. Shannon's Code, § 5756, subsec. 5. See, also, section 6105. However, if the present suit had been instituted by the Attorney

General himself, the result would have to be the same.

In a former part of this opinion we called attention to the rule requiring this court, on overruling a demurrer to a bill for mandamus, to inspect the answers submitted, with a view to deciding whether they presented any such contention as would justify us in withholding the issuance of a peremptory writ. Inasmuch as we sustain the demurrer, we deem it unnecessary to refer to the answers further than to say that they show that the state would have to encounter all of the difficulties above indicated.

On the grounds stated, we are of the opinion that the judgment of the court below sustaining the demurrer must be affirmed, and the bill dismissed, with costs.

#### WINER et al. v. BANK OF BLYTHEVILLE. (Supreme Court of Arkansas. March 1, 1909.)

##### 1. JUSTICES OF THE PEACE (§ 44\*)—JURISDICTION—AMOUNT INVOLVED—HOW DETERMINED.

A justice's jurisdiction depends on the amount of each cause of action, and not the total of several demands joined, and hence he has jurisdiction of a suit on five \$100 notes.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 168, 169; Dec. Dig. § 44.\*]

##### 2. CORPORATIONS (§ 487\*)—NOTES—ASSIGNMENT—VALIDITY.

Though a corporation's indorsement of negotiable paper be ultra vires, so that it incurs no liability thereby, yet title passes.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1894; Dec. Dig. § 487.\*]

##### 3. ASSIGNMENTS (§ 131\*)—ACTION BY ASSIGNEE—PROOF OF ASSIGNMENT—NECESSITY OF VERIFIED DENIAL.

Under Kirby's Dig. § 517, providing that an assignee suing on an assignable instrument need not prove the assignment unless defendant file an affidavit denying it and alleging that he believes one or more of the assignments were forged, the validity of an assignment of a note by a corporation could not be questioned by the makers, where no such affidavit was filed.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. §§ 223, 228; Dec. Dig. § 131.\*]

##### 4. BILLS AND NOTES (§ 182\*)—TRANSFER—CAPACITY TO MAKE—RIGHTS OF MAKER.

Generally, the maker of a note cannot question the authority or capacity of the payee to transfer it.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 434; Dec. Dig. § 182.\*]

##### 5. CORPORATIONS (§ 387\*)—NOTES—TRANSFER—VALIDITY—RIGHTS OF MAKER.

Makers of notes to a corporation cannot defeat liability thereon in a suit by a transferee because of invalidity or want of power in the transfer, where the validity of the note is admitted, and neither the corporation nor its officers or stockholders contest the transferee's rights.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1548; Dec. Dig. § 387.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**6. CORPORATIONS (§ 298\*)—DIRECTORS—MEETINGS—NECESSITY FOR WAIVER.**

A corporation, its directors and shareholders, may waive any necessity for a meeting of the directors to transact company business, by permitting them to establish a habit of assenting separately to the making and performance of contracts by their agents.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292, 1293; Dec. Dig. § 298.\*]

**7. CORPORATIONS (§ 432\*)—AGENTS—AUTHORITY—PROOF—METHOD.**

The method of proving a corporation's agent's authority is similar to the method of proving authority in an ordinary agent, and authority of an officer to act for a corporation may be shown by proof that he was held out to the public as having those powers exercised in a given case, or that the corporation acquiesced in or ratified his acts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1727, 1735; Dec. Dig. § 432.\*]

**8. CORPORATIONS (§ 387\*) — CREDITORS — RIGHTS.**

That makers of notes given a corporation sued by a transferee were creditors of the corporation did not entitle them to question the validity of the transfer, since simple contract creditors of a corporation cannot require its directors or officers to account for illegal or ultra vires acts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1552; Dec. Dig. § 387.\*]

**9. CORPORATIONS (§ 387\*) — CREDITORS — RIGHTS.**

A corporation does not hold its property in trust for simple contract creditors; in any sense other than as an individual debtor, the creditor acquired no interest in specific property until return of execution unsatisfied.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1552; Dec. Dig. § 387.\*]

**10. CORPORATIONS (§ 297\*)—DIRECTORS—POWER.**

The assets and affairs of a private business corporation are in the hands of its directors, and they have the full management and disposal thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1274; Dec. Dig. § 297.\*]

**11. BILLS AND NOTES (§ 427\*)—PAYMENT—TO WHOM PAYABLE.**

A note must be paid to the rightful holder, and payment to one not in possession of it is at the payee's risk.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1233, 1239; Dec. Dig. § 427.\*]

**12. PRINCIPAL AND AGENT (§ 105\*)—PAYMENT TO AGENT.**

One may pay a note to one whom the holder has led the payer to believe has authority to receive payment, but authority to collect some of a series of 29 notes did not authorize payment of all to the collector.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 299, 300; Dec. Dig. § 105;\* Bills and Notes, Cent. Dig. § 1236.]

Appeal from Circuit Court, Mississippi County; Frank Smith, Judge.

Action by the Bank of Blytheville against A. M. Winer and others. From a judgment for plaintiff in the circuit court, on appeal from a justice's court, defendants appeal. Affirmed.

Appellee, who was plaintiff below, instituted this suit against appellants, who were defendants below, upon five promissory notes which had been executed by them to the order of the Archillion Plantation Company. Within 10 days after the execution of these notes, they were duly indorsed by the payee thereof, and then transferred to the Mississippi County Bank; and by the latter transferred to the appellee. The notes were executed on February 18, 1904, and were for \$100 each maturing respectively on the 1st day of February, the 1st day of March, the 1st day of April, the 1st day of May, and the 1st day of June, 1906.

This suit was instituted on these five notes before a justice of the peace, and by him a judgment was rendered for the full amount of the notes in favor of the plaintiff; and the defendants appealed to the circuit court. The consideration for these five notes was a part payment for a stock of goods which was purchased by the defendants from the Archillion Plantation Company. The Archillion Plantation Company was a private business corporation, organized in February, 1903. Its capital stock was divided into 800 shares, of which Reginald Archillion and his wife, whom he represented as agent, owned 796 shares. Reginald Archillion was treasurer of the company, and from the date of its organization and continuously during its existence he was the sole manager of its properties and business affairs. The evidence tended to prove that by an agreement of the board of directors of the company he was given full power and authority to transact any and all of the business of the company, and with the knowledge and consent of its board of directors—in fact, of all the five stockholders of the corporation—he had unlimited authority to do and transact all of the business of the company, and was permitted and authorized to execute and indorse the notes and paper of the company. The evidence tended to prove that the officers and stockholders of the company held him out to the world as having full authority to do and perform any act and thing relative to the business and assets of the company.

In February, 1904, Reginald Archillion, on behalf of the company, sold to the defendants a stock of merchandise, and as part payment therefor took 29 notes, each of which was for the sum of \$100, and they matured respectively on the 1st day of March, 1904, and on the 1st day of each succeeding month thereafter. They were made payable to the order of the Archillion Plantation Company, and were signed by the defendants, and were indorsed and guaranteed before delivery by one Sam Levine. Five of these notes are the ones upon which this suit was instituted. Reginald Archillion had been given by the officers and stockholders of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the company such full control and management over its properties, and was held out to the world as having such full management thereof, that, when the sale of the stock of merchandise was made to the defendants, one of them, Ike Levine, testifies that he did not know whether he was buying from Reginald Archillion or from the company. In February, 1904, Reginald Archillion was individually indebted to the Mississippi County Bank in the sum of \$2,500; the 5 notes herein sued on, and about 15 of the other notes which had been executed by the defendants to the Archillion Plantation Company, had been duly indorsed in blank by the Archillion Plantation Company by written indorsement thereon, duly signed by that company, and all these notes were duly transferred by it, and within 10 days after the execution of the notes, and before the maturity of any of them, Reginald Archillion delivered and transferred the same to the Mississippi County Bank to secure his said indebtedness to that bank. His indebtedness was subsequently reduced to \$1,500, and on May 24, 1904, the indebtedness was extended for six months by the execution of a new note by him to the Mississippi County Bank, and the notes of the defendants were still retained and held by the bank by virtue of said transfer to it as collateral security for the payment of said note.

In 1904, Reginald Archillion was president of the Mississippi County Bank, and continued as such until June, 1905. In 1907 the Mississippi County Bank consolidated with the Bank of Blytheville and the said individual note of Reginald Archillion, and all the said notes of the said defendants which were collateral thereto, were transferred to and became the property of the appellee.

During the years of 1904, 1905, and 1906 the Archillion Plantation company was engaged in farming and other business, and during those years purchased goods and merchandise from the defendants, who were conducting a mercantile business. The company purchased these goods upon a running account, which continued during each month of said years, and amounted in the aggregate to several thousand dollars, upon which account payments were credited from time to time. In selling these goods to the company, and in transacting this business, the defendants actually had the transactions with Reginald Archillion for the Archillion Plantation Company, and they gave the credit, relying on Reginald Archillion and the solvency of the company. It is claimed by the defendants that they paid all the 29 notes which had been executed by them to the Archillion Plantation Company in the following manner: Some of the notes they paid in cash, and some of them they paid by crediting the amounts of the notes on the above running account. They claim that they would make payment in cash to Reginald Archillion on some of the notes, and after

such payments he would deliver to them the note so paid, or they would give credit upon the account on their books to the amount of certain of said notes, and then Reginald Archillion would bring to them the notes and deliver same to them. At the time of such payments on said notes, or at the time of giving credit on the account for any of said notes, the notes themselves were never actually present or delivered to them, but it was always after such payments or credits given that the notes were actually brought by Archillion and delivered to them. The evidence tended to show that the defendants knew that the notes were at the Mississippi County Bank prior to any of such payments or credit given; but they claim that they thought that the notes were at said bank for safe-keeping by Reginald Archillion.

It is conceded that they paid the first note, maturing March 1, 1904, by check to the Mississippi County Bank, and that the indorsement of payment on this note was signed by the Mississippi County Bank. On the trial of the cause, defendant Ike Levine, who was manager of the mercantile business of defendants, testified as a witness; and he was asked how many of the notes had been paid, and he replied 24. He was then asked if there were not 5 of the notes then that had not been paid, and he replied that there were. Subsequently, however, he testified that all of the 29 notes were paid. Upon the books of the defendants there appears upon the account of the Archillion Plantation Company the following credit: "Notes to be paid—Cr. \$1900." The notes thus referred to in this entry of credit were notes that had been executed by defendants to the Archillion Plantation Company, and this entry is of blank date. It is claimed by the defendants that after the allowance of all credits for all of said notes there was still due to the defendants by the Archillion Plantation Company the sum of \$905.71, which was subsequently paid by that company.

At the time of the institution of this suit the appellee still held and claimed title to the five notes herein sued on as security for the said indebtedness of Reginald Archillion to it, which then amounted to \$604, and which was less than the amount, with interest that was due upon said five notes.

Upon a trial of the cause in the circuit court a verdict was rendered in favor of plaintiff for \$604, and from the judgment rendered thereon this appeal is prosecuted.

John J. Ledbetter, for appellants. A. G. Little and Murphy, Coleman & Lewis, for appellee.

FRAUENTHAL, J. (after stating the facts as above). This suit was originally instituted in the court of a justice of the peace upon five several notes, each of which was for the sum of \$100. These notes had come

to the appellee by successive transfers from the payee as collateral security for a total indebtedness of \$804. It is urged by the appellants that, because the amount that was due to appellee from the party who had transferred to it these notes as collateral security was in excess of \$300, the justice of the peace did not have jurisdiction. But the causes of action upon which the suit was instituted before the justice of the peace were the five several notes sued on, and not the indebtedness that was due from the party who had transferred these notes to the appellee. The appellee, having title to these five notes, instituted suit thereon, as it had a right to do, against the appellants; so that the several causes of action, or several debts herein sued on, were represented by these several notes. Now this court has held that where no one of several debts sued on exceeds the sum of \$100, the plaintiff cannot combine them so as to give the circuit court jurisdiction. *Mannington v. Young*, 35 Ark. 237. And consistently with that opinion, and uniformly since then, this court has held that the amount of each separate demand or cause of action, and not the aggregate of the various causes which may be joined in an action, determines the jurisdictional amount. *Paris Merc. Co. v. Hunter*, 74 Ark. 615, 86 S. W. 808; *Brooks v. Hornberger*, 78 Ark. 585, 94 S. W. 708; *Amer. Soda Fountain Co. v. Battle*, 85 Ark. 213, 107 S. W. 672, 108 S. W. 508. Inasmuch as these five notes were each for the sum of \$100, the justice of the peace had jurisdiction of this suit.

The notes sued on were executed by the appellants to the Archillion Plantation Company in February, 1904. They were executed for a valuable consideration, and there is no question made with reference to their validity. These notes were transferred to the Mississippi County Bank in February, 1904, long before the maturity of the notes, and thereafter they became the property of the appellee, who became the successor of the Mississippi County Bank. It is contended that these notes were transferred to the Mississippi County Bank in order to secure an individual indebtedness of Reginald Archillion to the Mississippi County Bank; that on this account Reginald Archillion had no power or authority to transfer the notes of the corporation; and the appellants contend that on this account said transfer and assignment was invalid, and that the appellee cannot recover thereon against them.

Now this is an action, not brought against the corporation, but brought by the assignee and holder of the notes directly against the makers. The corporation is not making any defense or objection to the prosecution of this suit; it does not raise any question as to the transfer of the notes, and does not claim that its treasurer did not have the authority to transfer the notes, or that his act in so doing was ultra vires. The notes them-

selves show a proper assignment thereof, and thereby the title to the property passed to the transferee. If the corporation itself was being sued upon the indorsement, it would be necessary for it to plead as a defense the invalidity of such transfer; and, unless that was done, the assignee would not be required to prove the assignment or the consideration therefor. Unless that was done, it could not be shown that the transfer of the notes was made for an illegal or unauthorized purpose or consideration. It is provided by our statute (section 517, Kirby's Digest) that "the assignee of any instrument in writing made assignable by law, on bringing suit thereon, shall not be required to prove said assignment, unless the defendant shall annex to his answer an affidavit denying such assignment, and alleging that he verily believes that one or more of the assignments on such instrument was forged." It is further provided (Kirby's Dig. § 518) that "it shall not be necessary for any assignee to set forth the consideration of any of the assignments of any such assigned paper."

In the case of *Simon v. Calfee*, 80 Ark. 65, 95 S. W. 1011, this court held that "a corporation cannot avail itself of a want of power or lack of authority of its officers to bind it unless the defense is made on such grounds."

In 6 *Thompson on Corporations*, § 7617, it is said: "In all cases, if there was a want of power in the corporation or in its officer to make the contract, that is a matter of special defense, which must be pleaded by the defendant." And the same author further says (section 7619): "A corporation cannot avail itself of the defense that it had no power to enter into the obligation to enforce which the suit is brought, unless it pleads that defense. This principle applies equally where the defendant intends to challenge the power of its officer or agent to execute in its behalf the contract upon which the action is brought, and where it intends to defend on the ground of a total want of power in the corporation to make such a contract;" and that it is not necessary to plead the defense of ultra vires, but the facts must be shown by the corporation that the instrument was issued or the act done contrary to law. *City Waterworks v. White*, 61 Tex. 536.

Now, in this case, the corporation itself did not make, according to the evidence, any objection at any time to the transfer of these notes, and did not at any time make any objection after the transfer and during all these proceedings. The evidence tends to prove that the corporation and all its directors and stockholders, after full knowledge that the transfer of these notes had been made, acquiesced therein, and never raised any objection at any time thereto; and they are now and have always been satisfied with said transfer. In this case, no affidavit was made by the defendants denying the assignment of these notes as required by

the above section of Kirby's Digest; it follows, therefore, that it was not necessary for the present holder of said notes to set forth the consideration of such assignment, and that the assignment is therefore presumed to be perfectly valid, and made for a perfectly legitimate purpose and consideration. Even though the corporation might have been permitted, if it had been sued, to have shown the invalidity of the transfer of these notes, still, as is said in Joyce on Commercial Paper, at section 279, "If a corporation's indorsement of negotiable paper is ultra vires, and it incurs no liability thereby, its effect, nevertheless, is to pass the property therein." It follows, therefore, that the title to the notes herein sued on passed to the appellee, and it became the owner thereof; and that the validity of the assignment thereof could not be attacked by the defendant under the pleadings made in this action.

Now, as before stated, the corporation is making no defense to this suit, and is not objecting to the right of appellee to sue for the recovery of these notes, but, on the contrary, has acquiesced both in the transfer of the notes and in the institution of the suit thereon by the appellee. It is the makers of the notes, only, who are endeavoring to set up the want of power and authority to transfer these notes. They do not dispute the validity of the notes, or that they were liable thereon at the time they were transferred; that is clearly shown by the evidence. As a general rule, the maker of a note cannot question the authority or capacity of the payee to make a transfer thereof. 7 Cyc. 783. In Joyce on Commercial Paper, § 95, it is said: "The maker of a note is only interested in paying the same to one who is authorized to receive payment and to discharge him from liability, and the fact that a transaction between corporations in consequence of which the note held by one of the corporations has been transferred to the other was unauthorized does not constitute a defense by the maker."

In the case of Brown v. Donnell, 49 Me. 421, 77 Am. Dec. 266, it is held that, "In an action by the indorsee of a note against the maker, the plaintiff is only required to prove an indorsement sufficient to pass the property in the note." And, further, the court said: "The authority to be proved is not one to bind the corporation by a contract of indorsement, but simply an authority to transfer the property. \* \* \* If the indorsement is sufficient to pass the property, so as to protect the maker in paying the note, that is all that is necessary to render him liable to the indorsee."

In the case of Wolke v. Kuhne, 109 Ind. 313, 10 N. E. 116, a note was made payable to "T. W. Woollen, Attorney General," and by him indorsed to one Kuhne, who brought suit thereon; and, to the defense made by the maker that the assignment was unauthorized and invalid, the court said: "We are clearly

of the opinion that the appellants are not in a situation to dispute the authority of the payee to accept and transfer the note executed by them. Whatever may be the right of the state, it is certain that appellants cannot successfully present the question of the authority of T. W. Woollen to take or transfer the note executed to him. That is a question between him and the state, with which these appellants have no concern."

In the case of City Bank of New Haven v. Perkins, 29 N. Y. 554, 86 Am. Dec. 332, a loan was made to the Bank of Akron, and its cashier obtained the money individually and converted same to his individual use. As security for that loan, the cashier transferred certain bills of exchange held by the bank. In a suit on these bills, the acceptor pleaded want of capacity in the cashier to transfer them, and that therefore the plaintiff in that case was not the lawful holder thereof. In that case it was held that the acceptors of the bills could not set up as a defense to an action thereon that the same were still the property of the Bank of Akron, and that they had been transferred or pledged to the plaintiff in that case as security for a loan made by the cashier, who had no authority to transfer or pledge them. The court said: "It is sufficient, if the plaintiff's title is good as against the defendant. If there are any others who claim a title to the bills superior to that of the plaintiff, it can be determined whenever they come before the court to assert it." And, further the court said: "Even if it should be held as between the Bank of Akron, or its legal representatives, and the plaintiffs, that the latter were bound to inquire into the authority of the cashier and take notice of its extent (as to which I shall express no opinion), it is a question which in no way concerns the defendant, and upon which he cannot be allowed to defend, and escape the payment of his obligations."

In the case of Ehrman v. Ins. Co., 35 Ohio St. 324, a certain note was transferred by one corporation to another which was unauthorized by the charters of the companies, and on that account it was claimed that the transfer of the note was illegal and that the title of the plaintiff was inoperative. Upon suit being brought by the assignee of the note against the maker, this defense was made. In that case the court says: "The validity of the note sued on is admitted. The only defense relied on is that the plaintiff, the purchasing company, has not such a title to the note as will enable it to maintain the action. According to the principles already stated, the fact that the agreement between the companies is unauthorized by their charters does not constitute a defense by the maker of the note. As a debtor, he is interested in paying the note only to a party who is authorized to receive payment and to discharge him from liability. But while the validity of the trans-

fer is insisted upon or adhered to by the parties to it, he had no interest in questioning the title of the purchaser, as payment to the latter will discharge his liability on the note."

So, in this case, the notes sued on were duly indorsed and transferred by the payee, and the title thereto became invested in the appellee. The makers of these notes admit the validity thereof; the corporation, its officers and stockholders, do not contest the right of appellee to hold and collect the same; the makers of these notes can therefore not now defend against a recovery on the ground of invalidity or want of power in the transfer thereof by the payee.

It is contended by appellants that there were no minutes or written evidence of the proceedings of the board of directors of the corporation authorizing the transfer of these notes, and that any other testimony as to that was incompetent. But a corporation, its board of directors, and shareholders may waive any necessity of a meeting of its board of directors for the transaction of the business of the company. "They can do so by permitting the directors to establish a habit or usage of assenting separately to the making and performance of contracts by their agents. By permitting such usages or habits to be formed by a long course of business, they adopt and become bound by them, so long as they acquiesce. If this were not so, great injustice might be done to parties contracting with them in their usual way." *Estes v. German National Bank*, 62 Ark. 7, 34 S. W. 85; *Stiwell v. Webb Press Co.*, 79 Ark. 45, 94 S. W. 915, 116 Am. St. Rep. 62. And so, in the case of *Bank of U. S. v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552, it was held that parol evidence was admissible to show the acceptance of a bond by the officers of a corporation; and it is further held in that case that the acts of the corporate officers were admissible as evidence from which the fact of the acceptance of said bond might even be inferred, and that it was not indispensable to show a written instrument or vote on the corporation's books. In *Brown v. Donnell*, 49 Me. 421, 77 Am. Dec. 266, it is held that the authority of an agent of a corporation to indorse a note may be shown by other evidence than the by-laws.

The rules governing the authority of an agent to act for a private business corporation, and the proof thereof, are in many regards the same as between agents of natural persons. The authority of an officer to act for a corporation may be established by proof that he was held out to the public as possessing those powers, which he exercised in a given case, or that the corporation has acquiesced in or ratified such acts. 10 Cyc. 916; 3 Cook on Corporations, § 714. In this case the evidence shows that the Archillon Plantation Company was a private business corporation, and that substantially its entire stock was owned by Reginald Archillon, its treas-

urer, and his wife, whose agent he was; that he was the sole manager of the corporation from its beginning, and that by agreement with and authority of the board of directors—and, in fact, all the shareholders of that corporation—he had full power to transact any and every kind of business connected with such corporation, and was authorized to execute and transfer its notes and papers. He was thus held out to the world by the corporation and its officers. But, in addition to this, the transfer of these notes was known to the board of directors and to all the shareholders of the corporation, and has been known to them ever since they have been transferred. They have not objected to such transfer at any time, but, on the contrary, have acquiesced in and recognized the authority of the transfer.

It is contended by appellants that they are creditors of the corporation, and on that account should have the right to set up the invalidity of the transfer of these notes. But a simple contract creditor cannot sue to make the directors or officers account for ultra vires or illegal acts. He has no interest in any particular property of the corporation. A simple contract creditor of a corporation cannot set aside a fraudulent sale of property made even to a director. As between itself and its creditors, a corporation is simply a debtor, and does not hold its property or any portion thereof in trust, in any sense other than as an individual debtor. By reason of any illegal act, or even the insolvency of the corporation, a simple contract creditor does not obtain any lien upon its property, nor any right to any particular portion of the property of the corporation. Until a judgment is obtained against a corporation and the execution thereon is returned unsatisfied, a corporate creditor has no interest in any specific corporate property. 3 Purdy's *Beech on Private Corporations*, § 988b; 3 Cook on Corporations, § 735.

In the case of *Hollins v. Briersfield Coal & Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, it was held that a simple contract creditor of a corporation whose claims have not been reduced to judgment has no standing to obtain a seizure of the property of the corporation and its application to the payment of his debt. In the syllabus it is said: "Neither the insolvency of a corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, give to a simple contract creditor of the corporation any lien on its property, or charge any direct trust thereon." The assets and affairs of a private business corporation are in the hands of the board of directors of the corporation, and they have the full management and disposal thereof, and their acts cannot be questioned by a simple contract creditor. 3 Cook on Corporations, p. 2447. It, therefore, follows that simply because the appellants may be creditors

of this corporation they do not have any right to set up the invalidity of the transfer of these notes in this action.

It is claimed by appellants that they have made payment of these notes to Reginald Archillion or to the Archillion Plantation Company. We do not think that it is necessary to go into the evidence to determine whether or not this is shown, for the reason that if such payment was made it was not made to the holder of the notes. The appellants in 1904, when these notes were executed, and for several years thereafter, conducted a mercantile business, and furnished to Reginald Archillion and the Archillion Plantation Company merchandise upon a running account from time to time during these years through their store; and it is claimed that through these accounts for merchandise, and also by the payment of cash, the notes involved in this suit were paid. But long before any merchandise was furnished to the Archillion Plantation Company, the notes involved in this suit had been transferred and endorsed to the Mississippi County Bank.

It is claimed by appellee that long before the maturity of the notes involved in this suit the appellants knew of such transfer. But we do not think that it is necessary to determine that in this case, because the payment of a note should be made to the rightful holder thereof, and payment to a person who is not in possession of the instrument is wholly at the risk of the payor. 7 Cyc. 1028. In the case of *Jenkins v. Shinn*, 55 Ark. 347, 18 S. W. 240, the syllabus reads: "If the maker of a negotiable note pays the same to the payee who is not the holder, he is not discharged from his obligation to the indorsee and holder, without showing, either that the payee was authorized to receive payment, or that the holder led him to believe that he was so authorized." *State Natl. Bank of St. L. v. Hyatt*, 75 Ark. 170, 86 S. W. 1002, 112 Am. St. Rep. 50; *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818.

From February, 1904, until the institution of this suit, the Mississippi County Bank and the appellee were the holders of these notes. At the time the appellants claim they made payments thereon, the notes were not in the possession of Reginald Archillion, to whom they claim to have made the payments; and so, if they made such payments, they did so at their own risk.

The appellants asked an instruction, which is numbered 6, in which they asked the court to instruct the jury in substance that if the Mississippi County Bank, while holding the notes as collateral security, knowingly permitted Archillion, personally or as treasurer of the Archillion Plantation Company, to collect any of said notes and deliver any of said notes to defendants upon such collection, then the defendants had a right to pay all of said notes to him. But this is not correct, and

does not follow. It is true that if the holder of the notes involved in this suit had led the appellants to believe that Reginald Archillion, personally or as treasurer of the Archillion Plantation Company, was authorized to collect these notes involved in this suit, then the appellants would be discharged if they had paid them on such supposed authority. But this instruction does not present that defense. It simply says that if the Mississippi County Bank permitted Archillion, personally or as treasurer of the Plantation Company, to collect any of said 29 notes, then the defendants had a right to pay all of said 29 notes to him. Now the Mississippi County Bank may have released some of the notes after they had obtained them, or resold or retransferred them to Archillion; and, if they had done that with some of the notes, it would not affect their title to the remaining notes which they still retained.

We have carefully examined the instructions that were given on the part of appellee and those refused on the part of appellants, in connection with the testimony and the circumstances of this case, and we are unable to say that error has been committed in the giving or refusal of any of them under the law of this case. It therefore follows that the judgment of the lower court must be affirmed, and it is so ordered.

#### R. H. OLIVER & SON v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Arkansas. March 1, 1909.)

#### 1. STATUTES (§ 64\*) — VALIDITY — EFFECT OF PARTIAL INVALIDITY — DIVISIBILITY OF ACT.

Laws 1907, Act No. 193, p. 453, § 1, requires railroad companies to furnish cars, within six days of the filing of an application therefor by shippers, absolutely and unconditionally, and imposes a penalty for failure to comply with the requirement. Section 17 provides that interstate railroads shall furnish cars on application for interstate shipments the same as other cars are to be furnished by interstate railroads under the act. *Held* that, as the act refers to shipments each one of which would be either interstate or intrastate, and consequently either for the application of the federal law, or free from its provisions, there would be no confusion in enforcing it as to either interstate or domestic business alone, and hence, though it were void as to interstate business, it could be enforced within the state as to domestic business.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 58-66; Dec. Dig. § 64.\*]

#### 2. CARRIERS (§ 2\*) — CARRIAGE OF GOODS — STATUTORY REGULATION — VALIDITY — FAILURE TO PROVIDE CARS.

That Laws 1907, Act No. 193, pp. 454, 463, §§ 1, 17, requiring railroad companies to furnish cars within six days of application therefor made the duty to furnish cars absolute, and did not expressly provide for reasonable defenses to be interposed, did not render it unconstitutional, since the whole law is not in the legislative act, but in the Constitution and higher rights of property, and a failure of a railroad company to furnish cars under the act

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



would merely establish prima facie a breach of duty, which would not preclude the right to set up such defense as would excuse or justify the failure.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 2.\*]

**3. CARRIERS (§ 40\*)—DUTY TO FURNISH CARS—LIABILITY FOR FAILURE—UNUSUAL EMERGENCIES.**

Except in cases of extraordinary and unusual emergencies, which cannot reasonably be anticipated by railroad companies, it is their duty to equip themselves with sufficient cars to supply the demands for shipments, both interstate and intrastate, and a failure to furnish all cars demanded under other circumstances will not be excused.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 120-122; Dec. Dig. § 40.\*]

**4. STATUTES (§ 64\*)—STATUTES PARTLY VALID—TEST OF CONSTITUTIONALITY.**

In determining whether a statute partly constitutional is so divisible that the valid portion may stand, the test is the sufficiency, for practical working purposes, of the portion remaining after the provisions of the Constitution have been applied, and legislative acts will be enforced though in some parts unconstitutional, and regardless of whether a line of cleavage can be pointed out, except such as results from an application of the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 5866; Dec. Dig. § 64.\*]

Battle and Wood, JJ., dissenting.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by R. H. Oliver & Son and others against the Chicago, Rock Island & Pacific Railway Company. Judgment for defendant, and plaintiffs Oliver & Son appeal. Reversed.

Act No. 193, p. 453, Acts 1907, is entitled "An act to regulate freight transportation by railroad companies doing business in the state of Arkansas." Section 1 requires railroad companies to furnish cars within six days of the filing of an application therefor by shippers, and provides that for a failure to comply with this section of the act the railroad company so offending shall forfeit and pay to the shipper applying the sum of \$5 per car per day or fraction of a day's delay after the expiration of free time. The requirement to furnish cars upon application is absolute and unconditional. Section 17 of the act contains the following clause: "Interstate railroads shall furnish cars on application for interstate shipments the same in all respects as other cars are to be furnished by interstate railroads under the provisions of this act."

J. H. Harrod, for appellants. Buzbee & Hicks, for appellee.

NORTON, Special Judge (after stating the facts as above). When disposed of in the lower court, the complaint stood as one for the recovery of the penalty of \$5 per day for failure to furnish cars, under Act No. 193, approved April 19, 1907 (Laws 1907, p. 453). To this complaint a demurrer was interposed.

The record discloses that the purpose for which the cars were demanded was the transportation of wood from Galloway to Little Rock. It is conceded that the cars were wanted for intrastate business. It is also conceded by council that the legislation in question is unconstitutional and void with reference to intrastate business. Upon this point we express no opinion. Treating it for the purposes of this case as void as to interstate business, the question is, Must it be held void with reference to intrastate business also? Federal control of interstate commerce is not more plenary than the state's control of domestic business. In fact, it is even less so in a particular not necessary to the decision of this case; that is, that while federal control of interstate commerce may be somewhat affected by the police regulations of a state, there is probably no way in which the state's regulation of domestic commerce can be qualified, except as it may be done by provisions of the state's Constitution, or those higher rights of property which are superior to constitutional sanction. At first view, there seems to be ample room for confusion and conflict between federal and state laws dealing with commercial subjects, and many adjudications show this to be true. The difficulty, however, when present, is in the nature of the case, or in the nature of the legislation. When, as in this case, the controversy is connected with the shipment of goods, the difficulty cannot arise, for every shipment will be to a point within the state, or to a point without the state, and consequently one for the application of the federal law, or one free from its contact. It seems there could, as to domestic business, be no objection to the continued enforcement within a state of a statute broad enough in its terms to include interstate business. To the extent that it contemplated, or in its operation affected, any regulation of interstate business it would be void; but that would be the limit of its invalidity, and in all other matters it would stand to be enforced. This view would seem to be reasonable, and that it is the view of the Supreme Court of the United States can clearly be gathered from the cases of *Central of Georgia Railway Company v. Murphey*, 196 U. S. 194, 25 Sup. Ct. 218, 49 L. Ed. 444, and *Houston & Texas Central Railroad v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772. In this last case we find the following pertinent statement: "As the power to build and operate railways, and to acquire land by condemnation, usually rests upon state authority, the Legislatures may annex such conditions as they please with regard to intrastate transportation, and such rules regarding interstate commerce as are not inconsistent with the general right of such commerce to be free and unobstructed." It is conceivable that a state regulation of domestic com-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

merce could, in its operation, impair the usefulness of common carriers as to interstate business. There is, however, nothing in the act under consideration to prompt us to say that its enforcement as a state regulation would necessarily have such effect.

It is next contended that the act is unconstitutional because its requirement that cars be furnished is absolute and unconditional; that is, it does not mention anything that would justify or excuse the failure. In support of this contention we are referred to the case of *Houston v. Mayes*, supra. We cannot accept it as controlling. The Texas statute there involved, like the one under investigation, required the cars to be furnished; but, unlike the one here in question, it had a proviso as follows: "That the provisions of this law shall not apply in cases of strikes or other public calamities." This provision could well bring in for application the doctrine that the exception strengthens the rule, and that the statute, by enumerating these excuses, intended to exclude all others. But the stronger reason for refusing the application of that case to this lies in the fact that the Supreme Court of the United States there refused enforcement upon the ground that the requirement that cars be furnished transcended the right of the state, through its police power, to burden interstate commerce. This, it will be seen, is a reason without force as to intrastate business. In *St. L. I. M. & S. Ry. Co. v. Hampton* (C. C.) 162 Fed. 693, there is nothing to indicate that it was with reference to intrastate business. Dealing as we are with intrastate business, the question becomes one to be determined by the law of the state. Must the act be held unenforceable as a state law for the reason that it does not upon its face expressly provide for reasonable defenses to be interposed when actions may be brought under it? The whole law is not in the act of the Legislature; it is partly there, partly in the Constitution, and partly in the higher rights of property that the courts will always protect. The demurrer raises the question of the legal sufficiency of the complaint under law; that is, under the whole law. The question is not new. An act of February 3, 1875 (Laws 1874-75, p. 133) in its first section (Kirby's Dig. § 6773), provided that: "All railroads which are now, or may hereafter be built and operated in whole or in part in this state shall be responsible for all damages to persons and property done or caused by the running of trains in this state." This enactment provided for no defenses, but it was construed by the court in a way that let in all proper defenses, and was given the effect of making railroads prima facie liable only. *L. R. & Ft. S. Ry. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55. The principle has been familiar in the jurisprudence of this state for a generation, and we hold it applicable in this case. The failure to furnish cars under the terms of the act

under investigation will establish prima facie a breach of duty on the part of the railroad companies. This will not preclude their right to set up such defense as will excuse or justify the failure. That a fair division of cars with interstate business made it impossible to answer all demands made for cars for intrastate business would apparently be within the limit of proper defenses, in cases of demands too unusual to be foreseen; and, viewed in this way, the act is relieved of the imputation of burdening interstate commerce. Except in cases of extraordinary and unusual emergencies which cannot reasonably be anticipated by railroad companies, it is their duty to equip themselves with sufficient cars to supply the demands for shipments, both interstate and intrastate, and a failure to furnish all cars demanded under other circumstances would not be excused. *M. & N. A. Ry. Co. v. Sneed*, 85 Ark. 293, 107 S. W. 1182; *St. L. S. W. Ry. Co. v. State*, 85 Ark. 311, 107 S. W. 1180, 122 Am. St. Rep. 33; 2 *Hutchinson on Carriers*, § 495.

Another contention is that the legislation, being void as to interstate business, must be void for all purposes, upon the ground that the enactment is indivisible. In cases where legislative acts are assailed as unconstitutional, it is probable the divisibility of the statutes has been given more prominence than it is entitled to. In a sense it may amount to divisibility at last, but apparently the test should be the sufficiency for practical working purposes of that portion of the act remaining after the provisions of the Constitution have been applied. This would seem to be right, for it gives effect to the legislative intent, qualified by the superior force of the constitutional intent, and it gives the citizen (individual or corporation) the benefit of the Constitution, which is all that can be asked. The spirit of our adjudications is in harmony with this view; and the practice of the court, which we have no desire to change, has been to give some force and effect to legislative action, even when unable, under the Constitution, to give all the force and effect the language of the act would require. An apt illustration is the treatment given the legislative provision that tax deeds should be conclusive evidence of the truth of their recitals. There was no way to say the provision was divisible, for it was a single idea. The court refused to enforce it, saying that the truth could not be concluded in that way; but the tax deed was allowed to have the effect of prima facie establishing the truth of its recitals, and thereby the legislative intent was given some effect. *Cairo & Fulton Ry. Co. v. Parks*, 32 Ark. 131. It is not necessary to gather all of our adjudications consistent with this view. Some of them, with varying facts, are: *State v. Kate Marsh*, 37 Ark. 356; *State v. Deschamp*, 53 Ark. 490, 14 S. W. 653; *Fones Hdw. Co. v. Erl*, 54 Ark. 647, 17

S. W. 77, 13 L. R. A. 353; *Morrison v. State*, 40 Ark. 448; *Ry. Co. v. State*, 56 Ark. 166, 19 S. W. 572; *L. R. & Ft. S. Ry. Co. v. Worthen*, 46 Ark. 312; *Leep v. Ry. Co.*, 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 284, 41 Am. St. Rep. 109; *Hammond Pckg. Co. v. State*, 81 Ark. 519, 100 S. W. 407, 1199; *Cairo & Fulton Ry. Co. v. Parks*, 32 Ark. 131; *McGehee v. Mathis*, 21 Ark. 40. From these cases and others it is plain that in this state legislative acts will be enforced though in some parts unconstitutional, and regardless whether a line of cleavage can be pointed out or not, except such as result from an application of the provisions of the Constitution. But if the rule for this state was otherwise, would it avail the appellee? Not if we are correct in our first declaration that because of the divisible nature of the subject-matter—into domestic and interstate business—the act, as a whole, may be valid as to one and void as to the other.

The demurrer should have been overruled. The cause is reversed.

BATTLE and WOOD, JJ., dissent.

# INGLE et al. v. BATESVILLE GROCERY CO. et al.

(Supreme Court of Arkansas. Feb. 22, 1909.)

## 1. INSURANCE (§ 146\*)—MUTUAL INSURANCE—COMPANY'S LIABILITY.

The liability of a mutual insurance company is fixed by the terms of the policy, without regard to the character of the company.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 146.]\*

## 2. INSURANCE (§ 60\*)—MUTUAL COMPANY—ASSESSMENTS—PAYMENT TO POLICY HOLDERS—BOND—LIABILITY OF SURETY.

The liability of the sureties on the bond of a mutual insurance company, conditioned for the payment of all assessments to beneficiaries, is fixed by the bond itself, and not by the policy.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 60.]\*

## 3. EVIDENCE (§ 22\*)—JUDICIAL NOTICE—INSURANCE ASSOCIATIONS—EXISTENCE.

The Supreme Court will take judicial notice of the existence in the state of a class of insurance companies having no capital stock, composed of members equally interested, and paying the losses by assessments levied and collected from the members.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 26; Dec. Dig. § 22.]\*

## 4. INSURANCE (§ 60\*)—MUTUAL INSURANCE COMPANIES—ASSESSMENTS—PAYMENT TO POLICY HOLDERS—BONDS—LIABILITY.

Sand. & H. Dig. § 4133, excludes the application of the insurance laws to mutual insurance societies conducted upon the assessment plan, but requires them to give bond conditioned for the prompt payment of all assessments to the parties or beneficiaries entitled thereto, and makes the sureties liable for any violation of conditions thereof, or for any loss to the policy holders or beneficiaries of such company. Section 4124 requires all fire, etc., insurance companies to give bond, with three sureties conditioned for the prompt payment of all claims ac-

cruing to any person under policies issued. *Held*, construing the statute in view of the distinction made between the two classes of bonds, that the sureties on a bond given and conditioned under section 4133, are not required to pay the loss absolutely, but that their obligation ceased when the assessments were collected and paid over promptly.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 60.]\*

## 5. STATUTES (§ 206\*)—CONSTRUCTION—EFFECTUATING WHOLE STATUTE.

Statutes should be construed so as to avoid apparent repugnancies, and give effect to every word, clause, and provision thereof.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 233; Dec. Dig. § 206.]\*

## 6. INSURANCE (§ 60\*)—MUTUAL COMPANY—PAYMENT OF ASSESSMENTS TO POLICY HOLDERS—LIABILITY ON BONDS—ACTIONS AGAINST SURETIES—ADMISSIBILITY OF EVIDENCE—JUDGMENT AGAINST PRINCIPAL.

As a general rule, a judgment against an insurance company, obtained without fraud, is evidence in an action against the sureties on a bond executed for the benefit of policy holders, unless the judgment against the company is based upon a ground of liability not covered by the bond; and hence, where the bond was conditioned only upon the prompt payment over of assessments, which the complaint, in an action against the company, did not allege was not done, the judgment against the company was not admissible in an action against the sureties.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 60.]\*

## 7. INSURANCE (§ 60\*)—MUTUAL COMPANY—PAYMENT OF ASSESSMENTS TO POLICY HOLDERS—LIABILITY OF SURETY.

A judgment against a principal for breach of an obligation or duty, if obtained without fraud, is only prima facie evidence in an action against the surety, so that in an action on the bond of a mutual insurance company, conditioned for prompt payment over of assessments, the sureties could show that the assessments were promptly paid, notwithstanding a judgment against the company.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 60.]\*

Battle and Frauenthal, JJ., dissenting.

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Action by the Batesville Grocery Company and others against A. J. Ingle and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded, with directions.

T. W. M. Boone and Chas. E. Warner, for appellants. Mechem & Mechem and S. M. Carey, for appellees. Ashley Cockrill, W. F. Coleman, and Murphy, Coleman & Lewis, amici curiae.

BLACKWOOD, Special Judge. The plaintiff in the court below brought suit in the Marion circuit court against the Ozark Insurance Company, on a policy issued March 30, 1904, for loss of \$1,000 on stock of goods, and \$200 on the building, and recovered judgment for the full amount sued for. The bondsmen were not joined in this suit; neither was there any allegation that the company had failed to promptly collect or pay

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

over all assessments to the policy holders. The insurance company answered, and appealed at the first trial, where judgment was entered against it, and afterward a new trial was granted. At the second trial there was no appearance for the defendant, and judgment was rendered against it. The policy is set out in the transcript, and is what is known as a "standard policy," but it has attached to the printed copy, in typewriting, this clause: "This being a policy issued by the Ozark Insurance Co., an organization under the laws of the state of Arkansas governing mutual insurance companies, all special regulations lawfully applicable to its organization, membership, policy or contracts of insurance shall apply to and form a part of this policy." Plaintiff then brought suit against the bondsmen in the Sebastian circuit court for the amount of the loss, as evidenced by the judgment against the insurance company, and obtained judgment against them for the amount of the judgment of the Marion circuit court. The records contain no part of the company's charter, articles of association, or by-laws. The bond sued on sets forth that the insurance company is doing the business of insurance upon a mutual or assessment plan, as provided in sections 4132, 4133, Sand. & H. Dig. The bond is for \$20,000, and is as follows: "Know all men by these presents, that whereas, The Ozark Insurance Company of Ft. Smith, Arkansas, has filed its articles of association, and has in other respects conformed to the requirements of the statutes in such cases made and provided; and, whereas, the said company proposes to continue in the business of insurance upon the mutual or assessment plan, as provided in sections 4132 and 4133, Sandels & Hill's Digest, for the period of two years, ending on the 23d day of July, 1905, now, therefore, we, the Ozark Insurance Company, twenty thousand as principal, and the several persons whose names are in addition subscribed as sureties, are held and firmly bound unto the state of Arkansas, for the use of the beneficiaries of the policy holders of said company, in the sum of twenty thousand (\$20,000.00) dollars, lawful money of the United States. The conditions of the above obligation are set forth in section 4133 of Sandels & Hill's Digest, and are as follows: 'Conditioned for the prompt payment of all assessments to the parties or beneficiaries entitled thereto, and the makers of said bond shall be liable thereon for any violations of the conditions thereof, or any loss which may accrue to the policy holders or beneficiaries of such company.' When said Ozark Insurance Company has complied with all the requirements of this bond, then this instrument shall become null and void, otherwise to remain in full force and effect. Witness our hands and seals this 22d day of July, 1903. Ozark Insurance Company. By E. H. Stevenson, President. James B. Moore, Secretary."

The appellants urged as grounds for reversal: First, that the bond is a fidelity bond, and by it the sureties are only bound to see that the insurance company pays over all assessments to the parties or beneficiaries entitled thereto; second, that the court erred in admitting the judgment of the Marion circuit court as conclusive evidence against the bondsmen; third, that the lower court erred in refusing appellants permission to introduce evidence to show that the assessments collected had been promptly paid over according to the by-laws of the insurance company. The appellees urged for an affirmance of the judgment that it was obligatory upon the insurance company and the bondsmen to pay the loss absolutely, under the policy, and to sustain their contention rely upon this clause of the bond: "And the makers of said bond shall be liable thereon for any violations of the conditions thereof, or any loss which may accrue to the policy holders or beneficiaries of such company." What, then, is a true construction to be given to this bond? The liability of the insurance company is fixed by the policy of insurance, without regard to the character of the insurance company to be made liable. *Block v. Valley Mutual Association*, 52 Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 166. But the liability of the sureties on the bond is fixed by the bond itself.

Our statute does not undertake to define a mutual insurance company, and neither the articles of incorporation nor the by-laws are in evidence. We are left to our general knowledge of this class of insurance. But the court will take judicial cognizance of the fact that there is a class of insurance prevailing in the state of companies having no capital stock, composed of members equally interested, writing policies of insurance, and paying their losses by assessments levied and collected from the members. Section 4133, Sand. & H. Dig., expressly provides that the insurance laws of this state shall be so construed as not to apply in their operation and requirements to any mutual aid societies or organizations for the relief of members thereof, by reason of loss by fire or otherwise, which is not based upon a subscribed or paid-up capital in whole or in part, but alone upon membership dues and pro rata assessments upon its members. Section 4124 provides that all life, fire, and accident insurance companies shall annually give bond with three good and sufficient sureties, "conditioned for the prompt payment of all claims arising and accruing to any person during the term of said bond by virtue of any policy issued by any such company," etc. But section 4133 provides that all mutual insurance companies shall give a bond, "conditioned for the prompt payment of all assessments to the parties or beneficiaries entitled thereto." This is the only condition of this bond. The plan and scheme of insurance is one based on mutual benefits and assessments. If there was no

bond, the policy holders by this system would have to rely entirely upon assessments levied and collected from the members. The bond simply guarantees this system or scheme, and it is given for the sole purpose of seeing that the assessments when collected are promptly paid over to the parties or beneficiaries entitled thereto. It never was the intention of the statute to require a bond to assure to the policy holder a more beneficial contract than the one made under the law of mutual insurance companies. It would be an anomaly to say that the contract of the surety was greater than that of his principal. When the assessments are collected and promptly paid over, the obligation of the surety is at an end. We do not think that the latter clause "for any violation of the conditions thereof or any loss which may accrue to the policy holders or beneficiaries of such company" is necessarily in conflict with the former, nor does it broaden the liability of the bondsmen. In the construction of statutes such construction should be adopted as will avoid an apparent conflict, and at the same time give full effect to every word, clause, and provision of the enactment. In *Wilson v. Biscoe*, 11 Ark. 47, the court says: "A statute is to be construed so that it may have a reasonable effect, agreeably to the intention of the Legislature. It ought to be construed, if possible, so that no clause, sentence, or word shall be void, superfluous, or insignificant. But, if from a view of the whole act, the intent is different from the literal import of its terms, then the intent should prevail." The word "loss" as used in the latter part of this statute is not necessarily used as in a technical sense, as in a fire loss, but means such a loss as would accrue to the policy holders if the assessments of benefits were not promptly paid over to the beneficiary. To hold otherwise would be to disregard the distinction which the statute makes between ordinary or old-line insurance and mutual insurance companies. It would also disregard the distinction made in the two classes of bonds. To adopt the contention of the appellees would be to give a forced construction to the statute, contrary to its reason, intention, and purposes.

As a general rule a judgment against an insurance company, if no fraud or collusion is shown, is evidence against the surety, in a bond executed by the company for the benefit of the policy holders. But the suit against the company cannot be based upon an issue as to liability not covered by the obligation of the bond itself. *Shaw, C. J., in Lowell v. Parker*, 10 Metc. (Mass.) 309, 43 Am. Dec. 436, says: "When one is responsible, by force of law or by contract, for the faithful performance of the duty of another, a judgment against that other for the failure of performance of such duty, if not conclusive, is prima facie evidence in a suit against the

party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside. But otherwise it is prima facie evidence, to stand until impeached or controlled, in whole or in part, by counter-vailing proofs." We think this rule has been generally approved by the text-books and adjudged cases. See *Union Guar. & Tr. Co. v. Robinson*, 79 Fed. 420, 24 C. C. A. 650; *Stephens v. Shafer*, 48 Wis. 54, 3 N. W. 835, 33 Am. Rep. 793; *Beauchaine v. McKinnon*, 55 Minn. 320, 56 N. W. 1065, 43 Am. St. Rep. 506; *Norris v. Mersereau*, 74 Mich. 687, 42 N. W. 153; *Ins. Co. v. Wilson et al.*, 34 N. Y. 275; *State, for Use, etc., v. Colerick*, 3 Ohio, 487; *Robinson v. Baskins*, 53 Ark. 333, 14 S. W. 93, 22 Am. St. Rep. 202; *Baylies on Sureties and Guarantors*, 143; 1 *Herman on Estoppel and Res Adjudicata*, 173; 2 *Van Fleet's Former Adjudication*, 913. If the allegation of the complaint in the Marion circuit court had been that the company had not promptly paid over the assessments, the judgment against the company, in the absence of testimony showing fraud or collusion, would have been binding upon the sureties upon the issue made. The case in 79 Fed. 420, 24 C. C. A. 650, relied upon by appellee's counsel, was upon a bond conditioned "to pay all claims arising and accruing to any person by virtue of any policy issued by the company," and was different from the bond in this case.

We are therefore of the opinion that the case should be reversed, with directions that the plaintiff be permitted to amend its complaint, if it can, so as to allege that the assessments made, if any, were not promptly paid over for the benefit of this policy; and to allow defendants to introduce proof upon this issue, notwithstanding the judgment of the Marion circuit court.

BATTLE and FRAUENTHAL, JJ., dissent.

ST. LOUIS, I. M. & S. RY. CO. v. BIRCH.  
(Supreme Court of Arkansas. March 1, 1909.)

MASTER AND SERVANT (§ 217\*)—ASSUMPTION OF RISK—DEFECTS NOT KNOWN.

A servant does not assume the risk of danger created by a negligent act of the master, unless he is aware of the danger and appreciates it, though he may be guilty of contributory negligence barring a recovery in not discovering the danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

Appeal from Circuit Court, Hempstead County; J. M. Carter, Judge.

Personal injury action by Fred R. Birch against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Kinsworthy, J. H. Stevenson, and Lewis Rhoton, for appellant. J. D. Conway and W. H. Arnold, for appellee.

**McCULLOCH, C. J.** The plaintiff, F. R. Birch, while working for the defendant railway company as switchman in the company's yards at Hope, Ark., received personal injuries alleged to have been caused by negligent acts of defendant's servants, and he instituted the present action to recover damages for said injuries. A jury awarded him damages in the sum of \$1,500, and the defendant appealed.

The injury occurred in the following manner: The plaintiff was foreman of a switch engine, and was engaged in switching some box cars loaded with blocks of wood consigned to a heading mill at Hope. The door of one of these cars was standing open, and as plaintiff, after having set the coupling on one end of the car, ran along beside the car for the purpose of going to the other end to uncouple it from another car, some of the blocks of wood fell out of the car door, and one of them struck him, inflicting a serious injury. He testified that the switch engine bumped against the car with unusual force, and caused the blocks to fall out of the car and strike him. Recovery is sought on the ground that it was necessary for the plaintiff to pass along beside the car in the discharge of his duties, and that the defendant was guilty of negligence in leaving the door of the loaded car standing open so that its contents could be jolted out. The testimony shows that the loaded car came into the yards of defendant over the Arkansas & Louisiana Railroad from Ozan, Ark. It was the duty of the plaintiff and his switch crew to move cars when directed by the yard clerk. There was a car inspector, whose duty it was to inspect cars, but there is evidence to the effect that it was not his duty to report the finding of open doors, but to report only defects in cars.

The court gave the following instruction at the request of plaintiff, which was objected to by defendant: "(1) In this case, if you find from a preponderance of the evidence that the car from which the timber fell which struck the plaintiff was received by the defendant and the doors of said car were open at the time said car was received and at the time the plaintiff undertook to remove the same, and that an ordinarily prudent person acting in the place of the railway company would have anticipated an injury to an employee like or similar to the one in this case, and if you further find that said injury was caused by a failure to keep the door closed or to close the same before or at the time the car was removed, then you may find for the plaintiff, if you further find that said plaintiff was acting with the care of an ordinarily prudent person at the time he undertook to have the engine coupled to said car for the purpose of removing it." The court

also gave the following instruction, among others, at the request of the defendant: "(2) You are instructed that, where a person voluntarily enters the service of a railway company as a switchman, he assumes all the risks and hazards ordinary and incident to such employment, and he is presumed to have contracted with reference to such risks and hazards, and he not only assumes all risks and hazards ordinary and incident to such employment, but all risks and hazards which he could have known by the exercising of ordinary care and diligence; and if you find from the evidence that plaintiff so knew, or by the exercise of ordinary care and diligence could have known of the condition of the car, how it was loaded, and whether the door was open or not, then the plaintiff is presumed to have contracted and assumed the risks and hazards incident to the duties as switchman in connection with said car and load of blocks." The contention of learned counsel is that the above-quoted instruction given at the instance of the plaintiff is erroneous, because it ignores the question of assumed risk. This instruction was predicated on the theory of negligence on the part of defendant in leaving the car door open so as to expose the switchman to danger. His right of recovery was made to depend entirely upon such negligence on the part of the defendant and the exercise of due care on his own part. He did not assume the risk of danger created by the negligent act of the employer unless he was aware of the danger and appreciated it. The fact that he could, by the exercise of ordinary care, have discovered and avoided the danger, did not constitute an assumption of the risk where it arose by reason of negligence of the master, though he might have been guilty of contributory negligence which would have prevented a recovery. *C., O. & G. Ry. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837. In this respect the instruction given at the instance of the defendant was too favorable to it, for the jury were therein told, in effect, that notwithstanding the negligence of the defendant, if the plaintiff "knew, or by the exercise of ordinary care and diligence could have known, of the condition of the car, how it was loaded and whether the door was open or not," then he is deemed to have assumed the risk of the danger. This is not correct, as already stated.

Now, there is no testimony tending to establish the fact that the plaintiff knew that the door was open when he attempted to run past the car to uncouple it. He testified that he did not know it, and that is the only testimony on the subject. There is evidence sufficient to have warranted the jury in finding that he could have ascertained, by the exercise of ordinary care, that the car door was open, and that it was dangerous to pass along close to it. This would have been contributory negligence, but it could not

have constituted an assumption of a risk which arose by reason of the master's negligence, except in the sense that a person assumes the risk of his own negligence. *Mammoth Vein Coal Co. v. Bubliss*, 83 Ark. 567, 104 S. W. 210; *St. L., I. M. & S. Ry. Co. v. Mangan*, 86 Ark. —, 112 S. W. 168; *Naramore v. Cleveland, etc., Ry. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68.

Other instructions requested by the defendant and refused were fully covered by those given, and no prejudicial error is found.

Judgment affirmed.

#### AMERICAN INS. CO. v. DILLAHUNTY. (Supreme Court of Arkansas. March 1, 1909.)

##### 1. INSURANCE (§ 163\*)—DESCRIPTION OF PROPERTY INSURED.

A written application for insurance called for insurance in the sum of \$1,300, \$500 on household goods, \$300 on commissary stock, and \$500 on hay and grain. The policy stated in general terms that it was for insurance in the sum of \$1,300, but in specifying the separate items it failed to mention the item of \$500 on hay and grain. The descriptive clause of the policy was followed by the statement: "For a more particular description and as forming part of this policy reference is had to assured's application and description of even number herewith on file in the office of this company, a copy of which application is hereto attached." *Held*, that the policy was a valid contract for insurance in the sum of \$1,300, notwithstanding the omission of the description of a part of the insured property.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 339; Dec. Dig. § 163.\*]

##### 2. INSURANCE (§ 136\*)—SURRENDER OF POLICY—CONDITION PRECEDENT TO RESCISSION.

Insured is not bound to accept a policy which fails to enumerate all of the property insured, and has the right to demand a correct one; but, if he desires to repudiate the contract, he must return the policy, as his retention of it is an election to treat it as being in force.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 229; Dec. Dig. § 136.\*]

Appeal from Circuit Court, Mississippi County; Frank Smith, Judge.

Action by the American Insurance Company against S. P. Dillahunt. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

D. F. Taylor, for appellant. W. J. Driver, for appellee.

**McCULLOCH, C. J.** This is an action instituted by appellant insurance company to recover from appellee the amount of two promissory notes, executed by the latter for the premium on a policy of fire insurance issued to him by the company on his property. The written application, which by the terms of the policy formed a part thereof, called for insurance for a term of three years in the sum of \$1,300—\$500 on household goods, and \$300 on commissary stock, and \$500 on hay and grain. The policy, when is-

sued and delivered to appellee, stated in general terms, that it was for insurance in the sum of \$1,300, but in specifying the amounts on the separate items it failed to mention the item of \$500 on hay and grain. This was a manifest error on the part of the person who filled out the policy. The descriptive clause of the policy is succeeded by the following sentence: "For a more particular description, and as forming part of this policy, reference is had to assured's application and description of even number herewith, on file in the office of this company, a copy of which application is hereto attached." The policy was sent to appellee by mail, and he testified that soon after he received it he wrote to the company, giving information of the defect in the policy, but received no reply. He did not return, nor offer to return, the policy, and testified that he retained it because the company still had his notes, and he thought he "had better hold on to something." Repeated letters were written to him by the company requesting payment of the notes, and several months afterwards he wrote a letter to the company, mentioning the defect in the policy, and concluding with the following statement: "I have been thinking I would see Mr. Miles [the company's agent] and straighten it up before I pay the notes, so if you think you can collect the insurance on \$1,300 and the policy only shows \$800, go ahead." After the notes became due, the agent of the company who had them for collection called in person on appellee, and informed him that if he would return the policy to the company, the defect therein would be corrected. Appellee merely replied that he would show the policy to the agent some day.

The court, over appellant's objection, gave the following instruction, which is assigned as error: "If the defendant did in fact disaffirm the contract of insurance, such disaffirmance should have been evidenced by the return of, or the offer to return, the policy, either for correction or cancellation; but after disaffirming the contract, he would have been required to surrender the policy only upon surrender to him of his notes." This instruction was erroneous. The policy was a valid contract for insurance in the sum of \$1,300, notwithstanding the patent omission of description of part of the insured property. Appellee was not bound to accept the policy in the defective condition, and had the right to demand a correction, but he could not repudiate the contract without returning the policy. As long as he held the policy it constituted a valid and subsisting contract, and his retention of it was an election to treat it as being in force. He could not, by retaining it, treat it as being in force, and at the same time refuse performance on his own part. The court not only erred in giving the instruction quoted

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

above, but under the undisputed evidence adduced should have given a peremptory instruction in favor of appellant.

Reversed and remanded for a new trial.

**NOVAKOVICH et al. v. UNION TRUST CO.**  
(Supreme Court of Arkansas. March 1, 1909.)

**BROKERS (§ 44\*)—EMPLOYMENT OF AUTHORITY—REVOCATION OF AGENCY.**

A company was employed to sell defendant's property under a contract giving it the sole agency for the sale of the property for three months from the date of the contract, and thereafter until notified by defendant in writing of the withdrawal of the property from sale, and defendant further agreed to pay the company the agreed commission if the property was sold during the term of the contract, whether sold by the company or by some one else. *Held*, that the company would be entitled to the specified commission on the sale taking place within three months, regardless of any attempted revocation by the principal.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 45; Dec. Dig. § 44.\*]

Appeal from Circuit Court, Pulaski County; Robert J. Lea, Judge.

Action by the Union Trust Company against Nick Novakovich and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Bradshaw, Rhoton & Helm, for appellants. Moore, Smith & Moore, for appellee.

**BATTLE, J.** On the 3d day of June, 1907, the Union Trust Company, a corporation, brought this action against Nick Novakovich and wife to recover \$225, as commissions on the sale of certain real estate. The action was based on the following contract:

"Little Rock, Ark., Feb. 25, 1907.

"I have this day placed with the Union Trust Company for sale the property described on the reverse side of card of which I am the owner.

"The said Union Trust Company shall have the sole agency of sale for the above property for three months from the date hereof, and after until notified by me in writing of its withdrawal from sale. And I hereby authorize them to sell and contract with purchaser for the sale and conveyance by warranty deed of said premises, at a price of \$7,000 and terms of payment as written on reverse side of card, or any price or terms which I may authorize them to accept other than the above; and if the said property be sold during the period above stated, no matter by whom, I agree to pay them a commission of \$225, the usual per cent. on the gross amount of such sale."

The defendants denied indebtedness.

Plaintiff recovered judgment against the defendants for the \$225, and interest and costs; and the defendants appealed.

Upon procuring the foregoing contract plaintiff immediately opened negotiations with Walter Nash for the sale of the real

estate, and continually kept them up for about three months, visiting the property two or three times with him, suggesting alterations in it which would make it a better investment, and in various ways attempting to induce Nash to purchase the property. These negotiations were carried on until the property was sold by another agent to the said Walter Nash for \$7,000, he (the other real estate agent) taking other real estate in part payment and accounting to defendants therefor as \$2,000; the other \$5,000 being paid by Nash in cash. The sale was made and completed before plaintiff was notified in writing by the defendants, or either of them, of the withdrawal of the property from sale. Is plaintiff entitled to recover upon the contract?

Appellants contend that the contract sued upon conferred on appellee a naked power to sell, uncoupled with an interest in the property, and that it was revocable at any time they might choose to revoke it, and that when they revoked it before the sale the Union Trust Company could not recover the agreed commission. It is true that the power vested in the trust company by the contract was not coupled with any interest, as the commission to be earned was not an interest rendering the power irrevocable. But Mechem on Agency, § 2091, says:

"Where, then, the authority is not coupled with an interest, the principal has the power to revoke it at his will at any time. But this power to revoke is not to be confounded with the right to revoke. Much uncertainty has crept into the text-books and decisions from the failure to discriminate clearly between them. Except in those cases where the authority is coupled with an interest, the law compels no man to employ another against his will. As has been seen, the relation of an agent to his principal is founded in a greater or less degree in trust and confidence. It is essentially a personal relation. If, then, for any reason the principal determines that he no longer desires or is able to trust and confide in the agent, it is contrary to the policy of the law to undertake to compel him to do so. \* \* \* This, then, is what is meant when it is said that the principal may revoke the authority at any time. But it by no means follows that, though possessing the power, the principal has a right to exercise it without liability, regardless of his contracts in the matter. It is entirely consistent with the existence of the power that the principal may agree that for a definite period he will not exercise it, and for the violation of such an agreement the principal is as much liable as for a breach of any other contract. It is in this view, therefore, that the question of the right to revoke the authority arises."

"Section 210. Where no express or implied agreement exists that the agent shall be re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



tained for a definite time the power and the right of revocation coincide. Such employments are deemed to be at will merely, and may therefore be terminated at any time by either party without violating contract obligations or incurring liability. The law presumes that all general employments are thus at will merely, and the burden of proving an employment for a definite period rests upon him who alleges it.

"But where the agent has been employed for a fixed period the agency cannot be rightfully terminated before the expiration of that period at the mere will of the principal, but only in accordance with some express or implied condition of its continuance. Any other termination of such an agency by the act of the principal will subject him to liability to the agent for the damages he has sustained thereby."

To the same effect, see *John S. Rowan & Co. v. Hull*, 55 W. Va. 335, 47 S. E. 92, 104 Am. St. Rep. 998; *Tiffany on Agency*, pp. 136, 139, 448, 449; 1 *Clark & Skyles on the Law of Agency*, §§ 158, 160.

The contract sued upon is a valid contract. It was based upon mutual and dependent promises—on one side to employ and on the other to serve; and the trust company in good faith undertook to perform its part. The consideration was sufficient. According to the terms of it the trust company had the sole agency of sale of the property for three months after the date of the contract, and thereafter until notified by appellants in writing of its withdrawal from sale, and if it was sold within that time, no matter by whom, was entitled to a commission of \$225. *John L. Rowan & Co. v. Hull*, supra; *Clark v. Dalziel*, 3 Cal. App. 121, 84 Pac. 429.

Judgment affirmed.

# HILL-INGHAM LUMBER CO. v. NEAL. (Supreme Court of Arkansas. March 1, 1909.)

## 1. COMPROMISE AND SETTLEMENT (§ 20\*)— BREACH OF COMPROMISE AGREEMENT—REMEDY.

If a claim under an original lumber contract was settled by another contract, under which property was to be taken by the buyer on consideration that the seller would pay it a sum of money and sell it a car of lumber at a specified sum, and the seller only partly performed the contract, the buyer could not repudiate the contract of settlement and sue on the original one, but would be confined to his remedy for breach of the contract of settlement.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. § 88; Dec. Dig. § 20.\*]

## 2. MORTGAGES (§ 312\*)—SATISFACTION—DAMAGES FOR FAILURE TO ENTER SATISFACTION—ACTIONS—BURDEN OF PROOF.

To recover for failure of a mortgagee to enter satisfaction of the mortgage on the record after payment, the burden is upon the party aggrieved to show that the mortgagee failed to enter the satisfaction within 60 days after be-

ing requested to do so; Kirby's Dig. § 5402, providing a penalty only in case the mortgagee fails to enter satisfaction within that time after request.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 938; Dec. Dig. § 312.\*]

## 3. MORTGAGES (§ 312\*)—SATISFACTION—DAMAGES FOR FAILURE TO ENTER SATISFACTION—ACTIONS—EVIDENCE.

Evidence held not to show that a mortgagee receiving satisfaction of a mortgage failed to enter satisfaction on the record within 60 days after requested to do so by the mortgagor.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 938; Dec. Dig. § 312.\*]

Appeal from Circuit Court, Polk County; Jas. S. Steel, Judge.

Action by the Hill-Ingham Lumber Company against J. R. Neal. Judgment for defendant on his cross-complaint and plaintiff appeals. Reversed and cross-complaint dismissed.

The Hill Foster Lumber Company, a corporation engaged in the lumber business in this state, entered into a contract with one J. R. Neal for the purchase of certain lumber, at a certain price, the output of two sawmills owned by Neal, during the year 1907. The lumber company, under the terms of the contract, was to advance to Neal the sum of \$5 per thousand feet on the lumber as fast as it was cut and stacked in proper shape in the yards and insured in favor of the lumber company. The lumber company advanced to Neal on the contract the sum of \$1,000, with interest at the rate of 10 per cent. per annum, secured by a mortgage on the two mills and on all the timber owned by Neal.

Appellant and appellee afterwards entered into the following contract:

"It is agreed that upon the 19th day of January, 1907, J. R. Neal entered into a written contract for sale of lumber to the Hill-Forrester Lumber Co., and that since the execution of said contract the said Hill-Forrester Lumber Co. has been succeeded by Hill-Ingham Lumber Company, and that said Hill-Ingham Lumber Company has assumed all the provisions and conditions of the said contract made with Neal as above stated. It is further agreed that under the terms and conditions of the said contract the said Neal is due the Hill-Ingham Lumber Company upon the 19th day of this month Seven Hundred Dollars (\$700.00) with accrued interest, and that the Hill-Ingham Lumber Company hereafter called the party of the first part agrees to extend the payment of the said \$700.00 with interest for ninety days, from the 19th day of July, 1907, upon these conditions.

"First. As a part consideration for the extension of time, the said J. R. Neal, the party of the second part, agrees to deliver on board of cars at Acorn as much as 125,000 feet of lumber to the order of the Hill-Ingham Lumber Company, this lumber to be delivered as

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stated above within the ninety days from July 19, 1907.

"Second. It is agreed upon the part of Hill-Ingham Lumber Company that it advance to the said Neal from time to time as cars of lumber are shipped, four dollars per thousand feet, which is for the purpose of paying for the hauling and other expenses incident to the manufacture of the lumber and placing it upon the cars.

"Third. It is further agreed that in case 125,000 feet of lumber does not pay the full amount due the Hill-Ingham Lumber Company at the expiration of ninety days, then the company agrees to give Neal thirty days' more time in which to pay the balance due it with lumber under the terms and conditions of the said contract with Hill-Forrester Lumber Company.

"Fourth. It is agreed upon the part of Neal that he execute a good and sufficient bond to Hill-Ingham Lumber Company, party of the first part, and to be approved by them, in the sum of \$1,000.00, conditioned that the party of the second part fulfill and carry out the agreements in this extension and the terms and conditions of the contract upon his part with the Hill-Forrester Lumber Company which is now a contract between the parties hereto.

"Fifth. The agreement that the original contract as mentioned with Hill-Forrester Lumber Company as per agreement with Hill-Ingham Lumber Company is changed in this respect to wit: That, whereas, in said contract it is specified that five dollars per thousand feet is to be advanced to the party of the second part upon all lumber upon his millyard, that this provision of the said contract is eliminated, and the only moneys to be advanced is \$4.00 per thousand feet as specified above. Upon the fulfillment of the contract herein by him the party of the first part agrees and obligates itself to deliver to the party of the second part all mortgages, contracts, and papers relating to this transaction, and to satisfy the same of record.

"Given under our hands this the 17th day of July, 1907.

"Hill-Ingham Lumber Co. By Roy Lundy. J. R. Neal."

Appellant brought suit against appellee on these contracts, alleging that he had failed to furnish to the appellant 101,517 feet of the lumber specified in the contract, by reason of which appellant was damaged in the sum of \$304.50, the amount of profits which it would have realized had the contract been duly performed by the appellee. Appellee answered, admitting the execution of the contracts, and setting up that it was not the intention of the appellee, in the execution of the latter contract, for the shipment of 125,000 feet of lumber, that the appellant should make a profit upon said lumber, but that the object of the agreement was to secure to appellant the payment of the \$700, and to extend the

payment on the said amount for a period of 90 days, and to give appellee an opportunity to pay the same in lumber if it was so desired. Appellee alleged that the only reason that the 125,000 feet of lumber was mentioned in the contract was because appellant estimated that it would take that amount to pay the debt due appellant. Appellee alleged that the provision of the contract requiring a bond to be executed by him was waived by the appellant. Appellee also alleged that he did not deliver the balance of the lumber mentioned in the complaint because appellant had agreed to accept payment other than by delivery of the lumber, and that appellee, on the 30th day of September, 1907, paid off the indebtedness due to appellant by delivering to appellant a wagon and team at the price of \$275, a stock of shoes at \$254.80, and a car of lumber amounting to \$127.35, making a total payment upon the indebtedness due appellant of \$——, leaving a balance due of \$——, which was paid in full by check of the appellee on the National Bank of Mena, which check was accepted and afterwards cashed by the appellant; that the check showed specifically that it was in full payment of all indebtedness due appellant. Appellee denied that appellant suffered the loss alleged in its complaint, and denied that it would have realized the profit on the lumber alleged had the same been received by appellant.

Appellee set up by way of cross-complaint that he had paid appellant all of his indebtedness to it which was secured by the mortgage on the two sawmills—one known as "Mill No. 1," and one known as "Mill No. 2," situated in Polk county, the mortgage being executed upon the 19th day of January, 1907, and filed with the clerk and recorder of Polk county, and the appellee alleged that he notified appellant in writing to satisfy the mortgage, but that the appellant failed and refused to enter satisfaction of the mortgage at the time it was paid, or at the time it was notified so to do, and had not, on the 18th of January, the time of filing its complaint, satisfied said mortgage, and appellee alleged that by reason of the failure of the appellant to satisfy said mortgage he had been damaged in the sum of \$600; that if it had not been for the incumbrance on mill No. 2, as shown by the record of the mortgage, appellee could have sold the same for the sum of \$750. Wherefore he prayed for damages on his cross-complaint in the sum of \$600. Appellant, in answer to the cross-complaint, denied that the mortgage was paid, and denied that it had received notice to satisfy the mortgage, but alleged that it did satisfy the mortgage on the —— day of January, 1908, and denied that appellee was damaged in any sum. The cause was sent to the jury upon the issues as thus presented, and after hearing the evidence, the jury returned a verdict in favor of appellee on his cross-complaint

for \$200. Judgment was entered accordingly, and this appeal was taken.

Olney & Lundy, for appellant.

WOOD. J. (after stating the facts as above). First. The appellee contended, and adduced evidence tending to show, that the indebtedness due appellant under the contracts was paid and the contracts discharged in this way: It was agreed verbally between appellant and appellee that the debt should be paid by appellee turning over to appellant a team, a car load of lumber, and a lot of shoes, which amounted in the aggregate to \$776.23, which, taken from the debt of \$787.66 due appellant, left a balance of \$11.43 which appellee was to pay by lumber or check; that appellee performed the agreement on his part. It was contended by appellant, on the other hand, that appellee was to pay in addition to the above the sum of \$100 (which appellant claimed represented the profit that appellant would have realized had appellee shipped the lumber under the written contract), and ship an additional car of lumber at a specified price, and that appellee failed to perform his contract in the latter particulars only. On this phase of the case the appellant requested the following: "(4½) If you find from the evidence that after this contract was made the plaintiff agreed to accept a wagon and team and harness and some shoes on amount due plaintiff, in consideration of defendant agreeing to pay the plaintiff \$100 and selling him a car of lumber at \$13 per M. feet, and if you further find that plaintiff accepted the horses, wagon, harness, and shoes, but that defendant failed and refused to pay the \$100, and failed and refused to deliver the lumber, you are instructed that plaintiff has a right to treat this contract as broken and rely on the original contract. (5½) If you find that plaintiff and defendant made the contract referred to in instruction 4½, and that this supersedes the written contract, and that plaintiff did not treat this contract as broken and rely on the original contract, but instead relied on this latter contract, your measure of damages will be \$100, and the difference between the agreed price on the car of lumber and its market value, if you find that defendant failed and refused to deliver the lumber and to pay the \$100." The court did not err in refusing to give these prayers. After appellant had accepted the team, shoes, and lumber under the contract of settlement, even if its terms were according to his contention, he could not then repudiate same and rely on the origi-

nal contract. The question is ruled in principle by Whipple v. Baker, 85 Ark. 439, 108 S. W. 830, where we said, speaking of a contract for compromise and settlement of a disputed matter: "This partial performance by the defendant, and acceptance of its benefits by the plaintiff, placed it out of the power of the plaintiff to abandon the contract and sue for the original consideration, as he attempted to do in this case. He must resort to his action for damages on the contract, if any he has sustained, for the part not performed." Prayer 5½ was inseparably connected in express terms with 4½ and falls with it. In all other respects the rulings of the court on the issue raised by the complaint and answer were correct, and it could serve no useful purpose to discuss them. The verdict and judgment on this issue are correct.

Second. The question as to whether or not the penalty accruing under section 5402, Kirby's Dig., could be set up by way of cross-complaint to an action for breach of contract was not raised in the court below, and we, therefore, express no opinion on that question here. But, treating the issue raised by the cross-complaint and answer thereto as the parties treated it on the trial, we find that there was no evidence to sustain the verdict.

The evidence shows that appellee notified appellant by letter November 6, 1907, to satisfy the record of the mortgage, which appellee claims he had discharged. Appellee testified: "This is the time I asked him to satisfy the record." Appellant under the statute had 60 days, from the time it was requested, to satisfy the record. Section 5402, Kirby's Dig. The record was satisfied by appellant in January, 1908. But the evidence does not show what time in January the record was satisfied. For aught the evidence shows to the contrary the satisfaction may have been within 60 days from the time the request was made to satisfy. The burden of proof on this issue was on the appellee. The evidence, therefore, does not show any failure on the part of appellant to satisfy the record. The appellant on the issue raised by the cross-complaint and answer thereto asked, among other prayers, the following:

"(7) You are instructed that the defendant cannot recover on his cross-complaint." This prayer should have been granted.

For the errors indicated, the judgment on the cross-complaint is reversed, and the cause as to this is dismissed.

BATTLE, J., not participating.

NELSON et al. v. ALFORD et al.  
(Court of Appeals of Kentucky. March 11, 1909.)

**BOUNDARIES (§ 48\*)—AGREED LINE—FENCE.**

Where plaintiffs' immediate or remote vendors and defendants constructed a fence along an agreed line, which had been acquiesced in and maintained by the respective owners, who had cultivated their respective lands to the fence, such fence could properly be regarded as the true boundary line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 232-242; Dec. Dig. § 48.\*]

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Ejectment by Mary Jane Alford and others against Thomas Nelson and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

James C. Wright, for appellants. W. M. Rardin & C. A. Rardin, for appellees.

NUNN, J. This action was brought by appellees in ejectment for the recovery of possibly less than one-half acre of land. They contend for a line running from a hickory S. 70° W., 207 poles, to a stone and ash corner. Appellants claim a line from the same hickory S. 73° 33' W., 75 poles, to a stake in appellees' line, and that the ash and stone corner claimed by appellees is within this line. The evidence is very conflicting, and we would not disturb the verdict of the jury, if they had found for appellants.

It appears from the evidence that about 40 years since Joseph Shaw, the father of appellee Mrs. Alford, and from whom she obtained the land, erected a fence, about 200 yards in length, beginning at the hickory and running on a line about where appellants claim it to be. Appellants and their ancestors cleared their land up to this fence and have cultivated it ever since. The fence has been kept in repair for many years by both parties, and appellants claim that it has been regarded as the true line between them. Appellees admit that the fence has been jointly kept in repair, but controvert the alleged fact that it has been regarded as the true line. The evidence is very conflicting upon this question, which was also submitted to the jury by an instruction offered by appellants, which is as follows: "If the jury believe, from all the evidence, that the immediate or remote vendors of plaintiffs and defendants, as a location of the line in dispute herein, built a fence along said agreed line, and that such location has been acquiesced in [by] such original owners and their grantors for a time as far back as the ownership of plaintiffs' lands by Joseph Shaw, by maintaining said fence and occupying and cultivating their respective lands to said fence, and up to a line in extension thereof in a direct line, then they may find that the line as thus located is the true boundary line

between the lands of plaintiffs and defendants." We are of the opinion that the lower court committed no error prejudicial to the substantial rights of appellants.

For these reasons, the judgment of the lower court is affirmed.

ELAM v. CITY OF MT. STERLING.  
(Court of Appeals of Kentucky. March 10, 1909.)

**1. MUNICIPAL CORPORATIONS (§ 816\*) — OBJECTS IN STREETS—ACTION FOR INJURY—PLEADING.**

Where one suing a city for personal injury relied on the proposition that crossing stones piled in the street tended to frighten horses of ordinary gentleness, the petition should have pleaded it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1713; Dec. Dig. § 816.\*]

**2. MUNICIPAL CORPORATIONS (§ 781\*) — OBJECTS IN STREETS—FRIGHTENING ANIMALS.**

A city was not negligent in leaving stone along the curbing of a street, and out of the traveled way, if it did not tend to frighten horses of ordinary gentleness; and hence is not liable for injury caused by a horse taking fright unless the horse was ordinarily gentle.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1635; Dec. Dig. § 781.\*]

**3. MUNICIPAL CORPORATIONS (§ 799\*) — DEFECTS IN STREETS—PRECAUTIONS AGAINST INJURY—IMPROVING STREETS.**

Cities and towns must keep their streets in reasonably safe condition for travel, but in repairing a street they may place therein material, etc., properly used in the work, though reasonable care should be used to avoid injury therefrom.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1639; Dec. Dig. § 799.\*]

**4. MUNICIPAL CORPORATIONS (§ 755\*) — DEFECTS IN STREETS—INJURIES—LIABILITY.**

Cities are not insurers against accidents on streets and sidewalks.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1587; Dec. Dig. § 755.\*]

**5. MUNICIPAL CORPORATIONS (§ 821\*) — OBJECTS IN STREETS—FRIGHTENING HORSES—JURY QUESTION.**

Generally the question whether an object in a street tends to frighten horses of ordinary gentleness is a jury question.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1748; Dec. Dig. § 821.\*]

Appeal from Circuit Court, Montgomery County.

"To be officially reported."

Action by J. C. Elam against the City of Mt. Sterling. From a judgment for defendant, plaintiff appeals. Affirmed.

Prewitt & Senff, for appellant. W. O. Hamilton and W. B. White, for appellee.

CARROLL, J. The appellant in his petition to recover damages for personal in-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

juries received alleged that the city of Mt. Sterling, by its officers and agents, negligently and carelessly placed and permitted to remain on Richmond street, in said city, two large piles of crossing stones directly opposite each other on each side of the street, so close to the route of travel as to frighten horses passing same, thereby rendering the street dangerous and unsafe for travel, which fact was known to the officers of the city, or could have been known by them by the exercise of ordinary diligence on their part; that, while driving a gentle horse attached to a buggy along the street in the ordinary and usual mode of travel, his horse became frightened at the stones and ran away, causing his buggy to collide with another vehicle, which collision resulted in appellant being thrown violently to the ground, thereby injuring him severely. A demurrer to the petition being overruled, an answer was filed traversing the averments of the petition and pleading contributory negligence. Upon the conclusion of the evidence for the plaintiff the trial judge directed the jury to return a verdict for the city; so that the question we are called upon to determine is whether or not this ruling of the trial judge was erroneous.

The testimony established, in substance, that the city, desiring to make a foot crossing out of stone across the street, employed a contractor to do the work, and this contractor on Saturday, the 22d of February, hauled crossing stones to the point where the crossing was to be laid, and placed them in the street close to the curbing of the sidewalk and parallel with it. The stones, four in number, were six feet long, four feet wide, and four inches thick; two being placed on each side of the street, one on top of the other. They were not on the traveled or macadamized part of the street, and the space in the street for vehicle travel between the stones was some 15 feet. It was the intention of the contractor to lay the stone walk on the Monday following, but rain and other pressing engagements delayed him in the work, and it was not commenced until Wednesday, the 26th, the day appellant was thrown from his buggy. There was some conflict in the testimony as to the gentleness of the horse, but the weight of the evidence was to the effect that he was ordinarily gentle. The appellant offered to prove by several witnesses that stones, placed on the street as these were, were reasonably calculated to frighten horses of ordinary gentleness; but objection to this character of evidence was made and sustained. He also offered to prove by other witnesses that gentle horses driven by them were frightened by these stones before the accident to appellant occurred, and one witness was permitted to say that his horse did scare at them, and that they were reasonably calculated to frighten horses of ordinary gentleness.

It is the contention of the appellee that the offered evidence that the stones were reasonably calculated to frighten horses of ordinary gentleness was properly excluded, because there was no averment in the petition to this effect. It is further insisted that, in omitting to state this fact, the plaintiff failed to set out a cause of action, and a demurrer to the petition should have been sustained. As the cause of action was necessarily grounded upon the proposition that the stones were calculated to frighten horses of ordinary gentleness, it seems to us the petition should have contained this or a like averment. Placing the stones in the street was not in and of itself an act of negligence. The negligence, if any, consisted in the fact that the stones were calculated to frighten horses of ordinary gentleness. If they were not calculated to do this, it was not negligence to place them in the street, and travelers would have no cause of action against the city on account of their presence. As a general rule, a person cannot recover for injuries inflicted by the fright of his horse unless he proves that his horse was ordinarily gentle; and hence it would seem to follow that there should be an allegation of this fact. The stones might have frightened horses, but this fact of itself would not warrant a recovery against the city unless the horse so frightened was ordinarily gentle, and the stones calculated to frighten such a horse. *Elliott on Roads and Streets*, § 616; 28 Cyc. 1380; *Town of Royal Center v. Bingaman*, 37 Ind. App. 626, 77 N. E. 811; *Town of Rushville v. Adams*, 107 Ind. 476, 8 N. E. 292, 57 Am. Rep. 124; *Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 396; *Board of Councilmen v. Fain*, 99 S. W. 275, 30 Ky. Law Rep. 564.

Without passing upon the correctness of the rulings of the trial court in respect to the evidence offered and rejected, we will proceed to consider the question whether or not placing the stones in the street and permitting them to remain there for the time mentioned was an actionable nuisance. It is elementary doctrine that cities and towns must keep their streets, and all parts of them, in reasonably safe condition for public travel; but streets can only be kept in reasonably safe condition for public travel by improving and repairing them. And, if it becomes necessary to improve or repair streets, the municipal authorities must of necessity have the right to put in the streets the material needed to improve and repair them, as well as the implements and machinery that it is requisite or proper to use in this kind of work. It would be most unreasonable to impose upon a city the duty to improve and repair, and at the same time to hold it liable for accidents happening on account of horses becoming frightened at the material or implements or machinery used. In cases of this character the doctrine of nonliability should be applied, unless there is negligence independent of

merely placing material needed in a proper place on the street. The city should, of course, exercise care in placing the material; and, if it is of an unusual character, the additional duty might be imposed of exercising reasonable care to prevent injuries growing out of the fright of horses using the street. But in the case before us the uncontradicted evidence is that there was nothing unusual, or grotesque, or out of the ordinary, in the stones at which the horse became frightened. And it also appears that these stones were put at the place in the street where they would be least likely to frighten horses. They could not well have been put on the pavement or sidewalk, and to have placed them in the traveled part of the street would have been negligence, and so they were put alongside the curbing and parallel with it, and over a ditch or gutter, leaving both the sidewalk and the traveled part of the street entirely free from obstruction. It is a matter of common knowledge that piles of rock that have been placed there for the purpose of repair are constantly seen on the side of turnpikes and highways, and are permitted to remain there until it is convenient or deemed advisable to use them; and so, in the repair of streets and sidewalks in towns and cities, brick, sand, rock, and other material used in the construction or repair are placed conveniently for use. And if occasionally horses become frightened at rock on the side of the turnpike, or brick or stones on the side of the street that have been placed with due care and out of the traveled part of the highway, there can be no recovery for the damages sustained. There is quite a difference between the liability of a city for placing or permitting to remain in its streets material or objects not necessary for the use of the city in the construction or improvement of its streets and its liability for occupying its streets with material that is needed for construction or repair. In the first-mentioned state of case the city would not be keeping its streets reasonably safe for public travel, if by its negligence it permitted them to become incumbered with articles or objects calculated to frighten horses of ordinary gentleness; whereas, in the other instance, no liability would attach if proper care was taken in the location of the usual material.

Cities are not liable for every accident or injury that happens because horses take fright at objects on the side of the street. As said in 2 Dillon on Municipal Corporations, § 1019: "From what has already been said it follows that a municipal corporation is not an insurer against accidents upon the streets and sidewalks; nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient, we think, if the streets, which include sidewalks and bridges thereon, are in a reasonably safe condition for travel in the ordinary modes by night as well as by day; and whether they

are so or not is a practical question, to be determined in each case by its particular circumstances." Generally, the question whether or not an object is one calculated to frighten horses of ordinary gentleness is for the jury, but there are exceptions to this rule, and we think the case before us affords an illustration of one of them. The fact that the plaintiff's horse, assuming that he was ordinarily gentle, became frightened, is not the sole test of the city's liability. Whether or not it is liable depends primarily upon the question whether or not the street at that place was reasonably safe for public travel; and this, in turn, brings into view the final inquiry, whether or not the things in the street constituted a nuisance or rendered it unsafe for public travel. The objects at which the horse became frightened were plain ordinary stones, put there for a lawful purpose, and out of the usual way of travel. We therefore hold as a matter of law that a municipal corporation is not liable in damages because of injuries sustained by the fright of an ordinarily gentle horse at objects, not of an unusual character, placed upon the side of a street, out of the traveled way, for the purpose of constructing, improving or repairing the same, although they may be permitted to remain a longer time than is necessary before being used. As it was not a nuisance to place them there, neither was it a nuisance to leave them a few days. *Farrell v. Oldtown*, 69 Me. 72; *Nichols v. Athens*, 68 Me. 402; *Barrett v. Town of Walworth*, 64 Hun, 526, 19 N. Y. Supp. 557; *Loberg v. Town of Amhurst*, 87 Wis. 634, 58 N. W. 1048, 41 Am. St. Rep. 69; *District of Columbia v. Moulton*, 182 U. S. 576, 21 Sup. Ct. 840, 45 L. Ed. 1237.

We have examined the cases cited by counsel for appellant, as well as others along the same line, and they are not in conflict with the views we have expressed. In *Fugate v. City of Somerset*, 97 Ky. 48, 29 S. W. 970, the piles of lumber at which the horse became frightened were placed at right angles with the street, covering several feet of the improved part of it and extending upon the metal part. The lumber had been placed there to repair the sidewalk, and a portion of it was permitted to remain some time after the sidewalk had been repaired. In *Board of Councilmen of Nicholasville v. Fain*, 99 S. W. 275, 30 Ky. Law Rep. 564, the nuisance in the street consisted of a pile of rubbish containing scraps of tin, an old bath tub, oil cans, and other things. In *Hazelrigg v. Board of Councilmen of Frankfort*, 92 S. W. 584, 29 Ky. Law Rep. 207, the pile of rock, which was 3 feet high, 8 feet wide, and 11 feet long, was in part on the side of the street and partly in the traveled way.

Upon the whole case, we think the trial judge correctly ruled as a matter of law that the placing and leaving of the stones in the street was not an actionable nuisance.

Wherefore the judgment is affirmed.

**BALDRIDGE et al. v. BALDRIDGE.**  
(Court of Appeals of Kentucky. March 11, 1909.)

**1. APPEAL AND ERROR (§ 914\*)—SERVICE OF PROCESS—PRESUMPTION.**

The presumption that summons was duly served when a judgment is attacked collaterally does not obtain on a direct appeal from the judgment, in which case no presumption of service can be indulged where no evidence thereof appears in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3693-3698; Dec. Dig. § 914.\*]

**2. INFANTS (§ 39\*)—SALE OF LAND—CONFIRMATION—PREMATURE JUDGMENT.**

A judgment confirming a sale of an infant's real estate made on the same day the application therefor was filed, and before service had been had on the infant, was premature, and without jurisdiction.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 39.\*]

**3. INFANTS (§ 39\*)—SALE OF REAL ESTATE—HEARING.**

An application for the sale of infants' real estate did not stand for trial at the term at which the application was filed.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 39.\*]

**4. INFANTS (§ 39\*)—REAL ESTATE—SALE—BOND.**

An order for the sale of infants' real estate without the execution of a bond to the infants, as required by Civ. Code Prac. § 493, was void.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 39.\*]

**5. APPEAL AND ERROR (§ 238\*)—PREMATURE JUDGMENT.**

No appeal lies from a judgment rendered before the case stood for trial or from a void judgment until a motion had been made in the trial court to set the judgment aside, as provided by Civ. Code Prac. §§ 516, 517, 763.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1386-1407; Dec. Dig. § 238.\*]

**6. APPEAL AND ERROR (§ 112\*)—VOID JUDGMENT—MOTION TO VACATE.**

An appeal lies from an order overruling a motion to set aside a void judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 749-757; Dec. Dig. § 112.\*]

Appeal from Circuit Court, Knott County.  
"Not to be officially reported."

Action by Mary Jane Baldridge, as guardian, etc., against Eva Baldridge and others. From a judgment for plaintiff, defendants appeal. Dismissed.

G. W. Flenor, for appellants. Smith & Combs, for appellee.

**HOBSON, J.** On September 28, 1892, Mary Jane Baldridge, as guardian of her four children, filed a petition in the Knott court of common pleas, in which she alleged that her children were from three to nine years old; that she owned a half interest in a tract of land in Knott county which was worth \$400; that this was all the property they had; and that a sale of the land was necessary for

their support and education. On the same day an order was made filing certain depositions in the case, also an order appointing T. B. Sturtevant as guardian ad litem for the infant defendants, and filing his report as such, and on the same day the case was submitted and a judgment entered for the sale of the land, without any bond being executed to the infants, as provided by section 493, Civ. Code Prac. The report of sale was filed on September 2, 1893. It was confirmed on October 7, 1893, and on July 30, 1894, the commissioner was ordered to make a deed to the purchaser. From the judgment entered in this proceeding the infant defendants have prosecuted the appeal before us.

There is no evidence in the record that process was served on any one for the infants. The report of the guardian ad litem and the depositions referred to in the order of the court are not in the record. When a judgment is attacked collaterally, it is presumed that the summons was duly served; but, on a direct appeal from a judgment, there is no presumption that process was served where no evidence of service appears in the record. The judgment in the case and all the preceding orders were made on the same day that the petition was filed. The judgment was premature. The court had no jurisdiction over the parties until they were brought before the court, and the case did not stand for trial at that term. No bond having been executed to the infants, as provided by section 493, Civ. Code Prac., the order of sale, the sale, and all proceedings had thereunder were void. But no appeal lies from a judgment rendered before the case stood for trial, or from a judgment which is void, until a motion is made in the court which rendered it to set it aside. Civ. Code Prac. §§ 516, 517, 763; *Curd, etc., v. Williams*, 18 S. W. 634, 13 Ky. Law Rep. 855; *Morrison v. Beckham*, 96 Ky. 72, 27 S. W. 863; *Hermann's Executors v. Martin*, 107 Ky. 642, 53 S. W. 429. If a motion is made in the circuit court to set aside the judgment, and overruled, an appeal may then be prosecuted from the order overruling the motion.

The appeal is therefore dismissed.

**LEVERING v. COMMONWEALTH.**

(Court of Appeals of Kentucky. March 10, 1909.)

**1. HOMICIDE (§ 147\*)—MURDER—DELIBERATION AND PREMEDITATION—BURDEN OF PROOF.**

In a murder prosecution for poisoning accused's wife by giving her strychnia as medicine, the commonwealth must show by competent evidence, that accused willfully and maliciously caused the poison to be administered to his wife in the manner stated.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 147.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

bate of this alleged will was resisted by the relatives of the deceased, and after a contest over its validity in the Shelby circuit court, the paper was rejected. From the judgment rejecting the paper, an appeal was prosecuted to this court, and the judgment of the lower court was affirmed in *Livering v. Russell*, 100 S. W. 840, 30 Ky. Law Rep. 1185. Soon after the decision by this court, the indictment was found, and it seems probable that criminal action was induced by the result of the controversy over the will and the subsequent disclosures made by witnesses, whose testimony will be hereafter noticed. That the paper purporting to be a will was a forgery there is no room to doubt; and it is the contention of the commonwealth that the appellant accomplished the death of his wife for the purpose of procuring her estate. The home of appellant and his wife was in Shelby county, Ky., where they lived on a farm owned by her. But appellant owned a house in Louisville, in which, although rented out, he retained two furnished rooms, at which they lived when in the city. The deceased had been occupying these two rooms for some weeks before her death, and on the Sunday before she died appellant came in from the country to see her, but she did not return to her Shelby county home with him, desiring to remain in Louisville a few days longer. On the Thursday morning following appellant drove into Louisville in his buggy, going first to the home of Annie Gray, and from there to the house in which his wife was living, arriving at the latter place about 9 o'clock in the morning. When he went into the room he found her lying on the bed dead. He immediately went out on the street, and the first person he saw was a Dr. Wilhoit, whom he accosted with the request that he accompany him into the house. This the doctor did, and upon making a hasty examination of the deceased, pronounced her dead, and telephoned for the coroner. The coroner, who came at once in response to the message, testifies that he examined the body, and made a very critical examination of the person, but did not deem it necessary to use a knife in the case. Asked if he could state the cause of her death, as well as other relevant questions in connection therewith, he answered, in substance: "I will tell you—merely give you my conclusion. She was lying on her back, her arms slightly flexed across her chest; limbs drawn in; her feet slightly turned out; her jaws very tightly clenched; peculiar facial expression; very pale; the back part of her body rather bluish; and thought she had died from some convulsive poison, and the further evidence led me to believe that she had died from strychnia. I found her body in the sleeping room; lamp burning; the blind was down; she was dressed in her gown. I found powder on the table in a pasteboard box. The powder was very bitter. I felt sure it was

strychnia; I am familiar with it. I put it in my pocket, took it down to the coroner's office, and kept it there a great many months, but did not have it analyzed; made no analysis of anything that was found in her stomach." Asked if he could state if the powder he found in the box was strychnia, he said "I cannot mathematically swear that it was, but from long experience with strychnia—it had a crystal appearance and an intensely bitter taste—it was so perfectly evident to my mind, that I did not analyze it further."

We think the evidence of the coroner tended to show that the deceased died from the effects of strychnia poisoning. True it is not as full, clear, or satisfactory as it might have been if a post mortem examination had been held, or an analysis of the contents of the stomach made; but it furnished, in connection with other testimony, sufficient evidence of the cause of her death to warrant the jury in believing that strychnia poison caused it. At any rate, it cannot fairly be said there was no evidence that the deceased died from the effects of strychnia poisoning, because the coroner, who was a practicing physician, gave it as his opinion that this poison did produce her death; and it was for the jury to give such weight to his evidence as in their discretion and judgment it seemed to them entitled to. When there is any evidence, direct or circumstantial, to establish the corpus delicti, it is for the jury to pass upon its sufficiency. As under the instructions the jury could not have found the accused guilty unless they believed, beyond a reasonable doubt, that the death of Mrs. Levering was produced by strychnia poisoning, they must have reached the conclusion that she died from the effects of such poison administered by her husband.

The next question is, Was there any evidence to show that appellant caused his wife to take this poison under the belief that it was a beneficial medicine? Upon this point we find the following: In July, 1905, O. A. Dralle, a druggist in Louisville, sold to Mrs. Levering 60 grains of strychnia for the purpose of killing rats, and there is evidence by Annie Gray, the principal witness for the commonwealth, that Mrs. Levering sent this poison in the mail, addressed to her husband at his post office in Shelby county; that a few days after this Levering came to Louisville, went into the house of Annie Gray, and had with him a bottle of strychnia that his wife had bought and sent to him; that this strychnia he mixed with soot and put in capsules, and filled other capsules with flour and soot, at the same time remarking, with reference to his wife, "I am going to kill the ———." There is also evidence by the same witness that he gave these capsules containing the strychnia and soot to his wife, and told her that they were pills from Dr. Brennan, and she must take them, as they would do her good. It is also



testified to by Annie Gray that on the evening of the night that Mrs. Levering died, she saw her take three of the identical capsules that Levering had prepared for her, getting them out of the box in which he had put them at her house. This witness also states that when Levering came to Louisville on the morning his wife was found dead, he first went to her house, and asked her if his wife was there, and when she answered in the negative, he said, "The ——— is dead," and then left her house and drove to the house in which his wife was lying dead.

The evidence of this witness was in itself sufficient to establish the criminal agency. She testified to every fact essential to connect Levering with the death of his wife. But it is strongly insisted that she was an accomplice, and therefore a conviction could not be had upon her testimony alone. So that the important question to be determined in this connection is, Was Annie Gray an accomplice, within the legal acceptance of that word? She saw Levering put strychnia in the capsules; she knew that he intended to give them to his wife for the purpose of killing her. And when she saw Mrs. Levering take these capsules containing strychnia, and knew they would kill her, she did not advise or request her not to take them, nor did she inform her what the capsules contained, or take any steps whatever to save her life. It thus appears that this witness passively approved of, and silently consented to, this horrible crime, and yet she did not procure, advise, encourage, aid, or assist its commission, and so we are clearly of the opinion that she was not an accomplice. The words "accomplice," "accessory," and "aider and abettor" are often used indiscriminately and interchangeably by courts and text-book writers on criminal law. But an "accomplice" may be one of the principal actors, or an aider and abettor, or an accessory before the fact. The word includes in its meaning all persons who participate in the commission of a crime, whether they so participate as principals, aiders, and abettors, or accessories before the fact. *Miller v. Commonwealth*, 78 Ky. 15, 89 Am. Rep. 194; *Elliott on Evidence*, § 2785; 1 *Russell on Crimes*, § 28. It is commonly applied, as in the Code of Criminal Practice, to a witness, and is not so often used in describing a person accused of crime. Usually when persons are spoken of by courts in connection with the commission of an offense, they are mentioned as principals, accessories, or aiders and abettors, although the word "accomplice" would be equally as appropriate. But if, in the course of the trial either of these persons is put upon the witness stand, and a question comes up as to the necessity of corroborating his testimony, he will be spoken of as an accomplice, although he may in fact be a joint principal, or an accessory, or an aider and abettor. And so it is that the Criminal Code of Practice (section 241), fol-

lowing the precedents in this respect, speaks of an accomplice as a witness. But to constitute one either a principal, an accessory, an aider and abettor, or an accomplice he must do something; must take some part; must perform some act, or owe some duty to the person in danger that makes it incumbent upon him to prevent the commission of the crime. Mere presence or acquiescence in, or silent consent to, is not, in the absence of a duty to act, legally sufficient, however reprehensible it may be, to constitute one a principal, or an accessory, or an aider and abettor, or an accomplice; and Annie Gray did not occupy towards Mrs. Levering such relation as would make her failure to endeavor to save her life evidence of guilty agency in the perpetration of the crime. *Wharton on Criminal Law*, § 211; *Bishop on Criminal Procedure*, § 1159; *Plummer v. Commonwealth*, 1 Bush, 78; *Butler v. Commonwealth*, 2 Duv. 435; *True v. Commonwealth*, 90 Ky. 651, 14 S. W. 684; *Omer v. Commonwealth*, 95 Ky. 353, 25 S. W. 594; *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474; *White v. People*, 139 Ill. 143, 28 N. E. 1083, 32 Am. St. Rep. 196; *State v. Hildreth*, 31 N. C. 440, 51 Am. Dec. 369. The test, generally applied to determine whether or not one is an accomplice, is, Could the person so charged be convicted as a principal, or an accessory before the fact, or an aider and abettor upon the evidence? If a judgment of conviction could be sustained, then the person may be said to be an accomplice; but, unless a judgment of conviction could be had, he is not an accomplice. *Bass v. State*, 37 Ala. 469; *Commonwealth v. Wood*, 11 Gray (Mass.) 93; 1 Am. & Eng. Ency. of L., p. 891; 12 Cyc. p. 187; *Carroll v. State*, 45 Ark. 539.

It should further be stated that, although Annie Gray knew this crime had been committed, she concealed from the officers of the law, and other persons, her knowledge for more than two years, and therefore the argument is made that she was an accessory after the fact, and consequently an accomplice. This witness assigned as a reason for her failure to sooner give information of the guilt of Levering that she was under his influence and control, and was apprehensive that he would do her violence, as he had often so threatened to do in the event she disclosed his guilt. She also testified that she had been advised that a disclosure would involve her husband, and that, overcome by fear of personal violence and danger to her husband, she refrained from giving the information. But as the mere failure to give information of a crime will not, in the absence of other acts of comfort or assistance, constitute one an accessory after the fact, we are clearly of the opinion that under the circumstances of this case Annie Gray was not an accessory after the fact. But, passing this, we are further of the opinion that an accessory after the fact is not an accomplice within the meaning of the

Code provision, providing that: "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show that the offense was committed and the circumstances thereof."

Under the common law an accessory after the fact was guilty of a felony, and was subject to the same punishment as the principal. 4 Blackstone, p. 439. And in some jurisdictions where the common-law rule has not been changed by statute, and in others where it has, the courts have held that an accessory after the fact is an accomplice in the sense that his testimony must be corroborated. See cases collected in note on page 763, 5 Am. & Eng. Ann. Cases. But the prevailing and better practice, and the one we approve, is that an accessory after the fact is not an accomplice requiring corroboration of his evidence. Under Ky. St. § 1129 (Russell's St. § 3156): "Accessories after the fact, not otherwise punished, shall be guilty of high misdemeanor, and fined and imprisoned at the discretion of the jury, and may be tried, though the principals be not taken or tried." It will be noticed that the statute does not define an accessory after the fact, but according to the accepted definition an accessory after the fact is one "who knowing a felony to have been committed, harbors the felon or renders him any other assistance to elude punishment." And "one is not such an accessory who merely neglects to make known to the authorities that a felony has been committed, or forbears to arrest the felon." Bishop on Criminal Law, §§ 693, 694; 1 Wharton on Criminal Law, § 241; 1 Am. & Eng. Ency. of Law, p. 267. Whereas, to constitute one an accomplice, it is necessary that he should voluntarily unite with the principal offender in the commission of the crime; in other words, participate in its commission in some manner or other. Wharton's Criminal Evidence, § 440; People v. Smith, 28 Hun (N. Y.) 626; Rice on Crim. Ev. § 319; State v. Phillips, 18 S. D. 1, 98 N. W. 171, 5 Am. & Eng. Ann. Cas. p. 760. It is therefore clear that an accessory after the fact is not an accomplice.

Applying the principles above set forth, and which are generally recognized and approved, it is manifest that Annie Gray could not be convicted, either as principal, aider and abettor, or an accessory before the fact, and hence she was not an accomplice. The essential things necessary to constitute her one of these offenders are lacking. Having found that Annie Gray was not an accomplice, it was not necessary that there should be any corroboration of her evidence, within the meaning of section 241, Code Cr. Prac., and this conclusion disposes of the principal assignment of error, based upon the theory that, as Annie Gray was an accomplice,

there was not sufficient corroboration of her evidence. The trial court treated Annie Gray as an accomplice, and gave to the jury an instruction in the manner and form required by section 241 of the Code; but this, in our view of the case, was prejudicial to the commonwealth, and not the accused, as it placed upon the commonwealth the burden of corroborating her testimony by other evidence tending to connect the accused with the commission of the offense, when no other evidence was necessary.

But in addition to the testimony of this witness, there is other evidence conducing to show the guilt of the accused. The evidence is very satisfactory that the will offered for probate, and in which his wife made Levering her sole devisee, was a forgery and a fraud, concocted and perpetrated by him. And the desire upon his part that his wife should die in order that he might obtain her property furnished a motive for the commission of the deed. There is evidence that on the morning his wife died, he stated to Lewis Gray, just before leaving his home in Shelby county, to come to Louisville, that he "would bring a dead one home with him." There is evidence by Joe Cain that when he came to Louisville on the morning his wife was found dead, he went first to the house of Annie Gray, and asked if his wife was in, and when he learned that she was not, he said, "Damn her, I guess she's a dead one," and then got in his buggy and went to the house where his wife was. This witness also testifies that he saw Levering in the house of Annie Gray filling the capsules with strychnia and soot, and heard him say, "I guess when she gets this, it will fix her," and on the morning that Mrs. Levering was found dead he saw on the dresser in her room the bottle or box that he had seen Levering have at the house of Annie Gray when he was filling the capsules. A Mrs. Ratteman testified that a week or a few days before the death of Mrs. Levering she heard Levering say that, "when she got that stuff, it will fix her." She did not know who he meant, as he did not mention any name, and was not speaking to her, but the subsequent evidence developed that this statement was made in the presence of Annie Gray, and her evidence shows that Levering was referring to his wife when he made this remark. Stanley Brown testified that on the morning after the funeral the accused "clapped his hands in the dining room, and said he was the happiest man in the world."

There are other circumstances pointing to the guilt of the accused, but we do not deem it necessary to notice them. The principal witnesses for the commonwealth are vigorously and justly denounced by counsel for the appellant, and it must be conceded that their testimony exhibits them as wicked, degraded creatures, and yet they were the

most confidential friends and intimate associates of Levering. It is also forcibly urged that no man should be deprived of his liberty upon the testimony of such self-confessed falsifiers and villains, but as an all-sufficient answer to this, we say that a jury, chosen and accepted by the appellant, saw these witnesses, and heard them tell the story of their own depravity and Levering's crime in all its shocking details; and, having so seen and heard, that jury believed what they said, and it is not within our province to declare them unworthy of credit or belief.

We have noticed the alleged errors complained of in the admission of testimony, in the argument of counsel for the commonwealth, and in the remark made by the presiding judge during the trial, but do not deem either of them of sufficient importance to extend the opinion in discussing them.

After a careful examination of this record, we find no reason for disturbing the judgment, and it must be, and is, affirmed.

# DUFF et al. v. COMBS.

## COMBS v. DUFF.

(Court of Appeals of Kentucky. March 11, 1909.)

### 1. ABATEMENT AND REVIVAL (§ 61\*)—DEATH OF ONE OF SEVERAL PARTIES—SUITS TO SETTLE ESTATE.

Under Civ. Code Prac. § 432, making creditors who file claims against an estate parties to a suit to settle the estate, such suit does not abate as to other claimants by the death of the creditor bringing the suit, though it is not revived by his personal representative.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 315; Dec. Dig. § 61.\*]

### 2. ABATEMENT AND REVIVAL (§ 72\*)—DEATH OF PLAINTIFF—RIGHTS OF PERSONAL REPRESENTATIVE.

The interest of a creditor suing to settle an estate devolves upon his personal representative at his death.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 378, 379, 384, 385; Dec. Dig. § 72.\*]

### 3. ABATEMENT AND REVIVAL (§ 72\*)—BAR AS TO ONE PARTY—EFFECT.

There may be sufficient parties, though revivor as to one party is barred.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 378; Dec. Dig. § 72.\*]

### 4. JUDGMENT (§ 17\*)—PROCESS TO SUSTAIN—SUIT TO SETTLE ESTATE.

A decree and proceedings thereunder in a creditor's suit to settle an estate is void where defendants were not summoned, and did not appear.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 25; Dec. Dig. § 17.\*]

### 5. JUDGMENT (§ 117\*)—CONFORMITY TO PRAYER.

Under Civ. Code Prac. § 90, limiting recovery to that demanded when no defense is made, a decree of sale beyond the prayer of

the petition in a creditor's suit to settle a decedent's estate was improper.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 233; Dec. Dig. § 117.\*]

### 6. APPEAL AND ERROR (§ 238\*)—PRESENTATION OF QUESTIONS IN LOWER COURT—VOID JUDGMENTS—ESSENTIAL STEPS.

Before appeal lies from a void judgment or a clerical misprision, motion to correct the judgment must be first presented to the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1391; Dec. Dig. § 238.\*]

### 7. ATTORNEY AND CLIENT (§ 70\*)—AUTHORITY TO RECEIVE NOTICE—PRESUMPTION.

In the absence of a disclaimer of the relation of attorney and client, it will be presumed that the attorney had authority to receive notice of a motion.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 95; Dec. Dig. § 70.\*]

### 8. APPEAL AND ERROR (§ 934\*)—PRESUMPTIONS—SUPPORT OF JUDGMENT.

Service of summons is presumed as against collateral attack on a judgment, but not on appeal which is a direct attack.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777, 3778; Dec. Dig. § 934.\*]

Appeal from Circuit Court, Breathitt County.

"To be officially reported."

Action by E. C. Tutt to settle the estate of C. A. Duff, deceased. From the judgment, Creed Duff and others appeal adversely to S. S. Combs, and Combs appeals adversely to Nancy Duff. Reversed as to first appeal, and affirmed as to second.

O. H. Pollard and E. C. Hyden, for appellants, first appeal. J. J. C. Bach and G. W. Fleenor, for appellee, first appeal.

J. J. C. Bach and G. W. Fleenor, for appellant, second appeal. O. H. Pollard and E. C. Hyden, for appellee, second appeal.

O'REAR, J. C. A. Duff died intestate prior to 1895 a citizen of Breathitt county. He was survived by a widow and several children, and children of a deceased daughter, a number of whom were infants, and some of them under 14 years of age. The decedent owned two tracts of land in Breathitt county, comprising about 200 acres each. E. C. Tutt, who claimed to be a creditor of the decedent, brought this suit in the Breathitt circuit court to settle the estate. He described the lands above named, set out his debts, one of which was a note executed in 1874, and nothing showing that it was not barred many years before the suit was brought. The widow and children and grandchildren were made defendants. The petition alleged that there was no personal estate, and asked that enough of the land be sold to satisfy the debts of the decedent. Whether the summons issued against the defendants was ever served upon any of them is not shown. None of them appeared. A guardian ad litem filed a perfunctory an-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

swer for the infants, and then paid no further attention to the case. A reference to the master commissioner was directed to audit claims. Plaintiff Tutt appeared before the master commissioner and gave his deposition. The commissioner says he notified the parties. How is not shown. Perhaps it was by advertisement in a newspaper, as the order of reference directed that course among others. Claims amounting to about \$175 were presented and allowed. About three years later there was a judgment entered decreeing a sale of the two tracts of land described in the petition, or so much as might be necessary to pay the debts allowed in the commissioner's report and the cost of the action. The commissioner sold the land, all of it, for \$385.45. The two tracts were not sold separately, but sold together it appears. A deed was made to the assignee of purchaser in the course of a year or so. Two or three years later the purchaser was awarded a writ of possession. Then the widow and children seem to have become aware that they had been sued and their home had been sold. They moved the court to set aside the judgment ordering the sale and the judgment awarding the writ of possession. The court at first overruled the motion, but subsequently, upon notice to the vendee of the purchaser (S. S. Combs), did set aside the judgment of sale. In the meantime the plaintiff in the suit had died, and for more than a year the suit was not revived. It is not revived yet so far as that plaintiff is concerned. But he was not the only plaintiff. A creditor who files a suit to settle the estate of a deceased person brings the action necessarily on behalf of all other creditors, who by filing their claims become parties to the action. Civ. Code Prac. § 432. So, when E. C. Tutt died, and his claim was suffered to abate, the action was nevertheless on the docket for all other claimants who had appeared in the action. The original plaintiff could not have dismissed the suit to the prejudice of the other creditors. His death removed him from the case. Thereafter the personal interest he had represented devolved upon his personal representative. But the latter by failing to revive his intestate's cause of action could not prejudice the rights of the other creditors. Though they may not have appeared on the docket as plaintiffs, their interest made them such, and the court could have and should have ordered one or more of them to have assumed the active position of plaintiff on the record for the benefit of the others, if their interests were still unsettled. There may be other and sufficient parties before the court, although revivor as to one party may be barred. *Gardner v. Roberts*, 4 Ky. Law Rep. 614. But in this case the purchaser (now appellant S. S. Combs) had paid off the purchase-money bonds executed at the sale of the land. Presumably the creditors had all been paid their

debts. Combs, then, was the sole party in interest, opposed to the heirs of Duff.

This case has been loosely practiced, speaking by the record. It is not disclosed that a summons was ever served upon any party to the suit—adult or infant. Nor did any appear till long after the judgment of sale had been entered and executed. The petition in the case prayed for the sale of enough of the lands of the intestate, subject to the homestead of the widow, to pay his debts. As stated, the judgment rendered was for a sale of all the land, without allotting homestead.

The errors we notice are: (1) The failure to have service upon any of the defendants. (2) The appointment of the guardian ad litem for the infants before they had been summoned, or before any person had been summoned for them. Civ. Code Prac. § 36. (3) Entering the decree of sale in spite of and beyond the prayer of the petition. Civ. Code Prac. § 90. (4) Entering judgment at all without summons or appearance of the defendants. (5) Confirming a sale of two separate tracts of land, which sold as a whole, when the law directed a sale in parcels. (6) All subsequent proceedings save the order setting aside the judgment of sale. The nature of these errors varies. The decree and proceedings under it without the defendants having been summoned or appearing is void. The decree for relief beyond the prayer of the petition (when defense is not made) is a clerical misprision. The other errors are such as may be corrected by appeal from the final judgment within the time allowed by law. Before an appeal could be prosecuted from a void judgment or a clerical misprision, a motion to correct the judgment in the lower court must first be acted on by that tribunal. The notice was given in this case to S. S. Combs, the purchaser, and the only remaining party in interest. It was served upon J. J. C. Bach as his attorney. It was also served upon the attorney of record for the plaintiff. Neither Mr. Bach nor Combs appeared, at least the record does not show that either appeared. If the notice was served upon one not an attorney for a party, the attorney should disclaim the relation. It is presumed that one who appears or suffers himself to be treated as the attorney for a party to a suit is the attorney for that party. Mr. Bach appears in this court for Combs. The sheriff's certificate is that he executed the notice upon J. J. C. Bach; "he being attorney for S. S. Combs." The relationship of Bach at that time to Mr. Combs is not now disclaimed. We think the notice was sufficient.

It is argued for appellant Combs that the fact the record fails to disclose whether summons was served proves nothing; that the presumption is it was served. In a collateral attack upon a judgment that is the presumption. But this is not a collateral,

but a direct, attack upon the judgment. It is both by motion to vacate the judgment, and by appeal from it. In that state of case the record must sustain itself. See *Francis v. Lilly*, 124 Ky. 230, 98 S. W. 996, and cases there reviewed. The appeal of Duff's heirs against Combs may have been unnecessary, as the other appeal, that of Combs v. Duff's Heirs, probably brought up the whole question. But the matter is here without objection to the form of appeal and is accordingly disposed of.

The judgment confirming the sale and ordering deed to the purchaser does not appear to have been acted on. Let it now be reversed in the appeal of Duff's Heirs v. Combs. Let the appeal of Combs be affirmed. On a return of the case S. S. Combs will be substituted to the rights and place of those creditors whose claims he paid off when he settled the purchase-money bonds. The circuit court should appoint a guardian ad litem to look after the interest of the infants.

**CHESAPEAKE & O. RY. CO. et al. v.  
BARNES' ADM'R.**

(Court of Appeals of Kentucky. March 12, 1908.)

**1. MASTER AND SERVANT (§ 141\*)—RAILROADS—  
—DUTY TO ESTABLISH RULES.**

It is the duty of railroad companies to establish and publish rules for the operation of trains and the government and control of employes when in the discharge of their duties, and the failure to establish and enforce rules which will afford employes reasonable protection against the dangers of the employment will render a railroad company liable for injuries resulting therefrom.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 283; Dec. Dig. § 141.\*]

**2. MASTER AND SERVANT (§ 190\*)—INJURY TO  
SERVANT—RIGHT OF RECOVERY.**

Where an employe, himself free from negligence which would defeat a recovery, is injured or killed by a violation of the rules by a superior agent or officer of the master, the master is liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 466-470; Dec. Dig. § 190.\*]

**3. MASTER AND SERVANT (§ 146\*)—RULES FOR  
EMPLOYEES—INJURY TO SERVANT.**

Where decedent, a member of a wrecking crew, when the train took a siding to allow another train to pass, left his train and stood on the track immediately in front of the tender of his own volition, and not in pursuance of any duty, he could not depend on the observance by the engineer of a rule requiring the bell to be rung before the engine was started, and there could be no recovery from the railroad company for his death caused by the engineer's starting the engine without ringing the bell.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 283; Dec. Dig. § 146.\*]

**4. MASTER AND SERVANT (§ 223\*)—INJURY TO  
SERVANT—ASSUMPTION OF RISK—SCOPE OF  
EMPLOYMENT.**

The servant assumed the risk in taking such position, and the only duty the railroad company owed decedent was the duty to avoid injuring him after his position of peril was discovered.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 652-653; Dec. Dig. § 223.\*]

Appeal from Circuit Court, Campbell County.

"To be officially reported."

Death action by Leonard Barnes' administrator against the Chesapeake & Ohio Railway Company and another. Judgment for plaintiff, and defendants appeal. Reversed, with directions for a new trial.

Galvin & Galvin, for appellants. Arthur C. Hall and Arthur Shackelford, for appellee.

CARROLL, J. Leonard Barnes was a member of a wrecking crew of the Chesapeake & Ohio Railway Company, and in May, 1907, was sent out from Covington with a wrecking train to do some work in connection with a wreck on the road of appellant company. When the wrecking train arrived at New Richmond, a station about 20 miles east of Covington, it received notice that the wreck had been cleared, and was ordered to return to Covington as the second section of a freight train designated as "first 77." When the order to return was received, the engine of the wrecking train was cut off from the other cars, and coupled on to the rear end of the train next to the caboose, and then backed towards Covington; the tender being in front of the engine. When the train arrived at Ross' Station, a place between New Richmond and Covington, it was required to go upon a side track to await the passing of some east-bound trains. The freight train known as "first 77" was on this siding when the wrecking train reached there, and it and the wrecking train remained on the siding for something over an hour. When an east-bound freight train passed, the main track was clear, and "first 77" proceeded to move out on its journey towards Covington. As soon as it started, and after it had gone a few feet, the engineer on the wrecking train proceeded to follow it in obedience to verbal orders previously given him by the conductor, who was at the depot several hundred yards distant, when the wrecking train started. The deceased, Barnes, and Peacock, and Scheidler, other members of the wrecking crew, had been sitting on the main track, near the engine of the wrecking train, but, when the east-bound freight approached, they left the main track and got on the siding immediately in front of the tender of the wrecking train, in the space between the tender of

the wrecking engine and the caboose of "first 77," and were so standing when the wrecking engine started. Barnes and Peacock had their faces towards the caboose of "first 77," while Scheidler was looking at the east-bound freight train as it passed on the main track. The conductor of the east-bound freight, who was standing on the caboose as this train passed the engine of the wrecking train, evidently saw the position of peril the men were placed in by the movement of the engine of the wrecking train, and halloed to Scheidler, who immediately jumped off of the siding track, thereby escaping injury, but Barnes and Peacock, who did not receive any warning or notice, did not move from their position on the siding track, and were knocked down, run over, and killed by the tender. Neither the engineer nor the fireman had any notice of the position of these three men, and did not learn of the accident until some person called their attention to it, when the engine was immediately stopped. The administrator of Barnes brought this action against the appellee company and Montleth, the engineer, to recover damages for the death of his intestate. The negligence charged in the petition consisted in the fact that the engineer of the wrecking train started his engine without having received any signal to do so, and without giving any warning by sounding the whistle or ringing the bell of his intention to start, thus violating the rules of the company which provided that an engineer before starting his train should sound the whistle of the engine or ring the bell thereof as a warning and notice of his intention so to do. Upon a trial before a jury, a verdict was returned against the company and the engineer. We are asked to reverse the judgment entered upon the verdict for errors of the trial court in the admission of evidence, in the giving of instructions, because the verdict is excessive, and for failure to give a peremptory instruction.

The weight of the evidence conduces to show (1) that an hour or more prior to the accident the conductor of the wrecking train gave the engineer verbal orders to follow "first 77" as soon as it moved out, but there is no evidence that Barnes had any notice of information of this order; (2) that the engineer or fireman did not know that Barnes or the other men were on the side track immediately in front of the tender when the engine was started; (3) that neither the engineer nor fireman gave any notice or warning by ringing the bell or sounding the whistle of the intention to move the train; (4) that a rule of the company requires that "the engine bell must be rung when an engine is about to move." As we are of the opinion that the peremptory instruction requested by the company should have been given, we will consider the case upon the assumption that the rules of the company required that the engineer of the wrecking train should ring, or have his engine bell rung, before he start-

ed the train, and that, in violation of these rules, he started the engine without ringing the bell or sounding the whistle, or giving other notice of his intention. It must be further assumed, as there is no evidence to the contrary, that neither the engineer nor the fireman nor the conductor knew or had any reasonable grounds to believe that Barnes or the other men were standing on the side track when the engine started.

The question, therefore, to be determined, comes to this: Did the company and the engineer owe a duty to Barnes to ring the bell or sound the whistle before starting the train? If they did not, then the failure to give this notice was not negligence as to them, and consequently there can be no recovery. If the rules of the company are intended for the protection of employes who are not at the time engaged in any service in connection with their employment, or, to put it in another way, if the employes have a right at all times to rely upon the fact that the rules of the company will be observed, although they may not at the time be engaged in the discharge of any duty for the company or within the scope of their employment, then the failure to ring the bell before starting the engine was negligence. On the other hand, if the rules are only intended for the use and protection of the employes when they are engaged in the performance of some duty within the scope of their employment, or that is made necessary by the exigencies of the occasion, or that is being carried out in obedience to the orders of a superior officer, it follows that Barnes was not entitled to depend upon the rules requiring that the bell should be rung before the engine was started, and hence there can be no recovery for his death, as at the particular time he was not engaged in any service for the company. He was merely standing on the track waiting for another train to pass, when no duty that he owed to the company or within the scope of his employment required him to be there.

It is a duty imposed upon railroad companies to establish and publish rules for the operation of trains and the government and control of employes when in the discharge of their duty for the purpose of promoting the safety of the employes and to protect them from the negligence of each other; and the failure to establish, promulgate, and enforce rules which, if observed, will afford the employes reasonable protection against the dangers of the employment and avoid exposing them to unnecessary risks, will render the company liable in damages for accidents and injuries occurring because of such failure. 1 Shearman & Redfield on Negligence, § 202; Elliott on Railroads, § 1280; Thompson on Negligence, §§ 4135-4173; Nolan v. New York, N. H. & H. R. Co., 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305, and extended note. And when an employe, who is himself free from negligence that would defeat a recovery, is injured or

killed by a violation by a superior agent or officer of the company of the rules, an action to recover damages for the loss will lie. The reason of this is that the employes have the right to assume that their superiors will observe the rules set down for their guidance and government, and will not in violation of these rules, or without regard to them, do anything that will place other employes in peril. In the management and operation of trains the employes are called upon at all times of the day and night in the performance of their duties to place themselves in positions of great peril, where the slightest movement of the train without notice will endanger limb as well as life. But they go confidently into these hazardous places, relying upon the rules of the company to protect them, and feeling that the train will not be moved until some warning or notice has been sounded in accordance with the rules. It has therefore come to pass that absolute obedience to the rules established for the movement of trains is of the first importance. It is indispensable to the safety of life and protection of property that carriers engaged in the hazardous business of transportation by modern methods should devise and publish these rules, not only for the safety of the public, but for the protection of the employes. If it were not for the establishment and promulgation of these rules, and the fact that obedience to them is unconditionally exacted, and very generally accorded, employes engaged in the operation of trains would be constantly in danger from the innumerable situations in which the failure to observe rules would involve them. But these principles, so well recognized and generally enforced, do not reach the question we are dealing with. They are applicable to employes who are engaged in some service within the scope of their employment, or that are demanded by an emergency, or performed in obedience to the orders of a superior, and should not be extended so as to embrace employes who are not at the time engaged within the scope of their employment, or acting in obedience to the orders of a superior, or performing some duty that a sudden emergency has imposed. It follows from this that the deceased did not come under the protecting care of the rules, and therefore neither the engineer nor the company is liable in damages for his death, because a careful examination of the record fails to disclose any evidence that even conduces to show that Barnes in standing on the track in front of the tender was performing any duty that he owed to the company. He did not take the position in obedience to a request from any person. Nor did his employment require him to be there. The rule requiring the ringing of the bell before the engine started was not intended for the pro-

tection of persons on the track in places where their duties did not require them to be. If Barnes could claim the protection of the rule, so could any other person who might be there. Unless the rules are confined to employes engaged in some duty under the conditions hereinbefore set out, then the rule requiring the ringing of the bell and all other rules established by the company for the operation of its trains and the government and protection of its employes must be held to be enacted for the benefit of every person whether he be an employe or not, because the fact that Barnes was an employe did not afford him any protection when outside the line of his duty.

Some point is made that the engineer moved the train without a signal from the conductor so to do, but the uncontradicted evidence is that the conductor had received orders as to the movement of the train, and reported these orders at least once to the engineer, who thoroughly understood that he was to follow "first 77" from Ross. The fact that the orders were given to the engineer by the conductor verbally, and some hour or more before the train was moved at Ross, is totally immaterial, as there is no doubt that the train was moved in obedience to the orders, no matter when they were given; but, if the train had not been moved in obedience to the orders, it would not affect the question here involved, as Barnes had no right in the position he was to rely upon the orders. He had no concern whatever in the orders given as to the movement of the train. The orders under which the train was moved, or the observance or violation of them, have no place in this case.

Unfortunately for Barnes he got on the track for his own convenience or pleasure. The passing train does not help the case, as he was not required to get on the siding and avoid it. He could as well and as easily have taken a position on the other side of the main track, or on the other side of the passing track, or he might have gone into the caboose of the wrecking train, where in truth his place of safety was. But, as he chose to stand on the passing track in front of the tender, he took the risk of the place. The only duty the company owed him was to avoid injury to him after his position of peril was discovered, and there is no evidence whatever to support this view. The rule of the company invoked and under which a recovery was had does not embrace this case. As this rule and its violation is the only negligence relied on in the petition, we feel obliged to say that the request of the defendant for a peremptory instruction should have been granted.

Wherefore the judgment is reversed, with directions for a new trial in conformity with this opinion.

**HARKNESS v. LISLE et al.****LISLE et al. v. SAME (two cases).**

(Court of Appeals of Kentucky. March 16, 1909.)

**1. WILLS (§ 590\*) — CONSTRUCTION — ESTATE DEVISED.**

To determine the nature of the estate devised, reference may be made to other devises in the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1293; Dec. Dig. § 590.\*]

**2. WILLS (§ 597\*) — CONSTRUCTION — ESTATE DEVISED.**

A will, devising to a son "and his children" 250 acres of land, gave him a fee-simple, and not a life, estate, especially in view of other devises showing that testator knew what language to employ in giving a life estate, and in view of a clause restraining alienation of the various tracts devised, and in view of a provision requiring the son to pay \$4,200 to his brothers and sisters.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1320; Dec. Dig. § 597.\*]

**3. DEEDS (§ 149\*) — CONDITIONS — RESTRAINT ON ALIENATION—VALIDITY.**

A condition to a grant against alienation to any one is void, but conditions preventing alienation to a specified person, or his heirs, etc., are valid.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 479; Dec. Dig. § 149.\*]

**4. WILLS (§ 601\*)—DEVISES—PROVISIONS REPUGNANT TO DEVISE IN FEE.**

A devise over of an estate devised in fee is void.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1340; Dec. Dig. § 601.\*]

**5. DEEDS (§ 149\*) — CONDITIONS — RESTRAINT ON ALIENATION—VALIDITY.**

A restraint on alienation for a reasonable time is valid.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 479; Dec. Dig. § 149.\*]

**6. ESTATES (§ 5\*)—VESTED FEE-SIMPLE ESTATES—ESSENTIALS—RIGHT TO ALIENATE.**

Right to alienate is an inherent and inseparable quality of vested fee-simple estates.

[Ed. Note.—For other cases, see Estates, Cent. Dig. § 5; Dec. Dig. § 5.\*]

**7. WILLS (§ 649\*) — CONDITIONS — RESTRAINT ON ALIENATION — VALIDITY — REASONABLENESS.**

A provision, prohibiting devisees of fee-simple estates from alienating or incumbering the land during the lifetime of any of the devisees, testator's children, is void as restraining alienation for an unreasonable time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1540; Dec. Dig. § 649.\*]

Appeals from Circuit Court, Scott County.  
"To be officially reported."

Action by James L. Lisle and another against Rufus Lisle, Jr., and others. From the judgment, L. V. Harkness appeals against James L. Lisle and others; James L. Lisle and others appeal against Rufus Lisle, Jr., and others; and Rufus Lisle, Jr., and others appeal against James L. Lisle and others. Affirmed on first and third appeals; reversed on second.

Samuel M. Wilson, for L. V. Harkness. O. L. Williamson, for J. L. Lisle and others. Bradley & Bradley, for Rufus Lisle, Jr., and others.

CLAY, C. These appeals involve the construction of the will of Rufus Lisle, a prominent farmer and breeder of thoroughbred stock, who died a resident of Fayette county, Ky., in the year 1891, and the validity of the proceedings of the Scott circuit court decreeing a sale of the tract of land devised by Rufus Lisle to his son, James L. Lisle. The appeals will therefore be considered together.

This action was instituted by James L. Lisle and his wife, Pattie C. Lisle, against their only living children, Rufus Lisle, Jr., and Lillian Lisle, infants over 14 years of age, and their statutory guardian, Victor Bradley, and John H. Payne and E. P. Hailley, Sr., trustees under the last will and testament of Rufus Lisle, Sr. The petition charges that by the fifth clause of the will of Rufus Lisle, Sr., the testator devised to James L. Lisle a fee-simple title to the 250 acres of land known as the "Duke place," located in Scott county, Ky., and that the fifteenth clause of said will was an unreasonable restraint upon the fee so devised, and was therefore null and void. It is further charged: That, if the estate devised to James L. Lisle was not a fee simple, it was a joint estate in fee with his children and a vested estate in possession, and could not be divided without materially impairing its value and the value of plaintiff's interest therein; that it would be to the interest of the joint owners therein, including the infant defendants, to sell the property and reinvest the proceeds in other land which would yield a better income. It was further charged: That the trustees named in the will attempted to comply with its provisions by deeding the 250 acres of land in Scott county to James L. Lisle and his children. That the granting clause of said deed was as follows, "The party of the first part does hereby sell and convey unto the party of the second part, their heirs and assigns, the following described real property," etc.; and the habendum of said deed was as follows: "To have and to hold said property unto the party of the second part, their heirs and assigns forever." The petition then alleges that the deed so made did not conform to the provisions of the will, and prays for a construction of said will, asking that, if it be adjudged that plaintiff James L. Lisle was the exclusive owner of the fee in said property, the deed be reformed so as to invest him with that character of title; also, that paragraph 15 of said will be adjudged an unreasonable limitation upon the estate devised, and that it be held for naught and void; and that if the property be held to be a joint fee in James L. Lisle and his children, or that he be

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



the owner of a life estate with remainder to his children, the property be sold and the proceeds reinvested under the direction of the court.

Process was properly served upon John H. Payne and E. P. Halley, Sr., trustees, and upon the infant defendants, Rufus Lisle, Jr., and Lillian Lisle, and upon their statutory guardian, Victor Bradley. All the parties therefore were before the court. A demurrer was filed by the infant defendants to that portion of the petition charging that plaintiff was entitled either to the absolute fee or to a joint fee with his children. It was contended by their guardian that the estate devised to James L. Lisle was simply a life estate. This demurrer was sustained to that paragraph containing the plea that the estate devised was an absolute fee simple in James L. Lisle. It was overruled as to that paragraph pleading a joint estate in fee simple in him and his children, and judgment entered in accordance with the decision on the demurrer. James L. Lisle appeals from that portion of the judgment sustaining defendants' demurrer to the paragraph pleading an absolute fee-simple title in James L. Lisle. The infant defendants and their guardian appeal from that portion of the judgment adjudging a joint fee-simple estate in James L. Lisle and his children. Thereafter proof was taken upon the question of indivisibility and the advantages to be derived from a sale and reinvestment of the proceeds. The case was then submitted, and it was adjudged by the court that the property could not be divided without materially impairing its value as a whole, or the several parts thereof, that the fifteenth clause of the will of Rufus Lisle, Sr., was illegal and void, and that the property be sold for the purpose of reinvestment. It was further ordered that the proceeds of the sale be held subject to the further orders of the court. It appears that, prior to the institution of the proceedings, appellant L. V. Harkness agreed in writing with James L. Lisle to purchase the land at the price of \$150 per acre. The testimony shows that this was in fact a high price, and that the sale at such a price was very advantageous to all parties concerned. Upon the sale by the master commissioner, L. V. Harkness complied with his agreement and purchased the property at a specified price. In due time he filed exceptions to the sale. Certain of these exceptions it will be unnecessary to notice. The principal exceptions relied upon are: (a) That the court erred in holding that the estate devised was a joint estate in fee simple in James L. Lisle and his children; it being contended that plaintiff James L. Lisle had either a fee-simple estate or an estate for life, with remainder to his children. (b) That the court erred in holding that the restraint upon the alienation of the property, imposed by the fifteenth clause of the will, was illegal and void. (c) That the deed from John H. Payne

and E. P. Halley, Sr., trustees for James L. Lisle and his children, does not conform to the will of Rufus Lisle, Sr. All of the purchaser's exceptions were overruled, and he appeals.

We shall now proceed to a consideration of the questions involved on this appeal. The will in question bears date of October 7, 1890. It was probated November 23, 1891. In the first clause the testator directs the payment of his debts. In the second clause the testator devises and bequeaths to his wife, Mary M. Lisle, for and during her natural life, a certain farm, also the income of certain shares of stock. He then provides that, at the death of his wife, the shares of stock should be divided equally among his children, James L. Lisle, Hampton Halley Lisle, Virginia H. Lisle, Nancy Lisle, and Miriam Lisle, but that at the death of his wife, if any of his children should be dead leaving issue, said issue should take, in such shares of stock, the same interest that the parent would have taken, if living, and, if any child should die without issue living, then the share of such child should be divided equally among his living children and the issue of any child that might be dead. In the third clause certain stock and agricultural implements and household furniture are devised to his wife. Clause 4 directs that the testator's blooded horses be sold by his executors. Clause 5, which relates particularly to the property involved in this action, is as follows: "I give, devise and bequeath to my son James L. Lisle and his children two hundred and fifty (250) acres of the tract of land I own in Scott county, Kentucky, known as the Duke place, said two hundred and fifty (250) acres is to be laid off so as to include all the houses, buildings and improvements on said land, upon the condition that my said son shall pay to my daughter Virginia H. Lisle one thousand dollars (\$1,000.00) at once, and the further sum of eight hundred dollars (\$800.00) when she is twenty-five (25) years of age, and upon the further condition that he shall pay my other children, Hampton Halley, Nancy and Miriam, each the sum of eight hundred dollars (\$800.00) as they respectively become twenty-five (25) years of age. I require my said son to make said eight hundred dollars (\$800.00) payments, because of advancements that I have heretofore made to him. I also devise and bequeath to my said son James fifty (50) shares of stock in the Fayette National Bank, Lexington, Kentucky, to be delivered to him as soon as possible after my death. He shall have the right to do as he pleases with said stock." By clause 6 the land devised to the testator's wife for life, together with certain bank stock, is devised and bequeathed "to my son Hampton Halley Lisle, and his children." By clause 7 the remainder of the Duke place (the other part of which was conveyed to James L. Lisle) was devised "to my daughter, Virginia H. Lisle and her children," and it is

provided: " \* \* \* The said land shall be owned and held by my said daughter as her sole and separate estate, free from the debts and control of any husband she may have." Certain bank stock is also bequeathed to his said daughter. By clause 8 the testator devised and bequeathed "to my daughter Nancy Lisle and her children" one-half of a tract of 350 acres, with the provision that "said land shall be owned and held by my said daughter as her sole and separate estate, free from the debts or control of any husband she may have." By this clause certain shares of stock were also bequeathed to his daughter Nancy. By clause 9 the testator devised and bequeathed "to my daughter Miriam H. Lisle and her children" the other half of the 350 acres of land, "to be owned and held as her sole and separate estate, free from the debts and control of any husband she may have." This daughter is also bequeathed certain bank stock. Clause 10 is as follows: "If it is deemed advisable by the trustee hereinafter named to invest the fifty-eight hundred dollars (\$5,800.00) mentioned in the devise to my daughters Nancy and Miriam, or any part in buildings and improvements on the tracts of land devised to them, the said trustee shall have power and authority to expend the whole or any part of said sum in such buildings and improvements." Clause 11 is as follows: "I hereby authorize John H. Payne and Edmond Halley, Senior, to divide the tract of three hundred and fifty (350) acres of land devised to my daughters Nancy and Miriam and to execute the deeds necessary to invest each of them and the trustee hereinafter named with title to the land allotted to them in said division. The said John H. Payne and Edmond Halley, Senior, are also authorized and empowered to divide the land devised to my daughter Virginia and son James, and to make deeds investing them and the trustee hereinafter named, with title to the lands allotted to each of them in said division, and for the purpose of making said division and deeds I hereby invest them with all necessary power and authority in the premises." Clauses 12, 13, and 14 it will be unnecessary to consider. Clause 15 is as follows: "Neither of my children nor the trustee herein named shall sell, convey or in any way charge or incumber the land herein devised, for any purpose whatever during the lifetime of any of my said children."

The first question to be determined is: What estate in the land in question was devised to James L. Lisle? The language employed is: "I give, devise and bequeath to my son James L. Lisle and his children," etc. This language brings the case within the rule laid down in one of three lines of cases. One class of cases is to the effect that the parent takes a joint estate in fee simple with his children then born or thereafter to be born. *Turner v. Patterson*, 5 Dana, 295; *Cessna v. Cessna's Adm'r*, 4

*Bush*, 516; *Powell v. Powell*, 5 Bush, 620, 96 Am. Dec. 372; *Bell v. Kinneer*, 101 Ky. 271, 40 S. W. 680, 72 Am. St. Rep. 410. Another class of cases is to the effect that the parent takes merely a life estate with remainder to his children. *Fletcher v. Tyler*, 92 Ky. 145, 17 S. W. 282, 36 Am. St. Rep. 534; *Smith v. Upton*, 13 S. W. 721, 12 Ky. Law Rep. 28; *Davis v. Hardin*, 80 Ky. 672. Then there is another class of cases where the word "children" is used in the sense of "heirs." This construction is adopted only in those cases where, upon consideration of the whole will, it is evident that the words were used as words of limitation and not of purchase. *Childers v. Logan*, 65 S. W. 124, 23 Ky. Law Rep. 1239; *Moran v. Dillehay*, 8 Bush, 434; *Hood v. Dawson*, 98 Ky. 235, 33 S. W. 75; *Lachland's Heirs v. Downing's Ex'rs*, 11 B. Mon. 32; *Williams v. Duncan*, 92 Ky. 125, 17 S. W. 330.

In the case of *Williams v. Duncan*, supra, the court said: "'Children' is not, like 'heirs,' or, as construed under our statute, 'heirs of the body,' a word of limitation, importing by its own force a fee-simple estate. Nevertheless it has been often found necessary, in order to effectuate the intention of the testator, made manifest to the court by considering the whole will, to give it a meaning different from its legal, and perhaps popular, signification. Accordingly, it has been in some cases held to indicate a life estate, in others a joint estate, and in others courts have not hesitated to interpret it in the sense of 'heirs' and allow it the same effect. The testator in this case left a widow and four children, two sons, one being married, and his daughters, both of whom had husbands. To each of the sons he gave a lot of land absolutely. To each of his two daughters he also gave a distinct parcel, and one lot jointly; but in every instance previous to the eleventh clause the name of each daughter was coupled with the words 'and her children,' or in case of the joint devise 'their children,' and in one clause a sum of money was required to be paid by one son to Mrs. Tyler to make her equal, which he directed to be invested 'for the benefit of said daughter and her children,' and he was even so particular as to direct the lot, given jointly, to be laid off, so as 'to give my said daughters and their children a front of 200 feet.' It is manifest from the repeated and persistent use of the words mentioned that he had a definite, uniform, and fixed idea of their meaning, or of what he supposed and intended them to mean, and it is therefore persuasive he designed the words 'and their children' used in the fifth clause to have the same meaning as when used in making devices to his daughters. A partial solution of the question of his intended meaning may be derived from the eleventh clause, as follows: 'If either of my two daughters should die without leaving children or grandchildren I direct that the property devised to her here-

in shall go to my remaining daughter and her children, and if both of my daughters should die and either of them leave no children I direct that the property herein devised to her shall go to the children of my other daughter.' Now it is evident the object of that clause was to keep the real property devised to his daughters in the enjoyment of his immediate descendants, and the husbands from having a life estate, even, in any part of it, in case the wife of either died before he did; and as that object could be accomplished only by providing expressly and explicitly, as was done in the eleventh clause, they should take a life estate only, it is plain he believed the words 'and her children,' or 'and their children,' unexplained, did not import a life estate, but would be understood and interpreted as meaning a fee-simple estate in each of his two daughters, either wholly or jointly with her children; and if such was the case it is altogether reasonable that he did not intend for the words 'and their children,' as used in the fifth clause, to signify a life estate merely in his grandsons. Consequently he must have intended them each to take absolutely one-sixth, that being the number then born, or else for each to take that fractional part jointly with the indefinite number to be thereafter born to him. The latter construction we think unreasonable, for, if he had intended his then living grandsons to have less than one-sixth, he would have provided for their after-born brothers and sisters, his grandchildren, instead of their children, his great-grandchildren, some of whom he must have known and expected might not possibly, in due course of nature, be born to take their shares, in waiting, for more than half a century. In our opinion the six grandchildren living, and the two born within the period of gestation after his death, take, under the will, each one-eighth of the land in fee simple."

In the case of *Childers v. Logan*, supra, the provision of the will was as follows: "I will to Addy and her children and Charley and his children \$5,000, the money to be invested in bank stock until they are twenty-five years of age." The court said: "He (the testator) evidently meant by this clause of his will to give the \$5,000 to his children Addy and Charley, and that it should be paid to them when they arrived at the age of 25 years. The daughter, Addy, was seven, and the son, Charley, three, years of age when the will was made. The testator did not intend that his daughter and son should not take the \$5,000 until their children were 25 years of age. He did not intend to postpone the payment of the money to them until that time should arrive. He evidently used the words children in the sense of heirs, and the absolute title to the sum thus devised vested in his children named, and it was his intention that they should receive their shares upon the arrival of the age of 25 years."

In the *Am. & Eng. Encyc. of Law*, vol. 5, p. 1092, the rule is thus stated: "The term 'children' is a word of purchase, and will not be construed as equivalent to 'heirs' in the absence of other words or circumstances showing it to have been used in that sense. But where it is necessary to give effect to the instrument, or where there are other words showing that 'children' was used in the sense of 'heirs,' the term will be construed as a word of limitation equivalent to 'heirs' or 'heirs of the body,' etc. So the term 'heirs' has been construed as equivalent to 'children.'"

Under the more recent decisions of this court, where there is nothing in the deed or will to show a contrary purpose, the tendency is to hold that an estate deeded or devised to a man and his children or to a woman and her children is a life estate to the first taker, with remainder to the children. *Hall v. Wright*, 121 Ky. 16, 87 S. W. 1129; *Brumley v. Brumley*, 89 S. W. 182, 28 Ky. Law Rep. 231.

We therefore find ourselves forced to the position of holding that James L. Lisle took a fee-simple or a life estate. To determine the character of the estate devised to him, we may consider the provisions of the will with reference to the other devisees. It is manifest that he used the word "children" advisedly, for he repeats it in connection with the devises and bequests made to each of his children. The devise to the testator's wife has an important bearing. The land devised to her is "for and during her natural life." This plainly shows that when the testator intended to devise a life estate he knew what language to employ for that purpose. If he had intended a mere life estate in James L. Lisle, the most natural thing for him to have done would have been to use the same language employed in the devise to his wife. Furthermore, it is evident that the restraint imposed by clause 15 upon the alienation of the land devised to his children was imposed in the belief on the part of the testator that the language employed in the respective devises to his children would import a fee, and without such a restraint the devisees would have full power to sell and convey the same. Then, too, in each of the devises to his daughters, there is the following provision: " \* \* \* The said land shall be owned and held by my said daughter as her sole and separate estate, free from the debts and control of any husband she may have." It is evident from this language that the testator supposed he had conveyed a fee to his daughters, and that without such qualifying language the husband would have control over the land. Besides, the land is to be held "as her sole and separate estate," and not as the sole and separate estate of her children, or as their sole and separate estate. In clause 10 the testator speaks of "the devise to my daughters Nancy and Miriam, or any part in buildings and im-

provements on the tracts of land devised to them." It is evident from this language that he believed he had devised the land to them. This is made all the stronger by the language employed with reference to the devise to his wife. When he speaks in the sixth clause of giving to his son Hampton Halley Lisle and his children the farm of 185 acres, he does not employ the language "heretofore devised to my wife," but he uses the language, "heretofore devised to my wife for life." When the testator comes to the question of dividing the tract of 350 acres of land between his daughters Nancy and Miriam, he authorizes the trustees "to execute the deeds necessary to invest each of them and the trustee hereinafter named with title to the land allotted to them in said division." Likewise, when he provides for the division of the Duke place between his daughter Virginia and his son James, he authorizes the trustees "to make deeds investing them and the trustee hereinafter named, with title to the lands allotted to each of them in said division." We therefore conclude that, when the whole will of the testator is considered, it was his evident purpose to invest his son James L. Lisle with a fee-simple title to the land in controversy.

We are fortified in this conclusion by the rule laid down in the early case of *Lindsay's Heirs v. McCormack*, 2 A. K. Marsh. 229, 12 Am. Dec. 387, decided in the year 1820. That case involved a construction of a certain provision of the will of Joseph Lindsay, which was probated January 21, 1783. The provision in question was as follows: "I give to my loving wife, Ann Lindsay, one thousand acres of land, lying in the fork of Elkhorn, obtained by certificate from the commissioners of the district of Kentucky, granted to Fulton Lindsay, and conveyed to me by bill of sale from said Lindsay, bearing date the 12th of April, 1781. The said Ann is to pay Fulton Lindsay, Jr., at the time he arrives at the age of twenty-one, two hundred pounds, provided she obtains a legal title for the same, also to pay off the heir of William Pogue, deceased." In that case the court, in an opinion by Judge Owsley, said: "It is contended on the part of the appellants that as the devise to Ann Lindsay is in general terms to her, without containing any words descriptive of the nature of the estate intended to be devised, it should be construed to pass an estate for life and not of inheritance. As Lindsay, the testator, died before the passage of the act of the Virginia Legislature dispensing with words otherwise necessary in a deed or will to transfer an estate of inheritance, the legal import of the devise must be deduced upon common-law principles applicable to the construction of wills before the passage of the act. Testing the decree by those principles, there can, however, be little doubt but Ann Lindsay acquired an estate of inheritance and not barely an estate for life. It is apparent from the

devise that no grant had been obtained for the land from the commonwealth when the will was made, and that it was intended by the testator to authorize a perfection of the title in the name of the devisee. It could not therefore have been deemed material by him in the devise to Ann to describe specifically the nature of the estate intended to be given, for, as by obtaining a grant from the commonwealth, she would be invested with an estate in fee, he must have supposed that his intention to dispose of such an interest would be sufficiently clear by providing for her procurement of the title. As a question of intention therefore, depending upon a construction of the will, we would have no hesitation in deciding that an estate of inheritance passed to Ann; but admitting, if no provision had been made requiring the devisee to pay Fulton Lindsay £200, etc., the devise might have been differently construed, yet, as that provision clearly imposes a personal charge and not a charge upon the estate devised, the devisee must be held to have taken an estate in fee, for it is well settled that a devise which would otherwise pass but for a life estate, by creating a personal charge upon the devisee, passes an estate of inheritance."

In the case under consideration the devisee, James L. Lisle, was directed to pay to testator's daughter Virginia H. Lisle the sum of \$1,000 immediately, and the further sum \$800 when she arrived at 25 years of age. He was further required to pay to testator's children Hampton Halley Lisle, Nancy Lisle, and Miriam Lisle, each, the sum of \$800 as they respectively became 25 years of age. It is inconceivable that the testator intended that James L. Lisle should have only a life estate in the land devised, and yet, in order to secure it, have to pay the sum of \$4,200 to his brother and sisters. Under such circumstances the benefit he might derive from the land devised might be far less than the sum required to be paid. The sum required to be paid was a personal charge upon the devisee, and this is a strong circumstance in favor of the view that the estate devised was one of inheritance and not for life. Being of the opinion that said estate is a fee simple in James L. Lisle alone, we think the court erred in holding that he had a joint estate in fee simple with his children.

We shall next discuss the question of the validity of clause 15 of the will. By that clause the testator's children and their trustees are prohibited from selling, conveying, or in any way charging or incumbering the land devised, for any purpose whatever, during the lifetime of any of said children.

The general rule of law applicable to restraints on alienation may be found in *Littleton*, § 860, and is as follows: "If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements he hath power to alien

them to any person by the law. For if such a condition be good, then the condition should oust him of all power which the law gives him, which should be against reason; and therefore such a condition is void." The exception to this doctrine may be found in Littleton, § 361, which section is as follows: "But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc., then such a condition is good."

In the well-considered case of *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61, the court said: "Now, neither Littleton nor Coke, nor any of the annotators of Coke upon Littleton, so far as I have been able to discover, has mentioned any such qualification of the general rule laid down by Littleton in section 360, nor anywhere intimated that such a condition against alienation for a particular time, or for a reasonable time, or for any time whatever, would be valid; and the same may be said of the other approved English works upon real estate: Blackstone's Commentaries, Sheppard's Touchstone, Bacon's Abridgement, Cruise's Digest, Comyn's Digest, and all other English works which I have been able to examine. And if there is any English decision since the statute *Quia Emptores*, where the point was involved, in which it was held competent for a feoffor, grantor, or devisor of a vested estate in fee simple, whether in remainder or in possession, by any condition or restriction in the instrument creating it, to suspend all power of the feoffee, grantee, or devisee, otherwise competent, to sell, for a single day, I have not been able to find it; and the able counsel for the defendants, whose research nothing of this kind is likely to escape, seem to have been equally unsuccessful. In making this statement I do not overlook *Large's Case*, 2 Leonard, 82, and 3 Leonard, 182, which by some elementary writers and annotators, and in some dicta by judges, and perhaps one or two decisions in this country, seems to have been understood as warranting such a restriction, and upon which all such elementary writers, annotators, and judges, who profess to rest such an opinion upon any authority, rely, but which I propose presently to show decides no such thing as to any vested estate of any kind."

In Am. & Eng. Encyc. of Law, vol. 24, p. 967, the rule is thus stated: "There are many dicta, as well as a few direct authorities, to the effect that restraints on alienation for a limited time are valid, but in a number of cases the validity of such restraints has been said to be doubtful; and on principle, and according to the weight of authority, a restriction, whether by way of condition, or of limitation over, or of bare prohibition against any and all alienation, although for a limited time, of a vested estate in fee, whether in

possession or remainder, is void. In the case of a contingent remainder, however, or of any other interest not vested, a restriction upon the power of alienation to last as long as the interest remains contingent is valid."

As an inseparable part of this doctrine, it is the recognized rule of law that a devise over of an estate devised in fee is void, and this court has so held in a number of carefully considered cases. *Barth v. Barth*, 38 S. W. 511, 18 Ky. Law Rep. 840; *Clay v. Chenault*, 108 Ky. 77, 55 S. W. 729; *Ray v. Spears' Ex'r*, 64 S. W. 413, 23 Ky. Law Rep. 816; *Humphrey v. Potter*, 70 S. W. 1062, 24 Ky. Law Rep. 1264; *Cralle v. Jackson*, 81 S. W. 669, 26 Ky. Law Rep. 417; *Becker v. Roth* (decided Jan. 29, 1909, but not yet officially reported) 115 S. W. 761. But this court is committed to the doctrine that a restraint on alienation for a reasonable time is valid. In *Stewart v. Brady*, 3 Bush, 623, the restraint upon alienation was until the devisee arrived at the age of 35 years. In *Stewart v. Barrow*, 7 Bush, 368, the restraint was for a specified length of time. In *Kean's Guardian v. Kean*, 18 S. W. 1032, 19 S. W. 184, 13 Ky. Law Rep. 956, alienation was restrained until the devisee reached the age of 28. In *Wallace v. Smith*, 113 Ky. 263, 68 S. W. 131, the devisee was prohibited from selling the property until he reached the age of 35. In *Johnson v. Dumeyer*, 66 S. W. 1025, 23 Ky. Law Rep. 2243, the devisee, a daughter, was restrained from disposing of the property for a period of 20 years after the death of the testator. In *Morton's Guardian v. Morton*, 120 Ky. 251, 85 S. W. 1188, the restraint was during the lives of the joint life tenants. In *Lawson v. Lightfoot*, 84 S. W. 739, 27 Ky. Law Rep. 217, it was provided that the remainder interest should not be sold during the life of the tenant for life. In all of these cases it was held that the restraints upon alienation were for a reasonable time, and therefore valid. In discussing the question, this court, in the case last cited, speaking through Judge Settle, said: "It must be conceded that the great weight of authority outside of Kentucky is to the effect that, where the fee-simple title to real estate passes under a deed or will, any restraint attempted to be imposed by the instrument upon its alienation by the grantee, or devisee, is to be treated as void, and such is clearly the rule announced by Mr. Gray in his excellent work on Restraints of Alienation; but the contrary view has been adopted by this court in repeated decisions, beginning with *Stewart v. Brady*, 3 Bush, 623, and ending with *Wallace v. Smith*, 113 Ky. 263, 68 S. W. 131. *Stewart v. Barrow*, 7 Bush, 368; *Rice v. Hall*, 42 S. W. 99, 19 Ky. Law Rep. 814; *Kean's Guardian v. Kean*, 18 S. W. 1032, 19 S. W. 184, 13 Ky. Law Rep. 956; *Johnson v. Dumeyer*, 66 S. W. 1025, 23 Ky. Law Rep. 2243. In other words, the accepted doctrine in this state is that restraints upon aliena-

tion may be imposed for a reasonable period. This court has, however, never fixed a limit to such restraint, but in *Stewart v. Brady*, supra, it was held that a devise of land to the testator's daughter, with the limitation that it should not be disposed of by her until she became 35 years of age, was reasonable, and in *Kean's Guardian v. Kean*, 18 S. W. 1032, 19 S. W. 184, 13 Ky. Law Rep. 956, it was held that a restriction accompanying a devise of real estate to a son of the testator that he should not have the power to dispose of it until he became 28 years of age was good. If such a restriction may be imposed for the periods indicated by the cases supra, why may it not endure for a longer time, or, as contemplated by the testator in this case, during the life of his widow, the tenant for life of the real estate, the alienation of which is attempted to be restricted? The manifest intention of the testator, R. A. Lightfoot, was to preserve the property intact during the life of the widow, and until it should be taken in possession by the daughters. The widow was beyond middle life when the will was probated, so after all her life expectancy was not then so great as to render unreasonable the restriction placed by the testator upon the right of the devisees to dispose of the property. After a careful consideration by the whole court of the question presented by the record, it is deemed safer to adhere to the former decisions of the court thereon, though this conclusion has not been reached without misgiving as to its correctness upon the part of a minority of the court; the writer of this opinion being of that minority. It may not, however, be improper to suggest that, notwithstanding the restriction imposed by the will upon the power of the devisees to dispose of the real estate in question, if the deed of general warranty tendered appellant by them should be accepted, they probably could not thereafter recover the property; at any rate, they could not do so without being made to account upon their warranty for the consideration received by them, with interest."

We then come to the question whether or not the restriction contained in the will under discussion is reasonable. Here the testator attempted to impose a restraint upon alienation, not for a specified period of time, nor until the devisee arrived at a certain age, but during the entire lifetime of the devisee. The general rule is that the right of alienation is an inherent and inseparable quality of every vested fee-simple estate. To hold that alienation could be restrained during the lifetime of the fee-simple holder would be to deprive the fee of all its essential qualities. As said by Littleton: "If such a condition be good, then the condition should oust him of all power which the law gives him, which should be against reason." While bound by the former adjudication of this

court to adhere to the doctrine that a limitation for a reasonable length of time is valid, we have no hesitation in saying that the limitation attempted to be imposed by the will in question is unreasonable. A testator cannot devise a fee, and then destroy it entirely. We therefore conclude that clause 15 of the will is invalid.

In view of the fact that the deed executed to James L. Lisle by John H. Payne and E. P. Halley, Sr., does not convey a fee-simple estate, and inasmuch as said trustees are before the court, judgment may be entered upon the return of the case declaring that deed void and directing the trustees to make, in conformity with this opinion, a deed to the property in question to James L. Lisle.

On the appeal of L. V. Harkness and of Rufus Lisle, Jr., etc., the judgment is affirmed. Judgment on the appeal of James L. Lisle, etc., is reversed, and cause remanded for proceedings consistent with this opinion.

#### SOUTHERN EXPRESS CO. v. FOX & LOGAN.

(Court of Appeals of Kentucky. March 19, 1909.)

##### 1. CARRIERS (§ 215\*)—TRANSPORTATION OF ANIMALS—CARE REQUIRED—"REASONABLY SAFE."

A car stall in which a horse was transported by a carrier is "reasonably safe" when it is such as a person of ordinary prudence would provide.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 923; Dec. Dig. § 215.\*]

For other definitions, see Words and Phrases, vol. 7, p. 5985.]

##### 2. CARRIERS (§ 228\*)—TRANSPORTATION OF ANIMALS—CARE REQUIRED—EVIDENCE.

In an action against a carrier for injuries to a horse transported by it, the carrier may show, by persons qualified to know, that the car stall was put up in the customary method of erecting stalls for the shipment of horses and that it was reasonably safe.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 959; Dec. Dig. § 228.\*]

##### 3. EVIDENCE (§ 243\*)—DECLARATIONS OF AGENT—ADMISSIBILITY.

Declarations of an agent of a shipper of horses, in charge of the horses, made after they had reached their destination, are incompetent as substantive evidence against the shipper; while declarations made by the agent during the transportation, and in reference thereto, are competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 910; Dec. Dig. § 243.\*]

"To be officially reported."

Extended opinion.

For former opinion, see 115 S. W. 184.

HOBSON, J. 1. A stall is reasonably safe when it is such as a person of ordinary prudence would provide. The defendant may show, by persons qualified to know, that the stall in question was put up in the usual and customary method of erecting stalls for

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the shipment of horses, and that it was reasonably safe for that purpose.

2. The defendant offered to prove by J. W. Bondurant that, after the horses had been at Memphis some days, he met Benyon, who was then in charge of the horses, and Benyon then told him they were all right. It is insisted that this testimony of Bondurant was binding upon the plaintiffs as an admission, and was competent for this purpose as substantive evidence. In Greenleaf on Evidence, § 113, the rule is thus stated: "The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending, et dum fervet opus. It is because it is a verbal act, and part of the *res gestæ*, that it is admissible at all, and therefore it is not necessary to call the agent himself to prove it; but, wherever what he did is admissible in evidence, then it is competent to prove what he said about the act while he was doing it, and it follows that, where his right to act in the particular matter in question has ceased, the principal can no longer be affected by his declarations, they being merely hearsay."

The same rule has often been announced by this court. Thus, in *Reed v. Brooks*, 13 Ky. 127, the court said: "The confessions of an agent cannot be admitted as proof either of his agency or of acts done by him as agent. Where what an agent says is part of the *res gestæ*, it may be proved as any other act of his agency may be; but the confessions offered to be proved in this case were evidently not of that character." In *Roberts v. Burks*, 16 Ky. 411, 12 Am. Dec. 325, the court said: "The principle that the declarations or confessions of an agent, except they be made at the time and compose a part of acts done by him for his principal, within the scope of his authority, cannot be given in evidence to charge the principal, is too well settled to need authority to support it. The confessions of the agent in this case do not appear to have been made at the time of doing the acts, nor does it appear that they were executing any authority given them, except by their own declarations." These principles have been often since applied by the court.

Benyon was an agent of the plaintiffs to ship the horses. What he said in shipping them is competent against the plaintiffs; but what he said in Memphis, after the horses reached their destination, is no more competent against the plaintiffs as substantive evidence than the declarations of a livery stable keeper would be to whose keeping the horses had been intrusted after they reached Memphis. In talking to Bondurant as to how the horses were, Benyon did not represent the plaintiffs, and what he said is

only competent to contradict him as a witness.

3. For the same reason, the statement of McManus, offered to be proven by J. W. Gartrell, to the effect that Emily Letcher always gave him trouble, and that if she became unmanageable he would jump out of the car to get out of her way, if it was going 40 miles an hour, was incompetent. This statement of McManus was in no sense a part of the *res gestæ*.

The opinion is extended as above indicated.

## LOUISVILLE RY. CO. v. KNOCKE'S ADM'R.

(Court of Appeals of Kentucky. March 23, 1909.)

### 1. STREET RAILROADS (§ 117\*)—INJURIES TO PERSON ON TRACK—NEGLIGENCE—SUBMISSION TO JURY.

In an action against a street railroad company for injuries to a pedestrian, struck by a car while attempting to cross the track, evidence held to justify the submission to the jury of the question of defendant's negligence.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 251-254; Dec. Dig. § 117.\*]

### 2. TRIAL (§ 206\*)—INSTRUCTIONS—ERROR CURED BY SUBSEQUENT INSTRUCTIONS.

In an action against a street railroad company for injuries through being struck by a car, error in instructions imposing on defendant's agents the duty of keeping the car under reasonable control, of keeping a lookout ahead, and of giving the usual signals, was cured by a subsequent instruction specifying the motorman as the particular agent on whom such duties devolved.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 709; Dec. Dig. § 293.\*]

### 3. STREET RAILROADS (§ 81\*)—OPERATION—CARE REQUIRED AS TO PERSONS CROSSING TRACK.

The duties of having a street car under reasonable control and of giving the usual signals are a part of the duty of exercising ordinary care to discover the peril of persons crossing the tracks and to avoid injuring them after their peril is discovered.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 172-177; Dec. Dig. § 81.\*]

### 4. TRIAL (§ 256\*)—INSTRUCTIONS—REQUESTS—MORE SPECIFIC INSTRUCTIONS.

In action against a street railroad for injuries to a man 94 years old and slightly deaf in one ear, through being struck by a car while attempting to cross the track, an instruction defining ordinary care as applied to plaintiff as that degree of care which men of his age and capacity usually exercise under similar circumstances was sufficient, in the absence of a request for an instruction that it is the duty of one whose senses are defective to exercise great care and caution in the use of his remaining senses to avoid danger.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by Frederick Knocke's administrator against the Louisville Railway Company.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Judgment for plaintiff, and defendant appeals. Affirmed.

Fairleigh, Straus & Fairleigh, Howard B. Lee, and Robt. G. Gordan, for appellant. W. O. Harris, for appellee.

OLAY, C. On May 22, 1907, Frederick Knocke, while crossing Fourth street, at its intersection with Breckinridge, in the city of Louisville, was knocked down and injured by one of the cars of the Louisville Railway Company. From the injuries thus received he died in the month of March, 1908. On June 27, 1907, he instituted this action in the Jefferson circuit court to recover damages. Upon his death the action was revived in the name of his administrator. The jury returned a verdict in favor of Knocke's administrator for the sum of \$2,500. From the judgment entered thereon, this appeal is prosecuted.

It appears from the record that the decedent was walking east on the north side of Breckinridge street at the time of the accident. There is evidence to the effect that, when he stepped off the sidewalk and started in the direction of appellant's tracks, the street car was from 30 to 40 feet away, and that the motorman saw him, or could have seen him, at the time. Indeed, the testimony rather tends to the conclusion that the motorman actually saw the decedent. From the time he left the curbing and approached the track he appeared utterly unconscious of the approach of the car, and paid no attention whatever to it, although it is claimed, and shown, that the motorman did ring the gong. The decedent was a man 94 years of age and was using a cane. This fact was known to the motorman, although he claims he did not know Knocke was infirm or helpless. The motorman testified that Knocke was about 4 or 5 feet from the track when he first took particular notice of him, and that the car was about 10 or 15 feet away when he first saw that Knocke was paying no attention to its approach. In answer to the question, "Up to that time was there anything in his conduct to indicate that he could not see or hear your car?" the motorman replied as follows: "Well, he didn't pay any attention to the car approaching him." He further testified that, when he saw Knocke was getting too close, he commenced to stop the car by reversing. At that time the car was about 8 feet from Knocke. On account of the speed of the car, he could not stop it in 12 feet.

We think this evidence justified the submission of the case to the jury. The motorman's statement, alone, shows that he saw the decedent when he was 4 or 5 feet from the track, and it was then apparent that he was unconscious of the approach of the car. At that time the car was from 10 to 15 feet away—more probably 15 feet. Instead of immediately reversing, the motorman wait-

ed until the car was within 8 feet of the decedent, and then reversed. Manifestly decedent was in peril from the moment it became reasonably apparent to the motorman that he was unconscious of the approach or the nearness of the car and intended to continue his course without regard to it. Whether or not, from this moment on, the motorman used ordinary care to avoid injuring the decedent, was a question for the jury.

It is insisted that instructions 1 and 2 are erroneous, because the duty of exercising ordinary care to have the car under reasonable control, to keep a lookout ahead, and to give the usual signals of the car's approach, were imposed upon appellant's agents in charge of the car, and for the further reason that they submitted to the jury questions not authorized by the pleadings or proof. It is true that instructions similar to those complained of were condemned by this court in the case of Louisville Railway Co. v. Gaar, 112 S. W. 1130. We find, however, that in instruction 4 the court specified the motorman as the particular agent upon whom devolved the duties referred to in instructions 1 and 2. Under the circumstances, we think the defect in instructions 1 and 2 was cured by instruction 4, and they were not, therefore, prejudicial in the respect complained of.

The petition, after charging that one of defendant's cars was by defendant, its servants and agents, violently driven upon and over the plaintiff, breaking both bones of one of his legs in several places, and cutting, lacerating, and bruising his head, body, and arms, and inflicting upon him other grievous and permanent injuries, from which he suffered, and would continue to suffer while he lived, great bodily and mental pain and suffering and permanent disability, contains the following: "He says that when said car was run over him he was on the public highway, in plain view of the motorman who was operating said car, long enough to enable said motorman by ordinary care to stop his car before it could strike plaintiff; but the plaintiff says that the said motorman failed to stop his car or make any effective effort to do so, and that his act in so failing to stop his car and in running said car upon and over plaintiff was grossly negligent." It is insisted that by this last allegation the appellee specified the negligence as a failure on the part of the motorman to stop the car after he saw, or by the exercise of ordinary care could have seen, the decedent in time to avoid the accident. It is therefore insisted that it was error to permit a recovery for the failure to have the car under reasonable control and to give the usual and customary signals of the approach of the car. Upon this point our conclusion is that the duties of having the car under reasonable control and of giving the usual and customary signals are necessarily included in, and are a part of, the duty of exercising ordinary care to discover the peril of persons crossing the



tracks and to avoid injuring them after their peril is discovered.

It is next insisted that the court erred in defining ordinary care, as applied to the decedent, as that degree of care which men of his age and capacity usually exercise under the same or similar circumstances. In support of this position we are cited to the case of *Hummer's Executrix v. Louisville & Nashville R. R. Co.*, 108 S. W. 885, 32 Ky. Law Rep. 1315, wherein the court held that it was the duty of a party whose senses were defective to exercise great care and caution in the use of his remaining senses to avoid danger. The instruction complained of is correct as far as it goes, and as decedent was only slightly deaf in one ear, and appellant did not offer any instruction embodying the idea contained in the instruction approved of in the case last cited, we will not reverse on the ground suggested.

Judgment affirmed.

### BATES v. WHITT.

(Court of Appeals of Kentucky. March 18, 1909.)

**VENDOR AND PURCHASER (§ 308\*)—ACTIONS FOR PURCHASE MONEY—DEFENSES—DEFECT IN TITLE OF VENDOR.**

Plaintiff and a partner purchased a tract of land, and on failure to pay the price a suit was brought to enforce the vendor's lien, and at the sale B. purchased the land, less 43 acres, and executed bonds for the price, with defendant as his surety. The bonds not being paid, the land was resold, and at this sale the whole tract was bought by a company that transferred its bid to defendant on his paying the full amount of the judgment against the original purchasers and costs. After the first sale, plaintiff sold her interest in the 43 acres left unsold to defendant, who executed his note for the purchase price. *Held*, that defendant, in an action on the note, could not set up the failure of title to the 43 acres for which the note was executed, due to his default, as surety on the bonds of the purchaser at the first execution sale, in not paying the bonds.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 308.\*]

Appeal from Circuit Court, Menifee County.

"Not to be officially reported."

Action by Carrie Bates against W. H. Whitt. Judgment for defendant, and plaintiff appeals. Reversed, with directions to enter judgment in favor of plaintiff.

L. C. Caudell and B. F. Day, for appellant. Robt. H. Winn, for appellee.

**CARROLL, J.** In 1899 the Beaver Furnace Land Company sold to the appellant, Carrie Bates, and one T. P. Byrne, a tract of land containing 188 acres. The purchasers were equal partners in the transaction, and were to pay equal parts of the purchase money; but it appears that Mrs. Bates paid some \$144 more than Byrne of what was paid. Failing to pay the full purchase price,

suit was instituted against them to enforce the lien retained on the land to secure the payment of the unpaid purchase money. At the judicial sale made in this action T. P. Byrne purchased the land, less 43 acres, bidding therefor the amount of the judgment debt. He executed bonds for the purchase price, with the appellee, W. H. Whitt, as his surety. When the bonds became due, an execution issued upon them and was returned "No property found." Thereupon the court, after notice to Mrs. Bates, Byrne, and Whitt, ordered the land to be resold. At this sale the whole tract, including the 43 acres, was bought by the Kentucky Land Supply Company; but its bid was transferred to Whitt upon his paying the full amount of the judgment and costs. Whitt thereby became the owner of the whole tract of land, including the 43 acres, for the amount of the judgment debt and costs. After the first sale, at which, as stated, Byrne was the purchaser, Mrs. Bates sold her interest in the 43 acres left to the appellee, Whitt, for \$222.70, for which amount Whitt executed his note to her. Failing to pay this note, Mrs. Bates instituted this action upon it. To this suit Whitt answered, setting up that the consideration for the execution of the note had failed, because the 43 acres for which the note was executed was sold to satisfy the judgment against Mrs. Bates and Byrne.

It is true that the 43 acres was sold to pay the judgment debt against Mrs. Bates and Byrne; but the sale of the 43 acres for this purpose was made necessary by the failure of Whitt and Byrne to pay the purchase bonds executed by them for the tract less 43 acres. If Whitt or Byrne had paid these bonds, the judgment would have been satisfied, and the sale of the 43 acres avoided. Whitt, by failing to pay these purchase bonds, as he obliged himself to do, and permitting a resale of the land, was enabled to obtain the entire tract of land for the amount of the judgment; whereas, if he had paid the purchase-money bonds, he would in addition thereto have to pay Mrs. Bates the note executed to her for the 43 acres. In other words, by failing to pay the bonds, Whitt is attempting to defeat the note executed to Mrs. Bates, and obtain the whole of the land for the amount of the judgment. This scheme on the part of Whitt does not look fair on its face. He will not be permitted in this way to escape the payment of the note executed to Mrs. Bates. If he could pay, as he did, the amount of the judgment on the resale of the land, when he obtained the entire tract from the purchaser, we see no reason why he should not have paid the same amount as surety on the bond of Byrne. If the consideration for the execution of the note failed, Whitt was the sole cause of the failure, and will not be

permitted to avail himself of his own act to defeat the payment of the note.

Wherefore the judgment is reversed, with directions to enter a judgment in favor of Mrs. Bates for the amount of the note sued on.

### INDIAN REFINING CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 17, 1909.)

#### 1. NUISANCE (§ 91\*) — PUBLIC NUISANCE — CRIMINAL PROSECUTIONS—INDICTMENT.

An indictment for maintaining a common-law nuisance in permitting oil and refuse from an oil refinery to enter a stream, thereby corrupting the atmosphere with stenches and smells, which alleges the particular circumstances of the offense, is sufficient as against a demurrer on the ground that it is not direct and certain, as required by Cr. Code Prac. § 124, though it also states that the oil and refuse polluted the stream.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 91.\*]

#### 2. NUISANCE (§ 92\*) — PUBLIC NUISANCE — CRIMINAL PROSECUTION—EVIDENCE.

In a prosecution for maintaining a common-law nuisance in permitting oil and refuse from a refinery to enter a stream, it is competent for the state to show the effect the oil had on the stream in the county in which the indictment was found.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 92.\*]

Appeal from Circuit Court, Franklin County.

"Not to be officially reported."

The Indian Refining Company was convicted of the offense of maintaining a common-law nuisance, and appeals. Affirmed.

B. G. Williams, McQuown & Beckham, Field McLeod, and Bradley & Bradley, for appellant. R. B. Franklin, Jas. Breathitt, Atty. Gen., and John F. Lockett, Asst. Atty. Gen., for the Commonwealth.

NUNN, J. This appeal is from a judgment for \$10,600, rendered by the Franklin circuit court April 28, 1908. Appellant contends that its demurrer to the indictment should have been sustained, because it is void for uncertainty and lack of directness necessary to charge an offense. Section 124 of the Criminal Code of Practice provides: "The indictment must be direct and certain as regards: (1) The party charged. (2) The offense charged. (3) The county in which the offense was committed. (4) The particular circumstances of the offense charged, if they be necessary to constitute a complete offense."

The offense charged is a common-law nuisance committed in Franklin county, Ky., by polluting the water of Elkhorn creek, which passes through the county. The particular circumstances of the offense, as alleged in the indictment, are as follows: "Did unlawfully, in said county of Franklin, make and

maintain a common nuisance, by emptying, causing to be emptied, and through pipes and otherwise to flow into and upon the waters of Elkhorn creek, at and near its oil-refining plant, which is situated on the waters of said creek, near Georgetown, in Scott county, Kentucky, oil, oil-carrying water, waste, and refuse from the oil-refining plant of said corporation, thereby polluting the waters of said creek in Franklin county, Kentucky, as far down said stream as Peak's Mill, rendering the same unfit for the use of man as well as for live stock watering purposes, because of the foul and unpleasant smell, taste, and appearance thereby given to same, so charging and covering the waters of said creek with foul-smelling and unsightly oily substances as that the beauty of said stream along its winding way is marred, and in times after high water the banks of said creek from the Franklin county line to Peak's Mill, in said Franklin county, are covered therewith, and so foul have the waters of said creek, in said Franklin county, for the distance above stated, been rendered as that the atmosphere along said creek has been corrupted and charged with stenches and smells, producing such discomfort and annoyance to all persons of ordinary sensibilities, and especially to those residing on and along said portion of Elkhorn creek, in Franklin county, as to impair their comfortable enjoyment of life."

The circumstances of the offense charged are the same, in substance, as those that were charged in the indictment in the case of Peacock Distilling Co. v. Commonwealth, 78 S. W. 893, 25 Ky. Law Rep. 1778, which this court held good on demurrer. There is no doubt about the fact that the commonwealth proved the offense as charged in the indictment.

Appellant also contends that the court erred to its prejudice in allowing witnesses who resided along the creek in Scott county to testify as to what effect the oil had on the creek in that county. We are of the opinion that this was not error. Appellant's refining plant was situated in Scott county, near Georgetown, Ky., on the headwaters of Elkhorn creek, which runs into Franklin county and flows into the Kentucky river. The commonwealth, to make out its case, was required to prove that the oil was suffered and permitted to enter the creek at appellant's plant, and the effect it had on the water and vegetation along the creek, and upon stock that drank it, and the manner in which it affected the people residing along the creek, to show that it was the same substance that ran down the creek and through Franklin county; otherwise, the jury could not know that it was the same substance that appellant suffered and permitted to enter the creek at its plant, and that affected the people residing along the creek in Franklin county.

There are some complaints made as to the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

instructions of the court; but they are in substance the same as was given in the case of *Peacock Distilling Co. v. Commonwealth*, supra, and which were approved by this court in that case. The amount of the verdict is large; but it was peculiarly within the province of the jury to fix the amount, and we are unwilling to disturb its finding.

Perceiving no error prejudicial to appellant's substantial rights, the judgment of the lower court is affirmed.

### SUPREME LODGE, K. P., v. BRADLEY.

(Court of Appeals of Kentucky. March 19, 1909.)

#### APPEAL AND ERROR (§ 1003\*)—VERDICT—CONCLUSIVENESS.

The court, on appeal, cannot reverse a judgment on the ground that the weight of the evidence is against the verdict, and can only reverse where the verdict is flagrantly against the evidence, or was superinduced by passion or prejudice.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.\*]

Appeal from Circuit Court, Powell County. "Not to be officially reported."

Action by Louie Bradley against the Supreme Lodge, Knights of Pythias. From a judgment for plaintiff, defendant appeals. Affirmed.

Thornton & Johnson, for appellant. C. F. Spencer and D. L. Pendleton, for appellee.

NUNN, J. This is the second appeal of this case. The opinion and extended opinion on the first appeal may be found in 107 S. W. 209, 32 Ky. Law Rep. 743, and 109 S. W. 1178, 33 Ky. Law Rep. 413. On the last trial the evidence offered by appellant, which was rejected on the first trial, was permitted to be read to the jury; and the lower court, in giving instructions on the last trial, conformed literally to the former opinion of this court.

The testimony introduced on the last trial was, in substance, the same as that introduced on the first. In discussing the evidence on the former appeal this court said: "While, as stated, we think the weight of the evidence supported appellant's defense, there was some evidence to support appellee's theory of the case. We cannot, however, reverse the judgment on the ground that the weight of the evidence was against the verdict. The case was properly allowed to go to the jury. There was no ground for the peremptory instruction asked by appellant, and the trial court did right in refusing it. It is only in the absence of evidence against the party asking such instruction that the court will grant it. If there is any evidence to support the claim or defense of his adversary, the decision of the case rests with the jury. This court may reverse, where the verdict is

flagrantly against the evidence, or the verdict was superinduced by passion or prejudice on the part of the jury; but we are not prepared to say that either of these grounds exists in this case."

We do not feel authorized to disturb the verdict of the jury. The cases are very rare in which this court should invade the province of the jury. We adhere to the view expressed in the former opinion.

Therefore the judgment of the lower court is affirmed.

### CROWN REAL ESTATE CO. v. ROGERS' COMMITTEE et al.

(Court of Appeals of Kentucky. March 16, 1909.)

#### 1. JUDGMENT (§ 496\*)—COLLATERAL ATTACK—COURTS OF LIMITED JURISDICTION—PRESUMPTIONS AS TO JURISDICTION.

Judgments of courts of limited jurisdiction exercising special powers are void on collateral attack, unless the facts necessary to confer jurisdiction appear of record.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 936; Dec. Dig. § 496.\*]

#### 2. INSANE PERSONS (§ 36\*)—APPOINTMENT OF GUARDIAN—PRESUMPTIONS—COLLATERAL ATTACK—COURTS OF LIMITED JURISDICTION.

Since the county court is one of limited jurisdiction possessing only statutory powers, the record of the proceedings for the appointment of a committee for a lunatic must show the facts essential to jurisdiction, and a substantial compliance with the statute or the judgment is open to collateral attack.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 55; Dec. Dig. § 36.\*]

#### 3. JUDGMENT (§ 495\*)—COLLATERAL ATTACK—COURTS OF GENERAL JURISDICTION.

On a collateral attack from a judgment rendered by a court of record of general jurisdiction in the exercise of its ordinary jurisdiction over the subject-matter in litigation, it will be presumed that the court acted correctly and with due authority, and its judgment is as valid as though every fact necessary to jurisdiction affirmatively appeared of record, and, in the absence of any showing on the subject, it will be presumed in support of the judgment that a statutory affidavit was filed.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 933; Dec. Dig. § 495.\*]

#### 4. INSANE PERSONS (§ 36\*)—APPOINTMENT OF GUARDIAN—PRESUMPTIONS—COLLATERAL ATTACK—COURTS OF GENERAL JURISDICTION.

Where the record of the circuit court appointing a committee for a lunatic showed that prior to the inquest process was served on the lunatic and on a physician in whose charge she then was, and that the presence of the lunatic was dispensed with on the sworn statements of two physicians that it would be injurious to bring her into court, it would be presumed, in support of the judgment as against collateral attack, that the physicians testified as required by St. 1909, § 2157 (Russell's St. § 4248), that they had previously examined her and believed her to be of unsound mind, rendering the judgment valid.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 55; Dec. Dig. § 36.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action by the Fidelity Trust Company, as committee of Belle B. Rogers, a lunatic, against Belle B. Rogers and another for the sale of real estate. From a judgment overruling exceptions to the report of sale, the purchaser, the Crown Real Estate Company, appeals. Affirmed.

Johnson & Hieatt, for appellant. Morton V. Joyes, for appellee.

SETTLE, C. J. This action was instituted in the court below by the appellee, Fidelity Trust Company, as committee of Belle B. Rogers, a lunatic, against Belle B. Rogers and her son, Preston Rogers, to procure the sale of certain real estate in the city of Louisville, in which Belle B. Rogers owned the life estate and Preston Rogers the remainder. The sale was asked under section 491, Civ. Code Prac., for the purpose of reinvesting the proceeds in other property; it being alleged and proved that such sale and reinvestment would be beneficial to all the parties in interest. The parties were all properly before the court, and a guardian ad litem appointed to defend for the lunatic. The sale was adjudged by the court, and the real estate thereafter duly advertised and sold by the commissioner as directed by the judgment. The appellant, Crown Real Estate Company, became the purchaser of the property at the price of \$9,100, but doubting the sufficiency of the title it filed exceptions to the report of sale. The court, however, overruled the exceptions, and from the judgment manifesting that ruling the purchaser has appealed.

Only one of the several exceptions filed to the report of sale is now relied on. It attacks the validity of the inquest held May 21, 1908, in the criminal division of the Jefferson circuit court, whereby Belle B. Rogers, by verdict of a jury and judgment of the court was found and adjudged to be a person of unsound mind, and the appellee, Fidelity Trust Company, appointed committee and given charge of her estate. If the proceedings by which these results were reached were illegal and the judgment void, it necessarily follows that the Fidelity Trust Company was without authority to maintain this action, and the court below without jurisdiction to order a sale of the lunatic's property. It appears from the record before us that notice of the time and place of holding the inquest was duly served upon Mrs. Rogers, but that she was not personally present in court when it was held. The order of the court dispensing with her presence reads as follows: "Came the commonwealth and filed a notice, duly served on the defendant, and on the sworn statement of Dr. E. R. Palmer and Dr. M. H. Yeaman, that it would be injurious to bring the defendant into court,

ordered that the personal presence of the defendant be dispensed with." Section 2157, Ky. St. (Russell's St. § 4248), provides: "No inquest shall be held unless the person charged to be of unsound mind, or an imbecile, or incompetent to manage his estate is in court, and personally in the presence of the jury. The personal presence of the person charged shall not be dispensed with unless it shall appear, by oath or affidavits of two regular practicing physicians, that they have personally examined the individual charged to be of unsound mind, or an imbecile or incompetent to manage his estate and that they verily believe him to be an idiot or lunatic, or incompetent to manage his estate, as the case may be, and that his condition is such that it would be unsafe to bring him into court."

It will be observed that the order of the court merely declares that Drs. Palmer and Yeaman made sworn statements that it would be injurious to bring the defendant into court. It is contended by counsel for appellant that the sworn statement falls far short of the requirements of the statute; indeed, that it imperfectly complies with but one of its three requirements, and that this court has declared the statute mandatory. In support of this contention the cases of Tipton v. Tipton's Committee, 97 S. W. 413, 30 Ky. Law Rep. 80, and Kelly v. Gardner, 76 S. W. 531, 25 Ky. Law Rep. 924, are relied on. In each of these cases the presence at the inquest of the person charged with unsoundness of mind was dispensed with, the order of the court showing that fact in the first case being based upon the joint affidavit of two physicians, and in the second case upon the sworn statements of two physicians; but in neither case did the order show that the physicians had previously examined or verily believed the defendant to be of unsound mind. This court in each case held that the inquest was invalid, and the appointment thereunder of a committee for the defendant void. It appears, however, from the opinion in each of the cases mentioned, that the proceeding was instituted and inquest held in the county court and the committee appointed by that court, and that the inquest and judgment were directly attacked in an action brought by the defendant in the circuit court. The same is true of the case of Taylor v. Moore, 112 Ky. 330, 65 S. W. 612, and that of Stewart v. Taylor, 111 Ky. 247, 63 S. W. 783, in which the inquests were held and committees appointed in the county court; but in neither of which was there notice given of the inquest, or the presence of the defendant legally dispensed with. The county court, though a court of record, is one of limited jurisdiction. Its powers being defined and fixed by statute, it can exercise no jurisdiction as to persons or property beyond what is expressly conferred by statute, and is even forbidden by the statute to hold an inquest of lunacy when the circuit court of

the county is in session. Therefore its records must manifest the facts or steps upon which its right to exercise jurisdiction depends. Mr. Freeman, in his excellent work on Judgments (volume 1, § 123), in discussing the jurisdiction of courts of special powers, says: "The decided preponderance of adjudged cases upon the subject establishes the rule that judgments arising from the exercise of this jurisdiction are to be regarded in no other light, and supported by no other presumptions, than judgments pronounced in courts not of record. The particular state of facts necessary to confer jurisdiction will not be presumed; and if such facts do not appear, the judgment will be treated as void." So, for the reason so well stated by the learned author mentioned, this court will in no case approve an inquest held in the county court, or its appointment of a committee for the lunatic, unless the record of the proceedings therein is such as to show jurisdiction on the part of the court and a substantial compliance in other respects with the statutory requirements.

A different rule, however, obtains as to the judgment of a court of general or complete jurisdiction, such as a circuit court, and this rule is also well stated in Freeman on Judgments, vol. 1, § 124: "If it is ascertained that the judgment or decree under examination was rendered by a court of record in the exercise of its ordinary jurisdiction over the subject-matter in litigation, the next fact to be determined is whether the court had jurisdiction over the person against whom the judgment has been obtained. The preponderance of authority shows that in a collateral proceeding this fact must be determined by an inspection of the matters contained in what, at the time of entering the judgment, constituted the record or judgment roll. Any other paper which happens to be on file in the case and improperly attached to the record must be disregarded. The record, however, may be silent upon the subject of jurisdiction. It may fail to show whether the proceedings taken to bring the defendant within the authority of the court were sufficient or insufficient; or, for aught that appears by the judgment roll, no attempt may have been made to perform some act essential to jurisdiction. Nothing shall be intended to be out of the jurisdiction of a superior court but that which expressly appears to be so. Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed upon a collateral attack that the court, if of general jurisdiction, acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared. The decisions to this effect are very numerous. If a statute required a certain affidavit to be filed or a certain fact to be found prior to the rendition of judgment, it will be presumed, in the absence of any statement or showing upon the

subject, that such affidavit was filed or such fact found."

The Jefferson circuit court is a court of general jurisdiction, and its criminal division undoubtedly had jurisdiction to determine the question whether Belle B. Rogers was or not a person of unsound mind, and likewise to appoint a committee to take charge of her estate in the event she was found to be of unsound mind. The inquest by which that fact was determined was held in that court and by a jury under the direction of the court; the verdict being in the statutory form and to the effect that she was of unsound mind and a lunatic. The court by its judgment approved the finding and appointed the Fidelity Trust Company to take charge of her estate, and the latter did so after duly qualifying. These facts were all shown in the instant case in which the real estate of the lunatic and her son was adjudged to be sold, and they also appear in the record thereof before us. The record also shows that prior to the inquest process was duly served upon the lunatic and upon Dr. Yeaman in whose sanitarium and charge she then was. In addition, the record, as presented in the court below and appearing in this court, contained the order copied in the opinion showing why and upon what proof the presence of the lunatic at the inquest was dispensed with. If the two physicians upon whose testimony the personal attendance of Mrs. Rogers at the inquest was excused had furnished it by affidavit, and the affidavit had failed in any essential particular to comply with the requirements of section 2157, Ky. St., it might have given appellant some ground for insisting that the record affirmatively showed such an absence of jurisdictional facts as would invalidate the inquest; but there was no affidavit from the physicians filed. Instead, the testimony furnished by them as to the necessity for the nonattendance of the lunatic was presented in the form of statements under oath, which was permitted by the statute. Whether, in addition to stating that the condition of the lunatic was such as to make it unsafe or injurious to her to have her personally attend the inquest, they also testified, as the statute required, that they had previously examined her and verily believed her to be of unsound mind, we cannot tell, as the order of the court dispensing with her presence is silent on the subject; but as the record shows they were at the inquest, and that upon their sworn statements the presence of the lunatic was dispensed with, we must presume, as they were sworn as witnesses upon the inquest, they were requested to testify before the court and jury as to all the facts in their possession with respect to the condition of mind of the lunatic, including such as were required by section 2157 of the statute, supra. At any rate as it does not affirmatively appear from the record that they did not testify, we must

presume that they did; the court being of general jurisdiction and knowing the necessity for eliciting all the facts essential to the validity of the inquest.

As upon the record before us neither the inquest nor the order appointing a committee for the lunatic can be pronounced void, and cannot be collaterally attacked or set aside, as here attempted, we need not pass upon the question of whether either should be declared void in a direct proceeding by the lunatic.

Being of opinion that appellant will acquire a good title to the real estate in question by virtue of its purchase thereof at the commissioner's sale, and the deed to be made by the commissioner, it follows that the circuit court did not err in overruling the exceptions to the report of sale.

Wherefore the judgment is affirmed.

### LEWIS' ADM'R v. BOWLING GREEN GASLIGHT CO.

(Court of Appeals of Kentucky. March 17, 1909.)

#### 1. EVIDENCE (§ 125\*)—RES GESTÆ.

In an action for death of decedent through contact with an electric wire which had fallen from the poles, what decedent said on taking hold of the wire as to his purpose in grasping it was admissible as part of the *res gestæ*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 370; Dec. Dig. § 125.\*]

#### 2. ELECTRICITY (§ 17\*)—INJURIES INCIDENT TO PRODUCTION—COMPANIES AND PERSONS LIABLE.

A company supplying electricity cannot escape liability for negligence in the manner of distribution by turning it onto private wires, or on the wires of another concern, which are not safely arranged to receive and transmit the current.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 17.\*]

#### 3. ELECTRICITY (§ 14\*)—INJURIES INCIDENT TO PRODUCTION—CARE REQUIRED.

A company distributing electricity through public streets is held to the highest degree of care to keep its lines in a safe condition.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. § 14.\*]

#### 4. ELECTRICITY (§ 19\*)—INJURIES FROM BROKEN WIRES—FAILURE TO INSPECT—NEGLIGENCE—QUESTIONS FOR JURY.

In an action for death of decedent through contact with a sagging and defectively insulated electric wire, whether defendant, who used the wire for transmitting electricity, and who knew that the line had not been inspected or repaired for two years, and that the insulation was much worn off, was negligent in failing to inspect and discover the break for more than 12 hours in the daytime, was for the jury.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.\*]

#### 5. NEGLIGENCE (§ 136\*)—CONTRIBUTORY NEGLIGENCE—QUESTIONS OF LAW AND FACT.

While ordinarily, when there is no conflict in the evidence, it is a question of law whether the admitted facts constitute contributory negligence, yet, if it be a question whether plaintiff's act at the time was that of an ordinarily

prudent person under the same circumstances, the question is for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 291; Dec. Dig. § 136.\*]

#### 6. ELECTRICITY (§ 19\*)—INJURIES FROM BROKEN WIRES—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

In an action for death of decedent through grasping a broken electric wire which had fallen from the poles, whether decedent was guilty of contributory negligence, *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.\*]

Appeal from Circuit Court, Warren County.

"To be officially reported."

Action for wrongful death by I. O. Lewis' personal representative against the Bowling Green Gaslight Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded for new trial.

D. W. Wright, Wright & McElroy, and John B. Grider, for appellant. Sims, Du Bose & Rodes, for appellee.

O'REAR, J. The Bowling Green Gaslight Company furnished the electric power for a private electric light line extending beyond the city limits of Bowling Green, to supply some suburban residents with lights for their dwellings. One of the wires got down and parted in two places. It hung from the poles and partly on a fence or tree, so that it was sagging some six or eight feet above the ground and alongside of the highway in front of I. O. Lewis' residence. The insulation was worn off the wire in many places. It had not been inspected by the gaslight company since it had been put up—for about two years. The voltage used on this wire was about 1,200 or 1,300 watts. One kilowatt is ordinarily fatal to life where a human body forms part of the circuit. Mr. Lewis was about 70 years old, hale, and in possession of his mental faculties. Walking along the public highway in front of his premises, and seeing this loose wire sagging to within a short distance from the ground, he stepped over and took hold of it, probably to pull it down so as it would be out of the way, when he was shocked and killed by the current of electricity in it. What his purpose was in taking hold of the wire we do not know, because the trial judge would not allow the witness to state what Lewis said as he took hold of the wire. What he then said was as clearly competent as what he did, and was in fact part of his act. The accompanying statement of an act is a verbal act, and, as it illustrates the physical act, is treated as part of the *res gestæ*.

This suit was by the personal representatives of Lewis to recover for his death, on the ground that the gas company was negligent in not looking after the insulation and safety of the wire, and in turning into it such a dangerous voltage of electricity without know-

ing that the wire was in safe condition along the highway where people might be expected to come in contact with it. The trial court gave the jury a peremptory instruction to find for the defendant at the close of the evidence in the case. The correctness of that ruling is the question presented here for review.

It may be assumed that the trial judge did not base his ruling upon the fact that the gas company did not own the line, as it has been authoritatively declared that the distributor of such a deadly agency as electricity cannot escape liability for negligence in the manner of distribution by turning it onto private wires, or on the wires of another concern, which are not safely arranged to receive and transmit the current. *Thomas' Adm'r v. Maysville Gas Co.*, 108 Ky. 224, 56 S. W. 153, 53 L. R. A. 147. The evidence was that the wire in question was broken at one or two places, and was hanging down, as stated, and that on the night previous to the death of Mr. Lewis a witness saw sparks and flames emitted from the wire at a point where on the next morning it was discovered to be in two. The wire was without insulation in many places; it having rotted or broken off, and not repaired. That condition had existed for some months. The wires (two of them constituting a circuit) were strung on opposite sides of the posts along the highway, attached to the posts by glass brackets, and were thus placed 8 to 12 inches apart. They were so close as that, when they or one of them became loose, they were in danger of swinging together and touching, creating a short circuit. This would melt the wires, letting them fall to the ground. Appellee had not inspected this line for defects since it was built some two years before, and had not caused it to be repaired. Under these facts we think the case was one for the jury, both as to the company's negligence, and the decedent's contributory negligence. The company could not escape its responsibility as the dispenser through the public streets and roads of such a stealthy deadly force as an electric current of such high voltage upon insecure lines of wire, where the public might reasonably be expected. No more could it dispense with the duty of inspecting the wires, from time to time, to see that they were securely fastened and properly insulated, although the lines were not owned by it. When it used the lines, it was its duty to see to their proper and safe condition. This duty was not discharged by the exercise of ordinary care, but required the highest degree of care to keep them safe. If the wire broke because of the storm of Sunday morning (the injury occurred late Sunday afternoon), and

if appellee did not know that it was broken, and could not in the exercise of that degree of care exacted of it by the law have discovered it, then it would not be negligent in failing to discover it; but, having knowledge of the manner in which the wires were strung, the length of time they had been exposed and in use, and that the insulation was off much of the wire, whether then it was negligent in failing to inspect and discover the break, from whatever cause it may have occurred, for more than 12 hours in the daytime, is a question for the jury.

As to the plea of contributory negligence: Ordinarily, when the facts are admitted, and where there is no conflict in the evidence, it is a question of law whether they constitute contributory negligence; but it is not always so. Although the facts may be admitted, still, if it be a question whether the act of the plaintiff at the time was such as an ordinarily prudent person would have done under the same circumstances, the jury ought to be permitted to say whether, under the circumstances, it was or was not negligence, but for which the defendant's negligence would have been harmless. If the act relied on is admitted and is clearly negligent, or is clearly not negligent, the court as a matter of law should by instructions to the jury dispose of the matter; but, although the proof is all one way as to the act, the act itself may be of such doubtful character as to render it an issue of fact, as much so as if the act itself were not of a doubtful character, but the evidence tending to establish or to disprove it was. If decedent knew that was a live wire, and knew the danger of touching it as he did, the act would be undoubtedly negligence on his part which would defeat a recovery for his injury. If he did not know, and had not reason to believe, it was a live wire, but, on the contrary, had reason to believe the electric current was not turned onto it, his was not such an act as an ordinarily prudent person might have done under the same circumstances. At least it was not necessarily so. His purpose might have been to place the wire so that when the current was turned on it would be out of the way to do damage.

It is claimed that the insulation is not a protection to human life when the voltage is so high as was that in use in this instance, but there was evidence to the contrary of that contention. We think the whole matter should have gone to the jury under the usual instructions in such cases as to the care exacted of the gas company and of the decedent, and as to what would constitute negligence in each.

Judgment reversed and remanded for a new trial.

**SMITH'S ADM'R v. NATIONAL COAL & IRON CO.**

(Court of Appeals of Kentucky. March 23, 1909.)

**1. MASTER AND SERVANT (§ 277\*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—EMPLOYMENT.**

In an action for the death of a boy while working in a coal mine, evidence held to show that he was employed by defendant's foreman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 953; Dec. Dig. § 277.\*]

**2. MASTER AND SERVANT (§ 95\*)—UNLAWFUL EMPLOYMENT OF INFANT—MASTER'S LIABILITY.**

Under St. 1909, § 331a (Russell's St. §§ 3237-3251a [5]), making it unlawful to employ any child less than 14 years old in a mine, read in connection with St. 1909, § 466 (Russell's St. § 8), permitting one injured by the violation of a statute to recover from the offender any damage sustained by reason of the violation, an infant, employed in a mine in violation of the statute, can recover damages sustained in consequence of its violation, and whether the injury occurred when the boy was at his place in the mine, or going or coming to work, was immaterial.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 160; Dec. Dig. § 95.\*]

**3. DEATH (§ 7\*)—ACTION FOR DEATH—RIGHT OF ACTION.**

An action to recover for death by wrongful act can only be maintained under St. 1909, § 6 (Russell's St. § 11), enacted pursuant to Const. § 241, giving a right of action for death by wrongful act; no such right of action existing at common law.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 10; Dec. Dig. § 7.\*]

**4. DEATH (§ 23\*)—ACTION—DEFENSES—CONTRIBUTORY NEGLIGENCE—NEGLECT OF STATUTORY DUTY.**

Contributory negligence is a defense to an action brought pursuant to St. 1909, § 6 (Russell's St. § 11), giving a right of action for death by wrongful act, for the death of an infant while employed in a coal mine in violation of St. 1909, § 331a (Russell's St. §§ 3237-3251a [5]), prohibiting the employment of infants under 14 years old in a mine.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 25; Dec. Dig. § 23.\*]

**5. NEGLIGENCE (§ 85\*)—CONTRIBUTORY NEGLIGENCE—INFANTS.**

An infant is only required to exercise such care as may reasonably be expected from one of his age under like circumstances; the law recognizing his lack of mature discretion.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 123; Dec. Dig. § 85.\*]

**6. MASTER AND SERVANT (§ 289\*)—INFANTS—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.**

In an action for the death of a boy killed while working in a coal mine by falling between the cars while riding out from work, whether he used ordinary care in passing over the cars under the circumstances held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1098; Dec. Dig. § 289.\*]

Appeal from Circuit Court, Bell County.

"To be officially reported."

Action by Bentley Smith's administrator against the National Coal & Iron Company.

From a judgment for defendant on a directed verdict, plaintiff appeals. Reversed and remanded for new trial.

R. S. Rose, for appellant. Barker & Woods and D. B. Logan, for appellee.

HOBSON, J. Bentley Smith lost his life in the mine of the National Coal & Iron Company, and this action was brought to recover for his death under section 6, Ky. St. (Russell's St. § 11), on the ground that his death resulted from an injury inflicted by the negligence or wrongful act of the company, in this, that he was under 14 years of age and had been employed by the company in violation of the statute, which then read as follows: "That it shall be unlawful for a proprietor, foreman, owner or other person to employ any child less than fourteen years of age in any workshop, factory, or mine, in this state; that unless said proprietor, foreman or owner shall know the age of the child, it shall be his or their duty to require the parent or guardian to furnish a sworn statement of its age, and any swearing falsely to such by the parent or guardian shall be perjury and punishable as such." Section 331a, Ky. St. (Russell's St. §§ 3237-3251a [5]). This statute is to be read in connection with section 466, Ky. St. (Russell's St. § 8): "A person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed."

The plaintiff showed on the trial these facts: Bentley Smith was the son of Elliot Smith, who was a miner regularly employed in the mine. He took his son on one occasion to the mine and asked the foreman if he would let the boy work with him. The foreman asked him how old he was. He answered that he was not 14. The foreman then said that he was too young to work in the mine, and the boy was sent home. Shortly after this, about the 1st of May, Elliot Smith was injured in the mine so he could not work. His little boy then said to him: "I want to work in the mine. You are mashed up, and our house rent is to pay, and we have got to live." The father told him not to go in the mine, but notwithstanding this he did go to work in the mine, getting out coal on his father's number. When he went in the foreman said to the boy, "Son, you have to work now, do you, since your father got hurt?" The boy said, "Yes, sir," and he went on in the mine. The foreman came around where the boy was at work, showed him how to shovel, and told him how to run under the coal. The coal which the boy got out was weighed by the man who weighed the coal for the other miners, and was credited to his father, amounting to \$10.58. The company kept the money for the rent of the house in which the family lived. On the 18th of May

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



about noon, when a shot was to be fired, the boy started out of the mine, and, as was customary with the miners, rode out on the loaded cars of coal. There were six or seven cars in the train. The boy got up on the rear car. A friend of his was on the car next to the front. There were quite a number of men on the cars. The boy was walking over the cars toward the front, when he fell between the third and fourth car and was run over and killed. On this proof the circuit court instructed the jury peremptorily to find for the defendant apparently on the idea that the death of the child was due to his own act in walking over the cars. It is insisted that the court properly so instructed the jury, as he was not then serving the master, and his injury was due to his own want of care.

The boy was serving the master in the mine. He had been getting out coal all the morning. It was necessary that he should leave the mine at noon when the shots were fired. In leaving the mine he was in the regular course of his duty, and it was customary for all the miners to ride out on the cars or to ride in on them. The statute which forbids the employment of children in mines is for their protection. It was a violation of the statute for the child to be employed in the mine. The evidence was plainly sufficient to show that he was employed; and, as he was injured in the mine while going from his place of work to the shaft, it cannot be said that he was not injured in the course of his employment in the mine. The statute made it unlawful for him to be employed in the mine, and whether he was injured while at his work in the mine, or in going to his work or coming from his work, is immaterial. It has been held by this court in several cases that, where a statute prohibits a thing for the benefit of a person, he may maintain an action to recover damages sustained by reason of the violation of the statute. *City of Henderson v. Clayton*, 57 S. W. 1, 22 Ky. Law Rep. 283, 53 L. R. A. 145; *Hutchison v. L. & N. R. Co.*, 108 Ky. 619, 57 S. W. 251; *City of Henderson v. O'Halaran*, 114 Ky. 188, 70 S. W. 662, 59 L. R. A. 718, 102 Am. St. Rep. 279; *Sutton v. Wood*, 120 Ky. 23, 85 S. W. 201. We see no reason why this principle should not be applied to infants who are injured when employed in violation of the statute, for manifestly the purpose of the statute is to protect infants from the dangers attending the forbidden employments, which by reason of their youth they would not fully appreciate. While there is some conflict in the authorities, the weight of authority seems in favor of the rule that the breach of the statute is actionable negligence whenever it is shown that the injuries were sustained in consequence of the employment. *Queen v. Dayton Coal Co.*, 95 Tenn. 458, 32 S. W. 460, 30 L. R. 82, 49 Am. St. Rep. 935; *Rolin v. Reynolds Tobacco Co.*, 141 N. C. 300, 53 S. E.

891, 7 L. R. A. (N. S.) 335; *American Car Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 766; *Nickey v. Steuder*, 164 Ind. 189, 73 N. E. 117; *Iron & Wire Co. v. Green*, 108 Tenn. 164, 65 S. W. 399; *Sterling v. Union Carbide Co.*, 142 Mich. 284, 105 N. W. 755; *Woolf v. Nauman Co.*, 128 Iowa, 261, 103 N. W. 785; 1 *Thompson on Negligence*, § 10; 2 *Labatt on Master & Servant*, 2177.

This is an action to recover for the death of the intestate. No cause of action existed at common law to recover for death, and an action to recover for the death of a person can only be maintained in this state by virtue of section 6, Ky. St., enacted pursuant to section 241 of the Constitution. It is well settled that contributory negligence may be pleaded as a defense to an action brought under this section. *Passamanek v. Louisville, etc., R. R. Co.*, 98 Ky. 195, 32 S. W. 620; *Clark v. L. & N. R. R. Co.*, 101 Ky. 34, 39 S. W. 840. As the action can only be maintained under the statute referred to, and as contributory negligence may be pleaded as a defense to an action under the statute, it necessarily follows that contributory negligence may be relied on by the defendant in bar of the plaintiff's action. A child under 14 years of age is only required to exercise such care as may be reasonably expected of a child of his age under like circumstances. The law takes into consideration that children lack the discretion of grown persons, and that a child under 14 years of age may reasonably be expected to do things which an older person would not do. Whether the intestate used ordinary care in passing over the cars as he did is a question for the jury. *Ornamental Iron, etc., Co. v. Green*, 108 Tenn. 161, 65 S. W. 39. Of course, as we have not the proof of the defendant before us, we now only pass upon the case as presented by the proof for the plaintiff. On the proof for the plaintiff the court should have refused to give a peremptory instruction to the jury to find for the defendant.

Judgment reversed, and cause remanded for a new trial, and further proceedings consistent herewith.

BARKER, J., not sitting.

# BROWN et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 18, 1900.)

## 1. INDICTMENT AND INFORMATION (§ 33\*) — FORMAL REQUISITES—SIGNATURE OF PUBLIC PROSECUTOR.

Since the Code does not require the commonwealth's attorney to sign an indictment, the signing or printing by mistake of the name of a person to it as commonwealth's attorney who is not such officer does not invalidate it.

[Ed. Note.—For other cases, see *Indictment and Information*, Dec. Dig. § 33.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

## 2. ROBBERY (§ 1\*) — WHAT CONSTITUTES — FORCE—PUTTING IN FEAR.

To constitute robbery, the person robbed must be deprived of his property by force, or by putting him in fear.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6258-6264; vol. 8, p. 6238.]

## 3. ROBBERY (§ 6\*) — SUFFICIENCY OF EVIDENCE.

Evidence that one of defendants asked prosecutor for a dime with which to buy beer, and that, on the latter's drawing some money from his pocket, the other defendant suddenly and forcibly wrenched the money from prosecutor's hand, and fled with it, authorized a conviction for robbery, and an instruction on larceny was properly refused.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 6; Dec. Dig. § 6.\*]

Appeal from Circuit Court, Bell County.

"To be officially reported."

Robert Brown and others were convicted of robbery, and appeal. Affirmed.

J. G. Rollins and N. B. Hays, for appellants. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

SETTLE, C. J. The appellants, Robert Brown, Charlie Woods, and Pearl Wiggins, were indicted, tried, and convicted of the crime of robbery, the punishment of each being fixed at confinement in the penitentiary two years. Appellants ask a reversal of the judgment of conviction.

Numerous errors are assigned, but only two of them are relied on for the reversal asked. The first complaint is that the court erred in overruling appellants' demurrer to the indictment. At the close of the indictment appears the name of G. A. Denham, as commonwealth's attorney of the Twenty-Sixth judicial district, when it should have contained the name of J. B. Snyder, present commonwealth's attorney of the judicial district. Denham was the predecessor in office of Snyder, and it is admitted that the indictment against appellants was written upon a partly printed form, which was one of a lot that had been procured by Denham while commonwealth's attorney, and that in preparing the indictment Snyder forgot to erase the name of Denham and write his own in lieu thereof as commonwealth's attorney. The error did not affect the validity of the indictment. In the case of *Sims v. Commonwealth*, 13 S. W. 1079, 12 Ky. Law Rep. 215, it is said: "The Code does not require the commonwealth's attorney to sign the indictment. It makes no difference whether the person signing the indictment was a county or commonwealth's attorney. The law did not require either to sign it."

If, as thus held, neither the county nor the commonwealth's attorney is required by the Code to sign the indictment, it necessarily

follows that the signing or printing by mistake of the name of a person to it as commonwealth's attorney who is not such officer would not invalidate it. The mistake could have no other effect than would the absence from the indictment of the name of the commonwealth's or county attorney. It is further insisted for appellants that the trial court erred in failing to instruct the jury as to the law in respect to larceny, and that the evidence upon which they were convicted, if it showed them guilty of any crime, more directly tended to prove them guilty of larceny than robbery; and, \$6 being the amount of which the owner was deprived by them, they should have been convicted of petit larceny if convicted at all; whereas the instructions that were given only contained the law as to robbery, and compelled the jury to find appellants guilty of that crime, or to acquit them. It remains to be seen whether the evidence supports this contention. That introduced by the commonwealth conduced to prove that William Roberts and another man named Johnson were in the city of Middlesboro on the night of the robbery, having gone there from the state of Virginia. Together they walked along one of the streets of the city until they reached a point in front of the Shady Grove saloon and near a restaurant, where they met two negro men and a negro woman. The negro woman was Pearl Wiggins, and one of the negro men the appellant Charles Woods. The other man was a one-eyed negro, but there was a contrariety of evidence as to whether he was the appellant, Robert Brown, or another one-eyed negro known as "Bram." Upon meeting the three negroes something was said by Johnson to them, and the appellant Charles Woods then started away with Johnson, ostensibly for the purpose of conducting him to a barber's shop, leaving Roberts with the other negroes. At that juncture Pearl Wiggins asked Roberts for a dime to buy a bucket of beer. Evidently intending to comply with her request, Roberts drew some money from his pocket, and after he did so the one-eyed negro man with Pearl Wiggins suddenly, and with force and violence, snatched or wrenched the money from Roberts' hand, and with equal suddenness swiftly fled and escaped with it. The amount thus taken was \$6. The arrest of the three appellants speedily followed. Mrs. Gerrish, a witness for the commonwealth, was standing in the door of the restaurant, in plain view of the parties, when the robbery occurred, and claimed to have seen the entire transaction. She testified that the negro man who snatched the money from Roberts' hand and ran away with it was a one-eyed man, and identified the appellant Brown as the guilty person. Two other witnesses testified that he was in a negro restaurant on an alley in the rear of the Shady Grove saloon immediately before the robbery,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and one of them that he was then trying to borrow a bucket to get some beer for Pearl Wiggins. The evidence fails to show that he was seen at the place of the robbery after its occurrence. The appellants Brown and Pearl Wiggins admitted all the facts as to the robbery, except they claimed that it was the one-eyed negro Bram, and not Brown, who seized and fled with Roberts' money. They also proved by two or more witnesses that Bram resembles Brown; that he, too, was seen near the scene of the robbery shortly before it was committed, and that immediately thereafter he left Middlesboro, and has not since returned.

While the evidence was conflicting as to the identity of Brown and as to Woods' connection with the crime, we are unable to say that it furnished no basis for the verdict of the jury. It was for the jury to say whether Brown or Bram was the money snatcher, and whether Woods and Pearl Wiggins were aiders and abettors in the commission of the crime. We are not at a loss to understand how the jury constructed from the evidence as a whole the theory that each of the appellants contributed to the crime charged; the part assigned Woods being to get Johnson separated from Roberts that he might not assist the latter to resist the robbers, the act of Pearl Wiggins in asking of Roberts the dime to buy beer being a subterfuge to get him to pull the money from his pocket that Brown might be afforded the opportunity to forcibly take it from him, and Brown's part of the enterprise to possess himself by force of the money after Roberts drew it from his pocket. The evidence clearly shows that force was required and used to deprive Roberts of his money, and to constitute robbery the person robbed must be deprived of his property by force, or by putting him in fear. In *Davis v. Commonwealth*, 54 S. W. 959, 21 Ky. Law Rep. 1295, it was held the fact that the defendant snatched money from the hand of another was evidence of actual violence, which entitled the prosecution to an instruction to the jury to convict if the money was taken against the owner's will, by actual force. And in *Jones v. Commonwealth*, 112 Ky. 689, 66 S. W. 633, 57 L. R. A. 432, 99 Am. St. Rep. 330, it was also held that, where defendant snatched a pocketbook from the hand of another so quickly that he had no chance to actively resist, there was such a taking by violence as authorized a conviction under an indictment for robbery.

The trial court did not err in failing to give an instruction under which the jury might have found appellants guilty of larceny. There was indeed no proof of larceny; it was wholly and altogether to the effect that Roberts' money was taken from him by force, and with such violence and suddenness as gave him no opportunity to resist the robbers. The crime was therefore robbery, and

the instruction authorizing the jury to find appellants guilty of robbery, together with the one as to the reasonable doubt, gave to the jury all the law of the case. Wherefore, the judgment is affirmed.

### WAGNER v. CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. March 24, 1909.)

#### 1. MUNICIPAL CORPORATIONS (§ 185\*)—POLICEMEN—DISCHARGE—DISCRETION.

A municipal ordinance reducing the police force of 304 men to 294 was complied with by the discharge of 10 men. Subsequently the circuit court adjudged that the ordinance was void, and the dismissed men were reinstated. Thereafter the Court of Appeals decided that the ordinance was valid, and 10 other men were discharged. *Held*, that the municipal authorities had discretionary power in the selection of the men to be dismissed, and the men dismissed the second time could not complain because of the reinstatement of the 10 men first dismissed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 497; Dec. Dig. § 185.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 186\*)—POLICEMEN—COMPENSATION—EFFECT OF DISCHARGE.

Where a police officer was wrongfully discharged, and his place was filled by the officers remaining, some one of whom drew the salary which the officer would have received, had he remained on the force, the officer could not recover from the city salary during the time he was discharged.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 510, 515; Dec. Dig. § 186.\*]

#### 3. OFFICERS (§ 95\*)—DE FACTO OFFICERS—RIGHT OF DE JURE OFFICERS TO COMPENSATION.

Where there is a de facto officer holding the office pending a contest therefor, the de jure officer must first obtain the office by direct procedure against the wrongful incumbent, or be reinstated by some direct procedure against the power wrongfully removing him, and he cannot recover the salary drawn by the de facto officer pending the litigation.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 134, 139; Dec. Dig. § 95.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"Not to be officially reported."

Action by John J. Wagner against the City of Louisville. From a judgment of dismissal, plaintiff appeals. Affirmed.

Johnson & Heatt, for appellant. Joseph S. Lawton and Leon P. Lewis, for appellee.

**BARKER, J.** The appellant is a policeman of the city of Louisville, and this action was instituted by him to recover a claim for salary from April 30, 1901, when he was discharged from the force, until December of the same year, when he was reinstated. The claim arises from the following facts: Prior to January 21, 1900, the police force of Louisville, under the ordinance then existing, consisted of 304 patrolmen. On the date last

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mentioned the general council passed an ordinance reducing the number of the force to 294 patrolmen. This required the removal of 10 men, and in compliance with the ordinance one Stiggers and 9 other patrolmen were discharged, and a captain, Andrew Krakel, reduced to the position of lieutenant. Afterwards Stiggers instituted an action in the Jefferson circuit court for an injunction to prevent his removal. In this last-named case the court held that the ordinance reducing the force was void, and the discharge of Stiggers and his 9 companions illegal, but refused to grant a mandatory injunction restoring them to their position. The board of safety, however, in obedience to the judgment of the circuit court, reinstated Stiggers and his 9 companions, and the force continued then, as before, to consist of 304 patrolmen. The matter would probably have continued in this way indefinitely, but for the fact that Capt. Krakel made a demand upon the auditor of the city, Charles Neumeyer, that he should issue his warrant for his salary as captain, instead of as lieutenant, and upon the refusal of the auditor to comply he instituted an action in the Jefferson circuit court for a mandamus requiring him to issue the warrant as demanded. Upon the trial of this action the circuit judge held that the ordinance was void; but the city appealed the case to this court, where the judgment was reversed, and the ordinance upheld. Neumeyer, Auditor v. Krakel, 110 Ky. 624, 62 S. W. 518. After the ordinance was thus finally held to be valid, the board of safety, on the 30th day of April, 1901, discharged the appellant, John J. Wagner, and 9 companions; all of them being different men from those originally discharged with Stiggers and reinstated as above detailed.

It is the contention of appellant that, the ordinance reducing the force being valid, the original discharge of Stiggers and his 9 companions, which reduced the force to the proper number—294—was valid, and that their subsequent reinstatement was illegal; and, this being true, they, and not appellant and his companions, should have been removed in order to comply with the ordinance after the opinion of this court in Neumeyer v. Krakel. The vice of this reasoning on the part of appellant is that it assumes that any of the men had a vested right in remaining upon the force after the ordinance reducing it was passed. It is true the board of safety first discharged Stiggers and his companions, and then reinstated them in compliance with the views of the circuit judge as to the validity of the ordinance. We think this was proper. The judgment of the circuit judge was the law of the case until it was reversed, and it was altogether proper that the municipal officers should obey the unreversed judgment of the circuit court. When, however, this court finally set the matter at rest and held

the ordinance to be valid, there were 304 men on the force, and only 294 of them could properly remain. Ten had to go. It was within the discretion of the board of safety to select those to be finally removed in order to comply with the judgment of this court, and the appellant had no legal right to complain that he was one of the unfortunate men selected for discharge.

But, if we were less certain of the soundness of our position in this matter, we would still be constrained to uphold the judgment of the circuit court dismissing appellant's petition. When he was out of office, assuming, for the present, wrongfully so, his place was filled by one of the men not discharged. In other words, after the discharge of appellant and his 9 companions there remained 294 patrolmen on the roster of the city's police force. Some one of these occupied the position which Wagner would have held, had he been permitted to remain, and some one of these drew the salary which he would have received, had he remained on the force. This being true, he cannot recover from the city money received by the de facto policeman who occupied his place. This question is so fully settled in *Gorley v. City of Louisville*, 104 Ky. 372, 47 S. W. 263, *Gorley v. City of Louisville*, 108 Ky. 789, 55 S. W. 888, *Nall v. Coulter*, 117 Ky. 747, 78 S. W. 1110, and *Bradley v. City of Georgetown*, 118 Ky. 735, 82 S. W. 303, that we need not expand the argument further than to cite them. The principle settled is that, where there is a de facto officer holding the office in contest, the de jure officer must first obtain the office by direct procedure against the wrongful incumbent, or be reinstated in office by some direct procedure against the power which wrongfully removed him, and he cannot recover from the state or the municipality the salary drawn by the de facto officer pending the litigation.

The judgment of the circuit court, dismissing the petition, is affirmed.

#### TERRY et al. v. TERRY.

(Court of Appeals of Kentucky. March 12, 1909.)

#### SCHOOLS AND SCHOOL DISTRICTS (§ 53\*)— TRUSTEES — FORGED RESIGNATION — EVIDENCE.

Evidence in a suit involving the question of who was the rightful teacher of a school district, depending on whether a resignation of a trustee for the district was forged, held to authorize a finding that it was forged, so that there was no vacancy on the board, and hence an appointment to fill a vacancy was a nullity.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 133; Dec. Dig. § 53.\*]

Appeal from Circuit Court, Breathitt County.

"Not to be officially reported."

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Suit by Ellen Terry against W. K. Terry and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. L. Kash, for appellants. Gourley, Redwine & Gourley, for appellee.

LASSING, J. This litigation is the outgrowth of a contest between appellee, Ellen Terry, and Noah Johnson and W. K. Terry, as to who should teach the common school in district No. 41, Breathitt county, during the school year of 1904-5. On the 24th of June, 1904, P. H. Johnson, Arch Johnson, and Henry McIntosh were the legally qualified and acting trustees for said district No. 41. As such trustees they had indicated to appellee that they wanted her to teach the school, and had refused to employ appellants, W. K. Terry and Noah Johnson. Shortly after the 24th of June, 1904, H. B. Noble, county superintendent of schools, received what purported to be the resignation of Arch Johnson as a trustee in said district. He filed said paper in his office, and thereupon appointed Samuel Johnson, the father of Noah Johnson, as a trustee in said district, in place of Arch Johnson. Samuel Johnson, as soon as he was notified of his appointment, qualified by taking the oath of office, and on the 1st of July following, when the trustees met at the schoolhouse in the said district for the purpose of selecting a teacher for the ensuing year, Arch Johnson appeared and claimed his right to act as trustee, insisting that he had not resigned, and thereupon he and Henry McIntosh employed appellee to teach the school, and Samuel Johnson and P. H. Johnson arranged for Noah Johnson, son of Samuel Johnson, and W. K. Terry, his nephew, to teach the school. Some time after her employment as teacher, appellee went to the schoolhouse to open school, and found the house in the possession of appellants, who refused to surrender the house to her. She thereupon instituted suit to enjoin and restrain the appellants from interfering with her in the conduct of the school.

It developed that the paper purporting to be the resignation of Arch Johnson had been drawn up by one Anderson Spicer, uncle of Noah Johnson, who was an applicant for the school, and, according to the testimony of Noah Johnson and his uncle, Anderson Spicer, this resignation was procured in the following way: On the 24th of June, 1904, they went to the home of Arch Johnson and found him out in the field at work. They requested him to resign, so that they could have some one appointed in his stead who would employ Noah Johnson and W. K. Terry to teach the school. He refused to do this, although he finally consented that the resignation might be written out by them and handed to the county superintendent. In accordance with his direction and con-

sent, the resignation was written and signed by Spicer. After this was done they called upon the other trustee, Henry McIntosh, and requested him to resign; but he refused to do so. Arch Johnson stoutly denies that he resigned, or consented to resign, or consented that they might write out his resignation; and this is all of the testimony in the case, further than the conduct of the parties, which tends to corroborate the testimony of Arch Johnson. Immediately upon learning that it was being circulated around the neighborhood that he had resigned, Arch Johnson went to the county seat, a distance of about 15 miles from his home, and notified the superintendent that the paper purporting to be his resignation was a forgery. It appears, further, that this reputed resignation, although taken by Noah Johnson and his uncle, Anderson Spicer, was not lodged with the superintendent by them, but was delivered by them to a friend, who lodged it with the superintendent; and when Samuel Johnson was qualified the certificate of his qualification was likewise delivered to a friend, who in turn delivered it to the superintendent. The chancellor found on this evidence that Arch Johnson had never in fact resigned, and that on July 1st, when he entered into the contract of employment with appellee, he was a trustee in said district and, there being no vacancy, that the appointment of Samuel Johnson was a nullity, and of no binding force and effect, and that appellants had no right to teach the school or to interfere with appellee in teaching same. From that finding and judgment of the chancellor, this appeal is prosecuted.

If Arch Johnson is to be believed, the conduct of appellants, and especially of Noah Johnson and his uncle, Anderson Spicer, is clothed with suspicion; and the effort by which they sought to oust him from his position as a trustee, and have Samuel Johnson, father of Noah Johnson, appointed a trustee, in order that they might secure employment for Noah Johnson and W. K. Terry as teachers in said district, is most reprehensible. The testimony of the witnesses in this case is so antagonistic that it cannot be reconciled. Either Arch Johnson authorized Anderson Spicer to prepare and sign a resignation for him as trustee in said district, or else said Spicer deliberately forged said writing for the purpose of perpetrating a fraud upon Arch Johnson and the district, in order to enable his relatives to secure employment as teachers therein. The chancellor decided in favor of the contention of Arch Johnson; and, while this conclusion places Noah Johnson and his uncle, Anderson Spicer, in a most unenviable light, we are inclined to the opinion that the conclusion reached by the chancellor is correct, and the judgment is therefore affirmed.

**STANDARD LUMBER CO. v. COLWELL et al.**

(Court of Appeals of Kentucky. March 18, 1900.)

**1. LOGS AND LOGGING (§ 3\*) — BONA FIDE PURCHASERS.**

Where a purchaser of standing timber gave his notes for the price and a mortgage on the timber, and subsequently reconveyed the timber, and the mortgage was satisfied of record, and the notes were assigned by the vendor, but were not transferred on the record, a subsequent purchaser of the timber from the vendor, who takes without notice of the transfer of the notes, is a bona fide purchaser, and takes an unincumbered title to the timber.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 3.\*]

**2. PLEADING (§ 311\*)—CURE OF DEFECTS BY EXHIBITS.**

An exhibit will not cure a defect in a pleading, or supply the place of averments that are essential to make the pleading good.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 945; Dec. Dig. § 311.\*]

**3. PLEADING (§ 311\*)—DEMURRER—SCOPE OF INQUIRY CONSIDERED—EXHIBITS.**

Where an exhibit filed with and as the basis of an action shows on its face that plaintiff has no cause of action, the exhibit will be considered as a part of the pleading, in determining its insufficiency on a demurrer; and, if the exhibit relied on contradicts the pleading, the exhibit will control.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 945; Dec. Dig. § 311.\*]

Appeal from Circuit Court, Perry County.  
"Not to be officially reported."

Action by the Standard Lumber Company against S. C. Colwell and others. From an order dismissing the petition as to one of the defendants, plaintiff appeals. Affirmed.

Miller & Ward, for appellant. Wootton & Morgan, G. W. Fleenor, and Greene, Van Winkle & Schoolfield, for appellees.

**CARROLL, J.** This suit was instituted by appellant, Standard Lumber Company, against the appellee S. C. Colwell to recover judgment on four notes, for \$1,000 each, executed by Colwell to E. S. Patton. The petition averred that Patton assigned and transferred the notes to the Marietta Lumber Company, which company assigned and transferred them to the Standard Lumber Company; that the four notes were secured by a mortgage executed by Colwell to Patton on a large number of timber trees standing on the land described in a mortgage, which mortgage was put to record in the clerk's office of the Perry county court. It further averred that the Ohio Valley Tie Company, and other defendants named in the petition, were wrongfully cutting, removing, and converting to their own use timber covered by the mortgage, and it sought a personal judgment against Colwell, and asked that the defendants be restrained from cutting, removing, or converting the timber. In accordance with the prayer of the petition, a restraining order was issued by the clerk. Afterwards the

Ohio Valley Tie Company, which appears to be the only appellee, entered a general demurrer to the petition, and also moved the court to dissolve the restraining order. Its demurrer and motion were sustained, and, declining to plead further, the petition as amended was dismissed as to the Ohio Valley Tie Company, and from the order of the court dismissing the petition this appeal is prosecuted.

It appears from the record that the Ohio Valley Tie Company, at the time it filed its demurrer, also filed an answer and counterclaim, in which it admitted that Colwell executed to Patton the mortgage and notes described in the petition; but in a separate paragraph it set up that Colwell, being unable to pay for the trees for which the notes were executed and upon which the mortgage was given, reconveyed the trees to Patton in satisfaction and discharge of the notes and mortgage, and that Patton accepted them in satisfaction of his debt, and thereupon entered on the margin of the record book the following indorsement, duly attested by the clerk: "S. C. Colwell having paid or discharged the four \$1,000 notes in full, mentioned in this mortgage, I therefore release all liens I have under and by reason of this mortgage. This November 17, 1906." Afterwards, in April, 1907, Patton conveyed all of the timber to the Cleveland Lumber & Tie Company, and in May, 1907, this company conveyed the trees to the Ohio Valley Tie Company.

It is also shown by the answer that the notes mentioned in and secured by the mortgage from Colwell to Patton were not assigned or transferred on the record by Patton to the Marietta Lumber Company or its assignee, the Standard Lumber Company, or, indeed, to any other person; so that the record showed that Patton was the owner of the notes. Hence, when Patton released the lien retained in the mortgage to secure the notes, and acknowledged satisfaction of them, the Ohio Valley Tie Company, an innocent purchaser from Patton, without notice of the assignment or transfer of the notes by him, took a clear and unincumbered title to the property. Although this answer and counterclaim is not properly before us, as the case went off on the general demurrer to the petition, yet, as the relief the plaintiff was entitled to against the Ohio Valley Tie Company was based entirely upon the assumption that the plaintiff had a mortgage lien upon the timber, and as a certified copy of the mortgage and indorsement thereon filed, with the record before the court acted on the demurrer, and which was the basis of the plaintiff's action, shows that the lien had been released and the debt discharged, there was no other course for the lower court to pursue except to sustain the demurrer.

An exhibit will not cure a defect in a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pleading, or supply the place of averments that are essential to make the pleading good; but, when an exhibit that is filed with and as the basis of an action shows on its face that the plaintiff has no cause of action, the exhibit may be considered as a part of the pleading in determining its insufficiency on a demurrer, and, if the exhibit relied on contradicts the pleading, the exhibit will control. *Commonwealth v. Licking Valley Bldg. Ass'n*, 118 Ky. 791, 82 S. W. 435; *Union Boller & Tube Co. v. Louisville Ry. Co.*, 74 S. W. 1056, 25 Ky. Law Rep. 122.

Applying to the petition this well-settled rule of practice, the plaintiff failed to show any right of action against the Ohio Valley Tie Company, and the judgment of the lower court is affirmed.

#### DENNIS et al. v. ALVES et al.

(Court of Appeals of Kentucky. March 24, 1909.)

#### 1. JUDGMENT (§ 518\*)—WHAT CONSTITUTES COLLATERAL ATTACK—JUDGMENT PLEADED AS LINK IN CHAIN OF TITLE.

Where a judgment constitutes a link in the parties' chain of title to land in question, and is pleaded by them, a contention by the adverse parties that the judgment was void for want of jurisdiction is a collateral attack on it, and unless it is void for want of jurisdiction, either of the subject-matter or of the persons involved in the litigation, the attack is in vain.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 961, 962; Dec. Dig. § 518.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 365\*)—SALES TO EXECUTOR—VALIDITY.

The fact that an executor purchased land of the estate at a sale procured by his instrumentality to settle the estate would not make the purchase void.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1500; Dec. Dig. § 365.\*]

"To be officially reported."

On petition for rehearing. Petition overruled.

For former opinion, see 113 S. W. 483.

Thomas E. Ward and F. M. Hutcheson, for appellants. Montgomery Merritt, for appellees.

LASSING, J. Under the influence of the earnest petition for rehearing filed in this case, we have re-examined the record with more than ordinary care, but without being able to materially change our views as to the soundness of the original opinion delivered herein. The appellants in their petition do not concede that the judgment called in question in this case is collaterally attacked. But in this they are in error. A judgment is directly attacked when it is called in question by a motion or proceeding for a new trial, by an appeal to a higher court, or by an action to set it aside for fraud, or any like procedure; but in this case the judgment con-

stitutes a part of appellees' chain of title to the land in question, and, when pleaded by them, the appellants respond that the judgment is void for want of jurisdiction. This is a collateral attack, and, unless the judgment is void for want of jurisdiction, either of the subject-matter or of the persons involved in the litigation, the attack is in vain. As pointed out in the original opinion, when a collateral attack is made upon a judgment of a court of general jurisdiction, certain presumptions will be indulged in favor of the jurisdiction of the court to render it. These presumptions in the case at hand were fatal to appellants' case.

The fact that the executor, James M. Stanley, purchased the property at a sale procured by his instrumentality in order to settle the estate of his father, did not make the purchase void. *Johnson v. Poff*, 109 Ky. 396, 59 S. W. 325; *McGary's Heirs v. McGary*, 105 S. W. 891, 32 Ky. Law Rep. 314.

The appellants complain in their petition of a statement, made in the opinion, that each of the children (the appellants) received \$400 in money. This statement is not at all material to the opinion, and out of deference to the feelings of the appellants, who bitterly complain of it, it will be stricken from the face of the opinion. All that we meant to say was that when Point Place, which had been devised to appellants and their mother by their grandfather, was taken from them in order to pay the debts of their grandfather, they received other property from the estate, so as to make them equal with the devisees whose property had not been taken to pay off the debts of the common ancestor. This property was conveyed to the mother of appellants for life, with remainder to them, just as Point Place had been devised by their grandfather. Appellants got the benefit of this redistribution, and whether they received it in money or property is immaterial. They have it, or have had it, and it is a fact that they have received property from their grandfather's estate in lieu of that which they lost, as set forth in the opinion, and, having used this, they are still seeking to recover the original devise.

Petition overruled.

#### COMMONWEALTH v. CHESAPEAKE & O. RY. CO. IN KENTUCKY.

(Court of Appeals of Kentucky. March 19, 1909.)

#### 1. TAXATION (§ 437\*)—ASSESSMENT—CORPORATE FRANCHISE—PROPERTY OMITTED.

Defendant railroad leased and operated the M. road during certain years, during which time each road made separate reports to the State Auditor, but the board of valuation and assessment, acting upon the reports, made no separate assessment for its franchise against the M. road, but included everything in the franchise tax levied against defendant road. *Held*, that the board's action was a determination

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the franchise of the M. road was of no value, except as it was included in the assessment against defendant, so that it could not be said that its franchise was not assessed.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 766; Dec. Dig. § 437.\*]

## 2. TAXATION (§ 493\*)—ASSESSMENT—REVIEW BY COURTS—SCOPE.

Upon review of the action of the board of valuation and assessment in assessing the property and franchise of a leased railroad against the lessee road, the court cannot inquire whether the board's action in doing so was proper, but only whether any property of the lessor road was omitted from assessment.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 876; Dec. Dig. § 493.\*]

## 3. TAXATION (§ 47\*)—ASSESSMENT—CORPORATE FRANCHISE—DOUBLE ASSESSMENT.

Where, after the consolidation of a number of subsidiary and leased roads under the name of defendant railroad, which was owned by a Virginia corporation, all the intangible property, including its franchise, of defendant corporation was assessed against the Virginia corporation, defendant could not again be assessed on its intangible property, as such assessment would be a double taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 108; Dec. Dig. § 47.\*]

Appeal from Circuit Court, Greenup County.

"To be officially reported."

Proceedings by the Commonwealth, by Proctor K. Willis, Auditor's Agent, against the Chesapeake & Ohio Railway Company in Kentucky. From a judgment dismissing the petition, the Commonwealth appeals. Affirmed.

Allan D. Cole and E. E. Fullerton, for appellant. Worthington, Cochran & Browning, for appellee.

**HOBSON, J.** This is a proceeding instituted by Proctor K. Willis, as Auditor's Agent, against the Chesapeake & Ohio Railway Company in Kentucky, in the Greenup county court, to list certain property claimed to be omitted. There was a judgment in the county court as prayed in the petition, but on appeal to the circuit court the petition was dismissed. The commonwealth appeals.

The material facts are these: The Chesapeake & Ohio Railway Company in Kentucky is a corporation formed under section 841, Ky. St. The Maysville & Big Sandy Railway Company is a corporation formed under a special act of the Legislature, which leased its road to the Chesapeake & Ohio Railway Company, a Virginia corporation, many years ago. In the year 1904 the two corporations, together with some others that were subsidiary to the Virginia corporation, were consolidated. Previous to the consolidation the Maysville & Big Sandy Railway Company made its reports to the Auditor as required by the statute, and the Chesapeake & Ohio Railway Company, the Virginia corporation, made similar reports. The board of valua-

tion and assessment for the years in controversy made no separate assessment against the Maysville & Big Sandy Railway Company for a franchise tax, but included everything in the franchise tax levied upon the Chesapeake & Ohio Railway Company. The proceedings of the board and the receipts given for the taxes show that the franchise of the Maysville & Big Sandy Railway Company was included and assessed in the taxes paid by the Chesapeake & Ohio Railway Company.

It is said that the board proceeded upon an erroneous view of the law; but, however it may be, the fact is that the board had all the facts before it, and it did thus assess the franchise tax of the Maysville & Big Sandy Railway Company. The action of the board was necessarily a judgment by them that the franchise of the Maysville & Big Sandy Railway Company was of no value outside of the matters which were included in their assessment. They did not omit the franchise of the Maysville & Big Sandy Railway Company from assessment; but with all the facts before them they held in substance that there was nothing more to assess. The law looks at the substance, and not at the mere form. All the tangible property of the Maysville & Big Sandy Railway Company was assessed to the Chesapeake & Ohio Railway Company, and the taxes on it were paid. The Maysville & Big Sandy Railway Company was simply a subsidiary corporation to the Chesapeake & Ohio Railway Company. In so far as its tangible property was taxed in the hands of the Chesapeake & Ohio Railway Company, it should not have been taxed again, and the judgment of the board was in substance that everything that the Maysville & Big Sandy Railway Company had was taxed in the assessment made against the Chesapeake & Ohio Railway Company. We cannot inquire whether the board acted properly or not. We can only inquire whether the property was omitted from assessment. The reports having been regularly made to the board, and the board having acted upon the reports, and made such an assessment as it saw proper, it cannot be said that the franchise of the Maysville & Big Sandy Railway Company was omitted from assessment.

For the same reason we do not see that it can be said that anything has been omitted from assessment since the consolidation of the subsidiary companies under the name of the Chesapeake & Ohio Railway Company in Kentucky. The Chesapeake & Ohio Railway Company in Kentucky is the property of the Virginia corporation. Every dollar's worth of tangible property owned by it has been taxed as the tangible property of the Virginia corporation, and every dollar's worth of intangible property owned by it has been taxed to the Virginia corporation, and con-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



stitutes a part of the intangible property of the Virginia corporation. To assess the Virginia corporation upon its intangible property, and then to assess the Kentucky corporation upon its intangible property, which was necessarily included in the first assessment, would be simply to tax the same property twice. In the recent case of *Commonwealth v. C., St. L. & N. O. R. R. Co.*, 105 S. W. 127, 32 Ky. Law Rep. 10, it was expressly held that where the lessee corporation had been assessed with, and paid the tax on, the franchise of the lessor, it could not be assessed against the company.

The case of *Commonwealth v. Kinniconick & Freestone Railway Company*, 104 S. W. 290, 31 Ky. Law Rep. 859, is not in point. In that case there was nothing to show that the franchise sought to be taxed had been included in the assessment of the Chesapeake & Ohio Railway Company. This fact appears here, and on the whole case we are unable to see that any property has been omitted from assessment.

Judgment affirmed.

### CUMMINGS v. CUMMINGS.

(Court of Appeals of Kentucky. March 23, 1909.)

#### DIVORCE (§ 62\*)—VENUE—PLAINTIFF'S RESIDENCE—"RESIDENT."

A wife, who lived in a particular city with her husband during their cohabitation, and who, when abandoned, went to another state solely to make a living, acquiring no domicile there, and regarding such city as her home, was a resident of such city within Ky. St. 1903, § 2120 (Russell's St. § 70), requiring one year's continuous residence next before suit for divorce.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 208-216; Dec. Dig. § 62.\*

For other definitions, see *Words and Phrases*, vol. 7, pp. 6161-6166; vol. 8, p. 7738.]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

"To be officially reported."

Action by Florence P. Cummings against Orville Cummings. From a judgment dismissing the petition, plaintiff appeals. Reversed and remanded.

Oscar H. Roetken, for appellant.

**HOBSON, J.** Florence Piercy Cummings and Orville P. Cummings were married on August 29, 1905. They lived together as husband and wife until November 20, 1906. On March 6, 1908, she brought this suit against him for divorce in the Kenton circuit court, alleging that without fault on her part he had abandoned her, and that the abandonment had continued for more than one year last past. Proof was taken, and on final hearing the circuit court dismissed her petition on the ground, as shown by his opinion,

that she was not a resident of the state of Kentucky within the meaning of the statute. From this judgment she appeals.

The proof taken on her behalf establishes the abandonment as charged, and the only question we deem it necessary to consider is whether she was a resident of Kenton county, and had been for a year last past, when she filed her petition. She and her husband during their whole married life lived at Covington, and he continued to reside there after their separation. She, being without means of support, secured a situation at Columbus, Ohio, through friends in Covington, and has since been working there, although she has returned to Covington several times temporarily. Her going to Columbus was simply because she secured employment there in a chemical laboratory. She is only there for the purpose of making a living, and always speaks of Covington as her home. She has acquired no domicile there, and the suit was brought in the county in Kentucky in which alone she has had her home. The case seems to be upon all fours with *Boreing v. Boreing*, 114 Ky. 522, 71 S. W. 431. In that case the court said: "We do not think that appellant lost her residence in Kentucky by the fact that, in order to maintain herself, she left the state. She was still the wife of appellee, and his residence was her residence, and continued to be so during all of the time that she was absent. The separation commenced in Kentucky, and, if it be necessary, in order to obtain a divorce on the grounds relied upon in this action, that her home should have been in Kentucky during the five years specified, we think that the facts in this case show that appellant had the necessary residence here." The facts in that case cannot be distinguished from the facts here. To same effect, see *Dunlop v. Dunlop*, 3 Ky. Law Rep. 20.

The statute provides (Ky. St. § 2120 [Russell's St. § 70]): "Action for divorce must be brought in the county where the wife usually resides, if she has an actual residence in the state; if not, then in the county of the husband's residence. And no action shall be brought by one who has not been a continuous resident of this state for a year next before its institution." Construing this statute in *Johnson v. Johnson*, 12 Bush, 487, the court said: "The real object, we have no doubt, was to so regulate the jurisdiction as to subserve the convenience and possibly the interest of the wife, by making the jurisdiction local to that county in which she should, at the time of the commencement of the suit, have an actual residence; and, if she had no such residence in the state, then to the county of the husband's residence." The cause of divorce here occurred in Kenton county. That county was the county of the husband's residence, and the wife had no residence in the state outside of Kenton county. The suit

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 117 S.W.—19

was, therefore, properly brought in that county.

Judgment reversed, and cause remanded for a judgment as above indicated.

### TOLIN v. TERRELL.

(Court of Appeals of Kentucky. March 25, 1909.)

#### 1. NEGLIGENCE (§ 56\*)—PROXIMATE CAUSE.

To make one liable for negligent injuries, the negligence must be such that the injuries would not have occurred without it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 69; Dec. Dig. § 56.\*]

#### 2. NEGLIGENCE (§ 136\*)—PROXIMATE CAUSE—JURY QUESTIONS.

While ordinarily the question of proximate cause is for the jury, where the injury is connected with the alleged negligence only by speculation and conjecture, the question is for the court.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 327; Dec. Dig. § 136.\*]

#### 3. EVIDENCE (§ 13\*)—JUDICIAL NOTICE—KICKING PROPENSITIES OF THE MULE.

It is a matter of common knowledge that a mule is prone to kick.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 18; Dec. Dig. § 13.\*]

#### 4. ANIMALS (§ 71\*) — PERSONAL INJURIES — CONTRIBUTORY NEGLIGENCE — GOING BEHIND MULE.

It is contributory negligence to go behind a mule, without warning to the mule, to pick up lines for the purpose of placing them across the mule.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 239; Dec. Dig. § 71.\*]

#### 5. FERRIES (§ 32\*)—INJURY TO PERSON ON FERRYBOAT—PROXIMATE CAUSE.

Where plaintiff drove his mule on a ferryboat, and the mule stood some three feet from the treadmill horse which propelled the boat, the treadways being fenced from the driveway by a frame about the height of the horse's shoulders, it could not have been reasonably anticipated that, because there was no screen between the treadway and the driveway, the horse would reach over the framework and bite the mule and cause it to kick, so that the absence of such screen was not the proximate cause of injuries to one who was kicked by the mule.

[Ed. Note.—For other cases, see Ferries, Cent. Dig. § 85; Dec. Dig. § 32.\*]

Appeal from Circuit Court, Boone County.

"To be officially reported."

Action by L. R. Terrell against S. W. Tolin. From a judgment for plaintiff, defendant appeals. Reversed, and remanded for new trial.

John S. Gaunt, T. W. Bullitt, A. B. Rouse, and N. E. Riddell, for appellant. D. E. Castleman and Clore, Dickerson & Clayton, for appellee.

CLAY, C. Plaintiff, L. R. Terrell, instituted this action against defendant, S. W. Tolin, to recover damages for personal injuries alleged to have been caused by the negligence of defendant. The jury returned a verdict in his favor in the sum of \$5,500, and from the

judgment based thereon this appeal is prosecuted.

At the time of plaintiff's injury, and for some time prior thereto, S. W. Tolin owned and operated a ferryboat between a point near Petersburg, Ky., and Lawrenceburg, Ind. The boat was about 60 or 65 feet in length, and in the general form of a parallelogram. Its width, however, was greatest in the center, and from that point it gradually narrowed as the ends were approached. The boat was operated by horse power; there being an inclined treadway upon each side of the boat, upon which the horses stood while propelling the boat. These treadways were fenced about with framework of about the same height as the shoulders of the horses. There was a drive or gangway in the center of the boat, about 9 feet 10 inches wide, between the treadways. The front feet of the horses were raised about 2½ feet from the floor of the gangway. When a team drove on the gangway, it would be from 2 to 3 feet from the inclined treadway. At about 7:30 o'clock on the morning of November 6, 1905, plaintiff drove his wagon, which was hitched to a team of mules, on the ferryboat. According to the testimony of plaintiff's witnesses, he drove the team to a position where they could not be reached by either one of the ferry horses; but, owing to the leaky condition of the boat, he was told by one Hartman, who was in charge of the boat, to back his team to a position that brought them alongside, and in biting distance, of a gray mare engaged in operating the inclined treadway on the right side of the boat. After driving his team to this position, plaintiff unhitched the mules, as he claims, for the purpose of having them free in case any accident happened to the boat. Accompanying Terrell were four children, three boys and one girl; the oldest boy being about 15 years of age. After unhitching the team, plaintiff went to the end of the boat where the ferryman was steering, and from that time on he (Terrell) steered the boat. During the passage over the river, a negro by the name of Thornton was placed at the pump, which was a few feet ahead of the team, and continued to use the pump until the boat had about crossed the river. When the boat was within a few feet of the Indiana shore, Hartman took charge of the rudder and relieved plaintiff, who then proceeded to hitch up his team. While he had gone, his lines had dropped on the floor. As he picked up the lines and was attaching them to the brake, the gray mare stuck out her head, bit the right-hand mule on her rump, and the mule then kicked plaintiff, severely and permanently injuring him.

Plaintiff's testimony was also to the effect that there was no screen or guard between the gray mare and the mule that would prevent the former from biting the latter; furthermore, that the gray mare was tied so snug

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that she could easily reach her head out. Several witnesses testified that the gray mare was in the habit of biting at stock or persons who would come near; that this disposition of hers was well known to Hartman, the agent in charge of the boat. There was also testimony to the effect that the mule that did the kicking was of a gentle disposition, and had never, prior to that time, shown any tendency to kick. On the other hand, the testimony for the defendant was to the effect that the plaintiff drove his team upon the boat and stopped it at a point where the wagon was next to the gray mare, and the gray mare could not possibly have reached the mule that, it is claimed, was bitten on the rump. There was also testimony tending to show that, even had the mule team been located at the point where it is claimed by plaintiff they were stationed, it would have been a physical impossibility for the gray mare, situated and tied as she was, and engaged in propelling the boat, to stick out her head and cover the distance between her and the mule. The negro, Thornton, who was engaged in pumping, testified that, when plaintiff drove on the boat, he drove in so far that the mare could not bite the mule; that the mare was tied with a halter rope in such fashion that she could not turn her head; that, as the boat approached the Indiana shore, Terrell and Hartman began talking about the mules, and Hartman remarked, "The mules will kill you some time;" that, when plaintiff went to his team to hitch up, he picked up the lines, they touched the mule, and the mule kicked; that the mare did not bite the mule. There was also testimony to the effect that the gray mare was of a gentle disposition, and had no tendency to bite stock or people who came close to her. Two witnesses for the defendant testified that the mule which did the kicking had a tendency to kick, and they had seen it attempt to kick on two occasions before that.

It is the contention of plaintiff that the failure of defendant to have a screen or guard between the gray mare and stock that might be upon the boat, coupled with the fact of the vicious tendency of the mare, of which knowledge was brought home to the agent and manager of the boat, was the direct and proximate cause of plaintiff's injury. Upon one point all the witnesses in the case agree; i. e., that plaintiff was engaged in taking up and tying his lines at the time he was injured. In order to hold defendant liable in this case, his negligence must have been such that, without it, the injury would not have happened. While it is true that the question of proximate cause is ordinarily one for the jury, yet, where the evidence connecting the plaintiff's injuries with the defendant's alleged negligence amounts to mere speculation or conjecture, no case for the jury is presented. No one could tell, from the evidence before

us, whether plaintiff was injured as the result of walking behind his mule without warning and raising the lines, or because the gray mare bit the mule. The mule in question was three years old. In spite of the fact that there was testimony to show that this mule was of so gentle a disposition the children could play at its heels, it is a matter of common knowledge and common experience that there is no telling when or under what circumstances a mule will or will not kick. The only way to escape danger from the feet of a mule is not to go within the radius of its heels. He who goes within these limits assumes the risk of being kicked; and especially so when, without warning to the mule, he picks up the lines, which have been lying on the floor, passes them across the mule, and attempts to tie them at the brake.

Our conclusion in this case is that the evidence for the plaintiff utterly fails to show that the negligence of defendant was the proximate cause of plaintiff's injury. If the gray mare had bitten or kicked the plaintiff, and injured him, such act on the part of the mare might have been within the contemplation of the owner of the boat; but certainly it could not have been reasonably anticipated that, because there was no screen on the boat, the old gray mare would reach a distance of at least three feet and bite a mule on the rump, and that the mule would kick. We therefore conclude that the court erred in not giving the peremptory instruction asked for by the defendant. If the evidence be substantially the same upon a retrial, the court will instruct the jury to find for the defendant.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

LASSING, J., not sitting.

# CHARLEROI TIMBER & CANNEL COAL CO. v. SPAULDING et al.

(Court of Appeals of Kentucky. March 16, 1909.)

## ADVERSE POSSESSION (§ 73\*)—HOSTILE POSSESSION—SUFFICIENCY OF TITLE—JUNIOR PATENT.

Actual and continuous adverse possession of land for more than 15 years, claiming to a well-defined boundary, under a junior patent, entitles plaintiff in trespass to recover as against defendant, claiming under the senior patent, but without possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 435; Dec. Dig. § 73.\*]

Appeal from Circuit Court, Morgan County. "Not to be officially reported."

Action by Warren F. Spaulding and another against the Charleroi Timber & Cannel Coal Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

D. D. Sublett, for appellant. Finley E. Fogg, for appellees.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**CARROLL, J.** This action in trespass was instituted by appellee, Spaulding, plaintiff below, against the appellant company, to recover damages for trespass committed by it and its servants in entering upon and cutting and removing timber from a tract of land alleged to be owned by appellee. He asserted ownership under a paper title, and also relied upon adverse possession by himself and those under whom he claims. The appellant denied all the material allegations of the petition, except the fact that it cut the timber complained of, which it admitted, in connection with an averment that it was the owner of the land upon which the trespass complained of was committed. Upon a trial before a jury a verdict was rendered in favor of the appellee for \$160; the finding of the jury in effect establishing that appellee was the owner of the land in controversy. From a judgment upon this verdict, this appeal is prosecuted.

The only errors assigned that we need notice are the ones complaining that the verdict is against the evidence and that the court erred in instructing the jury. The appellee, Spaulding, claims title under seven patents issued to Jesse Caskey in 1866 and one patent issued to Robert Caskey in 1844. In 1874 the Caskeys sold and conveyed to the immediate vendor of appellee the land covered by the patents. The appellant claims under a patent issued to one Amyx in 1849. It will thus be seen that the Amyx patent is senior to the Jesse Caskey patents and junior to the Robert Caskey patent; and it is the contention of appellant that the land in controversy was obtained by appellee under and through the patents issued to Jesse Caskey, and that, as these patents were issued subsequent to the patent to Amyx, therefore its title is superior to that of appellee, in so far as the land in controversy is covered by the Jesse Caskey patents. The issues in the case are: First, is any part of the land in controversy, claimed by appellee, embraced in the Amyx patent? and, second, if it is, have appellee and those under whom he claims been in the actual, continuous, and adverse possession of the land for more than 15 years, claiming and holding to a well-defined boundary?

The evidence upon the first of these issues is conflicting, but not enough so to warrant us in holding that the finding of the jury should be disturbed. In our opinion the instructions, although not entirely accurate, fairly presented for the consideration of the jury the law applicable to the case. Instruction No. 2 is open to the criticism that it fails to state that the adverse holding was to a well-defined boundary, and in omitting to direct attention to the fact that an entry and adverse holding under the Jesse Caskey patent would not avail, if possession had been taken under the Amyx patent. But the

evidence upon these points was so satisfactory in favor of appellee that the jury could not have been misled by the omissions indicated. Of course, if the Amyx patent did not embrace any of the land in controversy, the appellee was entitled to recover damages for the trespass committed upon his premises; and so, if the Amyx patent did cover it, but no person had ever taken possession of the land in controversy under that patent, and the appellee or those under whom he claims have been in the actual, continuous, adverse possession of the land for more than 15 years before the institution of this suit, claiming to a well-defined boundary, he is entitled to recover for the trespass. There is substantial evidence conducing to show that no person was ever in possession of the land under the Amyx patent, and, further, that when J. S. Spaulding became the purchaser of the land from the Caskeys, in 1874, he had the boundary conveyed to him by them surveyed, and the exterior lines accurately, carefully, and plainly marked, so that there could be no reasonable doubt as to these lines, and that from then until the institution of this suit the appellee and J. S. Spaulding have been, by themselves and tenants and agents, continuously in the open, notorious, continuous, and adverse possession of the land.

The instructions offered by appellant did not present correctly the law of the case. They ignored entirely the question of adverse holding. Under them the jury were instructed to find for appellant if they believed that Jesse Caskey's land was included in the Amyx patent. Although this land may have been included in the Amyx patent, yet if no person ever took possession of the land under this patent, and it was in the continuous, open, and adverse possession of the junior patentee, claiming to a well-defined boundary, for 15 years before the institution of the suit, the mere fact that the senior patent covered it would not overcome the adverse holding under the junior patent.

Perceiving no error in the record, the judgment is affirmed.

#### SHARP v. LAYNE et al.

(Court of Appeals of Kentucky. March 16, 1909.)

#### 1. DAMAGES (§ 139\*)—EXCESSIVE DAMAGES—INJURY TO PROPERTY.

In an action against a United States marshal for damages by fire to a steamboat of which he had taken possession under a writ from a United States court, evidence that before the fire the boat was reasonably worth between \$2,000 and \$3,000, and after the fire it was not reasonably worth more than \$400 or \$500, and that the boat was subsequently sold by the marshal for \$200, is sufficient to sustain a verdict for \$665.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 400-403; Dec. Dig. § 130.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 2. UNITED STATES MARSHALS (§ 34\*)—ACTIONS FOR DAMAGES—QUESTION FOR JURY.

Evidence, in an action against a United States marshal to recover for damages to a steamboat which he had taken possession of under a writ from the United States court, held to raise a question for the jury whether the marshal, or the person placed by him in charge of the boat, had used reasonable care.

[Ed. Note.—For other cases, see United States Marshals, Cent. Dig. § 35; Dec. Dig. § 34.\*]

## 3. UNITED STATES MARSHALS (§ 32\*)—LIABILITY FOR NEGLIGENCE—CARE OF PROPERTY.

It is the duty of a United States marshal, who has taken possession of a steamboat under a writ from a United States court, to exercise ordinary care in looking after the boat, and he will be responsible for the failure of his custodian to exercise the same degree of care; nor will his exercise of reasonable care in selecting persons to take charge of the boat, be an excuse for failure to take due care of the boat, and what will constitute reasonable care, or ordinary care, will depend on the circumstances and facts of the case.

[Ed. Note.—For other cases, see United States Marshals, Cent. Dig. §§ 30, 31; Dec. Dig. § 32.\*]

## 4. NEGLIGENCE (§ 136\*)—QUESTIONS FOR JURY—REASONABLE CARE.

Whether reasonable care has been exercised is for the jury, unless from a consideration of the facts, and all reasonable inferences that can be drawn therefrom, it can be said as a matter of law that reasonable care was exercised.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 305; Dec. Dig. § 136.\*]

## 5. UNITED STATES MARSHALS (§ 34\*)—ACTIONS FOR DAMAGES—INSTRUCTIONS.

In an action against a United States marshal for damages by fire to a steamboat while in his possession under a writ from a United States court, instructions that negligence is the failure to use ordinary care, and that ordinary care is such care as an ordinarily prudent person would ordinarily use under the same or similar circumstances to those proven in the case on trial, and that if the jury should find from the evidence that defendant had charge of the steamboat under a writ, by himself or deputy, and should further find that he or his deputy, or those whom he or his deputy had put in charge of the boat, negligently failed to use ordinary care in looking after the boat, and that by reason thereof the boat was partially or wholly destroyed by fire, they will find for the plaintiff, the damages sustained not exceeding the amount sued for, but, if they find that ordinary care was used in looking after the boat, they should find for defendant, and that, if they should find for the plaintiff, the measure of damages is the difference in value of the boat just immediately before the burning and the value immediately after the burning, correctly stated the law of the case.

[Ed. Note.—For other cases, see United States Marshals, Cent. Dig. § 35; Dec. Dig. § 34.\*]

Appeal from Circuit Court, Johnson County.  
"Not to be officially reported."

Action by F. M. Layne and others against Stephen G. Sharp. Judgment for plaintiffs, and defendant appeals. Affirmed.

M. C. Kirk, for appellant. R. S. Dinkle and Watt M. Prichard, for appellees.

CARROLL, J. Under libel proceedings instituted in the United States District Court for the Eastern District of Kentucky against

the steamboat Laynesville, it was taken possession of by the United States marshal under an order of the clerk of the District Court of the United States, directed to the United States marshal, commanding him to "arrest and seize the steamboat Laynesville, her tackle, apparel, and furniture, and the same safely keep until the further order of the District Court." While the steamer was in his custody under the order aforesaid, it was greatly damaged by fire. Following this, the owners of the boat brought this action against the appellant, as United States marshal, to recover from him the damages sustained by the fire, which was averred to be \$2,000. Upon a trial before a jury the damages were assessed at the sum of \$665. Complaining of the judgment entered upon this verdict, appellant appeals, and asks a reversal upon the grounds that the verdict is excessive, and that the court erred in failing to give a peremptory instruction to find for the defendant, and in the instructions given to the jury.

The petition averred that the marshal "negligently and carelessly kept and looked after the boat, and by reason thereof she was burned and destroyed, and if said defendant, his deputies, agents, or servants in charge thereof, had used ordinary care in keeping, looking after, and watching said steamer, she would not have burned; but they say that the said defendant, his deputies, agents, and servants in charge thereof, failed to use ordinary care in watching, looking after, and keeping said steamer, and by reason thereof she was burned and destroyed. They come and withdraw the allegation in their original petition that it was the duty of the defendant to use a high degree of care in looking after said steamer; but they say in lieu thereof that it was the duty of the defendant to use ordinary care in looking after, taking care of, and watching said steamer while he had the same in his charge under said process." The answer merely traversed the material averments of the petition. The decided weight of the evidence is that before the fire the boat was reasonably worth between \$2,000 and \$3,000, and that after the fire it was not reasonably worth more than \$400 or \$500. It also appears that soon after the fire the boat was sold by the marshal for \$200. This brief statement of the evidence is sufficient, in our opinion, to dispose of the question that the damages awarded were excessive.

The question of the peremptory instruction we will consider in connection with the instructions given, which are as follows:

"(1) Negligence is the failure to use ordinary care. Ordinary care is such care as an ordinarily prudent person would ordinarily use under the same or similar circumstances to those proven in this case.

"(2) If the jury should believe and find

from the evidence that defendant had charge of the steamboat Laynesville under a writ from the United States court, by himself or deputy, and should further believe and find from the evidence that the defendant or his deputy, or those whom he or his deputy put in charge of said boat, negligently failed to use ordinary care in watching, looking after, and keeping said boat, and that by reason of the failure to use such care the said boat was partially or wholly destroyed and burned by fire, they will find for the plaintiff the damages they thereby sustained, not exceeding \$2,000; but if the jury should believe and find that the defendant, by his deputy and those he had in charge of the boat, used ordinary care in watching, looking after, and keeping said boat, they will find for the defendant.

"(3) If the jury should find for the plaintiff, the measure of damages is the difference in value of the boat just immediately before the burning and the value of the boat immediately after the burning."

There is some conflict in the evidence as to whether the marshal placed the boat in the care of Osborne or Price; but we think it may fairly be said that, although the care of the boat was in the keeping of Osborne, it was placed in his custody with the understanding that Price would look after and have charge of it, for which services he was to receive 75 cents a day from the marshal. The fire occurred in this way: The boat was damp, and Osborne, about 1 o'clock on the day of the fire, got the keys from Price, and went on the boat, and made a fire in a stove. After making the fire, he left the boat, and between 8 and 9 o'clock that night it was discovered to be on fire. No person was on the boat between the time that Osborne left, after making the fire, until after the boat was discovered to be on fire. The negligence, or want of care, consisted in the failure of Osborne or Price to notice or give attention to the fire started in the stove. If either of them had gone aboard the boat during the afternoon, it is reasonable to suppose they would have discovered the danger from the fire, or have found that the boat had been set on fire by coals or sparks from the fire in the stove.

It was the duty of the marshal to exercise ordinary care in looking after the boat, and so he will be held responsible for the failure of the persons he placed in charge of it to exercise this degree of care. The duties of a United States marshal in the care and custody of personal property taken possession of by him under a process of the court are practically the same as the duty of a sheriff or other state officer in taking care of property that he has obtained possession of under a writ or process. This duty on the part of the officer is not discharged by exercising ordinary care in the selection of the person

who is placed in charge of the property levied on, although the character of the person in this particular is a circumstance that may be considered in connection with the question of negligence. But the real question is: Did the person in charge of the property exercise ordinary or reasonable care to protect it from injury or loss, whether the person in charge be the officer himself or some person selected or appointed by him? In either event the measure of care is the same. The officer cannot excuse himself upon the plea that the person he exercised reasonable care in selecting was negligent or failed to exercise ordinary care. What is reasonable or ordinary care—and both of these words mean in this connection substantially the same thing—depends on the circumstances and facts of each particular case as they are developed by the evidence. What would be reasonable care in one state of case might be negligence in another; and so the general rule is that the question whether or not reasonable care was exercised is for the jury, unless from a consideration of the facts and all the reasonable inferences to be drawn therefrom it can be said as a matter of law that reasonable care was exercised. A number of witnesses, qualified by their experience as steamboat men to express an opinion, testified that some person should at all times of the day and night be on board a steamboat for the purpose of guarding against the dangers of fire, water, and other causes that are liable to overtake steamers. In view of this evidence, we cannot say as a matter of law that it was reasonable care on the part of Osborne and Price, or either of them, to start a fire on this boat at 1 o'clock in the afternoon, and then leave the boat and pay no further attention to the fire. We think the question whether or not they exercised in this particular ordinary care was properly submitted to the jury, and therefore the motion for a peremptory was correctly refused.

We are also of the opinion that the instructions presented correctly the law of the case. *Tudor v. Lewis*, 3 Metc. 379; *Vance v. Vanarsdale*, 1 Bush. 504; *Conover v. Commonwealth*, for Gatewood, 2 A. K. Marsh. 566. 12 Am. Dec. 451.

The judgment is affirmed.

#### W. H. WHITE & SON v. BALLARD COUNTY BANK.

(Court of Appeals of Kentucky. March 25, 1900.)

#### 1. PRINCIPAL AND AGENT (§ 194\*)—ACTIONS—INSTRUCTIONS.

In an action by a bank to recover on an indebtedness incurred by defendant's alleged agent, evidence was introduced that the agent was conducting a business independent of his alleged principal. *Held* that, as the issue in the action was that of agency, it was not error for the court to refuse an instruction based on

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the evidence of the alleged agent's independent business.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 731; Dec. Dig. § 194.\*]

**2. APPEAL AND ERROR (§ 1001\*)—REVIEW—CONCLUSIVENESS OF VERDICT—CONFLICT OF EVIDENCE.**

A verdict will not be disturbed on appeal, there being evidence to sustain it, although the numerical weight of the evidence is against the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3928; Dec. Dig. § 1001.\*]

**3. PRINCIPAL AND AGENT (§ 194\*)—ACTIONS—INSTRUCTIONS—"SALARY."**

In an action against an alleged principal, where the issue was as to the agency of a person who contracted the debt sued for, an instruction that, if the alleged agent was working for defendants on a "commission or salary," the jury should find for plaintiff, is not misleading because of the use of the word "salary," although no witness had used that term in his evidence, as the word "salary" was used as a synonym of "commission."

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 727; Dec. Dig. § 194.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6287-6291; vol. 8, pp. 7792, 7793.]

**4. PRINCIPAL AND AGENT (§ 23\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.**

Evidence in an action against an alleged principal held to justify a verdict based on the existence of the agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.\*]

Appeal from Circuit Court, Ballard County.

"Not to be officially reported."

Action by the Ballard County Bank against W. H. White & Son and G. W. Gibbs. Judgment for plaintiff, and defendants White & Son appeal. Affirmed.

J. B. Wickliffe and Lansden & Lansden, for appellants. J. M. Nichols & Son, for appellee.

**LASSING, J.** The Ballard County Bank instituted a suit against W. H. White, W. A. Krebs, and W. O. White, partners under the firm name of White & Son, and G. W. Gibbs, in which it sought to recover of them \$2,539.12 as money advanced to them at their request, which they promised to repay and failed to do. White & Son filed a motion to require the bank to file an itemized statement of its claim. This the bank did, and, in an amended petition, alleged that White & Son had for many years been engaged in buying ties and other timber for railroad companies; that in 1904 they appointed and employed the defendant Gibbs as their agent to buy ties for them in Ballard county; that the said Gibbs, as agent, engaged in this business for White & Son, and that in the course of his said business the bank advanced to him money from time to time; that the ties, as bought, were delivered to White & Son, and Gibbs drew drafts in favor of the bank on White & Son to pay for same, and in this way the money advanced to Gibbs to pay for ties

and timber was repaid to it; that the business was thus carried on from 1904 until November, 1907, at which time White & Son and Gibbs were indebted in the sum above named. It is specifically pleaded that this amount was due the bank for money advanced to Gibbs as agent for White & Son, and was used in buying ties and timber for them, and that the ties and timber so bought were delivered by Gibbs to White & Son. The answer filed by White & Son was a traverse. Gibbs made no defense. On this issue the case was submitted to a jury, and a verdict was returned in favor of the bank for \$1,539.12, the full amount of the indebtedness claimed, less \$1,000 which it developed on the hearing had been secured by Gibbs by transferring to the bank certain collateral security which he owned, and this the court held was a credit upon the indebtedness sued on. Being dissatisfied with the judgment, White & Son appeal.

It is most earnestly insisted for appellants that the court did not properly instruct the jury, and that the verdict is not supported by the evidence. The whole case is made to turn upon the question as to whether or not Gibbs was the agent of White & Son in the conduct of the business in which he was engaged and for which the indebtedness sued on was created. If he was, then the jury reached a proper conclusion; and, of course, if he was not, the judgment should be reversed. Gibbs testifies that he was their agent; that they paid him so much per tie for his services in purchasing for them; that he made a good many ties in person, and these were taken upon the same basis as the ties which he bought from others. The timber was dealt in on the same terms. While, according to his own testimony, the business seems to have been loosely done, still he says that from time to time the ties and timber which he had made or purchased were inspected, measured, and received by White & Son; and he at regular intervals drew drafts upon them to pay for same, and these drafts were, in the regular course of business, honored from time to time until in the fall of 1907 a draft for \$420 was drawn in favor of the bank on White & Son. This draft they refused to pay, for the reason that they were without funds or ready cash to meet same, because of the stringency then existing in the money market. There was no notice given at the time of this refusal that they would not pay the indebtedness which had been created by Gibbs, and the bank continued to advance money to him until his account, which at that time amounted to something like \$1,500, had been increased until it amounted to the sum sued on. Between the date of the refusal of White & Son to pay the draft and the institution of the suit they had occasion to write two letters to the bank. In these letters they pleaded for time

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and insisted that, when the money matters adjusted themselves so that they could make collections, they would pay Gibbs' indebtedness. The whole tenor of these letters evidenced a purpose on their part to pay this indebtedness, and it would be placing upon the language no strained construction to say that White & Son, in writing about this indebtedness as they did, recognized it as their own, and were simply seeking delay in the payment thereof until they could adjust their business affairs and make the necessary collections to enable them to do so. These letters were introduced in evidence by the bank, strongly relied upon by its counsel, and, no doubt, exerted a controlling influence over the jury in reaching the conclusion that Gibbs was in fact the agent of White & Son. Each member of the firm of White & Son testified, and denied positively that Gibbs was their agent; and, while they admit that they had transacted much business with him during the period covered between 1904 and the institution of the suit, yet it had always been as an independent dealer for himself, and not as an agent of theirs.

The bank introduced two witnesses, who testified that they had sold ties to Gibbs, and that after the institution of the bank's suit White & Son had called upon them and paid their claims and received the ties. It was also made to appear in evidence that Gibbs was operating a sawmill, and had sold lumber and material to others, and had built a barn upon the premises which he was occupying, and did not keep his individual money separate from that which he drew on orders from White & Son. This evidence was introduced for the purpose of showing that the bank did not rely upon White & Son, or look to White & Son for payment, at the time the credit was extended to Gibbs. Its purpose was to refute the idea that Gibbs was in fact the agent of White & Son, and it is insisted that the court should have instructed the jury on this point; but, as the issue raised in the pleading was that of agency or no agency, we are of opinion that the court did not err in refusing to instruct the jury upon issues not raised. At last, all of this evidence, upon which appellants asked an instruction, bore upon the question of agency. By and through it they sought to show that Gibbs was not their agent, and, if the jury had accepted their theory as to the manner in which the transactions were carried on, then, of course, the verdict would have been in their favor. But the jury, with the witnesses before them, and doubtless acquainted with them, chose to accept the theory and contention of the bank as to the manner in which the business had been carried on; and, as this was a matter that was properly left to their consideration and determination, we do not feel that their finding should be disturbed. Although the numerical

weight of the evidence is in favor of appellants, still there are many circumstances which go to show that Gibbs was in fact their agent.

Especial complaint is made of instruction No. 1, because the court told the jury that, if Gibbs was working for appellants on a commission or salary, then they should find for the bank; the complaint being that it was prejudicial for the court to use the word "salary," when no witness had testified that Gibbs was working upon a salary. The word "salary" seems to have been used synonymous with "commission," and to the average mind they both convey the idea of compensation, and the jury no doubt thoroughly understood and were in no wise misled by the use of this word in the instruction. Gibbs had testified that he got so much per tie for acting as purchasing agent for White & Son, and, whether this compensation be termed a commission or a salary, it is immaterial. The jury was not misled by it; the main question being: Was he their agent, and paid for the services rendered, or was he acting for himself in purchasing the ties which he bought and afterward delivered to them?

The instructions are not subject to the criticisms passed upon them; and while the evidence is very conflicting, and cannot be reconciled, if the jury believed the witnesses for plaintiff, as they evidently did, it is sufficient to support the verdict.

Questions raised by appellee not passed upon.

Judgment affirmed.

#### FISCAL COURT OF OWEN COUNTY et al. v. F. & A. COX CO.

(Court of Appeals of Kentucky. March 12, 1909.)

#### 1. TAXATION (§ 608\*)—REMEDIES FOR WRONGFUL ENFORCEMENT—INJUNCTION.

Injunction lies to restrain the collection of an illegal tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 111\*)—ORDINANCES—PARTIAL INVALIDITY—EFFECT.

An ordinance, by-law, or order imposing license fees may be valid in part and invalid in part.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 248-251; Dec. Dig. § 111.\*]

#### 3. LICENSES (§ 7\*)—FEES—REASONABLENESS—JUDICIAL REVIEW.

The rule that the reasonableness of a license fee imposed as a tax is a question for the taxing power, and that the courts will not interfere with its discretion, is subject to the limitation that the tax shall not amount to a prohibition of any useful or legitimate occupation.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 15; Dec. Dig. § 7.\*]

#### 4. LICENSES (§ 7\*)—FEES—REASONABLENESS.

A license tax of \$200 on each four-horse wagon operated as a business for hauling

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



freight for pay was invalid as prohibitive; it appearing that the owner of such wagon, after paying the expense of running it, and taking into consideration the depreciation in the value of the teams and wagon, could make little, if anything, more than the amount of the tax.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 15; Dec. Dig. § 7.\*]

#### 5. LICENSES (§ 7\*)—FEES—DISCRIMINATION.

A license tax requiring the owner of a four-horse wagon to pay nearly three times as much as the owner of a three-horse wagon was void for unjust discrimination.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 15; Dec. Dig. § 7.\*]

#### 6. TAXATION (§ 543\*) — RECOVERY OF TAX PAID—PERSONS LIABLE.

No action can be maintained by a taxpayer against a county for taxes wrongfully collected, whether the taxes have been paid out by the county or not, though, where the taxes are in the hands of the collecting or disbursing officers, a direct action may be brought against them.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1011; Dec. Dig. § 543.\*]

#### 7. TAXATION (§ 543\*)—RECOVERY OF TAX PAID—ACTIONS—JUDGMENT.

Where, in an action against the members of the fiscal court and the county treasurer to recover a tax paid by plaintiff under protest, it appeared that the money was in the hands of the county treasurer, a judgment against him was proper, though a judgment against the county and the members of the fiscal court was improper.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 543.\*]

Appeal from Circuit Court, Owen County.

"To be officially reported."

Action by the F. & A. Cox Company against the Fiscal Court of Owen County and others. From the judgment, defendants appeal. Reversed in part, and affirmed in part.

J. G. Vallandingham and J. W. Douglas, for appellants. W. B. Moody and H. G. Botts, for appellee.

CLAY, C. The plaintiff, F. & A. Cox Company, a corporation, instituted this action against the members of the fiscal court of Owen county and the county treasurer to enjoin the collection of a license tax of \$200 imposed upon four-horse wagons hauling freight for hire, and to recover the sum of \$400 claimed to have been paid under protest as license fees on two four-horse wagons. The chancellor granted the injunction and also gave judgment against Owen county, the members of the fiscal court, and the county treasurer for the \$400. From that judgment Owen county, the members of the fiscal court, and the county treasurer prosecute this appeal.

By section 181 of the Constitution, authority is given to the General Assembly by general laws to delegate the power to counties to impose and collect license fees on stock used for breeding purposes and on franchises, trades, occupations, and professions. Pursuant to the above authority, the General Assembly enacted section 4325a, Ky. St. (Rus-

sell's St. § 5471), which is as follows: "That in all counties having free turnpikes the fiscal court of such counties may place license on livery vehicles or any other vehicles that carry passengers or freight for pay." In the year 1906 the fiscal court of Owen county passed an order imposing license fees as follows:

For each one-horse livery rig or buggy.....	\$ 3
For each two-horse livery rig or buggy.....	6
For each one-horse vehicle run or operated to carry passengers or baggage for pay.....	10
For each two-horse vehicle run or operated to carry passengers or baggage for pay.....	40
For each one-horse huckster wagon operated for pay.....	10
For each two-horse huckster wagon operated for pay.....	20
For each two-horse huckster wagon operated as a business for hauling freight for pay.....	40
For each three-horse wagon operated as a business for hauling freight for pay.....	75
For each four-horse wagon operated as a business for hauling freight for pay.....	200

The order provided that the license fees so collected should go to and become a part of the road and bridge fund.

It appears from the record that plaintiff is engaged in transporting passengers and freight for hire between the city of Owenton and the town of Sparta, in Gallatin county, a station on the Louisville & Nashville Railroad. For this purpose it employs several four-horse wagons besides many other wagons used for the same purpose. The license order is assailed on the ground that it unjustly discriminates between one, two, and three horse wagons and four-horse wagons, and on the further ground that the license fee imposed on the four-horse wagons is oppressive and prohibitive. The law is well settled that an injunction will lie to restrain the collection of an illegal tax. *Norman v. Boaz*, 85 Ky. 557, 4 S. W. 316; *Baldwin v. Shine*, 84 Ky. 510, 2 S. W. 164; *Gates v. Barrett*, 79 Ky. 295. An ordinance, by-law, or order, imposing license fees, may be valid in part and invalid in part. *Cooley on Constitutional Limitations*, § 177; *Levi v. City of Louisville*, 97 Ky. 394, 30 S. W. 973, 28 L. R. A. 480; *Whaley v. Commonwealth*, 110 Ky. 154, 61 S. W. 35. From the proof in this case it would appear that the fiscal court imposed the license fee of \$200 on four-horse vehicles on the idea that if free turnpikes were not maintained by the county the owners of such vehicles would be required to pay more than that amount by way of tolls. The defendants introduced proof to the effect that in the opinion of many citizens of Owen county the license fee imposed was altogether reasonable considering the wear and tear on the roads occasioned by the use of four-horse wagons. By the decided weight of the testimony of those who knew, it appears that the owner of a four-horse wagon, after paying the expense of running it and taking into consideration the depreciation in the value

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the teams and the wagon itself, could make but little, if anything, more than the amount of the license tax imposed.

It may be conceded that ordinarily the reasonableness of a license fee imposed as a tax is a question for the taxing power, and the courts will not interfere with its discretion. *Hall v. Commonwealth*, 101 Ky. 382, 41 S. W. 2. This rule we think, however, is subject to the limitation that the tax imposed shall not amount to a prohibition of any useful or legitimate occupation. In *re Quong Woo* (C. C.) 13 Fed. 229; *Mankato v. Fowler*, 32 Minn. 364, 20 N. W. 361; *City of Ottumwa v. Zekind*, 95 Iowa, 622, 64 N. W. 646, 29 L. R. A. 734, 58 Am. St. Rep. 447; *Van Sant v. Harlem Stage Co.*, 59 Md. 330; *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137; *Caldwell v. City of Lincoln*, 19 Neb. 569, 27 N. W. 647. While there are numerous authorities to the contrary, it will be found that the license fee involved in those cases was not prohibitive, and the courts simply declared the general rule that the reasonableness of the tax was a matter within the discretion of the taxing power. We can hardly believe that the same courts that announced that doctrine would hold to be valid an ordinance or statute imposing upon every physician and attorney at law an annual license tax of \$10,000, or imposing upon every merchant a license of \$5,000, or upon every washerwoman a tax of \$1,000 per year. If a prohibitive license tax could be imposed upon the professions and occupations mentioned above, the same character of tax could be imposed upon every profession and occupation. It may be answered that no legislative or municipal body would ever do this. The question, however, is not what it would do, but what it might do. The question is one of power. A powerful organization of men engaged in different pursuits might prevent the imposition of a prohibitive license tax upon their respective callings or occupations, but what is to become of the man without political power, whose means of livelihood are taken away by the imposition of a prohibitive tax? Shall we still say that the amount of the tax is within the discretion of the taxing power, or shall we say that among the inalienable and inherent rights guaranteed by our Constitution to every law-abiding citizen is the right to live and enjoy life and the right to acquire property, and that these rights necessarily carry with them the right to gain a livelihood and acquire property by following any useful or legitimate occupation, the pursuit of which is not injurious to the public weal? In our opinion there is but one answer to this question: If you deprive a man of the means of livelihood, you necessarily deprive him of the right to live and enjoy his life. Great as is the taxing power, it can never rise superior to the inalienable rights guaranteed

by our Constitution. As the evidence in this case shows that the license tax in question is prohibitive, we have no hesitancy in declaring it invalid. *Hager, Auditor, v. Walker*, 107 S. W. 254, 32 Ky. Law Rep. 748, 15 L. R. A. (N. S.) 195.

Furthermore, the order itself shows that the owner of a four-horse wagon is required to pay three times as much tax as the man who operates a three-horse wagon, when there is nothing in the character of the wagons to justify such inequality. It may be conceded that a reasonable classification for the purpose of license taxes may always be made. Classification based upon the character of the vehicles and the number of horses used in connection with them may be proper (*Smith v. City of Louisville*, 9 Ky. Law Rep. 779), but the classification sought to be made in this case is manifestly unequal and unreasonable. It cannot be said to be reasonable because it bears alike upon all owners of four-horse wagons. The class of persons whose occupations are taxed are those who run and operate vehicles for hire. The taxing power may subdivide this class, but it cannot unjustly discriminate between the subdivisions so made. As the order in question unjustly discriminates between the owners of three-horse vehicles and the owners of four-horse wagons, it follows that the license fee of \$200, imposed upon four-horse wagons, is therefore void. *Livingston v. City of Paducah*, 80 Ky. 656; 1 *Dillon's Municipal Corporations*, § 323; *Simrall & Co. v. City of Covington*, 90 Ky. 444, 14 S. W. 369, 9 L. R. A. 556, 29 Am. St. Rep. 398; *Cooley on Taxation*, § 127; *Hager, Auditor, v. Walker*, 107 S. W. 254, 32 Ky. Law Rep. 748, 15 L. R. A. (N. S.) 195.

It appears that judgment was given in favor of plaintiff against Owen county for the sum of \$400, being the amount which plaintiff paid as license tax on two four-horse wagons. The law is well settled that no action can be maintained by a taxpayer against a county for taxes wrongfully collected, it matters not whether the taxes have been paid out by the county or not. *First National Bank v. County of Christian*, 100 S. W. 831, 32 Ky. Law Rep. 634; *Commonwealth v. Boske*, 99 S. W. 316, 30 Ky. Law Rep. 400. On the other hand, it has been held that, where taxes have been wrongfully collected by county officials, and are in the hands of the collecting or disbursing officers, a direct action may be brought against the persons holding the tax. *Whaley v. Commonwealth*, 110 Ky. 154, 61 S. W. 35; *Blair v. Carlisle & Jackson Turnpike Co.*, 4 Bush. 157; *Commonwealth v. Stone*, 71 S. W. 428, 24 Ky. Law Rep. 1297. It does not appear from the record in this case that the members of the fiscal court hold the tax. It does appear, however, that the sum of \$400, paid by plaintiff at the time of the institution of this suit, was in the hands of the county

treasurer. We are of opinion therefore that: Judgment against Owen county and the members of the fiscal court was improper; judgment against the county treasurer was proper.

For the reasons given, that portion of the judgment enjoining the collection of the license tax is affirmed; that portion permitting plaintiff to recover the \$400 of Owen county, the members of the fiscal court, and the county treasurer, is reversed as to Owen county and the members of the fiscal court, and affirmed as to the county treasurer.

#### WALL'S EX'R et al. v. DIMMITT et al.

(Court of Appeals of Kentucky. March 12, 1909.)

#### 1. APPEAL AND ERROR (§ 1097\*)—LAW OF THE CASE.

A former decision of the Court of Appeals in a will contest that evidence of threats and an admission by decedent were sufficient to go to the jury on the question of his undue influence over testatrix precludes proponents' right to a reversal of a subsequent judgment for contestants, with directions to probate the will, though on the subsequent trial evidence of the admission was excluded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4361; Dec. Dig. § 1097.\*]

#### 2. WITNESSES (§ 163\*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Under Civ. Code Prac. § 606 (2), prohibiting one to testify for himself to a transaction with a decedent to affect a living person, etc., in contesting a will for undue influence exercised over testatrix by decedent, her husband, contestant could not testify that decedent told her that contestant could not break the will, and it was no use trying, and that decedent was to blame for the whole thing.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 670; Dec. Dig. § 163.\*]

#### 3. WITNESSES (§ 192\*)—COMPETENCY—COMMUNICATIONS BETWEEN HUSBAND AND WIFE.

Under Civ. Code Prac. § 606, prohibiting one to testify to a "communication" by a spouse, in a will contest, based on undue influence exercised over testatrix by decedent, her husband, it was improper to allow their grandson's former wife to testify that during her marriage her husband showed her letters from decedent in which he said that her husband should not have any share in decedent's or testatrix's estate unless he did certain things, and that her husband was worried and afterwards destroyed the letters; the word "communication" within the statute meaning any information acquired by one spouse from the other through the marital relation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 739; Dec. Dig. § 192.\*]

For other definitions, see Words and Phrases, vol. 2, p. 1342; vol. 8, p. 7608.]

#### 4. APPEAL AND ERROR (§ 1051\*)—PREJUDICIAL ERROR—ADMISSION OF EVIDENCE.

The admission of the testimony was not rendered harmless by competent testimony that decedent threatened that the grandson should have none of the "W. property" (decedent's name being W.) unless he mended his ways.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4161; Dec. Dig. § 1051.\*]

Appeal from Circuit Court, Mason County.  
"To be officially reported."

In the matter of the probate of Mrs. E. A. Wall's will. From a decree sustaining a contest by Lydia E. Dimmitt and others, the executor and others appeal. Reversed and remanded.

E. L. Worthington, Thos. R. Phister, Garrett B. Wall, and Lewis Apperson, for appellants. Sallee & Slattery, W. D. Cochran, and Hazelrigg, Chenault & Hazelrigg, for appellees.

LASSING, J. This is a contest over the will of Mrs. Elizabeth A. Wall, who died in 1898. The ground upon which the contest is based is the undue influence which was exerted over the testatrix by her husband, Dr. Wall. The case has been three times tried in the circuit court, and upon each of the trials a verdict was returned by the jury against the will. Twice the case has been appealed to this court and reversed, and, following the last reversal, the trial and judgment upon which this appeal is based was had, and it is here the third time for review.

It is most earnestly insisted for appellants that there is no evidence at all upon which to support the finding and judgment of the jury, and that the judgment should be reversed with instructions to the trial court to enter an order directing the probate of the will. This same course was urged upon the last appeal, and, in response thereto, this court said: "The former opinion precludes this court now from holding, if it desired to do so, that the case should be reversed with directions to probate the will. That opinion is the law of this case." Counsel for appellants urge that this principle is not applicable for the reason that a material part of the evidence which was given on the former trial was not introduced upon the trial from which this appeal is prosecuted. An examination of the record shows that upon the first appeal the evidence offered consisted, in the main, of certain threats which Dr. Wall was alleged to have made, to the effect that his grandson, Hal Dimmitt, should have none of the Wall property, coupled with the testimony of his daughter, Mrs. Dimmitt, to the effect that, after her mother's death, her father, Dr. Wall, had confessed to her that he was responsible for his wife's having made the will in the manner in which she did. Upon the last trial this testimony of Mrs. Dimmitt, to the effect that her father had told her that he was responsible or answerable for the way and manner in which the will was drawn, was excluded for the reason that Dr. Wall had died, and on the authority of the case of *Grove v. Grove's Adm'r*, 18 S. W. 456, 13 Ky. Law Rep. 807, the trial judge held this evidence incompetent; still the evidence of the threats which Dr. Wall is alleged to have

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

made was before the jury, and this being a part of the evidence which was before the jury upon the first trial, when this court said there was sufficient evidence to authorize the submission of the case to the jury, we are of opinion that appellants' right to a reversal with directions to probate the will is foreclosed in the former opinion, and not now open to further consideration. This leaves only the question of the correctness of the ruling of the trial judge on the exclusion and admission of certain evidence.

Appellees complain because they were not permitted to prove by Mrs. Dimmitt the statement of her father to her, to wit: "Daughter, you cannot break your mother's will. It is no use trying; don't reproach your brother. I am the one to blame. Blame me with the whole thing." Under the authority of subsection 2, § 606, Civ. Code Prac., this ruling of the trial court was correct, and this identical question was decided by this court in the case of *Grove v. Grove's Adm'r*, supra, in which this court said: "The propounder of the will and principal devisee died a few days before the term of the court began. \* \* \* The statements of the propounder to the contestants could not be used by them. The party in interest being dead, the contestants could not as witnesses prove conversations by her affecting the sanity of the testator, or her influence over him." In that case, as in the case at bar, it was proposed to prove by the witnesses, contestants, that the propounder had made certain statements, and, the propounder having died, this court held that these statements could not be so proven.

The contestants introduced Lucy M. Dimmitt, wife of Hal Dimmitt, grandson of the testatrix, and only child of Mrs. Lydia E. Dimmitt, and offered to prove by her the contents of two letters which her husband, Hal Dimmitt, is alleged to have received from his grandfather, Dr. Wall, in which letters Dr. Wall told Hal Dimmitt that he should have no part of the Wall estate, and none of his grandmother's estate, if he did not do certain things. Over the objection of propounders, this testimony was admitted. It was shown that Lucy M. Dimmitt had been divorced from her husband, Hal Dimmitt, though at the time he is alleged to have received the letters in question they were living together as man and wife. She states that, when her husband received the letters, he was much disturbed by reason of the statement contained therein, and handed them to her for her to read; that she read them, and he afterwards destroyed them. It is urged for appellants that this testimony was incompetent and highly prejudicial; that under the provision of Civ. Code Prac. § 606, the wife is expressly prohibited from testifying concerning any communication between herself and husband during the existence of their marriage. For appellees it is contended that

the evidence is competent because the exhibition of the letters by the husband to the wife, and his permitting her to read their contents is not, in the contemplation of the statute, a "communication." This court in the case of *Commonwealth v. Sapp*, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405, had under consideration the meaning of the word "communication" as used in section 606 of the Civil Code of Practice, and said: "The word 'communication,' as used in our statute, should be given a liberal construction. It should not be confined to a mere statement by the husband to the wife, or vice versa, but should be construed to embrace all knowledge upon the part of the one or the other obtained by reason of the marriage, and which but for the confidence growing out of it would not have been known to the party." This definition and construction has been approved by this court in the case of *Scott v. Commonwealth*, 94 Ky. 511, 23 S. W. 219, 42 Am. St. Rep. 371, and again in the case of *Howard v. Commonwealth*, 118 Ky. 1, 80 S. W. 211, 81 S. W. 704, the word "communication" is construed to mean any information which the husband or wife receives from the other by reason of the marital relation. Applying this definition to the evidence under consideration, we find, according to the testimony of the witness Lucy M. Dimmitt, that while she and her husband were living together as husband and wife he received two certain letters from his grandfather, and he exhibited or handed these letters to her for the purpose of having her read them, that their contents were such as to worry and annoy them, and that after she had read them they were destroyed. Clearly she saw and read these letters because of the fact that she was his wife, living there in the house with him. It is attempted to be shown that the contents of these letters were known to others in the town in which they lived, but, be that as it may, the information which she received came direct from her husband, and was communicated to her by him just as though he had said to her: "Lucy, I have received two letters from my grandfather in which he threatens to disinherit me and to see that I get none of my grandmother's estate." It would hardly be contended that, if this statement had been made by Hal Dimmitt to his wife, she would be permitted to testify to this fact, and yet such a statement would be no more a "communication" than was the information conveyed to her in the manner in which it was.

Again, it is urged that, even though the court did err in admitting this evidence, still it was only cumulative, but to this we cannot agree. None of the witnesses who testified to the threats made by Dr. Wall to the effect that Hal Dimmitt should have none of the Wall property unless he mended his ways, etc., went so far as to state that Dr. Wall said that Hal Dimmitt should have none of

his grandmother's estate, and yet Lucy M. Dimmitt says that the letters which she saw contained this threat. Such evidence was damaging in its nature; in fact, it was the strongest evidence which was introduced in the case. It would be mere speculation to say what effect it had in producing the verdict of the jury.

It was prejudicial error to admit it; and for this reason the judgment is reversed and cause remanded for another trial consistent herewith.

## FISCAL COURT OF FRANKLIN COUNTY v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 25, 1909.)

### COUNTIES (§ 150\*)—LIMITATION OF AMOUNT OF INDEBTEDNESS—CONSTITUTIONAL PROVISIONS.

Under Const. §§ 157, 158, limiting the tax rate of counties, prohibiting counties from becoming indebted in excess of the income without the assent of two-thirds of the voters thereof at an election, and providing that counties shall not incur indebtedness in excess of a specified limit, "unless in case of emergency the public health or safety" shall so require, a county indebted up to the constitutional limit and having a courthouse, which may be used without endangering the public health or safety, cannot incur further indebtedness for the construction of a new courthouse, though the community has outgrown the existing courthouse, and though it may need repairs, notwithstanding Act Va. 1751, requiring the fiscal court to maintain within each county one good and convenient courthouse.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 215; Dec. Dig. § 150.\*]

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Action by the Commonwealth against the Fiscal Court of Franklin County to compel the court to levy a tax and erect a courthouse. From a judgment for the commonwealth, defendant appeals. Reversed and remanded.

Jas. H. Polsgrove, for appellant. William Landsay, Jas. A. Scott, and T. L. Edelen, for the Commonwealth.

HOBSON, J. At its January term, 1904, the grand jury made to the Franklin circuit court the following report: "The courthouse is not a building such as the courts and officers of this county, with the increasing business of the courts and the county, are entitled to. This grand jury has no recommendations to make in the matter, believing that the proper steps will be taken to rebuild the old, or build a new one, when the courthouse fund is large enough. This, as we understand, is now about \$8,500.00, with the probable increase of \$3,000.00 when settlement is made with the sheriff." At the January term, 1905, it made the following re-

port: "The county courthouse is in most wretched condition, and now that a new State Capitol is to be erected here this county should make arrangement as soon as possible to do away with the old bat roost and erect in its stead a slightly and commodious building. We desire to compliment the county judge and magistrates and thank them for having begun the accumulation of a fund for that purpose." At the April term, 1905, and at the September term, 1906, it made a similar report. At the January term, 1907, it made this report: "This grand jury desires to call the attention of the fiscal court of the county and citizens generally once more to the condition of the county courthouse. It is a jeopardy to the health of those who of necessity must be there in discharge of official duty. The jury rooms are unfit for use, the courtroom is in bad condition, the drafts and cross drafts, the floor so rotten that it has been known to break through beneath the tread and chair legs pushed through it. The whole place is in such condition as to be uncomfortable, unhealthy, and dangerous. Officers of court, jurors, lawyers, litigants, witnesses, all who are forced to attend here, as well as the public generally, are entitled to a better place in which to transact public business. We believe the county judge is trying to bring about the erection of a new courthouse. We feel that his task is a hard one, and we trust that he will have the encouragement and assistance of all the people, but this matter should not longer be deferred. This improvement is sorely needed now, and we ask your honor to take such action as under the law you deem you have the right to take to hasten the day when the desired end may be accomplished." At the January term, 1909, a committee appointed by the bar for that purpose, upon the reports made by the grand jury, obtained a rule against the fiscal court to show cause why it did not levy a tax to build a courthouse. The fiscal court reported, in substance, that the present bonded indebtedness of Franklin county is \$291,000, no part of which will mature until July 1, 1913; that there is now on deposit in bank to the credit of a fund which has been established by order of the fiscal court the sum of \$23,000; but that sum would not be sufficient to pay for the construction of an adequate county courthouse. The report, after referring to sections 157 and 158 of the Constitution, concludes with these words: "Respondents further say that the total assessed valuation of taxable property in Franklin county for the year 1909 is \$7,499,177; that the total amount of revenue that can be derived from said valuation would not exceed \$50,000; that the sum of at least \$40,000 will be absolutely necessary for the payment of interest on the public debt and of the general expenses of the county for said year; that sec-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion 157 of the Constitution prohibits the levying of tax in any one year in excess of 50 cents on each \$100 of the taxable property of the county. It also prohibits the incurring of an indebtedness in any manner or for any purpose to an amount exceeding, in any year, the income and revenue provided for such year, unless submitted to a vote of the people, and as section 158 limits the fiscal court to the incurring of a debt, under any circumstances, in excess of 3 per centum, a vote would be futile, and this court is unable to comply with your honor's order. Your respondents say that \$190,000 of the bonded debt of the county was created and existed prior to the adoption of the present Constitution. The remainder of said bonded debt has been incurred since the adoption of said Constitution. Wherefore it asks that the rule awarded herein be dismissed." The circuit court sustained a demurrer to the response, and, the fiscal court failing to plead further, made the rule absolute directing the fiscal court to levy a tax and to erect a courthouse suitable for the needs of the people of Franklin county. The fiscal court appeals.

Sections 157 and 158 of the Constitution as far as material to the question here before us are as follows:

"The tax rate of cities, towns, counties, taxing districts and other municipalities, for other than school purposes, shall not, at any time, exceed the following rates upon the value of the taxable property therein, viz.:  
 \* \* \* For counties and taxing districts, fifty cents on the hundred dollars; unless it should be necessary to enable such \* \* \* county or taxing district to pay the interest on, and provide a sinking fund for the extinction of indebtedness contracted before the adoption of the Constitution. No county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void." Section 157.

"The respective cities, towns, counties, taxing districts and municipalities shall not be authorized or permitted to incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding the following named maximum percentages on the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness, viz.: \* \* \* Counties, taxing districts and other municipalities, two per centum: provided, any \* \* \* county, taxing district or other municipality may contract an indebtedness in excess of such limitations when the same has been authorized under laws in force prior to the adoption of this Constitution,

or when necessary for the completion of and payment for a public improvement undertaken and not completed and paid for at the time of the adoption of this Constitution: and provided further, if at the time of the adoption of this Constitution, the aggregate indebtedness, bonded or floating, of any city, town, county, taxing district or other municipality, including that which it has been or may be authorized to contract as herein provided, shall exceed the limit herein prescribed, then no such city or town shall be authorized or permitted to increase its indebtedness in an amount exceeding two per centum, and no such county, taxing districts or other municipality, in an amount exceeding one per centum, in the aggregate upon the value of the taxable property therein, to be ascertained as herein provided, until the aggregate of its indebtedness shall have been reduced below the limit herein fixed, and thereafter it shall not exceed the limit, unless in case of emergency, the public health or safety should so require." Section 158.

These sections were construed in *Knipper v. Covington*, 109 Ky. 187, 58 S. W. 498. It was there held that each section provided a limitation on the power to create indebtedness; that neither of them is a grant of power, as no such grant was then necessary, the power to create indebtedness not being theretofore specially limited; that section 157 provides a barrier against any indebtedness for any purpose beyond the revenues for the year without a vote of the people; that section 158 imposes an additional limitation on the creation of indebtedness in the aggregate. The court there points out that under section 157 a municipality might vote a large debt on itself year after year, an evil that had proven disastrous in former times, and therefore the framers of the Constitution placed a limit on aggregated indebtedness beyond which even the people themselves could not go, unless in case of emergency the public health or safety should so require. The record does not present a case of emergency where the public health or safety requires that an outlay should be made. The courthouse has been used for many years, and, while the community has outgrown it, there is no such necessity for a new courthouse as to bring the case within the proviso as to an emergency where the public health or safety requires the expenditure. The courthouse may need some repairs, but these may be made by the fiscal court, so as to keep the building safe and comfortable; but its continued use as a courthouse will not endanger the public health or safety within the meaning of this clause of the Constitution.

It is earnestly insisted that by virtue of an act of the Virginia Legislature passed in 1751, which it is said is still in force, it is the duty of the fiscal court "to maintain and keep in good repair within each respective

county and at the charge of such county, one good and convenient courthouse, of stone, brick or timber." It is also insisted that it was not the purpose of the Constitution to disable the fiscal court from providing for the courts and the people a good and sufficient courthouse. It was held in *Hopkins County v. St. Bernard Coal Company*, 114 Ky. 153, 70 S. W. 289, that it was not the purpose of the Constitution to disable the municipalities of the state from maintaining the public peace, and that, if the fiscal court had not levied a sufficient tax to pay the necessary expenses of maintaining the public peace, it should make an additional levy for this purpose. The same idea was also expressed in *Overall v. Madisonville*, 125 Ky. 684, 102 S. W. 278, 12 L. R. A. (N. S.) 433, but neither of these cases seem to have any relevancy here. The county has a courthouse which it has used for many years. The proposition is to incur an indebtedness for a new and more imposing building. The fund of \$23,000 that is on hand would be entirely inadequate, and an indebtedness in excess of the revenue provided for the year would have to be incurred. This cannot be done under section 157 of the Constitution without a vote of the people. But, as the indebtedness of Franklin county is now as great as section 158 allows, the people themselves cannot vote a greater indebtedness unless in case of emergency, which as we have said does not exist. To build a courthouse such as is contemplated would necessarily involve the incurring of an indebtedness of thousands of dollars; and, if such an indebtedness may be created for that purpose under the constitutional provisions above quoted, it is hard to see of what practical value these provisions would be to the municipalities of the state. The fiscal court may make a levy from year to year up to the constitutional limit, and may set apart so much of this levy for the building of a new courthouse as may be spared after meeting the other necessary expenditures, and in this way in a few years a sufficient courthouse fund may be accumulated; but the fiscal court is without authority now to make a levy sufficient to build a courthouse or to create an indebtedness for that purpose beyond the revenues provided for the year.

Judgment reversed and cause remanded to the circuit court, with instructions to overrule the demurrer to the response, and for further proceedings consistent herewith.

#### LOUISVILLE & N. R. CO. v. SHELBURNE.

(Court of Appeals of Kentucky. March 18, 1909.)

#### 1. PLEADING (§ 433\*)—DEFECTS IN PETITION—AIDED BY VERDICT.

Where a petition in a personal injury case was defective because containing only general

allegations of negligence, and not stating facts showing the extent of the injury and the manner of its infliction, but no demurrer was interposed nor motion made to make it more specific, and the evidence on both sides was directed to show negligence in furnishing an insufficient number of employes to do the work in connection with which plaintiff was injured, and the court charged making the recovery depend upon proof of that issue, the defect in the petition was cured by the verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1454, 1456, 1459, 1473; Dec. Dig. § 433.\*]

#### 2. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—ACTIONS—SUFFICIENCY OF EVIDENCE.

In a personal injury action by a servant against the master, evidence held sufficient to take the case to the jury on the issue as to whether the master was negligent in not furnishing a sufficient number of employes to properly do the work in connection with which the servant was injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1051; Dec. Dig. § 286.\*]

#### 3. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action by a servant for injuries by a timber dropped while being lowered from a scaffold above him, whether he was negligent in failing to get out of the way held for the jury under the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

#### 4. MASTER AND SERVANT (§ 293\*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action by a servant for injuries, where plaintiff abandoned his right to recover upon any ground except the insufficiency of the number of hands employed in the work, charges precluding plaintiff's recovery unless his injury was the result of defendant's gross negligence were properly refused.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.\*]

#### 5. DAMAGES (§ 132\*)—PERSONAL INJURIES.

A verdict for \$800 was not excessive for personal injuries resulting in a mashed hand, fracture of the bones of one finger, and an injury to the ligaments and muscles in the palm of the hand such that when it healed up there was a weblike formation in the hand, especially where it appeared that there would not be an entire recovery.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.\*]

Appeal from Circuit Court, Spencer County.

"Not to be officially reported."

Personal injury action by J. S. Shelburne against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Benjamin D. Warfield and Luther C. Wilts, for appellant. L. W. Ross and Edwards, Ogden & Peak, for appellee.

CLAY, C. In this action plaintiff, J. S. Shelburne, recovered damages in the sum of \$800 for personal injuries alleged to have been caused by the negligence of defendant, and the latter appeals.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The record discloses the fact that plaintiff was a young man 25 years of age. Prior to his employment by defendant he had been a farmer. At the time of his injuries he was at work as a bridge carpenter on defendant's trestle, which was located about a mile and a half south of Taylorsville, Ky. The trestle was about 60 feet high. On the occasion in question, plaintiff was stationed on the trestle timbers at a point about 14 feet from the ground. Three men were located on top of the trestle and were engaged in lowering pieces of timber to a point below. The piece of pine timber which injured plaintiff was 11 feet long and 6 by 11 inches thick, and weighed from 350 to 400 pounds. The men on top of the trestle wrapped a rope around the timber twice, a little nearer to one end than to the other, and made what is called in the testimony a "timber hitch." After this was done, two of the men lowered the timber, while the third man, who had made the hitch, held the rope as the timber was lowered by the other men. Prior to the time of the injury, several pieces of timber had been lowered. At a point about 28 feet above the plaintiff and 22 feet below the top of the trestle, there was an opening through the trestle through which the timber that was being lowered had to pass. While the piece of timber which caused the accident was being lowered, it slipped through the rope and fell below. In its descent it struck a post, a part of the trestle on which plaintiff had his hand resting, and injured his hand.

According to the testimony for plaintiff, the timber that was being lowered struck the trestle timbers above at a point where the knot in the rope was made, and this caused the timber to slip through the rope and fall. According to some of defendant's witnesses, the timber did not strike the trestle in passing through the opening, nor did the rope. Other witnesses for the defendant testified that the rope may have struck as the timber passed through the opening. Plaintiff and his brother testified that the usual and customary way for lowering the timber was to have a man on the trestle at the opening through which the timber had to pass, for the purpose of guiding it through the opening, and that the number of hands employed in lowering the timber was insufficient for that purpose. Several witnesses for defendant testified: That the number of men engaged in lowering the timber was all that was needed; that any more would have been in the way; that it was not usual or customary, in lowering timber of the size of that which caused the accident, to have an additional man to guide it through the opening above plaintiff; and that an additional man was stationed at that point only in those cases where the timber was much larger than that which was being lowered at the time of the injury. There was also evidence to the effect that, when the timber which caused

the injury was started down, those on top of the trestle called out "heads up," for the purpose of warning those below that the timber was being lowered. The foreman also testified that he had directed plaintiff to get out of the way when the timber was descending. Plaintiff, however, claims that his duty was to receive the timbers that were being lowered, and he was at his post of duty when he was injured.

It is first insisted that the petition is defective and is not sufficient to support the verdict. The allegations of negligence contained in the petition are as follows: "Plaintiff says that at the time above set out he was employed by the defendant as a bridge carpenter, and that on said date he was working for the defendant as a bridge carpenter on its trestle No. 82 in Spencer county, Ky., and while so engaged he was by the gross and willful negligence and carelessness of the defendant, its agents and servants in charge of said part of its railroad track and trestles, greatly and permanently injured in his head and left hand, to such an extent as to deprive him of the use of his left hand and to cause him to suffer great pain and mental anguish, to the damage of this plaintiff in the sum of \$2,000." The point is made that, although general allegations of negligence are sufficient where the petition states facts showing the extent of the injury and the manner of its infliction, the petition in question is defective because the manner of plaintiff's injury is not shown. This is doubtless true, but no demurrer was interposed to the petition, nor was a motion made to make it more specific. Plaintiff's evidence was directed to the insufficiency of the number of hands employed. No objection was made to this evidence. Furthermore, defendant's evidence was directed to the same issue. Indeed, the principal part of it consisted in an effort to show that the number of hands employed was sufficient for the purpose. Following the issue made by the proof, the court, after defining "ordinary care" and giving an instruction on the measure of damages, instructed the jury that if they believed from the evidence that the defendant negligently failed to furnish a sufficient number of hands to handle in a reasonably safe manner the timber in question, and that the defendant knew, or by the exercise of ordinary care could have known, that the force furnished for the handling of the timber in question in a reasonably safe manner was insufficient, and the same was not known to the plaintiff, and by reason of the defendant's failure to furnish a sufficient number of hands to handle said timber in a reasonably safe manner, if it did so fail, and the plaintiff was injured thereby, they should find for plaintiff; unless they so believed, they should find for defendant. Under these circumstances, we are of the opinion that the defect in the petition was cured by the verdict. This principle is recognized in the



case of *Hill v. Ragland*, 114 Ky. 209, 70 S. W. 634, where the court said: "Where the parties have attempted to join an issue to be tried, and which has been tried, however defective in form the pleadings may be, a verdict for the one or the other will be held to cure such defective pleading, that is, will cure them as to their form, supplying all omitted necessary averments concerning essential facts relied on, provided the proof or admission of such facts was necessarily considered before the verdict could have been rendered. Then if such facts, when considered as if properly pleaded as to form, do not entitle the party obtaining the verdict to that relief in law, the judgment will be for his adversary." And in the case of *Louisville & Nashville R. R. Co. v. Lawes*, 56 S. W. 426, 21 Ky. Law Rep. 1793, this court held that the same rule applies under the Code as at common law as to the effect of a verdict on defective pleading, and then proceeded to approve the following statement of the common-law rule taken from the opinion in the case of *Western Assurance Co. v. Ray & Co.*, 105 Ky. 523, 49 S. W. 326: "At common law, where there was any defect, imperfection, or omission in any pleading, whether in substance or form, which would be fatal on demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed that either the judge would direct or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict by intendment of law after verdict."

It was not error to submit the case to the jury, nor can we say that the verdict was flagrantly against the weight of the evidence. Plaintiff and one other witness testified to the insufficient number of hands employed for the purpose of lowering the timber. On the other hand, some five or six witnesses of the defendant testified that the number was sufficient. Under these circumstances, the question at issue was properly submitted to the jury.

Nor are we prepared to say, as a matter of law, that plaintiff was guilty of contributory negligence because he failed to get out of the way of the timber. His duty required him to be at or near the point where he was injured, for the purpose of receiving the very timber that was being lowered.

The defendant offered two instructions to the effect that the jury should find for it, unless they believed from the evidence that plaintiff was injured, or caused to be injured, by the gross negligence of the defendant, or its agents and servants superior in authority to plaintiff. It was not error to refuse these instructions. Plaintiff abandoned his right to recover upon any other ground than the insufficiency of the number of hands employ-

ed. This issue was submitted in an instruction which was not subject to criticism.

The proof shows that plaintiff's hand was mashed, and the bones of one of his fingers fractured. The ligaments and muscles in the palm of his hand were so injured that when it healed up there was a weblike formation in his hand. The testimony of his physician was to the effect that he would not entirely recover from the injury. Under such circumstances, we cannot say that a verdict for \$800 is excessive.

Perceiving no error in the record prejudicial to the substantial rights of the appellant, the judgment is affirmed.

#### NEWCOME v. RUSSELL

(Court of Appeals of Kentucky. March 24, 1909.)

##### 1. ASSAULT AND BATTERY (§ 15\*)—DEFENSE OF PROPERTY.

A mere trespass to realty does not justify the owner of the premises in shooting the trespasser unless the trespass be accompanied by acts amounting to an assault on the owner such as would warrant him in exercising the right of self-defense.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 13-15; Dec. Dig. § 15.\*]

##### 2. ASSAULT AND BATTERY (§ 15\*)—DEFENSE OF HOME.

When one's home is invaded, after a request to desist, he may resort to such means as are necessary in the exercise of a reasonable judgment to expel the intruder.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 13-15; Dec. Dig. § 15.\*]

Appeal from Circuit Court, Marion County.  
"To be officially reported."

Action by J. B. Russell against J. A. Newcome. Judgment for plaintiff, and defendant appeals. Affirmed.

H. W. Rives, for appellant. W. W. Spalding and S. A. Russell, for appellee.

CARROLL, J. In an action for assault and battery, the appellee recovered a judgment against appellant for \$400. The facts are, briefly, these: The parties, who were neighbors, were not on good terms. The ill feeling between them was aggravated by an arrangement made by appellee with a party to pasture some cattle for him. In taking the cattle to pasture, it was necessary that they should be driven through the lands of appellant, who objected to the cattle passing through his premises, and, to prevent them, had fastened his gate on the morning of the day the difficulty out of which the action arose occurred. Appellant's version of the affair is that appellee was attempting to take down or make a gap in appellant's fence for the purpose of letting the cattle through, and, when he objected to the tearing down of the fence, appellee persisted, whereupon he shot him in the leg, which is the assault and bat-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tery complained of. Appellee's story is that he was not tearing down the fence to let the cattle through, but, being a cripple, he was obliged to take a few rails off the fence to get over it, and was in the act of getting over the fence and escaping from appellant, who had been threatening and cursing him, when he was shot.

The principal error complained of is in respect to the instructions given and refused. The court instructed the jury: "(1) That if you believe from the evidence that the defendant Newcome on the — day of June, 1907, not in his necessary or apparently necessary self-defense from death or great bodily harm, then and there about to be inflicted upon him at the hands of the plaintiff, Russell, assaulted, shot, and wounded Russell, you should find for plaintiff and award him in damages such sum as you will believe from the evidence will fairly and reasonably compensate him for any loss of time, or for any impairment of his power to labor and earn money in the future, resulting directly from such assaulting, shooting, and wounding; and if you shall believe from the evidence that said assaulting and wounding was wilful, wanton, and malicious, you may or not award him punitive damages. (2) Defendant had the right to protect his property, including his fence, from unnecessary interference on the part of plaintiff; and if you shall believe from the evidence that the plaintiff was unnecessarily taking down defendant's fence, and that defendant in shooting and wounding plaintiff used only such force as was reasonably necessary to prevent plaintiff from so taking down his fence, you should find for the defendant." The appellant, defendant below, offered the following instruction, which was refused: "The defendant had the right to protect his property, including his fence, from any interference on the part of plaintiff; and if you shall believe from the evidence that plaintiff was taking down defendant's fence, and that defendant in shooting and wounding plaintiff used only such force as was reasonably necessary to prevent plaintiff from so taking down his fence, you should find for the defendant."

It may be well to notice at the outset that appellant did not, in the instruction offered, attempt to justify the shooting upon the ground that it was necessary in his self-defense, but rested his right solely upon the proposition that he had the right, if it was necessary to prevent appellee from taking down his fence, to shoot him. The force that may be used to prevent a trespass depends upon the circumstances surrounding it. The general rule is that when a trespass, like the one in question, is attempted, the owner of the premises has a right to use such means—saving the taking of human life and the infliction of bodily harm—as in the exercise of a reasonable judgment are necessary to protect his premises or property from forcible invasion. He is not obliged to re-

treat, but may stand his ground, and defend his property by whatever force short of the taking of human life, or inflicting a serious wound, as is necessary to make the defense effectual. Bishop on Criminal Law, §§ 861-875; Wharton on Criminal Law, § 501; Robertson's Kentucky Criminal Law, § 544. In a well-written note to *Hannabson v. Sessions*, 93 Am. St. Rep. 250, the editor, supported by numerous authorities, lays it down that: "A mere trespass upon lands of another, even after the trespasser has been warned to depart and has refused, does not justify the landowner in using a dangerous or deadly weapon to resist the trespass; and if the landowner shoots or otherwise injures the trespasser, with a deadly or dangerous weapon, not in his necessary self-defense, he is liable for the damages caused thereby. An assault with a gun or revolver for the purpose of removing a mere trespasser from the premises of the assailant cannot be justified. A man has not the same right in repelling a trespasser from his outlying lands as he has from his residence lot, nor has he any right to take his gun as a means of running a trespasser off from his lands."

The law regards human life too highly to permit it to be imperiled in attempting to prevent so slight a trespass as the one committed by appellee, even if we accept appellant's version of what he did as true. Assuming that appellee persisted in laying down the fence, after he had been requested to desist, his acts did not justify appellant in either shooting or wounding him. Questions like this have been before this court in several cases. In *Baker v. Commonwealth*, 93 Ky. 302, 19 S. W. 975, Baker shot and killed a person who was making, under the most aggravating circumstances, a forcible trespass upon his premises. In considering his right to protect his property, the court said: "The rule upon the subject as applicable to this case is that a person is not bound to retreat when upon his own premises, but may stand his ground and defend his person or property; but he is not justified to take the life of a mere trespasser or do him bodily harm to prevent the mere trespass; but if a trespass is committed, with the intention of killing or doing the owner of the property great bodily harm if he resists the trespass, in such case the trespass is committed with felonious intention against the owner, and he has the right to stand his ground and kill the felonious trespasser if he has reasonable ground to believe that it is necessary to protect his life or to prevent great bodily harm at the hands of the trespasser." In *Utterback v. Commonwealth*, 105 Ky. 723, 49 S. W. 479, 88 Am. St. Rep. 328, the court said: "Life cannot be taken to prevent a mere trespass, and on a trial for homicide the guilt or innocence of the defendant does not depend upon whether he was right or wrong in the controversy about the land. Life, in cases like

this, can only be taken in self-defense or in the necessary defense of others." In *Commonwealth v. Bullock*, 67 S. W. 992, 24 Ky. Law Rep. 78, Bullock was indicted for shooting Calvert, who was undertaking to build a fence upon the land of Bullock over his protest. Upon the trial the court instructed the jury that: "Calvert had no legal right to build the fence where he was attempting to build it on the occasion of the shooting, and the defendant, Bullock, had a right to compel him to desist from so doing, and to use such force as under the circumstances seemed to him to be reasonably necessary to compel him to desist." But this court held, following the *Utterback Case*, that a mere trespass does not justify the owner of the premises in shooting or wounding the trespasser. In *McIlvoy v. Cochran*, 2 A. K. Marsh. 271, the court said: "Where the possession is invaded by force in law, and the intruder refuses to depart, or where it is invaded by actual force, force may be employed by the possessor; and, as every forcible laying of hands on another is in legal contemplation a battery, it follows that either mode of pleading an assault and battery may be justified. Notwithstanding, however, an assault and battery may be justified in either mode of pleading, we apprehend a wounding cannot be justified." To the same effect is *Robinson v. Hawkins*, 4 T. B. Mon. 134; *Shain v. Markham*, 4 J. J. Marsh. 578, 20 Am. Dec. 232.

From this line of authorities, it will be seen that it is the law not only in this state, but everywhere, that a mere trespass upon the premises of another—such as was committed by appellee—will not justify the owner of the premises in either shooting or wounding the trespasser, unless the trespass be accompanied by acts that amount to an assault upon the person of the owner such as would warrant him in exercising the right of self-defense to protect his person. *Chapman v. Commonwealth*, 15 S. W. 50, 12 Ky. Law Rep. 704. And when this right of self-defense exists, his act will be excusable or justifiable as the circumstances may appear—not on account of the trespass alone, but because of the attack upon the person. If the argument of counsel for appellant was declared to be the law, it would shock the good sense of the people of this state, and they would be greatly surprised to learn that a man had the right to shoot a person who, upon outlying premises, was committing the trifling trespass of tearing down a fence. The person aggrieved by a trespass of this nature may resort to such means, not involving life or limb, as may be necessary to prevent the trespass and remove the trespasser from the premises. If these means do not accomplish the desired result, he must resort to the orderly and peaceable methods afforded by the law for

the redress of such wrongs. It should be observed that the principle we have announced does not apply to a trespass committed under circumstances of aggravation upon the home of a person. When a man's home is invaded, after a request to desist, the owner may resort to such means as are necessary in the exercise of a reasonable judgment to expel the intruder. *Watson v. Commonwealth* (Ky.) 116 S. W. 287; *Wright v. Commonwealth*, 85 Ky. 123, 2 S. W. 904; *Estep v. Commonwealth*, 86 Ky. 39, 4 S. W. 820, 9 Am. St. Rep. 260; *Leach v. Commonwealth*, 112 S. W. 595, 13 Ky. Law Rep. 1016.

Instruction No. 2 given by the court was more favorable than the appellant had the right to request.

The admission of the testimony of George Lake, Jr., as to the conversation between himself and appellant, a few days after the shooting, was not error. It was competent as an admission by appellant of the purpose for which he obtained from Lake the pistol with which he did the shooting.

The judgment is affirmed.

#### EAST JELLICO COAL CO. v. HAYS.

(Court of Appeals of Kentucky. March 23, 1909.)

##### 1. ADVERSE POSSESSION (§ 104\*)—OPERATION AND EFFECT—PRESUMPTION OF GRANT.

Where land has been held adversely for 15 years, the law conclusively presumes a grant; but, if the adverse holding has not been continuous for 15 years, a grant may be presumed from this and other circumstances.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 596; Dec. Dig. § 104.\*]

##### 2. EQUITY (§ 87\*)—LACHES FOLLOWING LIMITATIONS.

A claim may be stale, so that a court of equity will not enforce it under the facts shown, although it is not barred by limitation.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 242; Dec. Dig. § 87.\*]

##### 3. ADVERSE POSSESSION (§ 104\*)—PRESUMPTION OF GRANT—EVIDENCE.

Evidence, in an action to quiet title, held to show such acquiescence in possession and assertion of ownership as to justify a presumption that the land was conveyed by one holding the title to a predecessor of defendants.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 596; Dec. Dig. § 104.\*]

##### 4. VENDOR AND PURCHASER (§ 244\*)—BONA FIDE PURCHASERS—SUFFICIENCY OF EVIDENCE AS TO PURCHASE IN GOOD FAITH.

Evidence, in an action to quiet title, held to show that plaintiff was not a bona fide purchaser.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 609-611; Dec. Dig. § 244.\*]

Appeal from Circuit Court, Knox County.

"To be officially reported."

Action by J. Smith Hays against the East Jellico Coal Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Jas. D. Black, W. R. Black, and Pitzer D. Black, for appellant. Jas. M. Hays and J. Smith Hays, for appellee.

HOBSON, J. J. Smith Hays brought this suit against the East Jellico Coal Company to quiet his title to a tract of 100 acres of land granted by the commonwealth to Joel D. Partin on September 27, 1867, alleging that he was the owner and in possession of the land. The defendant answered traversing the allegations of the petition, and on final hearing the circuit court entered a judgment in favor of the plaintiff as prayed by him. The defendant appeals.

Both parties claim under Joel D. Partin. On March 17, 1879, Joel D. Partin and his wife conveyed the land to Silas Partin, and on February 8, 1906, the heirs at law of Silas Partin conveyed it to the plaintiff, Hays. On the other hand, the East Jellico Coal Company claims the land under a deed made to it on January 2, 1896, by William Bays and wife. Bays held the land under a deed made to him on February 28, 1889, by the heirs at law of Elijah Rhodes, and a deed of partition between him and H. H. Rhodes made on March 1, 1889; H. H. Rhodes being also one of the heirs at law of Elijah Rhodes. The defendant produced no title papers to Elijah Rhodes from Silas Partin, but it showed these facts: A man named Miller bought the land from Joel D. Partin some time in the seventies, and built a house and lived on it, intending to take possession of the tract; but this house, as the lines of the survey are now run, was about 200 feet outside of the line. He cleared and inclosed a body of land about his house, and this clearing and inclosure included 7 or 8 acres of the patent boundary. He sold out to Silas Partin, and gave him possession about the year 1880. Silas Partin moved into the house where Miller had lived and took possession of the survey claiming it as his own; Joel D. Partin, the patentee, making a deed to him. In the year 1881 Silas Partin traded this land with a man named Hensley for a tract about a mile and a half away, and moved to the tract he traded for. Hensley traded the tract he got from Partin to a man named West, and West traded it to Elijah Rhodes. How these trades were made does not appear; that is, no writings evidencing them are produced. While Silas Partin was living on the tract which he got from Hensley, a third person set up claim to a lien on that tract for \$20. Silas Partin then sold that place to another person for a mare and colt, and from that time until his death rented land in the neighborhood of the tract in controversy. He claimed that there was \$20 coming to him on this tract of land. Elijah Rhodes sold the timber off the land, the purchaser of the timber paying \$20 of the purchase money to Silas Partin, and Silas Partin then said he was ready to make Elijah Rhodes a deed. All this occurred

about the year 1882 or 1883. Elijah Rhodes held the land using it as his own from that time until his death, in 1886, and after his death his heirs at law held it until 1889, when William Bays purchased it, and he held it until about the year 1894, when he sold it to the East Jellico Coal Company, and it has held the land since its purchase. Silas Partin at no time after he received the \$20 ever set up any claim to the land, although he lived near by and on land which he was renting. He did not give it in for taxation. It was held and used by Elijah Rhodes, and those claiming under him, as their own, as he well knew, and yet he made no objection, although from time to time timber was cut off the land, which then constituted its chief value; he and his son assisting in getting the poplar timber off. After his death his heirs at law set up themselves no claim to the land, but on February 8, 1906, sold it to the plaintiff Hays for \$5 an acre, although it was then worth \$15 or \$20 an acre. It is earnestly insisted for Hays that the judgment of the circuit court is right because the defendant has produced no deed or other writing from Silas Partin divesting him of the title to the land; but, although no deed is produced, the question arises: Are the facts established by the proof sufficient to warrant a presumption that a deed was executed? It is a matter of common knowledge that mountain land of this sort 25 or 30 years ago was considered valuable only for the timber on it, and that little care was taken in preserving or recording the muniments of title. The salable timber on this tract was cut off in the lifetime of Elijah Rhodes, and perhaps no controversy over the title would ever have arisen but that a valuable vein of coal has since been discovered in the vicinity. William Bays testifies that, after he bought the land, H. H. Rhodes delivered to him a deed which, as shown by it, was signed by Silas Partin and his wife, and acknowledged, as shown by the certificate on it, before a deputy clerk. He then delivered the deed to the county clerk to be recorded, but did not pay the fees on it. The deed now cannot be found.

It is insisted that the testimony of William Bays as to the deed cannot be considered because he conveyed the land to the defendant and stands under the Code as though he had not made the conveyance, but he does not testify to anything done by Silas Partin. He simply testifies to seeing and having in his possession a certain document. He does not testify that Silas Partin had signed it. He only testifies to the existence of the paper. His testimony does not establish the deed, and the question remains: Are the facts shown sufficient to raise a presumption that Silas Partin had signed the deed? In 1 Greenleaf on Evidence, § 46, the rule is thus stated: "Juries are often instructed or advised, in more or less forcible terms, to presume conveyances between private individu-

als in favor of the party who has proved a right to the beneficial enjoyment of the property, and whose possession is consistent with the existence of such conveyance, as is to be presumed; especially if the possession, without such conveyance, would have been unlawful, or cannot be satisfactorily explained." In 4 Wigmore on Evidence, § 2522, the rule is thus stated: "When a title to land is to be proved, the execution, contents, and loss of the appropriate document of grant may be presumed from certain circumstances; the inference resting on a principle of relevancy already considered. (Ante, §§ 148, 157.) Those circumstances are the long continued possession of the land (or an appurtenant right) by a party claiming as owner, the nonclaim of possible opponents, and such other varying circumstances of the particular case as increase the probability of an origin of grant for the situation as a whole." See, also, *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599, 30 L. R. A. 747; *Cahill v. Cahill*, 75 Conn. 522, 54 Atl. 201, 732, 60 L. R. A. 706; *Townsend v. Boyd*, 217 Pa. 386, 66 Atl. 1099, 12 L. R. A. (N. S.) 1148. In *Badger v. Badger*, 2 Wall. 94, 17 L. Ed. 836, the United States Supreme Court thus stated the rule: "In such cases courts of equity, acting upon their own inherent doctrine of discouraging for the peace of society antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim or a long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor."

The plaintiff here seeks the aid of the court of equity to quiet his title to the land after Silas Partin and his children slept on their rights for more than 20 years. In *Severns v. Hill*, 3 Bibb, 240, this court held that where the claimant of land did not prosecute his claim for more than 20 years from the date of a patent obtained by another and for about 16 years after a purchaser had settled on the land, the court would refuse the claimant its aid. The same rule was followed in *Barnett v. Emerson*, 6 T. B. Mon. 607, and *Baker v. Baker*, 13 B. Mon. 406. When land has been held adversely for 15 years, the law conclusively presumes a grant; but, if the adverse holding has not been continuous for 15 years, the law may presume a grant from this and other circumstances. Whether the presumption of a grant will arise, as shown by the authorities cited, depends not alone upon the length of time that has elapsed, but upon all the circumstances. When limitation has run there is no need to call in play the presumption; but, when limitation has not run, other facts may be shown justifying the presumption of

a grant, although this conclusion would not arise by operation of the law from the lapse of time alone. Thus a claim may be stale so that a court of equity will not enforce it under the facts shown, although it is not barred by limitation. *Gatewood v. Gatewood*, 70 S. W. 284, 24 Ky. Law Rep. 931.

It is shown here by three witnesses that Silas Partin said he would not make the deed unless he got the \$20, that the \$20 was paid him, and he then said he would make the deed. It is shown by two witnesses that he said he had received the \$20 and was ready to make the deed. It is shown that after this Elijah Rhodes treated the land as his own, Silas Partin acquiescing in it, and, although he lived in the neighborhood for something like 20 years, he set up no claim to the land and acquiesced in the ownership of it by Elijah Rhodes and those claiming under him. He did not give in the land for taxation. He lived on rented land. He had actual notice of the use of the land by Rhodes as his property, and of the different sales that were made, and was all the time living on rented land near by. If a conveyance cannot be presumed from such proof as this after 20 years, and after the death of the parties to the transaction, then it is hard to understand when such a presumption would arise. The suit was not brought until more than 20 years had elapsed. The conduct of the children of Silas Partin after his death was precisely similar to his conduct, until they made the conveyance to Hays at less than half the real value of the land. If this suit had been brought by them, they could not recover. Does Hays stand in their shoes?

The record shows that in February, 1906, he made a contract with them by which he was to pay them \$5 an acre for so much of the land as they should manifest their title to. In July they made him a deed to the boundary at \$5 an acre. At the time of these transactions, the defendant had possession of the land. Its possession was notice to him of its claim. About this time, or a little before, one of the children of Elijah Rhodes brought a suit for partition of the land his father owned; he not having joined in the deed to Hays. This suit was brought by James M. Hays, who was a partner with J. Smith Hays, the appellee, in the purchase of the land in controversy. In that suit the entire boundary in controversy is included in the petition drawn by James M. Hays, and so he had actual notice of Elijah Rhodes' claim to the land. In addition to this, what his vendors told J. Smith Hays, as shown by himself, taken in connection with the price at which they sold the land, was sufficient to put him on notice. We therefore conclude that he is not a purchaser without notice, but stands in the shoes of his vendors, and that against him, as well as against them, a conveyance of the land by Silas Partin to Elijah Rhodes must be presumed.

Judgment reversed, and cause remanded to the circuit court for a judgment as above indicated.

**CONTINENTAL REALTY CO. et al. v. LITTLE.**

(Court of Appeals of Kentucky. March 17, 1909.)

**1. LIBEL AND SLANDER (§ 139\*)—SLANDER OF TITLE—CONSTRUCTION OF PETITION.**

A petition, averring that plaintiff "is the owner and in the actual possession of one-half of 522 oak trees," standing on a tract of land described, and which further states that plaintiff "has a deed to the said property," and that defendants are alleging that a certain company is the owner of the tract of land described in the petition, and by reason of such allegations are greatly injuring plaintiff's title to the "said property," will not be construed as alleging title to the land but only to the trees, and that defendants were seeking to slander plaintiff's interest in the trees.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 394; Dec. Dig. § 139.\*]

**2. LIBEL AND SLANDER (§ 132\*)—SLANDER OF TITLE TO PROPERTY—WHAT CONSTITUTES.**

The owner of a one-half interest in trees on land is afforded no action for slander of title by false statements that a certain company owns the land.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 387; Dec. Dig. § 132.\*]

**3. CORPORATIONS (§ 423\*) — LIABILITY FOR ACTS OF OFFICERS—SLANDER OF TITLE TO PROPERTY.**

A corporation is not liable in an action for slander of title because of declarations made by the president and secretary of the company, where it is not shown that such declarations were made by them in their official capacity, and by direction of the corporation, or in the apparent scope of their authority as its officers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1693, 1694; Dec. Dig. § 423.\*]

**4. PLEADING (§ 8\*)—CONCLUSIONS—SLANDER OF TITLE TO PROPERTY.**

A petition, in an action for slander of title to land, which sets out certain allegations made by defendants, but which does not state that they were false or maliciously made, and does not charge that the market value of plaintiff's property was thereby impaired or lessened, or that he was prevented from selling or using it, but which merely alleges that he was injured and his title slandered by the alleged statements, is insufficient; the allegations as to injury and slander of title being mere conclusions unsupported by statements of fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-31; Dec. Dig. § 8.\*]

**5. LIBEL AND SLANDER (§ 139\*)—SLANDER OF TITLE TO PROPERTY—ACTIONS—PETITION.**

A petition, in an action for slander of title, to property because of alleged declarations of defendants, must set out the words constituting the slander and the special damage resulting therefrom.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 394; Dec. Dig. § 139.\*]

**6. LIBEL AND SLANDER (§ 139\*)—SLANDER OF TITLE TO PROPERTY—PETITION.**

A petition, in an action for slander of title to land, must allege that plaintiff holds the legal title to the land and is in possession of it, in

order to recover as against a defendant setting up a claim thereto.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 394; Dec. Dig. § 139.\*]

Appeal from Circuit Court, Perry County. "To be officially reported."

Action by C. J. Little against the Continental Realty Company and others. Demurrers to plaintiff's petition were overruled, and defendants appeal. Reversed and remanded.

Martin F. Kelley, for appellants. Gourley, Redwine & Gourley, for appellee.

SETTLE, C. J. This is an appeal from a judgment of the Perry circuit court overruling demurrers filed by each of the appellants to appellee's petition. It therefore presents for our consideration but one question, namely, whether or not the petition states a cause of action.

The action was brought in equity by the appellee, C. J. Little, against the appellants, Continental Realty Company, F. L. Whitaker, and Martin Kelley; it being alleged in the petition that the Continental Realty Company is a corporation, that F. L. Whitaker is its president, and Martin Kelley its secretary. It is not clear from the language of the petition whether the action is one to quiet title or to recover for slander of title. The petition begins with the averment that appellee "is the owner and in the actual possession of one-half of 522 oak trees," standing upon a tract of land on the waters of Troublesome creek in Perry county; the land being described by metes and bounds, courses and distances. The petition contains the further averment that appellee "has a deed to the said property." As it does not allege that appellee owns or has either actual or constructive possession of the land upon which the oak trees stand, but does in express terms allege his title to and actual possession of one-half of 522 oak trees standing on the land, we must infer that the deed received by appellee for "the said property" merely conveyed him one-half of the trees, and that by the words "the said property" is meant one-half of the trees, and nothing more.

The petition does not disclose the name of the owner of the other half of the 522 oak trees, or of the land; nor does it contain any explanation of the failure to give the name of such owner, or any reason for not making him a party to the action. As it is not alleged that appellee's half of the 522 oak trees have been marked or set apart to him, it is apparent that his interest in the trees is an undivided half thereof. Hence it would seem necessary that the owner of the other undivided half of the trees should be made a party to the action. The fact that this was not done may, it is true, amount to a mere

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defect of parties, which could be corrected by the filing of a special demurrer to the petition; but it is here mentioned as one of the evidences of the vague and intangible nature of appellee's claim to the relief sought in the petition. It is also, in substance, alleged in the petition that the appellants Whittaker and Kelley are giving it out in speeches that the appellant Continental Realty Company is the owner of the tract of land described in the petition, and by reason of such speeches are greatly injuring appellee's title to the "said property." As the only property the petition alleges appellee has title to is an undivided half of 522 oak trees, and it nowhere alleges that he has title to the land upon which the trees are standing, we must conclude that the words "said property" refer, as in previous connection, to appellee's undivided half of the oak trees, and for the same reason must also conclude that in further alleging in the petition that appellants have no title to "said property," and that, in claiming appellee has not title thereto, they were seeking to injure him and to slander and becloud his title to "said property," was again meant appellee's undivided half of the trees.

In view of the fact that the petition does not set up title in appellee to the land on which the trees stood, we are unable to comprehend how he could have been or can in the future be injured, or his title to one-half the oak trees injured or beclouded by the alleged declarations of Whittaker and Kelley that the Continental Realty Company owns the land. Its ownership of the land is not inconsistent with appellee's ownership or possession of one-half of 522 white oak trees standing thereon, if, as alleged in the petition, the latter's ownership of the trees is evidenced by a deed or other written instrument. If, as alleged in the petition, Whittaker and Kelley declared appellee had no title to the half of the 522 oak trees claimed by him, and that the title thereto was in the Continental Realty Company, that fact would not impose any liability upon the corporation, even in an action for slander of title, unless such declaration was made by them in their official capacity as president and secretary, respectively, and by direction of the corporation, or in the apparent scope of their authority as its officers; none of which facts will be found to have been alleged in the petition. *Perkins v. Maysville District Camp Meeting Association*, 10 S. W. 659, 10 Ky. Law Rep. 781; *Odgers on Libel and Slander* (Am. Ed.) 368.

It is not charged in the petition that the statements of Whittaker and Kelley complained of were false, or that they were maliciously made; nor is it charged that the market value of appellee's half of the 522 oak trees was thereby impaired or lessened, or that he was thereby prevented

from selling the timber or interfered with in its use. The averment that he was injured and his title slandered by the alleged statements was a mere conclusion, unsupported by any statement of fact showing such injury or any damage. If the action could be treated as one for slander of title resulting from the alleged declarations of Whittaker and Kelley, there could be no recovery, for the petition does not set out the words constituting the slander of title, and no special damage is alleged, both of which are essential in such a case. *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151. It is not averred that Whittaker or Kelley set up any claim to the land or timber in or for themselves, but that they did so for and on behalf of the Continental Realty Company, which, as we have already said, was unaccompanied by other necessary allegations showing that they were authorized to make such claim in behalf of the corporation. If the language of the petition could be construed to mean that it asserts title in appellee to the land, it obviously fails to allege his possession of the land, and to maintain an action *quia timet* the plaintiff must allege that he holds both the legal title and possession of the land, in order to recover as against a defendant setting up claim thereto.

The petition in the instant case being factually defective, the circuit court erred in overruling appellant's demurrers.

Wherefore the judgment is reversed, and cause remanded, with direction to sustain each of the demurrers and for further proceedings consistent with the opinion, including leave to appellee, should it be asked, to amend his petition.

#### CORNWALL et al. v. HILL et al.

(Court of Appeals of Kentucky. March 19, 1909.)

#### 1. WILLS (§ 481\*)—CONSTRUCTION—TIME OF TAKING EFFECT.

St. 1909, § 4839 (Russell's St. § 3962), provides that "a will shall be construed \* \* \* to speak and take effect as if executed immediately before the death of testator, unless a contrary intention appears." *Held*, that where it appears that a will was made in contemplation of a settlement with creditors, and a conveyance for carrying out that plan was made in about a month after its execution, the will should be read as speaking from the date of the conveyance rather than that of its execution.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1005; Dec. Dig. § 481.\*]

#### 2. WILLS (§ 453\*)—CONSTRUCTION—EQUALITY OF BENEFICIARIES.

The construction of the will which produces equality is preferred to one that produces inequality, and it will not be presumed that testator intended to prefer one of his children to the others, unless this appears from a fair reading of the will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 971; Dec. Dig. § 453.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

### 3. WILLS (§ 525\*) — CONSTRUCTION—DIVISION OF PROPERTY.

A will construed with reference to the condition of testator's property and the contemplated compromise and settlement with creditors, and held, that testator intended to divide his estate equally between his three children, and that the daughter was not entitled to a one-third interest in a certain factory before a division of the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1129; Dec. Dig. § 525.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Action between William Cornwall, Jr., and another, and Sally W. C. Hill and another, for the construction of a will. From the judgment rendered, William Cornwall, Jr., and another appeal. Reversed.

Bodley & Baskin, for appellants. Alfred Selligman, Fairleigh, Straus & Fairleigh, and David W. Fairleigh, for appellees.

HOBSON, J. William Cornwall, Sr., died testate, a resident of Jefferson county, in March, 1895, leaving three children surviving him, two sons and a daughter. His will was duly admitted to probate, and this controversy has arisen between his children as to its construction; the two sons insisting that the estate is left to the three children equally, and the daughter that one-third of the property known as the "factory of Cornwall & Bro." goes to her in addition to one-third of the estate. The will, after a clause appointing the two sons as executors without bond, as far as material, reads as follows:

"I give all my real and personal property I may die possessed of to my executors, or executor, in trust for the purposes named in this my last will, and any rents or income of my estate, after paying taxes, insurance and repairs shall be equally divided among my children, viz.: My sons, William and Aaron W. Cornwall, and my daughter, Sally W. Hill. Any interest I may have in the manufacture of soap and candles at the time of my death may be continued by my executors or executor with my sons as partners or at the election of my sons be continued as stock in a manufacturing corporation, or invested in the stock of a corporation that may be formed for manufacturing soap and candles; or my sons may take my interest at its value as shown by the books at the time of my death and pay for the same in one, two and three years time, without security, paying interest at the rate of six per cent. per annum. The value of my interest shall be ascertained by taking stock at the usual time which is any of the summer months when candle market is usually stopped. Or the stock may be taken if my sons so elect to do so, as near the time of my death as may be deemed to involve the least loss of time and business. And the election hereinabove given may be exercised by my sons after taking the account of stock.

My daughter's share of any money coming to her under this will, or her share of any real estate shall be held by my executors, or executor, in trust for her separate use, free from the control of any husband she may have, and she may will it to any child or children she may have who may survive her.

"The income from rents or dividends, if any that may accrue for my daughter shall be paid to her only on her receipt, free from any debt or claim of any husband she may have. She shall not anticipate the income by drawing orders or by creating debts or pledging it for any purpose, and if she should the amount so anticipated or pledged shall be forfeited and distributed to my other children then living, or to their descendants then living. And in the event of any husband she may have surviving her, said husband shall have no estate of curtesy in said property of my daughter nor any interest therein by virtue of his married relation. In the event that the portion of the factory known as the factory of Cornwall & Bro. now belonging to my daughter should again become my property, I devise said portion to my daughter and her heirs forever as her separate estate, free from the control of her husband, R. E. Hill, or any husband she may have and it shall not be subject to any right of curtesy or any other right in or to him by virtue of his marriage to my daughter or by virtue of any other circumstance or condition whatever. I direct that no debt or claim which I may now have or hereafter have against my children or either or any of them shall be made against them or either or any of them; but that all and every of said claims or debts against my children or any of them shall be considered as paid and cancelled to the full extent as if there never had been any claim against them or either of them. And I expressly direct that no claim or debt that I now have against my children or either of them or any of them shall ever be considered as an advancement to them or either of them; and that under no circumstances shall any debt or claim I may now have or may hereafter have against any of my children or either of them be subject to the rule or principle of advancement."

To understand the will it will be necessary to read it in the light of the facts surrounding the testator at the time. William Cornwall and John Cornwall, doing business under the name of Cornwall & Bro., operated a candle and soap factory in Louisville for many years before the death of John Cornwall, which occurred in the year 1867. After his death the property was sold and was bought by William Cornwall, Jr., who conveyed two-thirds of it to his father, retaining one-third himself. They continued to run the manufacturing business in the name of Cornwall & Bro. In 1874, when Aaron Cornwall became of age, William Cornwall, Sr., conveyed

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



to him a one-third interest in the factory property; the two sons and the father operating it from that time on in the old name of Cornwall & Bro. In 1875, the daughter having become of age, the father conveyed to the two sons the remaining third of the property which he then owned in trust for her use, reserving in himself the power of revocation; the firm paying her as rent \$1,000 a year. Thus things ran along until 1891, when the firm, having become insolvent, made an assignment for the benefit of their creditors; their debts amounting to about \$350,000. The assignee proceeded with the settlement of the trust and paid several dividends to the creditors. In the year 1894 the Cornwalls undertook to make a compromise with their creditors, and finally did make a settlement on the basis of \$60,000. To raise the \$60,000 it was arranged that William Cornwall would revoke the deed to the daughter, and the two sons would convey to him their interest in the factory property, and he would then convey this property, together with some other lands he had in Texas and a warehouse property owned by him and his sons, to the Louisville Trust Company, the Louisville Trust Company to furnish him \$60,000, and to sell the land when a sale could be made, so far as necessary, and to convey back to William Cornwall, Sr., so much of the property as was left after the payment of the debt. The arrangement was carried out, the deeds were made, and the creditors were settled with. The will is dated November 24, 1894. The agreement between the parties as to the conveyance of the property to the Louisville Trust Company was made on December 4, 1894. The deeds were executed on January 2, 1895. William Cornwall, Sr., died the following March. After his death in the year 1900 the Louisville Trust Company sold the factory property and the warehouse property for \$30,000. Its debts then amounted to something over \$23,000, and it turned over the surplus to the executors of William Cornwall, Sr. It is conceded that the factory property in this sale brought \$14,000. Mrs. Hill insists that one-third of this, with interest, should be paid to her. Whether she is entitled to it or not depends upon the question whether the event took place that the third of the factory property belonging to Mrs. Hill again became the property of William Cornwall, Sr. It is evident from the will as a whole that the testator, at the time the will was made, contemplated reopening the factory and running it as before. What he had in his mind was that after the creditors were paid, and he got his affairs straightened out, he wished his daughter not to lose by the revocation of the deed of trust in her favor. While the will was made on November 24th, and the written agreement for the conveyance of the property on December 4th, and the deeds were not made until nearly a month afterwards, still it is perfectly mani-

fest from the will that the will was written in contemplation that the composition with the creditors would be carried out, and it should be read as speaking rather from that time than from the date of its execution, pursuant to section 4339, Ky. St. (Russell's St. § 3962): "A will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear by the will."

In the contract of December 4th, it is provided that the conveyance to the trust company shall be upon trust that it shall collect all choses in action assigned to it, and sell so much of the land as may be necessary, and that, as soon as its debt was paid, all the residue of the property should be "the individual property of William Cornwall, Sr.," and should be conveyed by the trust company to him. When the testator speaks in the will of the event of the factory property again becoming "my property," he evidently had in mind the event of the trust company reconveying the property to him after the payment of his debt, as specified in this written contract. By the deed which he made to the trust company, it was provided that the deed was made "to the end that the title to said entire property known as the factory property shall be vested in fee simple in said Louisville Trust Company." At the time of his death the title to the property was in the Louisville Trust Company. What he contemplated was that, if he and his sons got the factory property back, he wished his daughter to be placed where she was before he revoked the deed of trust for her benefit; but he died without getting the property back. At his death the title to the land was in the Louisville Trust Company, and all that he had was an obligation on the part of the Louisville Trust Company to convey back to him the remainder of the property left after the payment of the debt to the trust company. The title to the factory property was not in him when he made his will, and, although the two sons conveyed to him their interest in it, this interest was charged with the debts of the firm which had to be settled, and their conveyance to him was only made that he might convey the entire property to the trust company, so all these deeds should be read together; their evident purpose being merely to pass the title through him to the trust company, and not to vest any title in him, until the \$60,000 was paid.

Taking the will as a whole, it leaves no doubt that the testator was equally devoted to all three of his children. He had not in mind giving one a preference over the others. His sole purpose, as exhibited by the whole instrument, was to treat them all alike and with exact justice. He did not intend that a sum equal to one-third of the proceeds of the factory property should be paid to his daughter out of his estate before the two

sons received anything from the estate. The careful wording of the will to the effect that no advancements are to be charged, when read in connection with the words directing an equal division among the three children, forbids such a conclusion. The construction of a will which produces equality is preferred to one that produces inequality, and it will not be presumed that the testator intended to prefer one of his children to others, unless this appears from a fair reading of the will. The whole will here shows a purpose on the part of the testator to put all his children on equality without regard to what had theretofore been received by each of them. To adopt the construction of the will urged by the daughter would be in effect to make the value of her one-third of the factory property a first charge upon his whole estate left after the payment of the debts, in the event the testator revoked the trust deed to her. That is not the event he had in mind. He had in mind the event of getting back his property and going on again with the business of Cornwall & Bro., as shown by the preceding words of the will. The revocation of the trust to the daughter was only a step to vest the property in the trust company. The event he had in mind was the property re-vesting in him. It would then be his to devise. If at the date of the will he had revoked the deed of trust to his daughter and had stopped there, he would have had no interest in the factory property to devise to her, for his creditors would then have subjected the property to their claims. He had at that time no interest in the manufacture of soap and candles to devise, for he had assigned everything for the payment of his debts. All this part of the will must therefore be regarded as prospective and as made in contemplation of the composition with his creditors which he had in hand, and in view of a subsequent carrying on of his business after his debts were settled; but he died the following March, before his plans were carried out, and before the portion of the factory property then owned by his daughter became his property within the meaning of the will. We are therefore of opinion that the three children take the estate equally under the will.

Judgment reversed, and cause remanded for a judgment as above indicated.

#### COMMONWEALTH v. UNITED STATES TRUST CO.

(Court of Appeals of Kentucky. March 24, 1909.)

#### 1. ABATEMENT AND REVIVAL (§ 9\*)—PENDENCY OF PRIOR PROCEEDING.

Pendency of a proceeding to have omitted property for a particular year listed for taxation is ground for abatement of a second proceeding for the same purpose, each being on behalf of the commonwealth, though one is insti-

tuted by the auditor's agent for the county, and the other by the revenue agent for the state at large, and both being against the same company, though in one it is against it in its individual as well as in its fiduciary capacity; and this, though more land is described in the second than in the first proceeding, the commonwealth not being entitled to split up its cause of action, but being required, in case of omission in the first proceeding, to amend.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 73; Dec. Dig. § 9.\*]

#### 2. ABATEMENT AND REVIVAL (§ 14\*)—PLEADINGS IN PRIOR PROCEEDINGS.

Plaintiff, in a second proceeding to list omitted property for taxation, cannot, in opposition to a plea of abatement because of pendency of a prior proceeding, claim that the statement in the prior proceeding is bad on demurrer.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 105; Dec. Dig. § 14.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Proceeding by the Commonwealth, by Holland L. Anderson, revenue agent for the state at large, against the United States Trust Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

M. J. Holt, for the Commonwealth. Burwell K. Marshall, for appellee.

LASSING, J. John W. Cassaday, auditor's agent for Jefferson county, filed a statement in the Jefferson county court on February 8, 1908, against the United States Trust Company. Two days later Holland L. Anderson, revenue agent for the state at large, filed a statement against the same company in the same court. Summons was issued upon each, and some time thereafter the defendant company answered in the proceeding instituted by Anderson, and pleaded the pendency of the proceeding instituted by Cassaday, and asked that the proceeding instituted by Anderson be abated. This plea was heard and sustained by the county judge, and an appeal prosecuted to the circuit court, where, in due time, the question came on to be heard, and the circuit judge held the plea in abatement to be good, and entered a judgment dismissing the proceeding instituted by Anderson; and from that ruling and judgment this appeal is prosecuted.

Several reasons are assigned why the judgment should be reversed, but two of which will be considered: First, that in the Anderson statement much more property is described than in that filed by Cassaday; and, second, that the descriptions of the property in the Cassaday statement do not meet the requirements of the revised revenue laws of 1906, as found in section 4260 of the Kentucky Statutes of 1909 (Russell's St. § 6220).

Each of these suits is a proceeding on behalf of the commonwealth. The commonwealth is the plaintiff in each. The purpose of each is to list omitted property. The de-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant in each is the same; but it is claimed in the Anderson suit that the proceeding is against the defendant in its individual, as well as in its fiducial, capacity. There is nothing in the statement indicative of any purpose on the part of the commonwealth to proceed against any particular fund in the hands of the defendant company. Any judgment which might be rendered would necessarily have been a personal judgment against the defendant. The rights of no one who was not a party to the proceeding could have been affected thereby; hence the proceedings were against the same party. It is immaterial that the property declared to be omitted is described with more particularity in the Anderson statement; for, as this court said in the case of Commonwealth, on relation, etc., v. Bacon, 102 S. W. 839, 31 Ky. Law Rep. 472, the commonwealth stands as any other suitor, and will not be permitted to split up its cause of action into several suits, but must in one suit present its whole case; and, in seeking to have omitted property for any particular year listed for taxation, the commonwealth is required to describe all of the property which she seeks to have listed, and if, through inadvertence or oversight, she should fall in any proceeding to have listed all of the omitted property of the taxpayer, she may not thereafter in a separate proceeding seek another listing for the same year. The remedy in this case should have been by amended statement, and not by a separate proceeding.

As to the second contention, that the Cassaday statement is bad on demurrer, we deem it but necessary to say that this is a point which might have been taken advantage of by the defendant company; but the plaintiff is not in a position to complain because it failed to do so. In the recent case of Commonwealth v. Louisville Water Company (decided March 9, 1909) 116 S. W. 712, this court held that where a sheriff was proceeding to enforce the collection of taxes by a levy, which effort was resisted, pending the determination of his right to do so, an Auditor's agent, representing the commonwealth, might not institute proceedings to recover the same taxes from the same party.

This case and the Bacon Case, to which we have referred, are conclusive of the questions under consideration, and the judgment is therefore affirmed.

LOUISVILLE HOME TELEPHONE CO. v. GORDON, Judge.

CITY OF LOUISVILLE et al. v. LOUISVILLE HOME TELEPHONE CO.

(Court of Appeals of Kentucky. March 24, 1909.)

1. EXCEPTIONS, BILL OF (§ 41\*)—BY WHOM PREPARED.

A bill of exceptions cannot be prepared by the successful party, and the unsuccessful party

may take the time given him by express statute for that purpose.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 65; Dec. Dig. § 41.\*]

2. APPEAL AND ERROR (§ 609\*)—APPELLEE'S TRANSCRIPT OF RECORD — FILING INCOMPLETE TRANSCRIPT—SUPPLEMENTATION.

Civ. Code Prac. § 741, providing that the appellee may file an authenticated copy of the record in the clerk's office of the Court of Appeals with the same effect as if filed by the appellant, carries with it the necessary implication that the record has been completed in the court below, and does not confer on an appellee the right to file an incomplete transcript and then supplement it by subsequently filing the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2687; Dec. Dig. § 609.\*]

3. MANDAMUS (§ 187\*)—APPEAL—BILL OF EXCEPTIONS—NECESSITY.

Where, in an action for a mandamus, witnesses were heard, the evidence was taken by the court stenographer, the conclusions of law and fact were separated, motion and grounds for new trial duly passed on and filed, and the stenographer's transcript of evidence was filed on plaintiff's motion, a bill of exceptions was necessary in order to have rulings on evidence reviewed, and the responsibility of preparing such bill was on defendants.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 435; Dec. Dig. § 187.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"To be officially reported."

Petition by the Louisville Home Telephone Company for writ of mandamus against Thomas R. Gordon, Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division; and action by the Louisville Home Telephone Company against the City of Louisville and others, in which action there was a judgment for plaintiff, and defendants appeal, and plaintiff applies for extension of time in which to file a completed transcript. Writ and motion denied.

Dodd & Dodd and Clayton B. Blakey, for appellants. Helm Bruce and Kohn, Baird, Sloss & Kohn, for Louisville Home Telephone Co.

EDELEN, Special Judge. This action comes before the court upon two questions: First, a petition for a mandamus directing the judge of the Second division of the common pleas branch of the Jefferson circuit court to consider and, if found correct, to sign the bill of exceptions tendered by the successful party in an action which terminated in a judgment on March 2, 1909; and, second, upon a motion addressed to this court by the same party for an extension of time to file a completed transcript in the same case.

The purpose of these motions is plainly to avoid the delay which will result if the unsuccessful party takes the time given him by law to perfect his own appeal. The case, which was a mandamus action tried out on issues of fact, was decided by Judge Gordon

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on March 2, 1909. On March 9th the motion for a new trial was overruled. In the ordinary and orderly course of business the unsuccessful party had 60 days within which to tender a bill of exceptions. In the very nature of things a bill of exceptions cannot be prepared by the successful party. It is not every ruling by the trial court, to which unavailing objection is made, that counsel wishes reviewed by an appellate tribunal. Many exceptions taken in the heat of trial evaporate over night, and it is only those which crystallize into substantial error which counsel usually embody in a bill of exceptions. The bill usually represents a survival of the unfittest rulings. It is for this reason that Civ. Code Prac. § 337, imposes upon the losing party the duty of preparing the bill, and in this preparation he may use the official stenographer's report. Section 4644, Ky. St. (Russell's St. § 3115). True by section 337 of the Civil Code all the decisions excepted to in their order are required to be included, but practically the bill is an enumeration of errors complained of upon which counsel intends to rely for reversal. It follows therefore in the nature of things a bill of exceptions cannot be prepared by the successful party, and the unsuccessful one may take the time given him by express statute for that purpose. Besides, on the overruling of the motion for a new trial, the order was entered giving the defendants 60 days within which to tender their bill. (Page 44.)

2. The application for an extension of time by the telephone company to file a completed transcript must also be denied. By section 741 of the Civil Code of Practice: "The appellee may file an authenticated copy of the record in the clerk's office of the Court of Appeals with the same effect as if filed by the appellant." This section carries with it the necessary implication that the record has been completed in the court below, because otherwise it could not be authenticated. To construe it as conferring upon an appellee the right to file an incomplete transcript and then supplement it by subsequently filing the bill of exceptions would be to confer upon the appellee a right which this court has uniformly denied to the appellant.

The appellee further contends that in this case it has filed a complete transcript, because no bill of exceptions is necessary in an action for a mandamus. An action for a mandamus is an ordinary action tried by the court upon evidence whose competency is tested by the ordinary rules of law. In this case witnesses were heard, the evidence was taken by the court stenographer, the conclusions of law and fact were separated, motion and grounds for new trial duly filed and passed on, and the stenographer's transcript of evidence—whose statutory purpose is to furnish material from which to prepare

the bill of exceptions—was filed on motion of the plaintiff. Every reason which exists for a bill of exceptions in any case may be found here. Unless therefore a bill of exceptions be signed, no ruling of the court in the admission or rejection of evidence can be reviewed. We conclude that a bill of exceptions was necessary, and that the responsibility of preparing it rested on the defendants. They had 60 days for this purpose, both by statute and express order of the court.

The writ of mandamus against Judge Gordan and application and motion for extension of time to complete the transcript must therefore be denied.

LASSING and O'REAR, JJ., not sitting.

#### CROSBY et al. v. CITY OF MAYFIELD.

(Court of Appeals of Kentucky. March 25, 1909.)

##### 1. MUNICIPAL CORPORATIONS (§ 918\*)—TAXATION—BONDS—VALIDITY OF ELECTION.

Under Const. § 157, providing that no taxing district shall be permitted to become indebted to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof, and section 187, providing that separate schools for white and colored children shall be maintained, the issuance of bonds by a city for the purchase or erection of school buildings for white children and paid by taxes on the property of white people cannot be enjoined because the question of the issuance of such bond was submitted only to the white voters of the city, there being separate schools in the city for the white children under the supervision of a board of education and supported by the general tax fund and a special tax on the property of the white people, and separate schools for colored children supported by the general tax fund and a separate tax on the property of colored people.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 918.\*]

##### 2. CONSTITUTIONAL LAW (§ 220\*) — EQUAL PROTECTION OF LAWS—DISCRIMINATION BY REASON OF COLOR.

Where the state divides its school fund equally among all the children of the state, white and colored, providing further support for the schools by the taxation of property owned by white persons to be used for the support of schools for white children and taxation of property owned by colored persons for the support of schools for colored children, it does not violate Const. U. S. Amend. 14, by discriminating between the races.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 723; Dec. Dig. § 220.\*]

Appeal from Circuit Court, Graves County. "To be officially reported."

Action by L. H. Crosby and others against the City of Mayfield. Judgment for defendant, and plaintiffs appeal. Affirmed.

W. P. Lee, for appellants. W. J. Webb, for appellee.

HOBSON, J. Under ordinances passed by the board of council pursuant to the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

statute there exist in Mayfield two separate schools—one for the white children under the control of a board of education, and another for the colored children under the control of another board of education. Each school receives from the state its pro rata of the school fund as provided in the Constitution and the statutes. The city levies a tax of 19 cents on each \$100 of the property of white people for the benefit of the white school, and a like tax on the property of the colored people for the benefit of the colored school. On September 10, 1908, the board of education for the white graded school represented to the board of council that it was necessary to raise \$75,000 to be used in the purchase or erection of school buildings in the city. The council, pursuant to the request of the board of education, enacted an ordinance submitting to the white voters of the city the question whether they would authorize the board of council to incur an indebtedness of \$75,000 to be used in the purchase or erection of school buildings in the city, and to be paid by taxation upon the property of the white people subject to taxation. The election was duly held. Eight hundred and fifty-one votes were cast in favor of the proposition, and 65 were cast against it. The result was certified to the council, and it was proceeding to issue the bonds, when this suit was brought by one white man and one colored man to enjoin the bonds being issued. The circuit court dismissed the petition, and the plaintiffs appeal.

The first proposition made is that the proceeding is in violation of section 157 of the Constitution, which so far as material is as follows: "No county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void." It is insisted that two-thirds of the voters of the municipality have not authorized the incurring of the debt because the proposition was only submitted to the white voters, and not to all the voters of the municipality. The proposition is to incur an indebtedness to furnish the white school with proper school buildings. The question was submitted to all the white voters or to all the persons who have any interest in the question, or who will be liable in any manner for the tax. The meaning of the Constitution is that no liability shall be imposed without the assent of the voters; but it was not intended by the Constitution that the question should be submitted to persons who had no interest in it. The boundary of the

city constitutes the white school district. This white school district is a municipality within the meaning of the section. The tax is levied upon the property of the white persons in this district, and these white persons are the voters in this municipality. In like manner a similar tax might be submitted to the colored voters for an improvement of the buildings of the colored school. Section 187 of the Constitution provides that separate schools for white and colored children shall be maintained. This provision of the Constitution requires the General Assembly to maintain separate schools for the white and colored children; and, if questions of taxation could not be submitted to the white people when they concern the white schools or to the colored people when they concern the colored schools, the growth of the school system in the state would seriously suffer, for each race is more directly interested in its own school than in the school of the other. Section 157 must be read in connection with section 187; and, when so read, it in no manner interferes with the power of the General Assembly to submit to either race questions of taxation affecting only its own school. This question was before us in *Bowman v. Middlesboro*, 91 S. W. 728, 28 Ky. Law Rep. 1200, and we there sustained a proceeding similar to this.

It is also insisted that the effort to maintain the white school by the taxation of the property owned by white persons and to maintain the colored school by taxation of the property owned by colored persons is a discrimination between the races in violation of the fourteenth amendment to the Constitution of the United States. The state divides equally among all the children of the state, without regard to race or color, the funds raised by taxation for school purposes. But, when the question is submitted to a local community as to whether or not the community will vote an additional tax for the betterment of its local school, this being a voluntary matter is submitted as to the white school to the white voters, and as to the colored school to the colored voters. The question of supplementing the state funds is left wholly to the vote of the locality. The voter is simply allowed to vote a tax upon himself if he wishes to do so to support his own school. While this precise question is not referred to in any of the opinions, we have in a number of cases sustained schools organized under the act and taxes on white people voted under it. See *Board of Education of Somerset v. Trustee Colored District*, 35 S. W. 549, 18 Ky. Law Rep. 103; *Harrodsburg Education District v. Trustees*, 105 Ky. 675, 49 S. W. 538; *United States Fidelity, etc., Company v. Board of Education*, 118 Ky. 355, 80 S. W. 1191.

Judgment affirmed.

**RISNER v. COMMONWEALTH.**

(Court of Appeals of Kentucky. March 23, 1909.)

**1. CRIMINAL LAW (§ 1159\*)—APPEAL—VERDICT—CONCLUSIVENESS.**

A verdict, supported by the testimony of one witness, though contradicted by the testimony of accused, corroborated by another witness, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076; Dec. Dig. § 1159.\*]

**2. CRIMINAL LAW (§ 1123\*)—APPEAL—OBJECTIONS—RECORD.**

An objection that the verdict was only the verdict of 1 man, and not of 12, not bottomed on any fact or exception in the record, nor explained in the brief of accused's counsel, will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1123.\*]

**3. CRIMINAL LAW (§ 1120\*) — APPEAL — RULINGS ON EVIDENCE—REVIEW.**

Where the record does not show what incompetent evidence was admitted, or what competent evidence was excluded, and the brief of the counsel of accused does not indicate the fact, an objection that incompetent evidence was admitted, and competent evidence excluded, will not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2932, 2933; Dec. Dig. § 1120.\*]

**4. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—REFUSAL OF REQUESTS.**

It is not error to refuse an instruction, where the instructions given omit no feature of the law applicable to the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 829.\*]

**5. CRIMINAL LAW (§ 600\*)—CONTRADICTION OF DEPOSITION OF ABSENT WITNESS.**

The rule that the court, after admitting as a deposition statements of an absent witness as shown by an affidavit for a continuance, cannot permit the adverse party to prove that the absent witness, if present, would not make the statements attributed to him by the affidavit does not preclude the state from contradicting by other testimony the statements imputed to the absent witness, in the same manner that statements contained in a formal deposition of a witness may be contradicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1346; Dec. Dig. § 600.\*]

**6. CRIMINAL LAW (§ 720\*)—CONTRADICTION OF DEPOSITION OF ABSENT WITNESS—ARGUMENT OF COUNSEL.**

Where accused, in whose behalf statements of an absent witness contained in the affidavit for a continuance are read as a deposition, gives testimony contradictory of the affidavit, counsel for the state may in argument point out and comment on the contradiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1670; Dec. Dig. § 720.\*]

**7. CRIMINAL LAW (§ 1064\*)—APPEAL—OBJECTIONS PRESENTED IN MOTION FOR NEW TRIAL.**

Under the rule that there can be no review of an error by the trial court, unless it is first called to the attention of the trial court in the motion for a new trial, errors based on the improper argument of the prosecuting attorney, not mentioned in the motion for a new trial, will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2681; Dec. Dig. § 1064.\*]

**8. CRIMINAL LAW (§ 662\*)—RIGHTS OF ACCUSED.**

The court may, without violating the rights of accused, compel a trial by admitting in evidence his affidavit for a continuance on the ground of the absence of a witness, containing facts to which it is averred the absent witness would, if present, testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1542; Dec. Dig. § 662.\*]

**9. CRIMINAL LAW (§ 1064\*)—APPEAL—ERRORS NOT PRESENTED IN MOTION FOR NEW TRIAL—REVIEW.**

The refusal of a continuance on the ground of the absence of a witness, with the admission in evidence of the affidavit for a continuance, containing facts to which the absent witness would, if present, testify, not presented in the motion for new trial, is not reviewable on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2678; Dec. Dig. § 1064.\*]

Appeal from Circuit Court, Magoffin County.

"To be officially reported."

Ed Risner was convicted of voluntary manslaughter, and he appeals. Affirmed.

A. F. Byrd and Byrd & Howard, for appellant. Jas. Breathitt, Atty. Gen., and Theo. B. Blakey, Asst. Atty. Gen., for the Commonwealth.

SETTLE, C. J. The appellant, Ed Risner, by this appeal seeks the reversal of a judgment of the Magoffin circuit court, entered upon the verdict of a jury, finding him guilty of voluntary manslaughter, and fixing his punishment at three years' confinement in the penitentiary. The indictment under which appellant was tried and convicted charged him with the crime of murder. The victim of the homicide was William Hale, whose death resulted from a pistol ball fired by the hand of appellant. Appellant moved for a new trial in the court below on the following grounds: "(1) Because the verdict was contrary to law, and not sustained by the evidence; (2) because the judgment was not authorized by the verdict of the jury; (3) because the verdict was only the verdict of 1 man, and not of 12; (4) because the court erred in overruling a demurrer to the indictment; (5) because the court allowed incompetent evidence offered by the plaintiff to go to the jury and be considered by them, and refused to allow competent evidence by the defendant to go to the jury and be considered by them; (6) because the court erred in giving to the jury instructions Nos. 1, 2, 3, 4, 5; (7) because the court failed to give the jury the whole law of the case."

Grounds 1 and 2 may be disposed of together, as they present in effect, though in different words, the same objection, to properly dispose of which consideration of the evidence will be necessary. Without discussing in detail the facts furnished by the record they were, in substance as follows: Deceased, appellant, and Leander Risner all

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

live upon a tributary of the middle fork of Licking river, in Magoffin county, appellant's home being between and a short distance from those of deceased and Leander Risner. For some reason wholly unexplained by the record there was some ill will existing between appellant and these two neighbors of his, which had only manifested itself previous to the day of the homicide in an occasional failure of the parties to speak to each other when casually meeting. On the day of the killing Wm. Hale, the deceased, had at his residence some elderberry wine of which he and Leander Risner, on the morning of that day, partook to the point of intoxication. According to the testimony of absent witnesses whose statements were set forth in an affidavit made by appellant and admitted as a deposition, deceased and Leander Risner, while at the house of the former, expressed a hostile feeling toward appellant, and said they intended to kill or run him off the branch, which appellant claimed was communicated to him the morning of the homicide. After drinking of the elderberry wine deceased and Leander Risner left the home of deceased and went to that of Leander Risner, where they remained some time, but in the afternoon returned to the home of deceased, and in approaching saw appellant, who had gone there in their absence, leaving it in such a manner as indicated a purpose to avoid meeting them. They entered the house of deceased, and according to the statements attributed by the affidavit of appellant to the absent witnesses, deceased charged that appellant had been drinking his wine, and got his shotgun, threatening to shoot him, but was prevented by the persons in the house from doing so. The alleged threats were not heard by appellant, nor did he then know of the alleged attempt made by deceased to shoot him. Still later in the afternoon deceased and Leander Risner again left the home of deceased and started for that of Leander Risner. The road led by the residence of appellant, upon reaching which they there saw Ashland Patrick, to whom they spoke, and, entering the yard, engaged him in conversation. The wife of appellant gave them and Patrick seats in the yard. Appellant, who after leaving deceased's house that morning had borrowed a pistol, went to where deceased, Patrick and Leander Risner were seated, and also took a chair. Leander Risner, witness for the commonwealth, testified that the first intimation he had of a difficulty came from the language of appellant, who with an oath said to deceased, "If you have come here for any trouble, get out of my yard," and immediately drew his pistol and shot twice at deceased, who fell to the ground at the last shot, and later died; that deceased was 20 feet from appellant when he fell, was not making an assault upon or doing anything to appellant at the time, and had neither a knife nor other weapon in his hand with

which to harm him. The testimony of appellant and Patrick as to the circumstances of the homicide greatly differed from that of Leander Risner. Both testified that while they, Wm. Hale, and Leander Risner were seated in the yard, the latter asked appellant what he was mad at him and Wm. Hale about, and that appellant said he was not mad; that Leander then told deceased to whip appellant, and deceased said with an oath "I will," immediately getting upon his feet and starting toward appellant with his hand in his hip pocket as if in the act of drawing a weapon, seeing which, appellant drew his pistol, and commenced to back away from deceased, telling him not to press on him, but that deceased persisted in doing so until within two steps of appellant, who then shot at him twice, the last shot proving fatal. An examination of the clothing of deceased after the shooting demonstrated that he had no weapon upon his person other than an ordinary pocket knife, which he had not drawn, for it was found in one of his pockets closed.

It is patent that the jury accepted the testimony of Leander Risner, and rejected that of appellant and Patrick. This they had the right to do, and it is not our province to disturb the verdict merely because appellant's version of the homicide was corroborated by another witness, and that of the commonwealth's only eyewitness was uncorroborated. In view of the admitted fact that deceased was an old man 70 years of age and intoxicated, and the further fact that appellant was a younger and more vigorous man, it is not improbable that the jury may have concluded from appellant's own account of the homicide that he could and ought to have avoided the taking of deceased's life by employing nature's weapons and his own superior strength in repelling the old man's attack upon him. But whatever may have been the reasons of the jury for arriving at the conclusion expressed in the verdict, it is manifest that there was some evidence to support it; and, this being true, there is no soundness in the contention made in appellant's first and second grounds for a new trial.

The third objection made to the verdict by appellant in the court below is not bottomed upon any fact or exception appearing in the record; nor does the brief of his learned counsel contain any explanation of what is meant by the complaint that "the verdict was only the verdict of 1 man, and not of 12." Therefore we will assume that it is something unnecessary to consider.

We also find it unnecessary to consider the fourth ground for a new trial, except to say that the sufficiency of the indictment is too self-evident to require argument. Therefore the trial court did not err in overruling appellant's demurrer to it.

The fifth ground for a new trial it will also be unnecessary to notice. The record does

not show, nor does the brief of appellant's counsel indicate, what, if any, incompetent evidence the trial court admitted, or what, if any, competent evidence was excluded on the trial.

The sixth and seventh grounds are clearly untenable, for no error is to be found in the instructions given by the circuit court, nor do we find that it erred in omitting to give others. The instructions given are to be commended for their brevity, fairness, and completeness. They omit no feature of the law applicable to the case, and consequently rendered wholly unnecessary the giving of others.

In addition to urging a reversal on the grounds relied on for a new trial, appellant also asks it on account of alleged misconduct of the commonwealth's attorney in argument to the jury, which consisted in that officer's attempting to demonstrate that appellant's testimony on the witness stand was contradicted by statements attributed by his affidavit to certain absent witnesses, which he was allowed to read to the jury as the depositions of such witnesses, after being refused a continuance on account of their absence. There was no error in the failure of the court to exclude this statement of the commonwealth's attorney from the jury. While it is true that a trial court, after admitting to be read as a deposition statements attributed to an absent witness by an affidavit for a continuance, will not allow the opposite party to prove, or his counsel to argue, that such absent witness would not, if present and orally testifying, make the statements attributed to him by the affidavit, this rule will not preclude the opposite party from contradicting by other testimony the statements imputed to such absent witness by the affidavit. In the same manner statements contained in the formal deposition of such witness might be contradicted; and whatever contradiction may thus be established by proof may be argued by counsel to court or jury. Likewise, if the party in whose behalf the statements of the absent witness contained in the affidavit are read as a deposition gives testimony on the trial which is contradicted by that attributed by the affidavit to the absent witness, counsel may in argument point out and comment upon the contradiction. *Howerton v. Commonwealth*, 112 S. W. 606, 33 Ky. Law Rep. 1008; *Ochsner v. Commonwealth*, 109 S. W. 326, 33 Ky. Law Rep. 119. The commonwealth's attorney in the particular complained of seemed to have kept within the above rule. But if this were not so, and the

trial court in not excluding that part of the commonwealth's attorney's argument from the consideration of the jury had glaringly erred, as claimed by appellant, we would nevertheless be powerless to correct the error, because it was not mentioned in the motion or made a ground for a new trial in the circuit court. This rule of practice has long been adhered to by this court, and numerous decisions recognizing it may be found. So in criminal procedure there can be no review by this court of an error committed by the circuit court on a trial of the case therein, unless the error complained of be first called to the attention of that court in the written motion and grounds for a new trial. *Hopkins v. Commonwealth*, 3 Bush, 480; *Lewis v. Commonwealth*, 42 S. W. 1127, 19 Ky. Law Rep. 1139; *Baker v. Commonwealth*, 47 S. W. 864, 20 Ky. Law Rep. 879; *Nicely v. Commonwealth*, 58 S. W. 995, 22 Ky. Law Rep. 900; *Ison v. Commonwealth*, 66 S. W. 184, 23 Ky. Law Rep. 1805; *Griffin v. Commonwealth*, 66 S. W. 740, 23 Ky. Law Rep. 2148; *Howard v. Commonwealth*, 67 S. W. 1008, 24 Ky. Law Rep. 91; *Thompson v. Commonwealth*, 122 Ky. 501, 91 S. W. 701; *Meese v. Commonwealth*, 78 Ky. 586; *Herr v. Commonwealth*, 91 S. W. 606, 28 Ky. Law Rep. 1131; *Blshoff v. Commonwealth*, 123 Ky. 340, 96 S. W. 538.

It is further complained by appellant that the trial court also erred in refusing him a continuance, and that, though given on the trial the benefit of the statements of his absent witnesses, the full effect of their testimony could not in that way be had. Moreover, that the privilege of their personal presence and oral testimony was guaranteed him by section 11, Bill of Rights. This question has likewise been decided adversely to appellant's contention by this court. It is not a violation of the defendant's rights, or of the Bill of Rights, for the court, in a criminal case, to compel a trial by admitting the reading of his affidavit containing facts to which it is therein stated an absent witness would, if present, testify. *Adkins v. Commonwealth*, 98 Ky. 530, 33 S. W. 948, 32 L. R. A. 108. However, we need not have said this much with respect to the question of the continuance, for it was not presented in the court below in the motion or grounds for a new trial asked by appellant.

Our examination of the record and consideration of the questions it presents for review having failed to convince us that any substantial right of appellant was prejudiced by the rulings of the circuit court, the judgment must be, and is hereby, affirmed.



**SOUTHERN RY. CO. et al. v. ADKINS' ADM'R.**

(Court of Appeals of Kentucky. March 25, 1909.)

**1. APPEAL AND ERROR (§ 1033\*)—HARMLESS ERROR—ERROR FAVORABLE—INSTRUCTIONS.**

Railway companies, sued for death caused by an explosion of a car of dynamite, cannot complain of an instruction that, unless their employes shoved a car against the car of dynamite with such unusual violence and recklessness as to cause an explosion, plaintiff could not recover, since the instruction ignored the companies' liability for negligence in leaving the car in the yard for 11 or 12 hours, unguarded and without warning.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

**2. EXPLOSIVES (§ 7\*)—NEGLIGENCE—EVIDENCE—RULES OF RAILROAD COMPANY.**

In an action against railroad companies for death caused by the explosion of a car of dynamite in their yard, it was proper to allow their rules to be read to the jury to show negligence.

[Ed. Note.—For other cases, see Explosives, Dec. Dig. § 7.\*]

**3. DEATH (§ 65\*) — ACTION FOR NEGLIGENT DEATH — EVIDENCE — LIFE TABLES.**

In an action against railway companies for negligent death, life tables were properly admitted in evidence.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 84; Dec. Dig. § 65.\*]

**4. APPEAL AND ERROR (§ 999\*)—REVIEW—CONCLUSIVENESS OF VERDICT—PROVINCE OF JURY—WEIGHT OF EVIDENCE.**

It is the jury's province to hear the evidence and determine its truth and weight.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3924; Dec. Dig. § 999.\*]

**5. EXPLOSIVES (§ 7\*)—NEGLIGENCE—EVIDENCE—WEIGHT.**

Weight of the evidence in an action against railway companies for death caused by an explosion of a car of dynamite in their yard held to show that the explosion was caused by a violent kicking of cars against such car, and not by a rifle shot fired by a third person.

[Ed. Note.—For other cases, see Explosives, Dec. Dig. § 7.\*]

**6. APPEAL AND ERROR (§ 999\*)—REVIEW—SCOPE—CONCLUSIVENESS OF VERDICT.**

It is the province of the Court of Appeals to see that parties have a legal trial, but not to weigh the evidence, that duty belonging to the jury; and the court should only disturb a verdict in extreme cases, when no errors have been committed by the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3924; Dec. Dig. § 999.\*]

**7. EXPLOSIVES (§ 7\*)—NEGLIGENCE—LIABILITY OF RAILROAD.**

In an action against railway companies for death caused by an explosion of a car of dynamite in their yard, it was improper to restrict plaintiff's right to recover to a finding of negligence in switching cars against such car, since he was entitled to recover if the companies negligently left the car in their yard for 11 hours, without guarding it against trespassers, etc.

[Ed. Note.—For other cases, see Explosives, Dec. Dig. § 7.\*]

**8. EXPLOSIVES (§ 7\*)—DAMAGE BY—LIABILITY.**

One handling explosives is not liable for injury caused by an explosion thereof, if he has taken necessary precautions in attempting to save others from injuries through an explosion.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 3; Dec. Dig. § 7.\*]

**9. EXPLOSIVES (§ 7\*) — NEGLIGENCE — LIABILITY.**

Railway companies are liable for damage caused by an explosion of a car of dynamite, regardless of the cause of the explosion, if they failed to exercise care to prevent it.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 3; Dec. Dig. § 7.\*]

Lassing, Hobson, and Barker, JJ., dissenting.

Appeal from Circuit Court, Whitley County.  
"To be officially reported."

Action by George M. Adkins' administrator against the Southern Railway Company and another. From a judgment for plaintiff defendants appeal. Affirmed.

W. A. Henderson, William Low, J. W. Alcorn, H. H. Tye, Humphrey & Humphrey, and Alex P. Humphrey, for appellants. S. M. Payton, Sharp & Siler, R. L. Pope, and Hazelrigg, Chenault & Hazelrigg, for appellee.

NUNN, J. Appellants, Southern Railway Company and Louisville & Nashville Railroad Company, own and use in common a railroad yard in Jellico, a town of about 3,500 inhabitants. In the month of September, 1906, an engine of the Southern Railway placed in the north end of this yard a car loaded with 400 boxes of dynamite and 50 boxes of nitroglycerin, which were placed on top of the dynamite. This car was placed in the yard about 8 o'clock in the evening, and remained there until near 8 o'clock the next morning, when the dynamite and nitroglycerin exploded with terrific force, killing about 16 persons and injuring over 100, destroying many buildings, and injuring nearly all the others in the town. The explosion made a hole in the ground 15 or 16 feet deep, 60 or 70 feet long, and 40 or 50 feet wide. The car containing the dynamite and nitroglycerin was completely obliterated, as well as the one next to it, loaded with pig iron, and the end of the coal car that was next to the car loaded with pig iron was warped and blown in. It and other similar cars were moved on the track, by the force of the explosion, 40 or 50 feet. Adkins, at the time of the explosion, was in a brick business house about 200 yards from the car loaded with dynamite and nitroglycerin. The explosion caused the house to fall on and injure him, which resulted in his death. This action was instituted to recover damages for the loss of his life. It was alleged that his death was caused by the negligent or wrongful acts of appellants or their servants. The issues were formed, the testimony heard, and the jury returned a verdict in behalf of appellee for \$7,500.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The court gave to the jury the following instruction: "Unless you believe from the evidence that the employes of the defendants, or either of them, kicked or shoved a car or cars against the car of dynamite, and that in so kicking or shoving the car or cars they did so with such unusual violence, force, and recklessness as to cause the contents in the car to explode, you will find for the defendants; but, if you believe that such was the cause of the explosion, you will find for the plaintiff." In addition to this instruction, the court gave the jury the usual instruction on the measure of damages and properly defined negligence and ordinary care. It will be observed that under the instruction quoted the court did not authorize the jury to find for appellee unless they believed from the evidence that the car or cars were kicked or shoved against the car containing the dynamite and nitroglycerin and that the kicking or shoving was done with unusual violence, force, and recklessness. The court did not seem to think that there was any evidence of negligence on the part of appellants in their placing and leaving the car loaded with dynamite in their yard in the town for 11 or 12 hours without any one to protect it, or without giving notice in any manner of its contents and the danger incident thereto to any one. By this instruction the court exonerated appellants from liability, even though they negligently permitted another car in their yard to roll against the one loaded with dynamite and nitroglycerin causing it to explode. Appellants certainly have no cause to complain of errors in the instruction against their interest.

Appellants contend that the court erred in permitting their rules to be read to the jury to show negligence, and allowing the introduction of the "Life Tables." This court has so often considered and determined these questions against the contentions of appellants that we deem it unnecessary to discuss them and cite authorities thereon. This disposes of all the grounds for reversal presented by appellants save one, and that is: "The verdict of the jury is flagrantly against the evidence." They present this question with a great deal of force.

Appellants admit that a number of witnesses on behalf of appellee testified to facts showing that their agents had shunted cars against the car loaded with dynamite and nitroglycerin, which caused the explosion; but, on the other hand, they claim that appellants' testimony shows such a state of facts that it was impossible for this to have occurred, as there was no engine in the yard, especially in the south end, that could have shunted the cars against the car loaded with dynamite and nitroglycerin. Appellee's testimony shows that the car or cars were kicked by an engine from the south end of the yard against the car and caused the contents to explode. Appellants' theory is

that the dynamite and nitroglycerin were caused to explode by one Walter Rogers shooting a rifle ball into them. On account of the importance of the case, we will not content ourselves with a general statement of the testimony, but will give a detailed statement and quote what each witness said as to what caused the explosion. However, it is necessary to describe the situation of the railroad yard in order that the testimony quoted may be understood.

It appears that the yard is about three-fourths of a mile long; that the general course is north and south, with the main track running through the center, and four or five side tracks on either side of it. The station is a little north of the center of the yard, and the water tank is a little south of the center, the car containing the dynamite and nitroglycerin was about 200 yards from the north end of the yard, and was situated, according to the testimony of most of the witnesses, on the west side of the main track, on what is known as the "tank track"; there being one track, known as the "middle track," between it and the main track, and about 400 yards north of the station. The Commercial Hotel is located near the main track a short distance south of the yard. The track farthest east of the main line is the one under which the ash pit and the turntable are located, and it connects with the main track in the vicinity of the Commercial Hotel. The tracks in the yard are downgrade from the south to the north.

The witness Thos. Tate, after stating that he saw the explosion, was asked: "Q. Do you know what caused the explosion? A. Yes, sir; I suppose I do. Q. State what. A. It was a car coming from the south, and butted against another, and just flashed like lightning, and tore things up. Q. Were you looking at it at the time of the explosion? A. I was looking at it and talking about the car" (meaning the car that was moving from the south towards the car loaded with dynamite and nitroglycerin).

Jack Kincaid testified as follows: "Q. Did you see this car at the time it exploded? A. Yes, sir. Q. What caused it to explode? A. This car of pig iron. Q. Where did it come from? A. It came from the lower end of the yard. Q. How fast was it coming when you saw it? A. It was running faster than it ought to be. They gave it a kick, and flew, and left it. Q. Was anybody down there with it? A. No, sir. Q. How far was it from this exploded car at the time you say it was kicked? A. It was a right smart piece, about the length of five or six cars. Q. How many cars were kicked? A. Two. Q. Box or flat cars? A. Flats or pig iron cars. Q. How high up was the railing that the pig iron was in? A. It was a deep car. It was the same as a box car. It was of them big iron cars. I forget how much they hold. There was two of them hit it. Q. How long after you saw them before they bumped? A.

It was right immediately, and then everything was falling and rattling, and people hollering and screaming."

Robert Hale testified as follows: "Q. Do you know anything about this dynamite car being hit and exploded in the yard? A. I know I heard some cars bump together and I heard the explosion. Q. How long after the cars bumped together before the explosion? A. Just a second. Q. With what force? A. They struck very hard, because I made the remark to the clerk: 'That fellow is punching hard this morning.' Q. How long after the bump before the explosion? A. I had hardly got the words out of my mouth."

T. A. Butcher testified as follows: "Q. If you know what produced that explosion, I will get you to state to the court. A. I know this. I saw a string of cars come down and hit together, and then in an instant the explosion come. I was sitting there talking to a colored man by the name of Tate, and we were at work up there together, and the flash come, and I said, 'Good God; look at the lightning!'"

Jewett Garnett testified as follows: "Q. Just before the explosion occurred, did you see a Southern engine, or any other engine, moving cars in the switchyard down towards the southern end? A. I could not see whether it was moving any cars or not; but it was going in and out down there. Q. How close up did that engine continue to the time of the explosion? A. Right up, from what I could see of it. It was on the left-hand side coming this way, going north. The engine was headed south, but was going north. Q. You say that it was running north? A. Yes, sir; it was moving back and forwards, and the last time I noticed it it was standing still after the explosion. Q. Well, just before that explosion, which way was it going the last time you noticed? A. I do not remember which way it was going then, when I last noticed it. It was just moving back and forth, and we were hurrying to load the car. Q. How long before the explosion did you notice it? A. Two or three minutes, I guess. Q. Well, did you see it after the explosion? A. Yes, sir; I came in about five minutes after the explosion. Q. Where was it then? A. It was setting over there near the switch that turns off for coming up this way, this side of the Commercial Hotel."

Geo. Henderson testified as follows: "Q. Well, do you know anything about this explosion and collision of cars? A. I think I do. Q. Tell the jury what you know, and what your opportunities were for knowing. A. I saw the engine switching up the south end of the yard there, and give the cars a kick, and they came right on and struck that box car that was standing there that exploded, and when the cars came together there was a flash of lightning run out, and the thing went off. \* \* \* Q. You understand that location, do you (pointing to plat)? A. Yes, sir; right there is where they were kick-

ing those cars. This is the Commercial Hotel. Q. Yes. A. Right in here, now, is where they were kicking those cars. Q. Were they kicking them from up this way? A. They kicked them from here right down this way. Q. How far did the engine follow them? A. The engine never followed them very far. They gave them a kick, and cut loose. Q. How many cars were turned loose in that kick? A. I couldn't say. I was too far away, and there were cars on each side of the track where the cars were running. They were brand new steel cars; Southern steel cars, some of them was. Q. And you watched them? A. Yes, sir; I saw them when they struck. Yes, sir; I did. Q. How did they strike? What degree of speed did they have? A. They had a pretty good speed. \* \* \* Q. Just a lone car standing by itself? A. Yes, sir; that box car was standing there by itself. Q. And the thing that hit it was a new steel coal car? A. Yes, sir. Q. And when it bumped that lone dynamite car up there she bursted? A. In a flash of lightning. Q. And you heard the explosion? A. Yes, sir. Q. How many dynamite cars exploded there that day? A. There wasn't but one. Q. But it was of a sort of a double-barrel order? A. Yes, sir; I guess there were two kinds of material in it is what made that double explosion."

Mrs. Murphy testified as follows: "Q. State where you last saw those cars. A. The last I saw of them they were going. They were in behind a building. Q. Were they moving rapidly? A. Yes, sir; they set them in rapidly. Q. You say you know where the explosion was. State how they were moving with reference to that point. A. They were moving fast. Q. In what direction? A. Going towards where the explosion was. Q. Did the engine kick those cars in more rapidly or less rapidly than usual? A. They were kicking them in fast was what made me look out north. It cut loose, and the cars they went on down the track. Q. Did it damage the house you were in? A. Tore it all to pieces."

The witness Fred Densmore, after stating that he was on the ground where a tent for a show was being erected at the time the explosion occurred, and that he had just arrived at that place, which was on the east side of the railroad, when the explosion occurred, he stated that he came from the west side of the railroad, where he resided, and crossed the tracks near the Commercial Hotel, and continued as follows: "Q. Did you see an engine there, or any switching there in the yard? A. I saw an engine right there at the road crossing just as I crossed over. I stopped here (indicating) just about a minute and a half to wait for the engine to get out of my way until I could get over. Q. What was the engine doing? A. Pushing some cars around there. Q. Which way was the nose of the engine turned? A. Towards Knoxville. Q. The cowcatcher was towards

Knoxville? A. Yes, sir. Q. In what way was it pushing those cars? A. Right back down this way. Q. You say that you stopped there at that time for them to get out of your way? A. I stopped right here in the road crossing. It was in my way. That is the reason that I stopped. As quick as it pushed across there I went on across. Q. Which did it push the cars down, fast or slow? A. Right back down that way fast. Q. You say that was a few minutes before the explosion? A. Yes, sir. Q. Did you see what became of that engine? A. No, sir; I never noticed what became of it, any more than just about the time I got half way over to the show ground it was coming back up this way, after it had shoved the cars. Q. What became of the cars it shoved? A. The cut of cars went on yon way. Q. Did you afterwards see where the car of dynamite exploded? A. Did I see it? Q. Yes, sir. A. Yes, sir. Q. In what direction did those cars kicked loose go with reference to that car of dynamite? A. They went right toward it."

Joseph Phillips testified as follows: "Q. Did you see anything up there, or did you see the explosion? A. Yes, sir; I saw the explosion, and saw the engine switching. Q. Did you see anything just before? Did you see any switching in the yard of the railroad company just prior to the explosion? A. Yes, sir; I saw an engine switching. Q. Where was that engine? A. It was on the south end of the yard. Q. The south end? A. Yes, sir. Q. Do you know where the old Commercial Hotel, or the Mountain Home Hotel, is situated? A. Yes, sir. Q. Where with reference to that hotel? A. Well, the engine was switching right there at the Commercial, back in this side of the Commercial, toward the depot. Q. From the Commercial Hotel toward the depot? A. Yes, sir. Q. Now explain to the jury what you saw that engine do. A. Well, she backed in there with some cars and cut loose from them, and the cars came on down toward the north end, and the engine went back that way (indicating south). Q. How did those cars go, slow or fast? A. They were going fast. I call it pretty fast. Q. What did the engine do when it cut loose from the cars? A. It went back toward the Commercial Hotel. Q. How did it go back, fast or slow? A. It went tolerably fast. Q. Did you see what became of those cars? A. They went on down there and butted a box car. Q. What box car was that? A. It was the one, I reckon, that blowed up. It was supposed to be the one. Q. It was right where the explosion occurred? A. Yes, sir. Q. How did it butt that car? A. It butted it pretty heavy. Q. When was that explosion with reference to the butting of that car? A. Right then, instantly. Q. Right then, instantly? A. Yes, sir."

James Powers stated that Doug's passenger train left the station a few minutes before the explosion, and continued as follows: "I saw an engine coming from the southern end

of the yard, and it seemed like there was either one or two cars to it, and it kicked the car or cars back in. I saw one. I didn't pay very much attention to the car, for it attracted my attention the engine going in such a flight. I wasn't use to seeing them switching so fast, and that drew my attention, and I noticed the engine, and it went out of my sight above the depot, and I just turned around, and aimed to step across, and then the explosion happened, and that was the last I knowed. I didn't know anything more for some time. It knocked me down. Q. Do you know what became of that car or cars that was kicked by that engine? A. It came north toward where they showed me afterwards, to where the hole was dug out in the ground, where that car was torn up."

William Lovitt testified as follows: "Q. Now, Mr. Lovitt, please state to the jury fully what you saw take place just prior to and at the time of the explosion. A. Well, I was sitting there in my door, and I was looking at Doug's train going out—that was the Middlesboro train; and I was still sitting there, and these cars followed him, and they looked like steel gons to me, until they came in and struck this car, where them cars were setting there. I saw one box car, and looked like flat cars, and when they struck it the explosion went off. That is all I seen. Q. You say— Where did those cars come from? From what direction? A. They came from the south end of the track. Q. They came from the south end of the track? A. Yes, sir. Q. What rate were they going, Mr. Lovitt? A. They were going at a right smart rate. They bumped together pretty hard when I saw them. Q. And running from the south end up that way? A. Yes, sir; they were running from the south end. Q. Did you see the engine? A. No, sir; I never saw the engine. I saw the smoke of it. The engine was in behind the depot from where I was sitting. From where I was sitting I couldn't see the engine. Q. Could you see which way the engine went after it cut loose from those cars? A. The engine was going south. Q. And when was that explosion with reference to the time those cars coming north struck the other car? A. How is that? Q. When was the explosion with reference to the time that those cars coming north struck the other car? A. Just as soon as they came on down and hit it. Q. When they hit it the explosion occurred? A. Yes, sir; just as soon as they hit it."

James Scarbrough testified as follows: "Q. State what you heard at the time of the explosion, and immediately before, if anything. A. I was in the room there, with nothing to attract my attention, and I heard an engine running, switching cars and running, and I heard one unusually heavy bump, and it attracted my attention that it was something unusual, and immediately after I heard two reports. I thought something moved under me. I was on the second floor, and it

sounded as though they turned some heavy object over two times, and immediately I heard the windows and glass begin to fall."

A. B. Botts testified as follows: "Q. Did you see any switching going on in the yard just before the explosion? A. One engine. Q. Where was it? A. Up south from the depot. Q. Where with reference to the Commercial Hotel? A. Between the Commercial Hotel and the depot. Q. What kind of an engine was it? A. I don't know. Q. What did you see it doing? A. I saw it kick three coal cars back north, and she broke loose or cut loose, and she went back towards the Commercial Hotel. Q. Did she kick them back rapidly or slowly? A. Fast. Q. Any one on the cars? A. One man. Q. What became of him? A. He jumped off and ran back toward the engine. He jumped out from under his cap or hat, and never stopped to get it. Q. Did you know the man? A. No, sir. Q. How far did these cars run when you were noticing them? Where did you last see them? A. The last time they had turned back—two of them. Q. Which way? A. This way. Q. What started them? A. I don't know. Q. Did they turn back before or after the explosion? A. It seemed to be about the same time. Q. Did you hear the crash of the cars? A. I just heard a big noise. Q. Was you looking at them when the noise came? A. I was looking when they jumped back. Q. How far did they jump back? A. I don't know; it knocked me down. Q. Were the cars running up to the moment of the noise? A. Yes, sir. Q. And you saw two kick back? A. Yes, sir. Q. What became of the others? A. I don't know. I just seen everything bulged up, and it knocked me down. Q. How far had that man got back towards the engine? A. Thirty or forty yards. Q. Where did he jump? A. Just about the tank. Q. Is it kind of down-grade toward the Kentucky side? A. Yes, sir. Q. And you was up to the south? A. Yes, sir."

M. L. Lloyd testified as follows: "Q. Did you see any trains switching in the yard? A. Yes, sir. Q. Tell the jury what you saw that engine doing. A. I had started to the post office, and had got to the railroad, and a train come down, and I stopped and waited until it passed me. Q. What direction? A. I live east, and was going west. Q. What direction was the train running? A. South. I crossed the track and got down to the hotel, and I stopped and came back on a different track. I noticed a fellow running along with three or four cars in front of him, and he cut them off and let them go. Q. What kind of cars were they? A. I never paid any attention. Q. Three or four of them? A. Yes, sir. Q. How did he kick them back, rapidly or slowly? A. Pretty fast. Q. How far were they from the explosion at the time he cut them loose? A. From 30 to 40 yards. Q. Did you notice the cars after he cut them loose? A. I noticed them going up, and no-

body with them. I thought there should be. Q. Did you notice a car up there? A. Just as I turned around the explosion occurred. Two noises, just like a thought. \* \* \* Q. What became of the engine? A. It went south."

The following persons saw an engine in the south end of the yard in a position to shunt the cars against the car loaded with dynamite and nitroglycerin, immediately preceding and immediately after the explosion:

Jack Kincaid testified as follows: "Q. Did you see any engine on the yard? A. None but the one that was switching. Q. Did you see the passenger engine? A. Yes; it was gone. Q. After the passenger engine left, that was the only one you saw? A. Yes, sir. \* \* \* Q. Did it have steam up? A. Yes, sir. Q. Did you see it when it was getting these cars and switching? A. Yes, sir. Q. Was it kicking the cars while switching. A. Yes, sir. Q. How many cars did it kick? A. Two. Q. Were these cars coal cars? A. Yes, sir."

A. L. A. Housely testified as follows: "Q. Tell what took place before the explosion. Did you see an engine switching any cars toward the place where the car of dynamite was standing in the yard? A. Yes, sir. Q. Tell, now, what happened, and what caused you to see it. A. I could not tell you as to how many of the cars were being pushed by the engine, but directly a train came up there, and I was shoeing a horse at the time, and the horse got frightened, I had to stop until after the engine and cars had passed back, and the explosion came after I started ahead with my work. Q. Did you see the engine, and can you tell what one it was? A. I did not pay that much attention to it. Q. What did you do immediately after the explosion? A. I went down to the place. Q. Did you see the engine come back toward your shop about the time or just after the explosion—the one that had been switching? A. I do not know whether it was the engine or not. I saw an engine up here close, but whether it was the same engine or not I could not tell."

Geo. Sweat testified as follows: "Q. Did you observe a switching crew operating in the south end of the yard about that time? A. Yes, sir; Clear Fork train was making up to go out on Clear Fork, and it went to the south end of the yard before the passenger engine pulled out, and I saw the smoke up towards the Commercial Hotel about or a little before the explosion, but I could not see the engine. Q. Was it moving freight cars in the yard. A. Yes; they had been."

D. D. Scott testified as follows: "Q. Just before you went into the drug store, did you observe any switching in the south end? A. Just before I got to the store, across in front of the drug store, I noticed a freight train switching on the south end, and looked like it was coming in from the south end and going towards the depot. Q. Was that en-

gine pulling or pushing cars? A. I think the engine was hidden from me by the Commercial Hotel. I think I could hear the engine, but I saw the cars go in front."

Jewett Garnett testified to seeing an engine switching in the south end of the yard, as hereinbefore copied, and as follows: "Q. And that was the same engine that had been doing the switching? A. Yes, sir; it was standing over here (meaning on the track leading to the turntable and ash pit), popping off, between the Hackney building and the Commercial Hotel. Q. It was out on one of these tracks that run out toward the Hackney building? A. Yes, sir; it was somewhere near here. Q. When an engine pops off that way, it is because the steam is very high, is it not? A. Yes, sir; I suppose that is what it is for. Q. And this engine you saw lying there was full up with steam? A. Yes, sir; the steam was up and popping off. \* \* \* Q. Was you looking at that engine at the time of the explosion? A. No, sir; I had come out of the door of the ice car, and we had one block too many, and was putting it back, and looked out and seen the engine up there, and before I got the ice back the explosion occurred. \* \* \* Q. It went on one of the tracks toward the Hackney building? A. Yes; on toward the turntable. Q. It is one of these tracks toward the Hackney building? A. Yes, yes; it is the track that goes toward the Hackney building, and this is the one that goes toward the turntable. Q. And this engine was pulling south and emitting a great deal of smoke? A. Yes; you could see it was coming south. Q. And when you got there it had backed out on this track, and was popping off when you got there? A. Yes, sir. Q. And the man said, 'It is all over?' A. Yes."

W. S. Harkness, manager of the Jellico Heat & Power Company, testified as follows: "Q. State whether or not there was another engine had been switching cars just before that explosion. A. I could not say whether it had been switching or not. Immediately afterwards I saw the smoke near the Commercial Hotel, and another engine hitched on my car of ice and brought it up. (Witness had been loading a car with ice a few hundred yards south of the railroad yard.) \* \* \* Q. When you got to this crossing at the Commercial Hotel, where was that engine located, if you know? A. I come up on the switch engine at a point about the letter E, I should judge about 100 feet, or possibly 150 feet, from the road crossing near the Commercial Hotel, and north of the railroad crossing. This engine was backing, and the car of ice was attached to the head of the engine, and the engine was backing, and I was on the engineer's side, and I got off and came around the tender, and there was a railroad man—looked to me like an engineer of the switching crew—and he said, 'We have done something.' Do not remember what the exact words were. And we said, 'What is the

matter?' and he said, 'That car of dynamite is blown up.' There was an engine standing on the turntable track, and the Daisy track are side by side. There was an engine standing on the turntable track. Q. Did this man who come across there come from this engine? A. He was coming from this point on the Harkness [Hackney] track. \* \* \* Q. When did you notice the smoke of what you took to be an engine up in the yard? A. When I come out and looked to see what the trouble was. Q. Where was the engine at that time? A. Seemed to me to be alongside of the Commercial Hotel. Q. How far is the Commercial Hotel from where you were? A. I could not say, but I should judge, taking it in city blocks, it would be about four blocks."

Geo. Henderson testified as follows: "Q. Tell the jury what you know, and what your opportunities were for knowing. A. I saw the engine switching up in the south end of the yard there, and give the cars a kick, and they came right on down and struck that box car that was standing there, that exploded, and when the cars came together there was a flash of lightning run out, and the thing went off." (See, also, the quotation heretofore copied from his testimony.)

Mrs. Nettie Murphy testified as follows: "Q. Did you notice anything going on in the yard previous to the explosion? A. I noticed an engine switching there. Q. How long before the explosion? A. Just a few minutes. Q. Where was the engine when you saw it? A. Up above the depot, towards the Commercial House. Q. South of the depot? A. Yes, sir. Q. What was it doing? A. Setting some cars in. \* \* \* Q. What did you see the engine doing? A. I happened to look out. The engine was making an awful noise. They were setting them in here (indicating). They set them, and they run back. The engine run south. My little boy was with me in the kitchen, and I just turned around and picked up the stove hook, and I heard it hit the other car, and the explosion went off."

Scott Oaks testified as follows: "Q. Where were you at the time of the explosion, at Jellico in September last? A. I was between the depot and the Commercial Hotel—what is known as the 'Mountain Home Hotel' now. Q. State whether or not you saw any switching in the yards just prior to the explosion. A. Yes, sir; I saw an engine south of the depot doing some switching over on the right-hand tracks as I was going south, up towards the Commercial Hotel. Q. Which way was that engine headed—the nose of it, the cowcatcher? A. It was headed south, towards Knoxville from Jellico. Q. How long, Mr. Oaks, was that before the explosion? A. Well, it was between a minute and two minutes; maybe three minutes. I don't know exactly. Q. Do you know where the dynamite car was that exploded? A. No, sir; nothing more than I know where the hole was after the explosion. Q. Do you know

where the hole was? A. Yes, sir. Q. Well, from that evidence as to where it was, where were those cars—in what direction was those cars from this car of dynamite, where they kicked in there? A. They were going towards that hole. Q. State whether or not they were going slow or fast after they were kicked. A. They were going fast."

Jack Burns, superintendent of the Proctor coal mines, testified as follows: "Q. Where was that engine? A. It sounded down there by the depot. I couldn't tell how close. The Jellico Grocery building was between me and the car. Q. How could you tell that the engine was there? A. By hearing it. Q. By hearing it? A. Yes, sir. Q. And how long was that before, and when was that with reference to the time of, the explosion? A. I will say a minute or a minute and a half. There was enough time for me to walk across the street. I started down through the yard toward the railroad when the explosion occurred. Q. How far did you walk, Mr. Burns? A. Oh, I guess 50 or 60 feet, or maybe 75 feet; say 75 feet."

E. L. Grimes stated that he waited for an engine to leave the crossing, so that he could go to his home near the Commercial Hotel, on the west side of the railroad; that as soon as the engine cleared the crossing he walked to his house, and within a few minutes the explosion occurred.

S. S. Trammell testified that, about one minute after the explosion, he saw an engine with steam up in the south end of the yard, near the Commercial Hotel. Also see the quotations from the testimony of Fred Densmore, Joseph Phillips, James Powers, William Lovitt, A. B. Botts, and M. L. Lloyd.

We find that appellee produced 14 witnesses, some of whom saw the collision and the explosion, and the others saw cars kicked in the direction of the car loaded with the dynamite and nitroglycerin a moment or two before the explosion. Appellee also introduced 18 witnesses who saw an engine switching in the south end of the yard, immediately before and after the explosion, and at a place from which it could have shunted the cars and caused the explosion.

Appellants' position, in short, is that all these witnesses were in error, for the reason that, first, no engine was at the place or in a position to have kicked cars against the car loaded with dynamite and nitroglycerin; second, if an engine had been in such a position, it could not have done so, for there were other cars upon the track between it and the car containing the dynamite and nitroglycerin. Appellants contend that the explosion was caused by one Walter Rogers shooting into the car with a 22 rifle. We will quote the testimony on these three propositions in the order they are stated.

Appellants' train dispatcher, located in Knoxville, Tenn., testified from the train sheets that he had before him, and which were made by him from reports by telegram

as to arrival and departure of trains in and from Jellico on the morning of the 21st of September, 1906, the day of the explosion, as follows: "Passenger engine, No. 1784, left at 6:15 a. m. Freight engine, No. 680, left at 7:35 a. m. Freight engine, No. 686, arrived at 7:35 a. m. Switch engine, No. 277, no time given. Doug's engine, no time given. Show engine, No. 111, no time given. Proctor Coal Company's engine, in and about yard all the time."

The evidence shows that neither engines Nos. 1784, 680, 277, 111, Doug's engine, nor the Proctor Coal Company's engine, was in the yard at the time of the explosion, or, if there, were not in a position to have kicked cars against the car containing the dynamite and nitroglycerin. This eliminates all the engines reported by the train dispatcher, except engine No. 686, which brought into Jellico two freight cars, according to the conductor, or three, according to the dispatcher from his train sheet. This engine, as stated, arrived in Jellico at 7:35, as per train sheet, or at 7:40, according to the conductor's register at depot in Jellico.

W. F. Robertson, who at the time of the explosion was agent for the Southern and the Louisville & Nashville Railroad Companies, stated that engine No. 686 arrived in Jellico at 7:35 with two loaded cars.

J. W. Cook testified as follows: "Q. Did you see any immediately afterwards? Did you see 686? A. Well, yes; but it was over there. Q. Where was it? A. It was on the pit—cinder pit. Q. Was that engine over there at the time you were looking around at these cars being located there, before the explosion—686, did you see it moving around in there anywhere? A. No, sir; I did see it moving over there. I seen it on the main line before the explosion. Q. You saw it on the main line? A. Yes, sir. Q. That was as it came up? Tell what 686 was doing. A. It just came up from down in the south end of the yard. Q. Coming from towards Knoxville? A. Yes, sir; up the main line with the engine and cab. I was on the platform. Q. Do you know where it had left its cars? A. No, sir. Q. Now the engine and cab— A. Came on up the main line and passed the depot, and I don't know where it went after that until after the explosion. Q. After the explosion you saw it over there? A. Yes, sir. Q. Could it have got over there after the explosion? Could it have gone up there, and passed this hole and debris and all, after the explosion? A. No, sir; the tracks were all torn up. Q. That shows you, don't it, that it must have gone before the explosion? A. Yes, sir. Q. It was headed toward Knoxville? A. I don't know. I never noticed. Q. It came along there, this engine and the cab, and you don't know what it had done with its cars? A. No, sir. Q. It had come from Knoxville, hadn't it? A. Yes, sir. Q. And had dropped its cars somewhere, and came along up here, and you saw it coming up this

way? A. Yes, sir. Q. After the explosion you saw it down here? A. Yes, sir. Q. And you say that it couldn't have got there after the explosion? A. I don't see how it could. Q. Unless they carried it in a meal bag? A. Yes, sir."

W. O. Greer, night hostler in the railroad yard, testified as follows: "Q. Where was 686 when you saw it next time? A. 686? I had gotten about half way home, and I heard the blower start, and I looked and saw it in the pit. Q. What is the blower? A. It is something we use to give it draft to clean the fire quick, to keep the smoke from coming out of the door. Q. And you looked, and where was it standing? A. It was standing on the pit. I could see from where I was. Q. Was there any explosion up to that time? Had anything occurred down here at all? A. No, sir. Q. And then you saw it again up here with the blower? A. Yes, sir. Q. Steam, etc., going up high? A. He was cleaning the fire. Q. How would that be? How would he have to have gone to that place, from the time you left him and started home to go to bed? A. There was only one way to come down the main track, and that was to come north down the main track and head in on the pit track. There is only one way to get there." The witness stated that immediately after 680 left the yard he walked about 200 yards to his room, pulled off his shoes, and at that moment the explosion occurred.

W. D. Stanfill, the day hostler in the yard, after stating that he took charge of engine No. 686 upon its arrival in the south end of the yard, and took it to the north end and placed it on the ash pit, testified as follows: "Q. Where were you at the time of the explosion? A. I was down on the pit cleaning my engine. Q. You were down on the pit cleaning your engine? A. Beginning to shake the grates on the engine."

L. P. Smith testified as follows: "Q. Did you see any other engine come into the yard after the switch engine had gone south (meaning engine 277)? A. Yes, sir; one of them 600's come in. Q. Do you know what become of that? A. Why, they came with the cars in front of it, and the caboose, and put it on one of those back tracks in there. Then they went back towards the south end and came out on the main line, and went up to the north end of the track, and from there went to the ash pit. Q. Did you see any train go out of Jellico with a 600 class engine about then? A. Yes, sir; after Stanfill had pulled in with his engine on the main line, after getting out south, why there was another engine there made up a train with the caboose went out. Q. Another train with a 600 engine went out? A. Yes, sir. Q. How long was that before the explosion? A. Which one was that? Q. The one with the 600 engine that went off after the one that Stanfill took charge of? A. I couldn't say, sir, exactly what time it was.

I never paid particular attention to the matter, you understand; but it was some considerable time yet. Q. It passed out of your view there? A. Yes. Mr. Fowler: Yes, of course. By Mr. Smith: Q. Did you see the passenger train pull out—the L. & N. passenger train? A. No, sir; that was at the depot, you see, and I was about 75 yards from the depot, south of there. Q. Was there any switching being done in the yards there after those trains left? A. No, sir; none that I know of, not on the south end."

Andrew Kimbrough, who was unloading coal from a wagon into a car located on the Daisy track, for L. P. Smith, for about 12 minutes before the explosion, testified as follows: "Q. State whether or not any cars or engines were moving in the south end of the yard, or doing any switching, just before the explosion, or while you were on that wagon unloading the coal. A. Well, there wasn't any whilst I was unloading. There wasn't any moving at all. There was an engine went out just as I was coming up to the railroad. Q. What kind of an engine was that? A. It was one of these 600's. Q. Was it attached to a train? A. Yes, sir. Q. Which way was the engine going? A. It was going towards Knoxville."

J. B. Montgomery, a clerk in the station in Jellico, testified as follows: "Q. And you got over there in this seat before the explosion? A. Yes, sir; when I came down stairs the L. & N. passenger train was just ready to leave. Q. Just ready to leave? A. Yes, sir; the engine was blowing very hard, and harder than I thought I had ever heard it, and that attracted my attention, and I looked down; and after I got over there, when I got to these two tracks—the force of habit makes me look both ways to see if an engine is moving or cars moving, and I looked up towards the turntable, and I saw an engine standing on the ash pit, and then right over next to the ash pit another engine, and the L. & N. engine just ready to go out, are the only engines I saw whatever at all. I got across and went to sit down on the seat, and the explosion took place, and struck me, and knocked me out. Q. Do you remember what engine that was over the cinder pit? A. No, sir; I don't remember. Q. Do you know whether it was a Southern engine or an L. & N. engine? A. A Southern engine; I don't know what number. Q. Did you notice whether it was one of the large engines or the small ones? A. I didn't notice the number at all."

G. W. Montgomery testified as follows: "Q. In going from the hotel down to the depot, would you pass by an ash pit there where engines are cleaned out? A. Yes, sir; I did. Q. State whether or not you saw an engine on the ash pit. A. I did. Q. Do you know what kind of an engine it was? A. I do not. Q. Do you know whether it was a Southern engine? A. I just don't know."

C. K. Patterson stated that he went to the



station at 6:20 a. m. on the morning of the explosion, and while there saw two box cars standing on the tank track, and continued as follows: "Q. What, if anything, was next to them (the box cars) as they stood there on the tank track? A. There was some coal cars. Q. Next to them? A. Yes, sir. Q. In your best judgment how many of those coal cars were standing next to these two box cars? A. I would have to guess at it. I didn't count them. I guess there were seven or eight or ten of them. Q. Seven or eight or ten, somewhere along there? A. Yes, sir. Q. Do you remember who was with you, Mr. Patterson? A. Standing in front of the depot? Q. Yes, sir; if you remember anybody that was there? A. Engineer Witherspoon was there. Q. Engineer Witherspoon? A. Yes, sir. Q. What engine was he handling? A. 686. Q. Before the explosion did you see his engine, 686? A. Yes, sir. Q. Tell the jury where that was. A. Standing back of the depot on the cinder pit track. \* \* \* Q. That had nothing to do with it. Was this 686 there after the explosion, just where it was before? A. Yes, sir. Q. Could it have got there, after that explosion, on account of the tracks being torn up? A. No, sir; it could not. Q. Where was the 111, still there? A. Yes, sir. Q. Was there any other engine there in that yard? A. I didn't see any other engine."

J. J. Roach testified as follows: "Q. Where was it (meaning engine 686) the last time you saw it? A. It was on the pit after the explosion. Q. You don't know, of course, how it got on the pit? A. No, sir. Q. You know this—that it must have got to the pit before the explosion? A. It couldn't have got there no other way, because you can't take one over the turntable, and the tracks were all torn up up here, and plumb gone. \* \* \* Q. How long after the explosion (meaning when he saw the engine on the ash pit)? A. I guess it was about 10 minutes; something like 10 or 15. \* \* \* Q. Couldn't they take it around over the turntable? A. No, sir; not a 600. You couldn't turn a 600 engine on that turntable in a month. Q. You couldn't turn a 600 engine on that turntable in a month? A. No, sir. Q. Impossible, isn't it? A. Very near it. Q. Isn't it impossible to turn one of those 600 engines on that turntable? A. The L. & N. won't allow you to turn one of them on there; no, sir."

S. A. McKinney, the conductor who was on 686, after stating that he placed the cars he brought into Jellico on the middle track, and that he went to the depot to register, said: "The brakeman took the engine around down the main line to the pit."

J. A. Witherspoon, the engineer on engine No. 686, stated that he placed his loaded cars on the side track, and testified as follows: "Q. Now, then, what became of your engine? A. The hostler took her around, and went down the main line, and put her on the pit. Q. What hostler was it? A. Mr. Stanfill.

\* \* \* Q. Did you see 686 after it got around on the pit? A. Yes, sir; I saw it on the pit. Q. Where were you when you saw 686 on the pit; that is, down here? A. I was standing up in front of the depot, out there about the tracks somewhere, when the explosion happened."

J. R. Swartzman, fireman on engine No. 686, stated that he saw it on the ash pit before and after the explosion.

L. A. Troutman, night watchman in the yard, stated that he did not know the numbers of the large engines, and continued as follows: "Q. It (meaning an engine of the 600 class) was standing there after the explosion? A. It was standing on the ash pit when I came down to the yard immediately after the explosion; I suppose in 20 or 25 minutes. Q. It was standing there? A. Yes, sir. Q. If it had come up from towards Newcomb, how must it have done to have gotten there? A. Well, if it had gone in from the north end of the yard, it would have had to have gone in before the explosion. Q. Why? A. Because the tracks were torn up on the north end, so it couldn't have got in over them after the explosion. It would have had to have gone in before the explosion. Q. You saw it there after the explosion? A. After the explosion; yes, sir. Q. Did those big, heavy engines use that turntable? A. They used it for a while; but it was against instructions to put those heavy engines on that table any more. Q. For how long? A. It had been a rule for probably two or three months. Q. For two or three months? A. Yes, sir."

J. B. Douglass, the conductor on the passenger train that started out immediately before the explosion, stated that when he went from town to his train he passed two engines in the east part of the yard, and continued as follows: "Q. Tell the jury whether or not you saw any cars on either of these tracks as you went down. A. I don't remember seeing any cars. I seen two engines. Q. Engines, I mean. What engines were they? A. 111 and 686. Q. What company? A. One was a Southern and one was an L. & N. engine. Q. Which was the Southern? A. 686. Q. Where was that standing? A. That was standing over that cinder pit, or near that point somewhere. \* \* \* Q. You were in a hurry to get down there? A. Yes sir. Q. And you rushed right down by this engine, and stopped, and looked at the number on it? A. No, sir; I didn't stop. Q. How did you come to look at the number? A. I looked at it afterwards as I came up, in a few seconds after the explosion. \* \* \* Q. When you started home to your family, you noticed the number of that engine? A. As I went down I noticed it. Q. Didn't you say a while ago that you didn't notice the number until after the explosion? A. I don't know. I didn't pay much attention to it."

L. P. Paggett, conductor on Doug's pas-

senger train, testified with reference to a Southern engine as follows: "There came a Southern engine backing down the track, and I remarked to him (Mr. Cook), 'They are going to cut us off,' and he hurried them up, and he followed them down the track and threw the switch, and by that time we were on the main—our train—coming right back down the main. Q. You were not with that train at that time? A. No, sir; I was standing with him at that time, and he ran out and threw the switch himself, to put his engine on the cinder pit."

Harrison James, a track repairer in the yards, said that he saw two engines at or near the ash pit about 8 o'clock on the morning of the explosion.

W. D. Cozett, who was at the time of the explosion conductor on a train that took a circus into Jellico about 7 o'clock on the morning of the explosion, and who is now assistant master of trains in the yard, stated that he saw and passed a Southern engine on the ash pit as he went to the depot to register, and continued as follows: "Q. Well, which way were you facing at the time the explosion occurred? A. Facing east. Q. With your back to the railroad? A. Yes, sir. Q. At that time tell the jury whether or not you saw this Southern engine standing on the pit track. A. Yes, sir; it was there. Q. How far was it standing from your engine, 111? A. I should think it was about 25 or 30 feet. Q. Do you know the number of that Southern engine? A. No, sir. Q. You didn't notice it? A. I didn't notice it. Q. Tell the jury whether or not you heard any rumbling of cars, or rolling of cars, in the yard just before the accident. A. No, sir; I didn't notice any. Q. You didn't notice any? Do you know whether or not there were any engines down in the Southern part of the yard at that time? A. I couldn't say. No, sir; I don't know."

The following is the testimony introduced by appellants with reference to there being other cars upon the track that the car loaded with dynamite and nitroglycerin was on, which, they claim, prevented the kicking of cars against it:

C. K. Patterson, a conductor on the Southern division of the Clear Fork road, testified as follows: "Q. Now, as you stood there, Captain, it was all open in front of you, you say, and there were some coal cars. First there was a flat car, a box car, and then another box car, and then some six to ten, you don't know how many, coal cars, and then there was an open place. Were there any cars farther up on that track toward the Commercial? A. Do you mean south or north? Q. I mean north. There were two box cars, and from six to ten coal cars, and then you say right in front of the depot there was an open place? A. Yes, sir. Q. Now, at the other end, down at the south end of that track, were there any cars? A. There

were 12 or 14 cars down— Q. In that direction? A. Yes, sir."

C. F. Linger testified as follows: "Q. How many box cars were down there that you noticed, if you did notice? A. There were two on that track. Q. And some coal cars? A. Yes, sir; there were two anyway, and might have been three. Q. There were two, and might have been three? A. Yes, sir. Q. Way on down there, on that same track, do you recollect whether there were any more coal cars? A. I don't remember seeing any more coal cars. There were two or three more box cars, as well as I remember, still on farther south on the same track."

L. A. Troutman testified that about 25 minutes after the explosion he saw two or three cars on the track next to where the explosion occurred, then a space of some distance, then four or five more cars, but did not notice any other cars farther south on the track. Another witness, a lumber dealer, whose place of business was west of the yard, stated that he went over the yard early in the morning before the explosion looking for a car of lumber that he had received a bill for; that he noticed the car loaded with the dynamite and nitroglycerin, as he thought, with two or three others coupled to it; that the best of his recollection was that he saw two or three cars in the south end of the yard.

J. D. Hayden, roadmaster for the Louisville & Nashville, and who resided in Knoxville, Tenn., testified that he arrived in Jellico on the morning of the explosion between 10:45 and 11 o'clock; that he found two steel cars near the place of the explosion, one of which was badly damaged; and that he found ten other cars situated on the same track at different points.

W. F. Robertson, station agent in Jellico, testified, in substance, to the same facts.

Appellants introduced a photograph of the tank track, showing some cars on it. The picture was taken by S. S. Douglas about the middle of the afternoon of the day of the explosion.

As to the third proposition, to wit, that the dynamite and nitroglycerin was caused to explode by Walter Rogers shooting into it with a 22 rifle, all the witnesses who testified upon the subject for either party testified that the car containing the explosives was situated north of the station, on the west side of the main line; that Walter Rogers and John Swafford were at a point west of the main line, near to it, and fired two or three shots at a small contents card tacked on the door of the car about midway between the floor and the roof of the car; that this occurred some 12 or 15 minutes before the explosion; that just before the explosion Rogers, Cook, the master mechanic in the yard, and Joe Sellers, engineer for the Proctor Coal Company, were seen talking together on the east side of the main line at a point from

25 to 50 feet from the car containing the explosives; the witnesses varying as to the distance. There was no testimony showing that there was but one shot fired after the shots above referred to. The only witnesses testifying upon that subject were John Swafford, introduced by appellants, and J. A. Carson, introduced by appellee.

Swafford testified as follows: "Q. State whether or not you saw any shots fired then as you passed them, or soon after you passed them, as you were pulling out. A. As it backed down or pulled out? Q. As you were pulling out? A. Yes, sir. Q. How many shots did you hear fired? A. I saw one. Q. Who fired that? A. Walter Rogers. Q. How far was he then from the car? A. He was between the main track and the car. He was about the same place. Q. He was between the main track and the car? A. He was between the main track and the car, and I don't know exactly what point he was at; but he was between the main track and the car. Q. How far did that put him from the car? A. It put him anywhere from 10 to 20 feet. Q. Where was Cook? A. He was right there beside. All three were standing there side by side. Q. Did you see more than one shot fired? A. No, sir. Q. In what direction did he point his gun, with reference to the car, toward or away from it? A. Toward it. Q. In what direction was his face turned? A. Right toward the car. Q. How long after that before the explosion happened? A. Anywhere from one-half a minute to a minute and a half, something like that; a minute anyway. Q. Where were you? A. I was on the rear platform of the train. Q. As your train pulled out pretty fast? A. Yes, sir. \* \* \* Q. In what position did Cook have that gun, holding it, when you last noticed him—Rogers I mean? A. He had it something like this" (holding gun with barrel pointing slightly upward). Then he explained that the gun would be held in that position to reload it.

J. A. Carson, after stating that he saw Rogers, Cook, and Sellers on the east side of the main track immediately before the explosion, that Rogers shot at something under the Jung Brewing Company's warehouse, and that all three of them squatted and appeared to be looking under the brewery, continued as follows: "Q. Now, give the best impression you can, Mr. Carson, to the jury, how many minutes' time, about how long it was, from the time they shot under the brewery—seemed like shooting under the brewery—till the explosion? A. Well, it was about, it seemed to me like— Well, I just turned around there when Walter Rogers shot. I turned around there, and looked and seed him, and seed Sellers. He went around one way and Cook the other. I turned around, and they all squatted down there, and I just turned back, and went to cleaning my fish, and just about that time it went off."

H. L. Hall stated that he had made a test of the strength of a 22 rifle similar to the one used by Rogers, and continued as follows: "Q. I wish to know, Judge Hall, as to what depth or penetration your gun will— Have you tried to see how far it will go into wood? A. This 22 rifle? Q. Your little gun, the sister of this. No; this is yours? A. Yes, sir. Q. Now, how far will that drive one of these Union Metallic bullets into the wood? Have you ever tried it? A. Yes, sir; I tried over there at Knoxville shooting through a car door, and a box of dynamite was shipped in was setting behind the door. Q. Was that a standard Pennsylvania dynamite car door? A. They claimed that it was; yes, sir. They claimed that it was a Pennsylvania car door. Q. Judge Hall, you shot through what they claimed to be a Pennsylvania car door? A. Yes, sir. Q. And beyond that you say was a high explosive, dangerous dynamite box? A. Yes, sir. Q. How far did you stand away with it? A. Twenty-eight feet. Q. Was that your gun? A. Yes, sir. Q. With Union Metallic cartridges? A. Three of them Union Metallic and three of them Peters'. Q. You tried both sorts? A. Yes, sir. Q. Did the first of them go through? A. Yes, sir; all of them went through the door and through the box. Q. Is that the box? Look at that (handing witness box which had been exhibited to the jury). A. It looks like it. It is marked just like we marked it over there where we were shooting at it. Q. Show the jury just where those bullets went through. A. You can see where they went through and where they come out from the way it looks there. Q. Where did they go in? A. They have been turned around, some went in one way and some the other, and some through the end. Q. You tried it both ways? A. Yes, sir."

Appellee introduced the following testimony, which rebuts that of appellants upon this point:

Jack Burns testified as to the construction of a dynamite car, stating that the outside of the car is made of hardwood one inch thick fastened to two by four upright braces; that on the inside, and nailed to the braces, is a wainscoting of hardwood one inch thick, and four or five feet high, which would extend above the two layers of dynamite and nitroglycerin. The sides and ends of the boxes containing the explosives were each about one inch thick, and the boxes were set four or five inches from the wainscoting. So the ball fired from the 22 rifle, before it could have caused the explosion, would have had to pass through hardwood an inch thick, then a space, then through another piece of hardwood an inch thick, then through another space of four or five inches, and then through the side or end of one of the boxes containing one of the explosives, which was also an inch thick. The witness stated that a 22 rifle did not have sufficient power to shoot a ball through these.

The witness S. S. Trammell testified that he made a test of the strength of a 22 rifle, such as was used by Rogers, by firing six shots at a pine box, each side of which was seven-eighths of an inch thick, and that the balls went through one side, and made a slight dent in the other, and dropped to the ground.

The following testimony was introduced by appellee to show that no cars were on the track, south of the car that exploded, up as far as the Commercial Hotel, except the pig iron car and the two big steel cars, which appellee claims were shunted against it:

W. S. Harkness testified as follows: "Q. Then what did you do after that? A. I went to where the explosion occurred. Q. Did you see any cars that were torn to pieces? A. Yes, sir; I saw three cars, that I remember, right up against the exploded hole on the same track. Q. What kind of a car was nearest the place of explosion? A. Pig iron and pieces of cars, and the next was an empty steel car, with the end driven in. Q. How many cars from there south on the same track? A. There were no cars on that track from the Commercial Hotel to the point of explosion, except the cars standing at that place, and they were three in number, a steel car, a box, and another. \* \* \* Q. How many cars did you see near the place of explosion on the same track? A. I think there were three. Q. Did you look down the track to see if there were more than three? A. Yes; I looked down the track and could still see the engine. Q. Down the track that the dynamite car was on? A. Yes, sir; standing down there, still standing down there, with the one that brought us from the ice factory."

Joseph Giles, fireman on the Proctor Coal Company's engine, stated that about 6:35 or 6:40 o'clock on the morning of the explosion he backed the engine in from the north end of the yard, coupled onto the car containing the explosives, pulled it out with nine empty coal gons, which were coupled to it, moved north, cut the nine gons off, and kicked them onto the Proctor track, and pushed the car containing the dynamite and nitroglycerin and probably another back on the track where he found them, and that there were no other cars on that track at that time, and continued, in answer to a question as to whether or not there were any cars on the tank track, as follows: "A. There was nothing; no, sir, I went up the tank track, and stopped right here, and hopped off of my engine, and went off over here, and hit the tank track, and went across over here, and went to the show cars. Q. Was that before the explosion? A. Yes, sir; 15 or 20 minutes before the explosion. Q. And you say there was nothing on that tank track before that? A. No, sir; nothing at all. Q. You say there was nothing here? A. I won't say there was nothing on the north end. I went up the south end."

Jack Burns testified that the tank track was clear from the car containing the explosives to the south end of the yard before the explosion; that after the explosion there were remains of a box car and two steel cars near where the explosion occurred.

Jack Kincaid, after stating that the car of explosives was 300 or 400 yards from the depot, testified as follows: "Q. Now, were there any cars between the depot and this dynamite car before these two coal cars loaded with pig iron came down against the dynamite car? A. I did not see any. There was not any on that track but the two coal cars."

It thus appears that the evidence on all three of the propositions is very conflicting. It is contended that a camera cannot "lie," and that therefore the photograph showing cars at intervals on the tank track after the explosion is conclusive of the fact that the cars were there, and that they rendered it impossible to shunt cars onto that track and cause the explosion. It must be remembered that this picture was not taken until about the middle of the afternoon, after the explosion at 8 o'clock in the morning; that there had been, during the time intervening, three engines in the yard, either of which, in its regular course of duty, could have placed these cars there; nor is it shown, positively, that the car containing the explosives was on the tank track when the explosion occurred. The engineer who coupled onto the car last at about 6:30 o'clock says he either placed it back on the tank track, or on the middle track; but he was not positive which one. It is contended, however, that it must have been on the tank track, as it was at the center of the hole made by the explosion. This is a strong reason for presuming that it occupied that position, but it is not conclusive. There is no accounting for the peculiar things that may be made to appear from the explosion of 400 boxes of dynamite and 50 boxes of nitroglycerin when contained in a car. If the car had been of equal strength on each side and end, and the explosion of the substances in all the boxes had occurred at the same time, then it would be almost certain that the car set above the center of the hole; but if the sides and ends of the car were of unequal strength, and the explosion of all the boxes had not occurred at the same instant, then it is barely possible that the center of the hole would not be exactly under the place where the car set.

Nor was it impossible for the explosion to have been produced by kicking of cars against it, even though there were other cars on the same track. The yard is slightly downgrade from the south end to near the car containing the explosives. It was not impossible to have kicked with an engine a car or cars in the south end of the yard against the intervening car or cars on the line, which would cause it to start down-

grade and the first to stop, and so on until the car nearest the car loaded with the dynamite and nitroglycerin would be made to collide with it and produce the explosion. This can be understood by all who have seen one solid body roll against another and strike on center. The first will instantly stop and the other start. If the cars were upon the track as claimed by appellants, there is no other way to account for the collision. It was the peculiar province of the jury to hear and weigh the evidence and determine the truth of the matter. In finding for appellee they must have believed from the evidence that there were no cars on the south end of the track in the way of shunting cars against it, or that they were shunted in the manner above stated. The jury was compelled to come to one of these conclusions, or say that they did not believe the evidence of 14 "eyewitnesses."

The jury heard and determined the evidence on the question of the rifle shot causing the explosion against appellants' contention, and, in our opinion, their finding was not against the weight of the evidence, for it rather preponderates in appellee's favor. Of course, the last shot that Swafford saw Rogers fire, which was about  $1\frac{1}{2}$  minutes before the explosion, did not produce the explosion. Carson says that this shot was fired at some object under the brewery. It is also exceedingly doubtful whether the little target gun had sufficient penetrating power to reach the dynamite and nitroglycerin and cause them to explode. Appellants would have this court say the verdict of the jury is flagrantly against the evidence, when it is founded upon the testimony of 14 "eyewitnesses," corroborated by at least that many more, who testified that the explosion was caused by the shunting of cars against the car loaded with the dynamite and nitroglycerin, because witness Swafford testified that the last he saw of Rogers he had his target gun in a position to load it, that therefore it is inevitable that he loaded it and fired at the car, and that the ball penetrated to the dynamite or nitroglycerin and produced the explosion, when the preponderance of the proof shows that it could not have done so.

This leaves only appellants' first proposition to be considered, which is that there was no engine in the south end of the yard that could have kicked cars against the car loaded with the explosives. As will be seen from the testimony referred to, appellants introduced much testimony tending to support their position that engine No. 686 was, at the time of the explosion, upon the ash pit track which is on the east side of the yard. As conclusive evidence that it was there before the explosion, it was shown that the ash pit track was torn up by the explosion at a point between the ash pit and the north end, which rendered it impossible, after the explosion, to place this engine upon the ash pit; there being a turntable between the south end of the

track and the ash pit which was too weak to hold one of these large engines. After appellants had progressed with their evidence and this theory for a time, it was developed that this engine, No. 686, had the day of the explosion, about 1 p. m., been taken out over this turntable. After this it was conceded that this turntable would hold the large engines, but contended that it was a great deal of trouble to get one of them across it.

Appellants' contention is that engine No. 686 arrived, according to the train sheet, at 7:35 o'clock on the morning of the explosion, and that the explosion occurred at 7:47 o'clock, thus giving the engine 12 minutes to place its loaded cars on the sidings, recouple to its caboose, and go to the north end of the yard, throw a switch, and run back to the ash pit. It may be true that the engine would have had time to do these things if the train sheets were correct; but it must be remembered that they are no more infallible than the men who made them. See the opinion of this Court by Judge Hobson in the case of Louisville, H. & St. L. R. Co. v. Hall, 94 S. W. 26. In that case appellee won in the lower court on the time of his train as given by appellant's train sheets, but lost in this court because appellant showed by the testimony of the train crew that the time given in the train sheets was wrong. There must be some error as to time of arrival of No. 686, or as to the time of the explosion, or some engine not accounted for by the train dispatcher was in the south end of the yard, or 25 or 30 witnesses have sworn falsely. As before stated, the conductor's register, kept in the Jellico station, and which was made out by the conductor of 686, shows that that engine arrived in Jellico at 7:40 o'clock. This would give the engine only seven minutes to do the work required of it and get into the ash pit. Nor is it by any means certain that the explosion occurred at 7:47 o'clock. How easy for an error to occur as to this! The explosion wrecked the station and most all the town, killed many, wounded over 100, and dazed and rendered unconscious for a short time all others. Under such circumstances it is natural for one to forget to notice the time.

Under the instructions, the jury was compelled to believe from the evidence, before it could find for appellee, that the explosion was caused by an engine, not only kicking cars, but doing so with great, unusual, and unnecessary force, against the car containing the dynamite and nitroglycerin. The jury found in favor of appellee, and their verdict is abundantly supported by the evidence. It is true that there was much testimony introduced by appellants tending to contradict that of appellee; but the jury saw the witnesses, and their demeanor and appearance, and were in a much better position to arrive at a just conclusion than this court. The Constitution gave to the parties a right to a trial by a jury, and this court should not reverse the judgment, as the appellants had

a fair trial; no errors having been committed against them by the lower court. Many circumstances may be found in the 1,800 pages of evidence in this case which tend either to support or defeat the contentions of both appellee and appellants, and which we deem it unnecessary to refer to.

The case of *Howard v. Louisville Ry. Co.*, 105 S. W. 932, 32 Ky. Law Rep. 309, was one where appellant sued for damages for personal injuries. She alleged that appellee's servants started the car by giving it an unnecessary and violent jerk, which caused her injuries. She introduced three witnesses who sustained the allegations of her petition. Appellant did not introduce any direct evidence to the contrary; but the jury seemed to have disregarded the statement of her witnesses and found against her. In considering the case on appeal this court said: "In trials by jury it does not follow that because one or more witnesses testified positively concerning a fact, and there is no evidence to the contrary that the verdict must be flagrantly against the evidence. The number of witnesses who testify to a fact is not necessarily a controlling feature in determining its truth; neither does the fact that their evidence may not be contradicted by word of mouth compel its acceptance as true. The jury have the right to disregard the whole or any part of the testimony of any witness, and it is their province to give such weight to the evidence as in their judgment and discretion it is entitled to. In considering the weight to which evidence is entitled, and the credibility that shall be attached to the words of the witnesses, the jury may, and often do, take into consideration the demeanor, appearance, and the manner of the witness, and from these and other circumstances that come under their observation during the trial may conclude that the witness is not worthy of credit, or is not testifying to the truth, and disregard his entire testimony. We do not, of course, intimate that appellant or the witnesses who testified in her behalf were not telling the whole truth, but only express the opinion that the question of what weight, if any, shall be given to the testimony of a witness, is peculiarly within the province of the jury. The fact that neither appellant nor the persons in company with her made any complaint to the persons in charge of the car was a potent fact that no doubt largely influenced the finding of the jury. There is no evidence whatever indicating passion or prejudice on the part of the jury. Indeed, it is highly improbable that a jury should be biased in favor of the defendant in a suit against a corporation by a woman, or predisposed to return a verdict against her. But, whatever induced them in the face of this evidence to disregard it, we are not disposed to interfere with their conclusion. Every person who has had experience in the trial of jury cases knows that the court, the jury, as well as the

attorneys, give close attention to the manner of the witnesses while testifying, and their demeanor in the courthouse, and are sometimes more strongly influenced and impressed by appearances than they are by the words of the witnesses; and so it is that appellate courts, who do not see the witnesses, and have no opportunity of forming any conclusion from their appearance or conduct, are reluctant to interfere with the findings of those who do see them, and have the right to consider what they see, as well as what they hear, in making up their decision. A stronger impression may be made on the juror's mind by what he sees than by what he hears. A juror can see as well as hear, and has a right to use his eyes as well as his ears in making up his mind as to what weight, if any, shall be given the evidence of a witness."

This court has often enunciated this rule. This court was established for the purpose of seeing that parties have a legal trial, a trial according to legal principles, but not to weigh the evidence. That duty belongs to the jury, and this court should never disturb their verdict, when no errors have been committed by the court, except in extreme cases. We are of the opinion that there is sufficient testimony to support the judgment in this case; i. e., that the explosion resulted from the violent kicking of cars against the one containing the dynamite and nitroglycerin.

We are of the opinion, however, that the court erred to the prejudice of appellee in confining his right of recovery to that single issue. He should have, also, been permitted to recover if the jury believed from the evidence that appellants negligently placed this car, loaded with dynamite and nitroglycerin, in its yard in the city of Jellico, for the space of 11 hours, without taking any steps to guard it against intruders, trespassers, fun seekers, or the fickle-minded. The demands of commerce should be made subservient and held in check to some extent, at least, to the rights and lives of unsuspecting and innocent human beings. It appears to our minds that these propositions are self-evident. The mere statement of them impresses the mind that they are correct. There is abundant evidence in the record upon which to base such an instruction, and very much law to support it. The testimony shows that the car of explosives was placed in the yard at 8 o'clock p. m., and remained there until near 8 o'clock of the 21st. No person knew that it contained explosives, except the depot agent and the conductor, Yerkes, both of whom left the yard soon after the car was so placed. No guard or guards, or notice of any kind, was placed at or near the car to warn persons of the danger; indeed, no care of any kind was used to prevent an explosion. Appellants' own employes, without warning or notice of the danger, were permitted to couple to and move the car about the yard during the night. There was no card or poster placed on the east side of the

car showing that it contained explosives, except a little "contents" card. The proof was conflicting as to the other side and the two ends. Such absence of care in handling so dangerous a substance is certainly actionable negligence.

In early times a common carrier was not bound to receive for transportation dangerous articles, such as nitroglycerin, dynamite, and gunpowder, unless there was some statutory provision requiring it, and those who undertook to transport them did so at their own peril. 3 Wood on Common Carriers, § 113; 2 Rorer on Railroads, § 1231; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Lake Shore & M. S. R. Co. v. Perkins, 25 Mich. 329, 12 Am. Rep. 275. But on account of the demands of commerce, and the great necessity for the use of such articles in the development of this country, the rule has been relaxed in America. In 12 Am. & Eng. Ency. Law, p. 500, it is said: "According to the rule generally recognized in the United States, a person in the lawful possession or use of an apparatus or substance liable to explode is not responsible for damages resulting from its explosion to the person or property of another, unless there be some fault or negligence on his part. Perhaps in England the liability of one who keeps dangerous substances which explode and cause injury is not dependent upon his negligence." The author cites many cases to support the rule. It thus appears that if one handling explosives in this country takes the necessary precautions in endeavoring to save others from injury by the explosion of it, he will not be responsible in damages; but it appears that the rule is otherwise in England.

It is stated in 19 Cyc. p. 6, that the same degree of care is required of those transporting explosives or combustible oils as is exercised by merchants and those handling them, and many authorities are cited to sustain the rule. In the case of Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654, the court said that an individual has no more right to keep a magazine of powder upon his premises, which is dangerous, to the detriment of his neighbor, than he is authorized to engage in any other business which may occasion serious consequences. In the same case the court said that in Myers v. Malcolm, 6 Hill (N. Y.) 292, 41 Am. Dec. 744, it was held that the act of keeping a large quantity of gunpowder insufficiently secured near other buildings, thereby endangering the lives of persons residing in the vicinity, amounted to a public nuisance, and an action would lie for damages where an explosion occurred causing injury. In the case of Wilson v. Phoenix Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890, it was decided that the owner of a powder mill or nitroglycerin works was liable for all damages done to persons or property by the explosion of the plant, whether negligence was the cause of

the explosion or not, if it is so located that such an explosion is likely to involve injury to persons or property of third persons. In that case the court said: "Powder and nitroglycerin are commodities of essential, if not primary, importance, from their wide use in war and in the construction of railroads, roads, buildings, and other varied uses; and their manufacture is a business entirely respectable and indispensable. But that consideration is not all-controlling. That consideration is not alone to be regarded. The rights and safety of those not engaged in their manufacture must not be forgotten. They are agents of magical power and wrath. When the spark or touch of ignition meets them, their subtle force is awakened to instantaneous action—an action giving no warning, and so potent that almost in the twinkling of an eye, before thought of self-preservation can come, it wastes man and his home and his savings with irrepressible energy. Often the explosion comes from causes not discernible, which reasonable foresight or prudence cannot see. Valuable as are these giants as auxiliaries to man in his great works, they must be limited to places and bounds of safety."

The case of Ft. Worth & D. C. Ry. Co. v. Beauchamp, 95 Tex. 496, 68 S. W. 502, 58 L. R. A. 716, 93 Am. St. Rep. 864 is a case in point. In that case a car loaded with black and giant powder was delivered in the yard of appellant in the city of Bowie, Tex., and at a place upon the transfer switch in charge and under the control of appellant, the Ft. Worth Railroad Company. It was permitted to remain there until the morning of April 5th, when another car near it was set on fire, supposedly by a tramp, which caused the powder to explode and destroy the house of appellee, Beauchamp, which was situated about 800 yards distant. The lower court gave a statement of its finding of facts, in which it is said that the car containing the powder stood about the center of the switch and within a radius of one-fourth of a mile of some 40 residences, and within a radius of three-fourths of a mile of the greater portion of the residence and business portion of the city, the city having a population of about 2,600 people, with a public road running within a few feet, and with the main line of defendant within about 20 feet, and that of the Chicago, Rock Island & Texas Railway within about 200 feet, of where the car of powder was permitted to stand, and, further, that there was scheduled to pass this point, upon the two roads, 16 trains daily, besides extras. The lower court further found that defendant placed no guard or watch about the car of powder, that its contents were known to the agent, who received for the car, and that there was placarded upon the walls of the car the following, viz.: "High Explosives. Handle with Care." The Supreme Court of Texas, in passing upon these facts, said: "But a

nuisance may result from the negligent exercise of a right of performance of a duty with respect to one's own property or property in his charge. 1 Wood, Nuis. § 4, and notes. A nuisance to others may thus arise from the careless discharge by a common carrier of its duty in the transportation of such dangerous articles as are here in question. The right to carry them does not include the right to subject persons along the route to dangers from explosions for a longer time or in a greater degree than is reasonably necessary to the proper performance of the carrier's duty. This is an obvious deduction from plainest principles. If, therefore, the car was unnecessarily and unreasonably delayed at the place where it exploded, so as to subject plaintiff's property to such danger for a longer time than would have attended a transportation made with reasonable dispatch, such keeping of the car at that place was a nuisance. The case thus supposed would not differ essentially from those of other keepers of dangerous explosives; or if ordinary care was not exercised by the appellee in keeping and caring for the car, and the absence thereof gave rise to a degree of danger such as would have been avoided by the exercise of it, such negligence would make the presence of the car so negligently kept a nuisance." To the same effect is the case of *Henry v. Cleveland Ry. Co.* (C. C.) 67 Fed. 426.

In the case at bar the car containing the explosives was within 150 yards of the main portion of the city of Jellico. Many persons lived and performed labor all around the place it was located. It is proved, without contradiction, that within 20 feet of where the car stood was a common shooting ground, where persons shot at marks and turkeys for general amusement, which fact was known to appellants, and had been for years. It is conceded that no guard or watch was placed at or near the car, and that its contents were made known to appellants' depot agent in a moment or two after it was placed upon the track. It is virtually conceded that the car was not placarded on the east side with the words: "High Explosives. Handle with Care." However, the proof is conflicting as to whether there was any such card on the other side and ends. The proof showed that such cards were on each side and end when it left Emporium, Pa.; but some of them, at least, appeared to have been lost while the car was in transit. In *Thompson on Negligence*, vol. 1, § 759, it is said: "That the dangers to be apprehended in handling highly explosive substances is so great and obvious that a high degree of care should be taken to prevent them from falling into the hands of others." We understand the author to mean that strangers should not be allowed to have access to them; that they must be guarded and protected and safely kept. In 1 *Addison on Torts*, 511, it is said: "It appears to us that a man

who lives in a public place, along which persons have to pass a dangerous machine, which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character." It will be seen from these authorities that appellants are responsible for the damages resulting from the explosion, and it matters not what caused the explosion, if they failed to exercise care to prevent it.

The rules established by appellants, defining the precautions to be used in the transportation and care of explosives, contain the following: Subsection B of rule 23, in part, is as follows: "Conductors must frequently inspect such cars to see that the carding is intact. When any of these cards become detached or lost in transit, the conductor will give notice thereof on arrival at the next district terminal yard to the yardmaster, or other person in charge, who must attend at once to recarding the cars as required." Subsection C of the same rule is as follows: "At points where trains stop trainmen must examine cars carded as containing explosives and adjacent cars to see if they are in good condition and free from hot boxes or other defects liable to cause damage. If cars are set off short of destination from any cause, the conductor must notify the nearest agent, who must see that every precaution is taken to prevent accident. The conductor must also notify the superintendent from the first telegraph office." There is no pretense that these rules were complied with while the car was in the yard in Jellico. The destination of the car was a mining town about five miles from Jellico; and, from the proof, there was no precaution taken by any one to prevent the accident. In failing to take this precaution, appellants were guilty of negligence; for it is known by all men, who know anything upon the subject, that dynamite can be exploded by a jar, and that nitroglycerin is more sensitive than dynamite and extremely unstable and terribly explosive.

For these reasons, the judgment of the lower court is affirmed.

LASSING, J. (dissenting). George M. Adkins was killed by the explosion of dynamite in the railroad yards at Jellico, Ky., on the morning of September 21, 1906. The yards there are used by both the Louisville & Nashville Railroad and the Southern Railway; Jellico being the terminal of each road. A. C. Cox, administrator of said Adkins, sued both companies to recover for his death. He charges that the defendant companies, or one of them, negligently shunted a car against the car containing the dynamite with such force as to cause the dynamite to explode. Each of the companies denied liability, and a trial upon this issue resulted in a verdict in favor of the plaintiff for \$7,500. Many



reasons are assigned why the judgment should be reversed, chief of which is that the verdict is flagrantly against the evidence.

This car of dynamite had been shipped from Emporium, Pa., and arrived in the yards at Jellico, over the Southern Railroad, at 8:30 p. m. September 20th. It remained there overnight, and at 7:47 on the following morning the explosion occurred. Plaintiff proved by the testimony of several witnesses that they saw an engine shunt a car or cars against the car containing the dynamite, and that immediately or shortly thereafter the dynamite exploded. He also proved by several witnesses that they heard the noise of the impact when a car or cars were shunted against another car or cars, and that shortly thereafter the explosion followed. The defendants insist that explosion was not caused by the shunting of a car against the car of dynamite, but by a man named Rogers shooting into the car with a rifle. They proved by the testimony of several witnesses that this man and others had been shooting into the dynamite car before the explosion occurred, and that just immediately before the explosion he was seen to raise his rifle again as though to shoot. They also proved that a rifle of the make and caliber used by Rogers has sufficient penetrating force to go through a plank of similar material and thickness as the door of the car, and through a dynamite box, and explode the dynamite in the box. Several expert witnesses were introduced, who testified that dynamite, when properly packed, could not be exploded by shunting one car against another, unless the coupling of the car was broken and driven into the dynamite box, or, in other words, unless the force of the impact was great enough to wreck the car, and that even then, unless some metallic substance was driven violently into the dynamite, it would not explode; that they had seen dynamite cars wrecked, and no explosion occur. Defendants' testimony shows that the dynamite in this car had been carefully packed for shipment after the most approved fashion, and that as packed it was perfectly safe for shipment, and could not have been exploded by the ordinary and usual jar and jostling which a car would receive in being hauled over the road, or by other cars being shunted into the dynamite car with a less degree of force than that indicated. In its shipment from Emporium, Pa., to Jellico, this car had passed over the lines of the Pennsylvania, the Norfolk & Western, and the Southern Railroads, traversing the states of Pennsylvania, Virginia, and Tennessee. During the course of this journey it must necessarily have been hauled by different engines, and taken out of one train and put into another at least three or more times. There is no proof whatever that when it reached Jellico the car was not intact and in perfect condition. It was prop-

erly labeled, showing its contents. It appears that a part of this load of dynamite was to be taken out of the car at Jellico, and the remainder shipped on to another point; and this is the reason given for the car's remaining there in the yards overnight rather than being continued on to its destination.

Complaint is made because this load of highly explosive substances was brought into the yards and permitted to remain overnight there without being guarded. The trial judge was evidently of opinion that this act on the part of the company or companies was not, in itself, negligence; and in this conclusion I concur, for the proof shows that, as packed, the dynamite was perfectly safe for shipment. Besides, no amount of care on the part of the companies in the handling of the car could have prevented the explosion if it was produced by the rifle shot; and if it was not, the necessity for such care is wanting. As plaintiff's witnesses did not identify in any way the engine which they said shunted the car that did the damage, defendants undertook to show, from the location of every engine that had been in or about the yards within the hour just previous to the explosion, that it was impossible that a car could have been shunted against the dynamite car, as alleged. They also attempted to show, from the position of freight cars upon the track upon which the dynamite car was standing, that it would have been impossible for the explosion to have been produced in the way and manner in which the plaintiff claims it was. In order that the location of the engines and cars, as fixed by the various witnesses, may be understood, it becomes necessary to describe the yards and tracks at some length.

The yards at Jellico lie partly in Kentucky and partly in Tennessee. The northern part is in Kentucky, and the southern part in Tennessee. The Louisville & Nashville Railroad trains, in coming into and going from the yards, use the northern end, and the trains of the Southern Railway use the southern end. The surface is comparatively level, there being only a slight dip from either end of the yards toward the center. A car will stand upon any part of the tracks without the necessity of having the brakes applied. To the east of the depot are two tracks, on one of which is the "cinder pit." To the west of the depot there are seven tracks, and, naming these tracks, going west from the depot, we have, first, the house track; second, the main track; third, the middle track; fourth, the tank track; fifth, the side track; sixth, the sand track; and, seventh, and at some distance further west, the Proctor Coal spur track. The car containing the dynamite was on the tank track, not far from the Tennessee state line. From the testimony of all of the witnesses it is plain that, if a car was shunted into the dynamite car, it came from the south; and

this is made evident by the further fact that after the explosion no car or part of a car was found north of the spot where the car of dynamite stood. Defendants proved that just after the explosion there were four cars on the tank track immediately south of the hole made by the explosion of the dynamite car. Following the tank track south a distance of about 50 feet, there were six cars standing upon the tank track. Further south, and beyond the six cars, this track divides. On the eastern portion, which is in fact a continuation of the tank track proper, there was a space of 261 feet to one car, then 27 feet to four cars. On the western or spur branch of the tank track, there were three cars, none of which were joined together. That these cars on the tank track were located as claimed by defendants is abundantly proved by their witnesses, and not seriously contradicted by the testimony of the witnesses for the plaintiff.

It is argued with great earnestness for the defendants that the number and location of the cars on the tank track and its spur completely refute the testimony of plaintiff's witnesses as to what caused the explosion, for none of them say that there were more than 3 cars attached to the dynamite car, or that more than 3 cars were shunted into the dynamite car; whereas by actual count there were shown to be 15 cars on this track, south of the wrecked dynamite car, figuring those on the eastern end of the tank track, and 18 cars, counting those on the western end. So that, there must have been not less than 13 cars pushed by the engine that shunted the car into the dynamite car; whereas no witness introduced by plaintiff places the number at more than 6. There is no conflict in the record as to what engines were in or near the yards within the hour just previous to the explosion. These were the L. & N. engine known as "Doug's Engine," L. & N. engine No. 111, the Proctor Coal Company's engine, Southern switch engine No. 277, Southern engine No. 680, and Southern engine No. 686. These last two named were extra large freight engines. Defendants' witnesses testify that these six were all of the engines that had been in or near the yards within the hour just previous to the explosion. That their testimony upon this point is true is strengthened by the fact that no one testifies to seeing any other engine in or near the yards during this time. The explosion so tore up the track as to render all of the tracks north of the point where the explosion occurred impassable, either by being warped and thrown out of line or else by being blocked by earth and debris. Extending south from the yards is a single track, over which any engine leaving the yards would have to travel. The noise of the explosion aroused the railroad men and others at Newcomb, about three miles south of Jellico, and a lot of men started immediately for Jellico on a hand car. They found the track clear

between Newcomb and Jellico; hence no engine left the yards going south after it occurred. Many persons walked from the south up this track to the scene of the explosion, and none of them encountered any engine leaving the yards. As no engine left the yards after the explosion, and no witness testifies to having seen any other about there within the hour next before the explosion, one must conclude that the six engines above named were all that had been or were there within the time named.

Defendants have undertaken to account for the location of each of these engines. The L. & N. engine known as "Doug's Engine" was attached to a north-bound passenger train which had pulled out of Jellico just a few minutes before the explosion. It is conceded that this engine shunted no car against the car of dynamite, and could not have caused the explosion. The Proctor Coal Company's engine was standing over on the coal company's switching track, and, from its position and the fact that it was not then being used, it must be excluded from consideration. L. & N. engine No. 111 is shown by the testimony of witnesses, both for plaintiff and defendants, to have been, at the time of the explosion, standing over east of the depot near the "cinder pit," on the track known as the "old man's track." It was proven to have been there before the explosion, and was there after the explosion. Its fire had been "drawn," and it was, in railroad parlance, "dead." Southern switch engine No. 277 had left the yards at about 7 o'clock, and taken a load of empty cars down to the Blue Gem mines, some miles away, and was there at the mines at the time of the explosion, as is shown by the testimony of many witnesses, most of whom are wholly disinterested, so far as any connection with either railroad is concerned, and one of plaintiff's witnesses testifies to this state of fact also. Southern freight engine No. 680 left the yards with a train of cars at 7:35, or 12 minutes before the explosion, as is shown by the testimony of many witnesses, and at the time of the explosion was more than three miles south of Jellico. Eight or ten witnesses testified to seeing this engine with its train of cars near Newcomb at the time they heard the explosion. Southern freight engine No. 686 is shown by the testimony of a great number of witnesses, some for plaintiff and some for defendants, to have been on the "cinder pit" on the track east of the depot. This is a large engine, and had come into the yards from the south some time early in the morning, discharged its train of cars, and had been taken over on the "cinder pit." To get on this "cinder pit" it either had to go through the yards, past the dynamite car, to the northern limits of the yards, and then back up on the "cinder pit" track, or else it had to go to the southern limits of the yards, and over the switch to the turntable, and over the turntable to the "cinder pit"

track. While the proof shows that this engine could be passed over the turntable, yet it is quite difficult to have it do so on account of its size. The easy, natural, and usual way to get to the "cinder pit" is by the northern route; but, as the explosion blocked this way, if it was taken to the "cinder pit" after the explosion, it must have been over the other way. No possible reason is assigned for taking it there after the explosion occurred. No one testifies to having seen it being taken, and it is scarcely possible that it could have been done in the presence of the great number of people attracted to the scene by the explosion, and not be observed by some of them. That no one saw it go over to the "cinder pit" after the explosion is a circumstance in support of defendants' contention that it had gone there before. Plaintiff's witnesses failed to locate any one of these engines at a point other than that fixed by defendants' witnesses; in fact, plaintiff's witnesses have contributed much of the evidence which goes to show that these engines were, at the very moment when the explosion occurred, exactly where defendants contend they were.

Plaintiff's case rests upon the allegation of his witnesses as to how they saw and heard the car shunted into the dynamite car, and defendants' defense must rest upon their ability to establish, first, that there was no engine in the yards, at the time of the explosion, to have shunted a car; second, that from the location and number of cars on the tank track and its spur, south of where the explosion occurred, no car could have been shunted into the dynamite car unless the engine that did so afterward placed the other cars upon the track as they were found, by count and measurement, to be, and as partially shown by the photographs taken shortly after the explosion they were; third, that the dynamite was so packed that it could not have been exploded by the impact of a car or cars shunted with the force described by the plaintiff's witnesses, even if all that they say is true; and, lastly, that the rifle that was used was of such penetrating force that its ball would pass through the car and box, and into and explode the dynamite.

This is a large record, and a great many witnesses have testified. Much of their testimony is merely cumulative, and upon points not necessary to the determination of the real questions in issue. It is only when the evidence of each witness is carefully read, and his opportunities for observation considered, in connection with the physical facts, which are not controverted, that the truth as to how the explosion occurred can be ascertained. With the record so considered and analyzed, it is clear that no engine shunted a car or cars into the dynamite car, for the simple reason that not one was in a position to do so. The witnesses who say that a car was shunted into the dynamite car are so

overwhelmed with the physical facts shown in the record, and other facts proven—not by a preponderance of the evidence, but by the evidence of many witnesses undisputed—that the value of their testimony is destroyed. Their statements as to what caused the explosion are so completely refuted by the facts as shown by the record that their testimony cannot be accepted as the basis for a judgment to rest upon. Excuse for their being mistaken is not wanting. Their minds, if not warped by personal interest, have become confused in trying to bridge the chasm made in the trend of current events by the terrible catastrophe, and, while they no doubt recall various movements of engines on that day, they have evidently not done so in the natural order in which they occurred. No doubt they saw engines shifting cars around and through the yards on that fateful morning, and heard them bump together as they were being so switched and shifted and coupled up and put through the various maneuvers necessary both to the breaking up of a train after it came into the yards and the making up of one preparatory to its leaving. Such scenes and sounds were neither strange nor new to them. Most of them lived in or near that town, the terminus of two great railroad systems, where many trains came and went every day. There was nothing in such sights or sounds that would impress their minds sufficiently to enable them to recall any particular one. It is common knowledge that by daily association with trains, and being in and around railroad tracks and yards, one becomes so accustomed to them that he sees the trains without paying any attention to them or their movements, and hears the noises incident to their operation almost without being conscious of it; and, in the absence of anything unusual in the movement of a train, it would be exacting almost the impossible to expect one, some time thereafter, to describe its movements with any degree of accuracy.

There was no reason for observing the movements of the engines, or any one of them, on that morning until after the explosion, and then the witnesses, in seeking for the cause, would naturally remember that they saw an engine shifting cars about the yards, or heard cars being shunted together with considerable, or more than usual, force. Several witnesses say they saw an engine shunt a car or cars into the dynamite car, and the explosion followed. They differ as to the kind of engine. Some say large; others small. Some say one car; others several. So, also, as to the several witnesses who say they heard the force of the impact of the car that was shunted into the dynamite car. They differ as to the length of time that elapsed between the shunting of the cars together and the explosion. Some say that it occurred immediately; others that a considerable time elapsed. Clearly the shunting

which was heard did not cause the explosion; for, if the force of the impact had been sufficient to cause the explosion, it would have followed the impact instantaneously, and the noise of the impact would have been lost in the sound of the explosion. If plaintiff's witnesses are correct, then after the explosion those in charge of the engine that shunted the car or cars into the car of dynamite deliberately and immediately set about to manufacture a defense. There in the midst of the greatest calamity that had ever befallen that community, within sight and hearing of their dead and wounded friends and comrades, they must have dropped the cars along the tank track, as the evidence shows they were, and then stealthily spirited the engine out of the yards, and all of this must have been done while others were so busy that they failed to observe the movements of this engine; for out of the numbers of witnesses who have testified no one saw any engine making any such movements. Had any such thing taken place, surely it would have been seen by some one, and the fact that it was not is strong evidence that it did not occur.

The defendants have demonstrated to a practical certainty that the bullet fired from the Rogers rifle caused the explosion. He was in no wise connected with either of the defendant companies, and they are not answerable for the result of his conduct. Courts are ever reluctant to disturb the finding of a jury, and should decline to do so unless palpably against the evidence. Still, when the ends of substantial justice would be defeated by permitting the judgment to stand, no court should hesitate to set it aside. The case at bar presents such a condition. By the overwhelming weight of the evidence it is clear that the explosion was not caused by the shunting of a car into the dynamite car, or by any other act of negligence on the part of defendants or either of them, but by a wholly independent agency, one over which defendants, nor either of them, had any control whatever, and for which they are in no wise responsible.

The judgment should be reversed. For this reason, I dissent, and Judges HOBSON and BARKER join me.

#### SHIELDS v. CONWAY.

(Court of Appeals of Kentucky. March 24, 1909.)

#### 1. WITNESSES (§ 361\*)—IMPEACHMENT—EVIDENCE TO SUSTAIN CHARACTER—"IMPEACHMENT OF GENERAL REPUTATION OF WITNESS."

Proof of the conviction of a witness of a felony as permitted by Civ. Code Prac. § 597, is an impeachment of the general reputation of the witness within section 599, providing that evidence of the good character of a witness is inadmissible until his general reputation has been impeached, authorizing evidence of the general

good reputation of the witness for truth and veracity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1168; Dec. Dig. § 361.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3420.]

#### 2. WITNESSES (§ 361\*)—IMPEACHMENT—EVIDENCE IN REBUTTAL.

A witness impeached by proof of his conviction of a felony, as permitted by Civ. Code Prac. § 597, may not explain the conviction with a view of rebutting the impeachment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1168; Dec. Dig. § 361.\*]

#### 3. WITNESSES (§ 361\*)—IMPEACHMENT—EVIDENCE TO SUSTAIN CHARACTER—"IMPEACHMENT OF GENERAL REPUTATION OF WITNESS."

Proof that a witness is related to the party offering him, that he is interested in the result of the controversy, that he has made declarations in conflict with his testimony is not an impeachment of the general reputation of the witness within Civ. Code Prac. § 599, providing that evidence of the good character of a witness is inadmissible until his general reputation has been impeached, and evidence of his good character is inadmissible in rebuttal.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1165; Dec. Dig. § 361.\*]

Appeal from Circuit Court, Nelson County.

"To be officially reported."

Action by William Conway against Alexander M. Shields. From a judgment for plaintiff, defendant appeals. Affirmed.

Kelley & Cherry and N. W. Halstead, for appellant. Jno. A. Fulton, for appellee.

CARROLL, J. Appellee, who was plaintiff below, brought this action in slander against the appellant, Shields, who was defendant below, charging that in the presence and hearing of divers and sundry persons Shields falsely and maliciously spoke of and concerning him the following words, to wit: "Oh, yes; you are paving the way to have another lawsuit with me, so you can go down to Bardstown and swear to some more damned lies like you did on other trial"—thereby meaning to charge Conway with the crime of perjury committed in his testimony in a case pending between the parties a short time previously. The answer did not deny the fact that Conway had previously testified in the suit, but did deny speaking the words charged. Upon a trial before a jury the plaintiff recovered judgment for \$400.

On the trial of the case, after a witness named Barnett testified in behalf of plaintiff, the defendant introduced a record of the Nelson circuit court, consisting of an indictment against Barnett and a judgment, showing that in 1887 on the charge of murder he was convicted and his punishment fixed at 18 years in the state penitentiary. Thereupon the plaintiff introduced in rebuttal a number of witnesses, who testified to the general good reputation of Barnett for truth and morality. The admission of this evidence is the principal error complained of. It is the contention of appellant that this

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

evidence was incompetent because the general reputation of Barnett was not attacked or impeached by the introduction of the record of his conviction. Section 597 of the Civil Code of Practice declares that: "A witness may be impeached by the party against whom he is produced, by contradictory evidence, by showing that he has made statements different from his present testimony, or by evidence that his general reputation for untruthfulness or immorality renders him unworthy of belief; but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record of a judgment, that he has been convicted of felony." And section 599 provides: "Evidence of the good character of a witness is inadmissible until his general reputation has been impeached." Under section 597 it was competent for the defendant to introduce the record of Barnett's conviction, but the admissibility of the evidence of his good character depends upon the question whether or not the introduction of this record was such an impeachment of his general reputation, within the meaning of section 599, as authorized the introduction of evidence of his good character. This precise question has not heretofore been decided by this court, but it has come before other courts of last resort—some of them holding that evidence of this character is competent, and others holding it incompetent.

In our opinion the evidence was competent. The purpose in introducing the record of conviction was to impeach the general reputation of the witness, and to impress the jury with the fact that he was not worthy of belief. However serious an offense a man may have committed, and however damaging to his reputation it may be, he should be allowed the privilege of outliving the odium attached to it, and reinstating himself in the confidence and respect of his neighbors and acquaintances. No matter how bad a man may have been, or how low in the estimation of his neighbors he may have fallen, he should not be denied the right to reform or the high privilege of becoming an honored and useful citizen; and when he does so re-establish himself, and the record of his former delinquency is offered to discredit him, he should have the right to show that his reformation is genuine, and that his neighbors and acquaintances regard his general reputation for truthfulness and morality as good. It would be a hard and almost cruel rule to lay down that a man on the witness stand might be confronted with the record of a crime, committed many years before, offered for the purpose of embarrassing, humiliating, and discrediting him, and yet denied the right to show by persons competent and qualified to speak that afterwards by good conduct and an upright life he had established himself in the respect of his neighbors. We think this conclusion fully authorized by a fair construction of the Code provisions referred to.

A witness may not be impeached by evidence of particular wrongful acts, with the exception that it may be shown that he has been convicted of a felony. Although he may have committed a dozen particular wrongful acts, each involving greater moral turpitude than many felonies, yet evidence of them is not competent; but, if he has committed one amounting to a felony, followed by a conviction, this one offense may be offered in evidence against him. It is therefore manifest that the Legislature intended to place the one act followed by a conviction for a felony in a class different from other wrongful acts not so punished, and in the same category as an attack upon the general reputation of the witness. A witness cannot be impeached by evidence of particular wrongful acts, because he may not be prepared to meet them; and, if he was, to allow an explanation for each would often unreasonably protract the trial, besides bringing into it many side issues. And, as the witness cannot be impeached by evidence of particular wrongful acts, neither can evidence be offered to sustain his character, as such evidence is not admissible until his good character has been put in issue—until an attack has been made upon it in a general way. But a witness may be impeached by a record of conviction for a felony, and, as he cannot excuse or justify its commission or go behind the judgment, it would follow that if there was no other way by which he could show the jury or the court that he was truthful and moral, he must stand mute before the silent but impressive evidence of his guilt, and see his reputation attacked without an opportunity to defend. Although a witness when thus impeached may not go behind or explain the conviction, yet he may show that since the judgment was pronounced he has lived an honorable and upright life and is held in high esteem by friends and neighbors; and this, upon the ground that the evidence of conviction is in fact and truth an attack upon his general reputation within the fair meaning of the Code.

But counsel say that, if it is allowable to offer evidence of good character to rebut the presumption of unworthiness arising from a conviction for a felony, it would logically result in allowing a witness who had made contradictory statements or declarations in conflict with his present testimony, or who was shown to have an interest in the case, to introduce evidence in support of his good character. There is, however, no reason for carrying the rule we have announced to this extent. A witness may be related to the party in whose behalf he is testifying, or he may be interested in the result of the controversy, or he may have made contradictory statements, or declarations in conflict with his present testimony, but evidence of these facts, or any or all of them, would not be an impeachment of the general reputation of the witness for morality and truth. A witness

of the highest character may be related to a party to the litigation, or interested in the result of the trial, or have made statements contradictory of his evidence, but these circumstances do not involve his general reputation for truthfulness, nor are they regarded as impeaching his character. We have carefully examined the instruction criticized, but do not find it open to the objection urged against it.

Perceiving no error, the judgment is affirmed.

### CITY OF COVINGTON v. GATES.

(Court of Appeals of Kentucky. March 23, 1908.)

#### 1. MUNICIPAL CORPORATIONS (§ 821\*)—DEFECTS IN SIDEWALK—JURY QUESTION.

In an action against a city for injuries from a defective board walk, whether the defect had existed long enough for the city to have discovered it by exercising ordinary care in time to have made it reasonably safe before plaintiff was injured *held* for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1750; Dec. Dig. § 821.\*]

#### 2. BRIDGES (§ 42\*)—DEFECT IN—NOTICE TO CITY.

Where a policeman, whose duty it was to watch for defects in sidewalks, etc., discovered a hole in a bridge on the day of the night plaintiff was injured, and immediately telephoned the city officer whose duty it was to repair it, there was actual notice to the city of the dangerous condition of the bridge.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 88-90; Dec. Dig. § 42.\*]

#### 3. BRIDGES (§ 46\*)—DEFECTS IN—NOTICE—JURY QUESTION.

In an action for injuries caused by defects in a wooden bridge which was within the city limits, whether the city had reasonable time in which to repair the defect, after actual notice thereof on the day of the night the injury occurred, *held* for the jury.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. § 120; Dec. Dig. § 46.\*]

#### 4. APPEAL AND ERROR (§ 1053\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—PREJUDICIAL EFFECT.

The court refused to strike out testimony that plaintiff's general reputation for truth and veracity was good, though it appeared on cross-examination that the witness' knowledge of plaintiff's reputation was derived from business transactions and personal acquaintanceship with him; but the court had repeatedly stated in the jury's presence that testimony sustaining the general reputation of a witness was not competent where the opinion was based upon personal acquaintanceship and business transactions. The verdict for plaintiff was small in view of his injuries and the expenditures caused thereby. *Held*, that the admission of the testimony was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4180, 4182; Dec. Dig. § 1053.\*]

#### 5. APPEAL AND ERROR (§ 1057\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—PREJUDICIAL EFFECT.

A witness introduced to testify to plaintiff's reputation for truth, etc., was asked on cross-

examination what business plaintiff was engaged in at the time of the accident, which question was excluded; but defendant did not state what the witness was expected to answer or the purpose of the question, and plaintiff's occupation was fully proved by other evidence. The verdict for plaintiff was small in view of his injuries and the expenditures caused thereby. *Held*, that the exclusion of the testimony was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1057.\*]

Appeal from Circuit Court, Kenton County, Common Law & Equity Division.

"Not to be officially reported."

Action by George Gates against the City of Covington. From a judgment for plaintiff, defendant appeals. Affirmed.

John E. Shepard, for appellant. Fredrick W. Schmitz, for appellee.

NUNN, J. This is an appeal from a judgment for \$564. Appellee alleged, in substance, in his petition that on June 9, 1905, while crossing the wooden bridge, or board walk, over the bottom lands, known as "Willow Run," in the city of Covington, Ky., he broke through the walk at a point something over 200 feet west of the east end thereof, and was severely and permanently injured. The length of the bridge is not given, but the testimony indicates that it is several hundred yards long. He alleged: That the boards and other timbers in the bridge were rotten, defective, unsafe, and dangerous to those traveling thereon; that its condition rendered the footway unsafe and dangerous to those using same with ordinary care; that the defective and unsafe condition of the bridge, or footway, was known to the defendant, its servants and agents, or could have been known to them by the exercise of ordinary care, long enough before the time of the accident, to enable them to put same in repair; and that he did not know of the defective and unsafe condition of the bridge. Appellant answered, controverting the allegations of the petition, and interposed a plea of contributory negligence, which was controverted by reply. Appellant's counsel, by brief, presents three reasons for a reversal: First, the verdict is not sustained by sufficient evidence and is contrary to law; second, the admission of incompetent testimony; third, errors of the court in giving instructions and in refusing to give the one offered by it. It is not contended that appellee was not injured by stepping into a hole in the bridge, nor that it was not the duty of the city to use reasonable care in keeping the bridge in a reasonably safe condition for the safety of those who traveled thereon.

The testimony, without much contradiction, shows that the bridge was out of repair for three or five months preceding the accident, that the boards and stringers were rotten, and that some of the nails were out

and missing, which allowed the boards to tilt and get out of place. This condition existed at the place where the accident occurred and for some distance on either side of it. Appellant's real contention is that it was not shown that the city had notice of this defective condition of the bridge in time to have repaired it before appellee received his injuries. This question was submitted to the jury by a properly drawn instruction. It was for the jury to determine from the testimony whether the defective and dangerous condition of the bridge had existed for a sufficient length of time for the city, by its agents, to have discovered the same, by the exercise of ordinary care, in time to have made it reasonably safe before appellee was injured. In addition to this, appellant introduced a witness, who was a policeman at the time of the accident, and, this bridge being within his territory, it was his duty to watch for defects in it. He testified that, some time during the day before appellee was injured at night, he discovered the hole in the bridge through which appellee fell, and that he went immediately and telephoned to the officer whose duty it was to have it repaired. However, the hole was not repaired until the next day. This was proof of actual notice to the city of the dangerous condition of the bridge, and the question as to whether or not appellant had reasonable time in which to repair it, after this notice, before appellee received his injuries, was a question for the jury, and was submitted to it under proper instructions.

The instructions given by the court were proper, and submitted in clear language every principle of law applicable to the case. See the cases of *City of Madisonville v. Pemberton's Adm'r*, 75 S. W. 229, 25 Ky. Law Rep. 347, *City of Covington v. Jones*, 79 S. W. 243, 25 Ky. Law Rep. 1983, and *City of Wickliffe v. Moring, By, etc.*, 113 Ky. 597, 68 S. W. 641. The instruction offered by appellant, which the court refused to give, was the same, in substance, as was given by the court. In the instruction offered these words were used: "The defendant was no insurer of the safety of those using the bridge." The court in no instruction stated or intimated that the defendant was an insurer of the safety of those crossing the bridge, but, to the contrary, among other things, told the jury, in effect, that the law only required appellant to use ordinary care to keep the bridge reasonably safe for the protection of those using it.

There was no incompetent testimony permitted to be heard and considered by the jury on the issues made by the pleadings. The matter complained of arose in the following manner: Appellant introduced two or more witnesses whose testimony tended to impeach the reputation of appellee for truth and veracity. Appellee, in rebuttal, offered

a witness who testified that the general reputation of appellee for truth and veracity was good. Upon cross-examination it developed that all the witness knew about the reputation of appellee was learned from business transactions and his personal acquaintance with him. Appellant moved the court to withdraw all the testimony given by the witness. It appears from the record that the court had repeatedly stated in the presence of the jury that the testimony of a witness in impeaching or sustaining the general reputation of another witness was not competent when the witness' only means of forming an opinion upon the question was obtained through personal intercourse and business transactions with the person. Appellee introduced Charles Nock to sustain his reputation. Appellant, on cross-examination, asked him what business appellee, Gates, was engaged in at the time of his injury and at the time of the trial. The court sustained an objection to this question. Appellant complains of this. It appears from the record, without contradiction and from the testimony of many of the witnesses, that appellee, at the time of his injury and to the time of his trial, was a peddler of groceries when he was able to labor. This fact was fully proved. It does not appear from the record that appellant made known to the court, by an avowal, what it expected the answer of the witness to be, nor what benefit it anticipated receiving if the witness had been permitted to answer the question. We are therefore of the opinion that the court committed no material error prejudicial to the rights of appellant in the admission or rejection of testimony.

The verdict is small considering the injuries proved. His doctor's bill amounted to \$64 or more. He lost considerable time from labor, his injuries were severe, and one of them permanent. Appellant does not complain of the amount of the verdict.

For these reasons the judgment of the lower court is affirmed.

#### BRYANT et al. v. PREWITT.

(Court of Appeals of Kentucky. March 16, 1909.)

#### 1. PLEADING (§ 434\*) — DEFECTS — AIDED BY SUBSEQUENT PLEADINGS AND VERDICT.

Any failure of the answer of a defendant in ejectment to comply with Civ. Code Prac. § 125, in setting forth the tracts claimed by him, it merely alleging that he claims and owns a boundary of land which he understands is within the outside limit of the boundary set out in the petition, following which is a description of the tracts claimed, is cured by the pleadings and verdict; the reply admitting that the tracts claimed by defendant were within the outside boundary set out in the petition, and there being a verdict for defendant after evidence was heard on the issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1478-1480; Dec. Dig. § 434.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 2. CHAMPERTY AND MAINTENANCE (§ 7\*) — CHAMPERTOUS DEED.

A deed by a trustee to his cestui que trust, made pursuant to the judgment of a court of another state, in which some of the land included in the trust was situated, on application by the trustee to the court for authority to settle his trust and reconvey the property, is not champertous, though one is in adverse possession.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. § 107; Dec. Dig. § 7.\*]

## 3. ADVERSE POSSESSION (§ 52\*)—PURCHASE OF OUTSTANDING CLAIM—ONE IS NOT ESTOPPED TO CLAIM.

One does not stop his adverse possession by taking a deed, simply as a means of quieting his own title and preventing a lawsuit, from one making a claim to part of the land.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 259, 269-285; Dec. Dig. § 52.\*]

Appeal from Circuit Court, Laurel County.  
"To be officially reported."

Action by Roberta S. Bryant and others against Alex Prewitt and others. Judgment for defendant Prewitt. Plaintiffs appeal. Affirmed.

Brown & Brock and T. Z. Morrow, for appellants. H. C. Clay and Sam C. Hardin, for appellee.

CLAY, C. This action was instituted by Roberta S. Bryant and others, plaintiffs, against numerous defendants, including Alex Prewitt, to recover certain tracts of land. Defendant Prewitt had a separate trial, and the jury returned a verdict in his favor. From the judgment based on this verdict, this appeal is prosecuted.

During the progress of the case, the pleadings became very voluminous. Finally the petition was reduced to the allegations of ownership on the part of plaintiffs and the fact that each of the defendants wrongfully held possession of certain portions of the land. The answers were reduced to a denial of the ownership of plaintiffs, and a setting forth of the lands claimed by the several defendants, and pleas of adverse possession.

It is first insisted by appellants (plaintiffs below) that the appellee nowhere denied the allegation of the petition that he had for five years before the institution of the action been wrongfully in possession of the property. In this, however, appellants are mistaken. The second paragraph of appellee's answer contains a denial that he had wrongfully held possession of the land for the last five years, or for any other period of time. By amended answer, filed on June 21, 1907, defendant denied that plaintiffs, or any of them, were then, or ever were, the owners or entitled to possession of the land described in the petition, or any part thereof. We are therefore of the opinion that the answer and amended answer constitute a sufficient denial of appellants' ownership and appellee's wrongful possession.

It is next insisted that appellee's answer, setting forth the tracts of land claimed by him, did not sufficiently comply with section 125, Civ. Code Prac. The answer uses the following language: "The defendant claims and owns a boundary of land which he understands is within the outside limit of the boundary set out in the petition herein," etc. Then follows a description of the tracts claimed by appellee. It appears, however, that plaintiffs afterward filed a reply, in which they admitted that the tracts claimed by appellee were within the outside boundary set out in their petition. Furthermore, the case went to trial, evidence was heard upon the issue involved, and a verdict returned by the jury. We therefore conclude that the defect, if any, in defendant's answer, was cured by the pleadings and verdict.

On the trial of the case two questions were submitted to the jury: The question of adverse possession of the defendant, and the question whether or not defendant was in possession of the tracts of land in question when the deed was made from Chamberlain, trustee, to Roberta S. Bryant and others. It is earnestly insisted by appellants that the court improperly permitted a recovery by defendant in the event he was in possession when the deed was made from Chamberlain, trustee, to Roberta S. Bryant and others. We think appellants are correct in this conclusion. Chamberlain had no interest in the land. He held it in trust for Mrs. Bryant and her children. A portion of the land was located in Cook county, Ill., where the parties resided. Chamberlain applied to the courts there for authority to settle his trust and reconvey the property. All the parties were before the court. Judgment was given authorizing him to settle his trust and reconvey the property. The conveyance was made in pursuance of the judgment of the circuit court of Illinois. We are therefore of the opinion that the deed in question was not champertous. *Saunders v. Groves*, 2 J. J. Marsh. 406; *Preston v. Breckinridge*, 86 Ky. 619, 6 S. W. 641; *Kidd v. Central Safe Deposit Co. (Ky.)* 65 S. W. 355.

Although the instruction complained of was improper, we are of opinion that it was not prejudicial to the substantial rights of appellants. The latter proved neither actual nor constructive possession of the land in controversy. On the other hand, defendant showed that he entered upon the lands in 1877, had them surveyed in 1882, and took out a patent in 1884, and another patent in 1888. He marked out a well-defined boundary, and claimed possession to this boundary. No one else was in possession but him. There was a controversy between him and a man by the name of Hubbard as to a portion of the land involved, and he obtained a deed to this tract from Hubbard. It is insisted that this estopped adverse possession as to this particular tract. This is

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



not the case, however. It was simply a means of quieting his own title and preventing a lawsuit. Defendant cultivated a large portion of the land in controversy. He claimed all of it to a well-defined boundary. At the time of the suit he had held this land adversely for more than 15 years. Plaintiffs offered no evidence tending to rebut the evidence of defendant. The evidence of adverse possession on his part was all one way. Under these circumstances, defendant was entitled to a peremptory instruction in his favor. It matters not, then, whether the deed from Chamberlain, trustee, to Roberta S. Bryant and others, was champertous or not.

Judgment affirmed.

**BISHOP et al. v. VAN WINKLE et al.**  
(Court of Appeals of Kentucky. March 19, 1909.)

**1. MORTGAGES (§ 534\*)—FORECLOSURE—TITLE OF PURCHASER.**

The purchaser of land on mortgage foreclosure acquires only the mortgagor's interest in the land.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1555; Dec. Dig. § 534.\*]

**2. ADVERSE POSSESSION (§ 63\*)—HOSTILITY OF POSSESSION.**

Where the principal consideration for a deed is the agreement of the vendee to support the vendor and wife during their lives, and this contract is abandoned by the grantee, and possession resumed by the vendor and wife, and held by them and a relative during the life of the vendor for nearly 40 years, the rights of the grantee are extinguished.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 333-357; Dec. Dig. § 63.\*]

Appeal from Circuit Court, Pulaski County.  
"Not to be officially reported."

Action by E. S. Van Winkle and others against Cy Bishop and others. From a judgment for plaintiffs, defendants appeal. Reversed.

T. Z. Morrow, for appellants. Fox & Jackson and O. H. Waddle, for appellees.

**HOBSON, J.** Previous to the year 1861 Thomas Bishop owned a tract of 110 acres of land in Pulaski county. He executed to George M. Merick the following writing: "This indenture of bargain and sale, made this 23d day of March, 1861, between Thomas Bishop, of the county of Pulaski and state of Kentucky, of the first part, and George M. Merick, of the second part, of the county and state aforesaid, witnesseth: That said Thomas Bishop, for and in consideration of the said Merick's binding himself and his heirs to pay one note in the hands of Charles Bishop of \$50, and find for and decently supporting Thomas Bishop and Sarah, his wife, during their life, or so long as they may live with the said Merick, hath this day bargained and sold, and by these presents doth grant, bargain, and sell, unto the said

George M. Merick, his heirs and assigns, all that tract or parcel of land of my personal estate situated, lying, and being in the county of Pulaski and on the waters of Pitman creek, and bounded as follows: [Here follows boundary.] To have and to hold to the said George M. Merick, his heirs and assigns, forever; and said Thomas Bishop binds himself, his heirs and assigns, to make to the said George M. Merick a general warranty deed to the above-named tract of land, that is a warrant, forever, both against the claim of himself and heirs, or claim or claims of any others whatever. In witness whereof, I hereby set my hand and affix my seal the day and date above written. Thomas Bishop."

After the deed was made, Merick moved into the house where Thomas Bishop and his wife lived, and took care of them for a while; but in a year or so they fell out, and Bishop and wife left. On March 25, 1865, while things were in this shape, Merick executed a note to E. S. Van Winkle and W. McKee Fox for \$150, and gave them a mortgage on the tract of land to secure the note. Soon after this Merick left the state to escape a felony charge against him, and has never since returned. After he had left the state, Bishop and wife moved back to their old home and took up their residence there. Thomas Bishop died, living there, about the year 1869. The wife lived there until she died, in 1894. In the year 1867 Fox and Van Winkle foreclosed their mortgage by a judicial proceeding against Merick, and bought the land for the debt. The sale was confirmed, and a deed was made to them; but they took no steps to get possession of the land. After the death of Thomas Bishop, Cy Bishop moved on the land with the consent of Mrs. Bishop, who was his grandmother, and he has since lived on the land or held it by his tenants. Since her death he has been exclusively in possession of it. He and she paid the taxes on it. On May 13, 1904, the heirs at law of Van Winkle and Fox brought this suit to recover the land from Cy Bishop, and at the conclusion of the evidence on both sides, showing the facts we have stated, the court instructed the jury peremptorily to find for the plaintiffs; and, this having been done, the defendants appeal.

Van Winkle and Fox had no title to the land, except such as they derived from George M. Merick. Their claim originated in the mortgage which he executed, and when they purchased at the commissioner's sale in 1867 they acquired only such title as he had. They stand in his shoes, and whether or not they can recover must depend upon whether or not he could have recovered, if he had not made a mortgage on the land, but had retained the title which he had, and had brought this suit in his own name against Cy Bishop to recover it. The consideration of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the deed which Thomas Bishop executed to Merick was his agreement to pay a note to Charles Bishop of \$50 and to decently support Thomas Bishop and Sarah Bishop, his wife, during their lives, or so long as they might live with him. When he committed a felony, and fled from the state, he abandoned his contract; and the two old people, when he thus abandoned his contract and the land, had a right to resume possession of it. After he had so abandoned his contract, and they had so resumed possession, and held the land as long as they lived, he would not be allowed, nearly 40 years afterwards, to assert a right to the land under the contract which he abandoned while they lived. If he had set up claim to the property, and had brought this suit, nearly 40 years after he had abandoned the contract and left the state, the court would have treated his claim as stale, and would have refused him relief upon the ground that he was estopped to claim under the deed. This question was before us in the recent case of *Lowe v. Stepp*, 116 S. W. 293. As Fox and Van Winkle simply have his title, their rights are no greater than his.

When Merick had fled from the state, abandoning the land and his contract, Thomas Bishop resumed possession, claiming not under Merick, but holding adversely to him. When, in 1867, Fox and Van Winkle bought at the judicial sale, Thomas Bishop was in possession, holding adversely to them, and he continued to hold adversely to them until he died. After his death, his widow and grandson held the land, claiming it under him, and adversely to Fox and Van Winkle. The deed which Thomas Bishop had made to Merick in 1861 was not signed by his wife, and therefore did not pass her right of dower; but this was before the passage of the homestead law in 1866, and therefore, as against that deed, or the mortgage executed in 1865, she could not claim a homestead. If the title to the land was in Merick, and passed from Merick to Fox and Van Winkle, they could at any time after the death of Thomas Bishop have brought a suit against her and recovered the land, after laying off her dower to her. She did not hold the land as dower. She held it under her husband, and her possession was adverse to Fox and Van Winkle. If she was entitled to a homestead in the land, it was only because her husband died the owner of it. What was the nature of the title of Thomas Bishop at his death we need not determine. It is sufficient to say that Fox and Van Winkle simply stand in Merick's shoes, and will not be allowed, after so great a lapse of time, to say that Merick did not abandon his contract, or to assert any right under an instrument which he abandoned, after an adverse possession of so many years by Thomas Bishop and those claiming

under him. Under the evidence the circuit court should have instructed the jury peremptorily to find for the defendants.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

#### MESSMER v. BELL & COGGESHALL CO.

(Court of Appeals of Kentucky. March 23, 1909.)

##### 1. MASTER AND SERVANT (§ 318\*)—"INDEPENDENT CONTRACTOR."

An "independent contractor" is one who is independent of his employer in the doing of his work, and may work when and how he prefers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1257; Dec. Dig. § 318.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3542, 3543; vol. 8, p. 7686.]

##### 2. MASTER AND SERVANT (§ 1\*)—"SERVANT."

A "servant" is one who is employed by another and is subject to the control of his employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6422-6429; vol. 8, p. 7798.]

##### 3. MASTER AND SERVANT (§ 88\*)—INJURIES TO SERVANT—INDEPENDENT CONTRACTORS.

One employed by defendants to squeeze boxes for them in their factory with their machinery as and when directed by their foreman, and paid by the box, with the right to hire and pay his own assistant, was not an independent contractor, and for his negligence in operating the box machine, whereby his assistant was injured, defendants were liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 146; Dec. Dig. § 88.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division. "To be officially reported."

Action by Edward Messmer, Jr., against the Bell & Coggeshall Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded for new trial.

O'Neal & O'Neal, for appellant. Gregory & McHenry, for appellee.

HOBSON, J. Edward Messmer, a little boy 13 years of age, working under Charles Wommer at the factory of the Bell & Coggeshall Company, had his hand hurt by getting it in between some unprotected cogwheels, and brought this action to recover for his injury. A trial was had which resulted in a verdict in his favor for \$2,000. A new trial was granted, and a second trial was had, which resulted in a judgment and verdict for the defendant. The plaintiff appeals.

The defendant insisted on the trial that the boy was not in its employment, that Charles Wommer was an independent contractor, that he employed the boy, and that the boy was his servant. The court, at the conclusion of all the evidence, in effect instructed the jury that the Bell & Coggeshall Company was not liable for the negligence

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of Wommer, thus in effect holding that he was an independent contractor; and this is in effect the only question to be decided on the appeal. There is in the factory of the Bell & Coggeshall Company a machine known as a "squeezer," in which boxes are put together. Charles Wommer was in charge of this machine, and was paid by the box for squeezing the boxes. He was allowed to employ his own assistant, and paid the assistant himself. He employed Edward Messmer, who had been working with him about a week when the accident occurred. At the time of the accident the machine was in operation. Wommer went across the building to get a box, and while he was gone told the boy to hold a lever down, which prevented the machine from running in and out while he was gone. While the boy was thus holding the lever, a trip which was a part of the machine came up behind in its regular revolution striking the lever and knocking the boy's hand from it. His hand was near the cogwheels, and, when struck from the lever, got into the cogs and was painfully injured. The child was not warned of the danger, or given any instruction as to how to perform his duty, or cautioned in any way about the trip coming up and striking the lever. It was not necessary for the boy to hold the lever while Wommer was gone, if Wommer had set a prop under the machine to prevent it from coming down. If the defendant was chargeable with the negligence of Wommer in placing the boy where he was and directing him to hold the lever without any instruction as to his danger or warning as to how to perform his duty, clearly there was sufficient evidence of negligence to go to the jury; and so the question is: Was Wommer an independent contractor?

On this question the boy testified as follows: "Q. Was Mr. Wommer your boss? A. Yes, sir. Q. Who did he work for? A. For Mr. Billy Palmer and Mr. Stern and his brother. Q. Who were Stern and Palmer? Who were they? A. Superintendents. Q. Who was there in charge of Mr. Wommer, if anybody, who had control over Mr. Wommer? A. His brother and Billy Palmer and Stern. Q. Who were Billy Palmer and Stern and his brother working for? I mean to say: Were they working for the Bell & Coggeshall Company? Were they their superintendents? A. Yes, sir. Q. Did those gentlemen come into the place where you worked and have charge in that room? A. They would walk around. Q. What would they do? A. See if the work was done right. Q. I will ask you to state if, while you were working for Mr. Wommer, you did other work also for the Bell & Coggeshall Company? Were you sent anywhere else in the factory to work? A. I was catching from the saw behind his brother on Saturday. Q. Who did his brother work for? A. Mr. Palmer. Q. You mean Palmer, the superin-

tendent of Bell & Coggeshall? A. Yes, sir. Q. How long had you been working there before you were hurt? A. A week and one day. Q. When you were employed to work under Mr. Wommer, what sort of work did they give you to do? A. Dip the ends into the glue and put them on boards. Q. Then what would be done with the boxes after you dipped them in? A. Eric Lightfoot would put them together, and Mr. Wommer would squeeze them up. Q. Who was Mr. Lightfoot? A. A boy that worked there. Q. Do know whether other boys from the factory were taken by Mr. Wommer and put to work on that same machine while you were there? A. The other boy that quit and I got his job, he brought one up from downstairs and put him on it. The Court: Who did? The witness: Mr. Wommer. The Court: Which Wommer? The witness: The one that run the machine. The Court: The one that employed you? The witness: Yes, sir. Q. Where did he get the other boy? Who was the other boy working for before he got him? A. Billy Palmer. Q. In the same factory? A. Yes, sir." On cross-examination he stated as follows: "Q. Eddie, you were asked by Eric Lightfoot if you wanted a job before you went to Bell & Coggeshall? A. Yes, sir; that night. Q. Is it not a fact that he stated to you that Mr. Wommer wanted to employ boys? A. He asked me did I want to work, and I told him yes, and he said he could get me a job. Q. He told you Mr. Wommer wanted to employ you, didn't he? A. Yes, sir. Q. And you went to Mr. Wommer and was employed by him? A. Yes, sir. Q. And Mr. Wommer paid you? A. Yes, sir. Q. Bell & Coggeshall didn't pay you anything? A. No, sir. Q. Their men that worked for them were paid at the office, weren't they, the boys and men that worked for them? A. Yes, sir."

F. T. Ricketts, a witness for the plaintiff, testified as follows: "Q. Do you know Mr. Wommer, Charles Wommer? A. Yes, sir. Q. Did he work there at the same time you did? A. Yes, sir. Q. State how he worked there at that time, if you know, at the time you worked there. What was his business? A. He was running a squeezer and making boxes. Q. Did he have a regular job at that, or how would that be done? A. If he did not have any work there, he would go around in other parts of the mill and do work. Q. That is, Mr. Charles Wommer? A. Yes, sir. Q. What other work would he do when he did not have work there? A. Run a saw and work in the finishing gang. Q. Under whose control was Mr. Charles Wommer? A. Under Mr. Palmer. Q. Under whose control were all the men in the room where Charles Wommer worked? A. I don't know. I guess Mr. Palmer was. Q. Was he the superintendent there? A. Yes, sir. Q. I will get you to state, when men were needed on the squeezing machine, if they would be gotten out of other parts of

the factory, or boys. A. Yes, sir. Q. When this squeezing machine would stop running, what became of the boys who were working on it? A. They were put around in other parts of the factory."

The proof for the defendant was, in substance, as follows: "Charles Wommer was paid so much a thousand, hired by the piece, but we often worked him the other way. For instance, we would get an order for a car load of 5,000 boxes, and he would squeeze those boxes up, and there would be a steady run by the piece probably, and then maybe he would be there, and there would not be a half day's work for him by piece work. Then in order to keep him from going away somewhere, and to-morrow we might need him, we just put him on some other work and paid him by the day. Q. In reference to this squeezer, how was he employed? A. He was employed by piece work. Q. What was his contract with reference to such help as he might use in the operation of the squeezer and in squeezing boxes? A. He had the right to hire whatever boys he wanted to, to make his own prices. Q. Did you or he pay those boys? A. He paid them."

It was also shown that Bell & Coggeshall had an insurance policy insuring them against loss by reason of injuries to their employes, and that it reported the plaintiff's injury to the insurance company as an injury of one of its employes. It was further shown that the company discharged Wommer, and that he was subject to the orders of his superior, both as to what he should do and how he should do it.

An "independent contractor" is one who is independent of his employer in the doing of his work, and may work when and how he prefers. A "servant" is one who is employed by another and is subject to the control of his employer. In 1 Thompson on Negligence, §§ 579 and 629, the rule is thus stated: "The right to control the conduct of another implies the power to discharge him from the service or employment for disobedience; and, accordingly, the power to discharge has been regarded as the test by which to determine whether the relation of master and servant exists." 1 Thompson on Negligence, § 579. "In determining whether the relation is that of master and servant or that of proprietor and independent contractor, the courts have sometimes taken into consideration the manner of payment; whether payment was to be made by the day, week, month, etc., with a reservation of the power to discharge, or whether there was to be a payment by the piece or by the entire job. But the mode of payment is not a decisive test by which to determine this question. The test lies in the question whether the contract reserves to the proprietor the power of control over the employe. That the mere fact that the work being performed by an employe at the time he was injured was done by the piece or job—as by a payment of a stated price for each car

when loaded—does not deprive him of the character of an employe, where he was a mere servant carrying out the employer's will and instructions."

In *Singer Manufacturing Company v. Rahn*, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440, the United States Supreme Court said: "And the relation of master and servant exists whenever the employer retains the right to decide the manner in which the business shall be done as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done." In *Bracket v. Lubke*, 4 Allen (Mass.) 138, 81 Am. Dec. 694, the Supreme Court of Massachusetts, after showing that, where the power of directing and controlling the work is parted with by the employer, the relation of master and servant does not exist, said: "On the other hand, if work is done under a general employment and is to be performed for a reasonable compensation or for a stipulated price, the employer remains liable because he retains the right and power of directing and controlling the time and manner of executing the work or of refraining from doing it if he deems it necessary or expedient." The subject was fully examined by the Supreme Court of West Virginia in *Knicely v. West Virginia, etc., R. R. Co.*, 61 S. E. 811, 17 L. R. A. (N. S.) 370. In that case the person who was claimed to be an independent contractor was employed to unload lumber from cars at a certain price per 1,000 feet. Holding that the mode of payment was not a decisive test whether the person was a servant or independent contractor, the court said: "How many conceivable instances of employment in which compensation is determined by the amount of work done, instead of by the time employed, are there? Hundreds of thousands of 'piece workers' in factories, coal miners paid by the bushel, railway engineers paid according to mileage, and thousands of others. If that made an employe an independent contractor, it would be possible for employers to farm out all their work, and with it their liability, by a very simple operation. Nor is it more than a mere circumstance, having more or less probative force, that the general employer has not, or has delegated, the power to hire and discharge the men."

The later cases do not make either the mode of payment or the right to discharge, or the power to employ assistants or pay them, the decisive test whether the person is an independent contractor or a servant, but look to the broader question whether he was in fact independent or subject to the control of the person for whom the work was done, as to what should be done and how it should be done. Applying this test here, we are of opinion that Wommer was simply squeezing boxes for the Bell & Coggeshall Company in their factory with their machinery as directed by their foreman, and was paid for his services in squeezing boxes, not by the day, but by the

number of boxes he squeezed. The fact that he was paid according to the amount of work done, and was given the right to hire a boy who assisted him, in no manner militates against the evidence that he was under the control of the foreman. He was in no sense an independent contractor. He was to squeeze such boxes as they directed him to squeeze, and to do it when they directed him to do it. The mode of his payment was simply for the convenience of the parties. The pay of a teamster is often regulated by the number of miles he runs; but this would not make the teamster, if under the control of the employer, an independent contractor, although he selected his own helper and paid him. The squeezing of the boxes was only one step in the process of their manufacture. One employé did one thing, another did another thing until the finished box was the result. The squeezing of the boxes by Wommer was simply one of the intermediate steps between the beginning and the end. The manufacture of the box was the thing that the employer was doing, and, from the beginning of the box to the end, all the persons who worked on it were under the control of the employer. Without the power of control in the employer, the business could not reasonably be conducted. Wommer was as fully under the control of the foreman of the factory while squeezing boxes as when running the saw or doing other work about the factory.

We therefore conclude that Wommer was not an independent contractor, but a servant of the Bell & Coggeshall Company, and that it was liable to the plaintiff for his negligence, if he was negligent. The defendant introduced much proof on the trial tending to show that the boy was not hurt as he testified, and that his injury was due to his own fault; but these matters are for the jury under proper instructions.

Judgment reversed, and cause remanded for a new trial.

# McDONALD'S ADM'R v. WALLSEND COAL & COKE CO.

(Court of Appeals of Kentucky. March 17, 1909.)

## 1. MASTER AND SERVANT (§ 235\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Coal mine employes entitled to use the track of an electric railway into the mine when leaving the mine at the close of the day's work, may assume that the employer will not run cars into the mine while they are going out, and an employé is not chargeable with contributory negligence for failing to anticipate that cars will be run into the mine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 713; Dec. Dig. § 235.\*]

## 2. MASTER AND SERVANT (§ 246\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

An employé placed suddenly in a position of peril by the negligence of the employer is not bound to exercise a correct judgment, and is not

chargeable with contributory negligence because he failed to take the safer of two ways open to him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 789-794; Dec. Dig. § 246.\*]

## 3. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Coal mine employes, leaving the mine at the close of the day's work, used an electric railroad track, which was the only way provided for them. The employer ran cars into the mine while the men were coming out at an excessive speed without any headlight or gong. An employé on the cars, suddenly coming on the men, sought to escape, leaving the track at the side where he was walking, but the entry was too narrow to enable him to clear the track, and he was killed. The passage was dark, being only lighted by the miners' torches. *Held*, that the employé was not as a matter of law guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.\*]

## 4. JUDGES (§ 49\*)—DISQUALIFICATION—BIAS.

The bias of a judge does not legally disqualify him from trying a case, unless it causes him to act corruptly or with such oppression as to be equivalent to corruption, and the cause for the removal of a judge must be such that, if he assumes to act in spite of it, it involves his personal integrity, or makes it improper that a man of integrity should preside in that matter, and the mere fact that a judge is unfriendly to personal injury suits does not disqualify him from trying a personal injury action.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 187, 188; Dec. Dig. § 49.\*]

## 5. JUDGES (§ 51\*)—DISQUALIFICATION—AFFIDAVIT—SUFFICIENCY.

An affidavit to remove the regular judge on the ground of bias filed by plaintiff in action for injuries while a coal mine employé, which stated that the judge was a stockholder and officer in a coal mine, that it was thought that he was inimical to the interests of the miners, that he was on friendly social terms with mine operators, and that it was the common talk among lawyers and citizens that his friendliness to mineowners and unfriendliness toward damage suits created a bias in his mind, which made it difficult for an employé to get a fair trial of his case, did not state facts showing affirmatively a personal bias toward the litigant or his case essential to remove a judge on the ground of bias.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 227; Dec. Dig. § 51.\*]

## 6. JUDGES (§ 51\*) — BIAS — AFFIDAVIT — TIME TO FILE.

An affidavit to remove the regular judge because of his disqualification by bias must be presented promptly on the discovery of the facts.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 226; Dec. Dig. § 51.\*]

Appeal from Circuit Court, Bell County.  
"To be officially reported."

Action by Harvey McDonald's administrator against the Wallsend Coal & Coke Company. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

B. B. Golden and W. F. Davis, for appellant. William Law and O. V. Riley, for appellee.

O'REAR, J. Harvey McDonald, a miner in the service of appellee, was injured by

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

being run against by an electric motor and train of cars in appellee's mine in Bell county. There was a custom, as well as an agreement between the mineowner and the miners, that the latter were to "shoot" their coal twice a day—at 11:15 a. m. and 4:15 p. m. One hundred to 150 coal miners worked in the mine. When they had cut under the face of the coal far enough to place a charge of powder in a drilled hole at the top and fire it off, the coal would be knocked down. The smoke and gas generated by the discharge made it impossible for the miners to stay in the rooms and passages for awhile after the shots were fired; so it was arranged that all should shoot about the same time, which was near enough to quitting time, whether for the noon rest or in the evening, that the mines would clear of smoke and gas before the men went back to work. From the time of shooting 15 minutes were allowed the miners in which to get out of the mine. On the day appellant's intestate was injured the miners began shooting about 4:15, the intestate among the others. As they set off the charges, they withdrew and started out the main entry to leave the mine, which was the only way out. Electric motors were used to take in the empty coal cars, and to draw out the loaded cars. These motor cars had a speed of about 12 miles an hour. The main entry was about five feet high. The entry varied in width, but at places was less than six feet. The entry was not straight. An overhead wire to the side of the entry transmitted the current of electricity, which was fed to the motor by a trolley from the side of the motor car. At 4:15 p. m. the motor car was on the outside of the mine. The motorman then notified the mine boss that the headlight on this car was out of fix, and was not of use. The gong on the car was also out of repair, and could not be sounded. The mine boss promised to have the car repaired by morning, but directed the motorman to take in another lot of empty cars. The motorman demurred on account of having no headlight, and because it was then shooting time, and the miners would be coming out. The mine boss looked at his watch and told the motorman that, if he would hurry up, he could make it in time. The motor car, coupled to about 20 empty coal cars, then started in the mine, running at its highest speed. When in the mine about 1,200 or 1,500 feet, and directly after it had passed around a curve, the train ran into a squad of miners who were walking along the track coming out of the mine after their day's work. There was no warning of the approach of the train except the humming noise made by the trolley, and the noise of the cars on the rails. The noise, of course, indicated that a motor was running on that track, but whether coming in or going out it would not very well indicate. As

the trolley passed the retaining brackets electric flashes would appear at those points. But, as the cars were around the bend, these flashes would not show further than the bend. The intestate was in this squad of miners. Their walking and talking made some noise, and the frequent discharges of the blasts in the rooms, which were then being set off, further confused the sounds. This was the situation when the train dashed into the midst of this company of miners. They jumped to the side of the track for safety. But decedent McDonald failed to reach a place of safety. At the point where he jumped off the track the entry was too narrow to admit his person in the clear at the side of the cars. As they passed, they struck him, caught him, and rolled him along the side of the mine, bruising and mangleing him so that he died within three days. This suit is by his administrator to recover for the negligent destruction of the life of the intestate. At the close of the plaintiff's evidence, which disclosed the foregoing facts, the court gave the jury a peremptory instruction to find for the defendant. It is supposed this instruction was based upon the fact that the intestate was himself guilty of contributory negligence, but for which he would not have been hurt. The contributory negligence in this case is thought to have consisted of two factors: One, the decedent was either inattentive and failed to listen for the cars, or, hearing them, failed to exercise due care for his own safety; the other is that on the opposite side of the entry where he was struck there was room enough for him to have stood in safety while the cars passed.

We cannot doubt it was negligence, we might say criminal negligence, in running that train of cars at that time and under the circumstances at such high speed without headlight or gong to announce its approach. It was such an utter disregard of the lives of the men who were known to be coming out that entry, and who had to walk along the track, the entry being too narrow in many places to admit of their walking by the side of the track, or to get into a place of safety by its side, as makes the master liable for any injury inflicted upon them by reason of that act. Nor was it certain that the decedent was guilty of contributory negligence. He had a right to use the track to walk upon in coming out the mine. No other way was provided him. He had the right to assume that the master would not run the motor car into the mine while the miners were coming out—particularly not at the speed run in this instance—and without a headlight or gong on the motor car. He was not required to give attention to or to anticipate what reasonably he had not cause to suspect. Besides, he had not control of the other miners' movements—their walking, talking, and laughing

as they went along the passage way, nor the shooting that was going on in the rooms along the route. All these matters tended to confuse sounds, which were equally well known to the master and those operating the motor car, and decedent had the right to assume that with knowledge of such conditions the master would regulate the running of the trains so as to make the situation as safe for the miners as the conditions admitted of. When, contrary to such reasonable presumptions, the master ran the train of cars recklessly in the entry so as to suddenly imperil the decedent, he was not bound in such emergency to exercise correct judgment, or to select the safer of the two ways presented to his mind in that moment. He had the right to act upon impulse, as he was deprived by the master's negligence of a reasonable opportunity to exercise judgment. The impulse would be to take the nearest apparent means of safety. That was to leave the track at the side where he was walking, which he did. He probably had not time to cross the track. He took the chance of being able to find a safe place on his side. The passage was dark, narrow, and low. The only light was the feeble rays shed by the miners' cap torches. In choosing the means that he did the decedent acted as any ordinary person might have done under the circumstances. Whether he was guilty of contributory negligence at all on the evidence now in the record was barely presented so as to let the question go to the jury. But it was not such, in any event, as to make his conduct as a matter of law a bar to his right of recovery for the injuries which his master's negligence had inflicted. The motion for the peremptory instruction ought to have been overruled.

This action was begun in 1905. The docket of the Bell circuit court is said to be large. The issue was made up in this case some two years ago, and one trial was begun, but was discontinued for the plaintiff, owing to illness in his lawyer's family. When the case was called the last time for trial, plaintiff filed an affidavit to remove the regular judge of the court because of his disqualification, by bias. The facts disclosed, so far as they are facts, instead of rumors and suspicions, had existed since before the beginning of this case, and were known to the plaintiff and to his counsel from the beginning. No effort was made when this suit was filed, or at the first term of the court thereafter, to remove the judge because of his alleged bias. On the contrary, the parties submitted their case to his rulings. The judge is charged with being unfriendly to personal injury suits, and as himself being connected with a coal mining corporation. The judge is not charged with corruption, nor with being personally hostile to the litigant, nor as entertaining a particular antipathy toward the plaintiff or his suit. It is said he does not look with favor upon litigation growing out of personal injuries.

It is likely some judges have just the opposite feeling concerning such suits. But we do not see that that fact necessarily disqualifies the judge from presiding at the trial of such cases in his court. Judges, like other men, have their notions of right and wrong, which may or may not agree with the law of the matter. Their alleged bias may, so far as they are concerned, be a matter of conscience. Unless it causes them to act corruptly, or with such oppression as to be equivalent to corruption, we do not see how it can legally disqualify the judge as an official. A juror may not look with favor upon personal injury suits, or say that he may, and in his previous service his predilections have in some manner affected, or colorably affected, his verdicts. Would that subject him to challenge for cause in all cases of that nature? We doubt it. A judge will not be removed for the same causes always that a juror may be peremptorily challenged for. The cause to remove a judge must be one which, if he assumes to act in spite of it, involves his personal integrity, or which makes it improper that a man of integrity should preside in that matter. *German Ins. Co. v. Landrum*, 88 Ky. 433, 11 S. W. 367, 592. It is not always corrupt. So far as the man's own conscience is concerned, it may be innocent. But it must be such a cause as that an impartial mind would conclude that a person so situated would not probably, and could not, give a fair trial in the case. The substance of the complaint in this case is that the judge was a stockholder and officer in a coal mine; that it was thought he was "inimical" to the interests of the miners; that he is on friendly, social terms with mine operators; that it was the common talk among certain lawyers and citizens that his friendliness to the mine-owners and unfriendliness toward damage suits created a bias in his mind, which made it difficult for the workman to get a fair trial of his case. The latter is stated as a deduction from the predicate, much of which is "rumor of the county," and talk of certain lawyers who had been disappointed in court. This affidavit in this case involves more the question of character than of particular bias in the judge. The latter only is a matter reviewable by this court. Character is for the people in their elections or for the Senate sitting as a court of impeachment. The lack of character is such as disqualifies the man altogether. If an appellate court could say in such instance that the judge must vacate the bench upon complaint of any litigant who attacked his general character as a man, we must sit necessarily as a court of impeachment, which we cannot do. And it would result, if we did, that that judge could try only such cases as the litigants and lawyers in his court would suffer him to try. No; we cannot review these sweeping general charges. We have not the jurisdiction to do so. The trial judge's position is a hard one to fill. It is hard to

please a losing litigant. Some lawyers when they lose are not convinced by the judge's judgment—perhaps ought not to be. But, if these conditions are allowed to constitute a basis for impeaching the judge without trial, the circuit judiciary are indeed in a most unenviable condition; for, when attacked by an affidavit, the judge must sit dumb as to the truthfulness of the grounds charged. He cannot deny them, though he may know them to be false. He cannot call witnesses to refute them. He cannot even cross-examine his accuser. He must confine himself to deciding, by the standard erected by the law, whether the affidavit is sufficient to require him to vacate the bench in that case. It must be a delicate and embarrassing situation. Nevertheless he alone must first pass judicially upon the matter. Hence it is that the statute has been construed that the affidavit must state facts. *German Ins. Co. v. Landrum*, supra; *Sparks v. Colson*, 109 Ky. 711, 60 S. W. 540; *Schmidt v. Mitchell*, 101 Ky. 570, 41 S. W. 929, 72 Am. St. Rep. 427; *Hargis v. Marcum*, 103 S. W. 346, 31 Ky. Law Rep. 795; *Ky. Journal Co. v. Gaines*, 110 S. W. 268, 33 Ky. Law Rep. 402. They must show affirmatively a personal bias toward the litigant or his case (*Massie v. Commonwealth*, 98 Ky. 588, 20 S. W. 704), and must be presented promptly upon their discovery (*German Ins. Co. v. Landrum*, supra; *Ky. C. R. Co. v. Kenny*, 82 Ky. 154; *Vance v. Field*, 89 Ky. 178, 12 S. W. 190; *Russell v. Russell*, 12 S. W. 709, 11 Ky. Law Rep. 547; *Bales v. Fennell*, 49 S. W. 759, 20 Ky. Law Rep. 1564). The affidavit in this case did not fill those requirements. That seems to be admitted in the argument, but we are asked to go further in this case. We find no warrant to do so.

For the error in granting the nonsuit the judgment is reversed, and cause remanded for a new trial under proceedings consistent herewith.

**DEPPEN'S TRUSTEE et al. v. DEPPEN.**  
(Court of Appeals of Kentucky. March 12, 1909.)

**1. WILLS (§ 472\*)—CONSTRUCTION—INCONSISTENT DEVISES.**

Where there are two inconsistent devises in the same will, the latter prevails.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 990; Dec. Dig. § 472.\*]

**2. WILLS (§ 475\*)—CONSTRUCTION—INCONSISTENT WILLS.**

Where there are two inconsistent wills, or a will and a codicil, of different dates, the last will or codicil prevails, though the provisions of each as far as practicable must be given effect.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 996, 997; Dec. Dig. § 475.\*]

**3. WILLS (§ 449\*)—CONSTRUCTION—PRESUMPTIONS AGAINST INTESTACY.**

A testator is presumed to intend to dispose of his entire estate, and, though he may make a mistake in his estimate of the value of his es-

tate, that is not of itself a ground for setting aside his will or disregarding his intention; and, where there is a general description showing that testator intended to dispose of his entire estate, words of quantity or value will not control.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 965; Dec. Dig. § 449.\*]

**4. WILLS (§ 453\*)—CONSTRUCTION—EQUALITY OF DEVISEES.**

Where the language of a will is susceptible of two constructions, the court will adopt that construction which will make the devisees equal.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 453.\*]

**5. WILLS (§ 475\*)—CONSTRUCTION—INTENTION OF TESTATOR.**

Where two instruments bearing different dates were admitted to probate, the court, in ascertaining the intention of the testator, must consider both, whether they are treated as wills or the last instrument is treated as a codicil.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 996, 997; Dec. Dig. § 475.\*]

**6. WILLS (§ 449\*) — CONSTRUCTION — ESTATES DEVISED.**

Testatrix by her will made equal distribution of her estate between a daughter and a son, placing in the hands of a trustee the share of the son, and providing that he should be paid only the income, and directing what disposition should be made of the trust estate after his death. A codicil recited that the estate of testatrix was \$10,000, and that it was her desire that her daughter and son should equally receive a half thereof, and named \$5,000, to which each was entitled. Her property consisted of bonds, stocks, and other securities fluctuating in value, and their value exceeded the value specified in the codicil. *Held*, that testatrix intended to dispose of her entire estate, and the daughter and son each took one-half thereof absolutely.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 965; Dec. Dig. § 449.\*]

**7. WILLS (§§ 179, 184\*)—REVOCATION.**

A will or codicil may operate as a revocation of a prior will by reason of an express clause of revocation, or of an inconsistent disposition of the previously devised property.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 456-467; Dec. Dig. §§ 179, 184.\*]

**8. WILLS (§ 699\*)—CONSTRUCTION—ACTIONS—ESTOPPEL.**

Where a beneficiary in a will, on being advised of his rights, speedily took steps to assert them, and his acquiescence in the construction of the will adopted by the executor was but temporary, he was not estopped from insisting on a judicial construction of the will.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 699.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Suit by Rudolph O. Deppen against Henrietta Deppen's trustee and others for the construction of the will of Henrietta Deppen, deceased. From a judgment construing the will, defendants appeal. Affirmed.

Gregory & McHenry, for appellants. Boldrich & Gocke and McDermott & Ray, for appellee.

SETTLE, C. J. Henrietta Deppen, a resident of the city of Louisville, died in that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



city in the early part of the year 1906, leaving two written instruments, which together disposed of her entire estate. The first reads as follows:

"I, Henrietta Deppen, of Louisville, Ky., being of lawful age and sound mind and memory, do make and declare this to be my last will and testament.

"First: I direct my executor hereinafter named, to pay all my just debts and funeral expenses as soon after my death as convenient.

"Second: I do not make any provision for my son, Ferdinand W. Brinkman, now known as 'Brother Ferdinand,' who is a member of St. Xavier and Brothers at Baltimore, Maryland. I do this for the reason that he is well provided for.

"Third: All the balance of my estate, real, personal and mixed, I desire to be divided into equal parts one of which shall be the absolute property of my daughter, Matilda R. Dougherty. The other portions to be held by the Fidelity Trust and Safety Vault Company, and the net income therefrom shall be paid by said company to my son, Rudolph O. Deppen, during his life and in the event that Annie B. C. Deppen, wife of R. O. Deppen, should survive him, I give her one thousand (\$1,000.00) dollars, to be hers absolutely, and the remainder I give and devise to my daughter, Matilda R. Dougherty absolutely, if she is then living. If the said Matilda R. Dougherty is not then living, said sum shall be paid to her descendants in equal parts.

"Fourth: I appoint the Fidelity Trust and Safety Vault Company and my son-in-law, William B. Dougherty, executors of this will and request that no security be required on the bond to be given by my son-in-law as such executor."

The second was written wholly by the testatrix in German, her native language. Correctly translated into English it reads as follows: "My estate is 10,000 dollars. It is my desire that at my death my daughter, Matilda Dougherty, and my son, Rudolph Deppen, equally receive half this sum. That is the only wish of their mother, that my daughter Matilda Dougherty and my son, Rudolph Deppen, equally receive \$5,000.00: Matilda Dougherty \$5,000.00 and my son Rudolph Deppen \$5,000.00. Their mother Henrietta Deppen."

Both instruments were admitted to probate by an order of the Jefferson county court as the wills or the will and codicil of the testatrix, and the Fidelity Trust Company and W. B. Dougherty appointed by the will as the executors thereof duly qualified as such, and immediately took charge of the estate left by the testatrix, which consisted of stocks, bonds, and other personalty, of the value of \$16,000. Later the executors made in the Jefferson county court a settlement of their accounts, which shows that, after the payment of all debts owing by the testatrix and costs of administration, there was left in the hands of the executors the sum of \$15,175.64,

and that they paid one-half thereof, viz., \$7,587.82, to Matilda Dougherty, a daughter of the testatrix and one of the devisees under the will, \$5,000 to Rudolph O. Deppen, a son of the testatrix and also a devisee under the will, and the remainder, amounting to \$2,587.82, the executors paid to the Fidelity Trust Company, as trustee for Rudolph O. Deppen, with the avowed purpose on their and its part of applying the net annual income arising therefrom to the use of Rudolph O. Deppen during his life and the principal at his death to Matilda Dougherty, if living, or, if not, to her descendants in equal parts, as provided by the third clause of the testatrix's will. Annie Deppen, wife of Rudolph O. Deppen, to whom the same clause of the will directed the payment of \$1,000 if she survived her husband, is dead. Mrs. Dougherty is the mother of three children, all of whom are infants; the eldest being 18 and the youngest 13 years of age. Being dissatisfied with the disposition made by the executors of his mother's estate and insisting that the codicil or last will gave him absolutely one-half thereof, and revoked so much of the third clause of the first will as limited his interest, as to any part of the property devised, to the enjoyment of the net income for life, Rudolph O. Deppen brought this action in the court below to obtain a construction of the will or wills and recover of the executors and the Fidelity Trust Company, as trustee, the \$2,587.82 paid to or retained by it under the authority claimed to have been conferred by the third clause of the will. The executors, trustee, Matilda Dougherty, and her three infant children were made parties to the action, and duly summoned as defendants. W. B. Dougherty, one of the executors of the will, being the father and statutory guardian of the infant defendants, was also made a defendant and summoned as such guardian. The executors filed a general demurrer to the petition, which was overruled. They then filed an answer controverting the construction placed upon the will by the averments of the petition, and resisting the recovery sought, and, while admitting that the executors had disposed of the estate of the testatrix as in the petition charged, it was, in substance, alleged in the answer that such disposition of the estate accorded with the intention of the testatrix and complied with the provisions of the wills. The court sustained a demurrer to the answer, and, the executors refusing to plead further, judgment was rendered construing the will as insisted by the petition, declaring Rudolph O. Deppen entitled absolutely to one-half of the estate devised, and directing the executors to pay him the \$2,587.82 held by the Fidelity Trust Company, subject to certain credits for costs, etc., set out in the judgment. The executors, Mrs. Dougherty, the infants, and their statutory guardian all complain of the judgment, and by this appeal seek its reversal.

The only question presented by the appeal is one of construction. In construing a will the great object to be attained is the ascertainment of the testator's intention, in arriving at which every part of the instrument should be given its natural and legitimate meaning. Whether the last instrument executed by Mrs. Deppen be called a will or codicil, it contains no express words of revocation; but, if we say each paper is a will, the rule of construction seems to be that the will last executed acts as a revocation of everything in the earlier will inconsistent with its provisions. 1 Jarman on Wills, pp. 339, 340. Equally well recognized is the rule that, where there are two inconsistent devises in the same will, the later one will prevail. Greater is the reason for the rule where there are two wills, or a will and codicil, of different dates. *Hunt v. Johnson*, 10 B. Mon. 342; *Howard v. Howard*, 4 Bush, 494; 30 Am. & Eng. Ency. of Law, 624-685. Another cardinal rule of construction is that in making a will the testator is presumed to intend to dispose of his entire estate, and, though he may make a mistake in his estimate of the extent or value of his estate, that is not of itself a ground for setting aside his will or disregarding his intention. It frequently occurs that devises cannot be paid in full, and where the testator's estate is in stocks, or other securities, he is quite liable to mistake its value. We may safely say that, where there is a general description showing that the testator intended to dispose of his entire estate, words of quantity or value will not control. *Lewis' Heirs v. Singleton*, 1 A. K. Marsh. 525; *Trusty v. Trusty*, 59 S. W. 1094, 22 Ky. Law Rep. 1127; *Mayes v. Karn*, 115 Ky. 264, 72 S. W. 1111. There is yet another rule of construction too important to be overlooked, namely, where the language of a will is susceptible of two constructions, the court will adopt that construction which will make the devisees equal. *Munday v. Broaddus*, 40 S. W. 926, 19 Ky. Law Rep. 441; *Hunt v. Johnson*, 10 B. Mon. 342; *Thomas' Ex'x v. Thomas*, 110 S. W. 853, 33 Ky. Law Rep. 700.

Under the guidance of the foregoing several rules of construction, we have no hesitancy in expressing our approval of the construction given the will under consideration by the circuit court. Both instruments having been admitted to probate, and no appeal having been taken from the judgment probating either, whether treated as two wills or the last as a codicil to the first, both are to be considered in endeavoring to ascertain the intention of the testator. If the provisions of the later instrument conflict with or are repugnant to the provisions of the first, the rules of construction require that those of the instrument last executed shall prevail, but the provisions of each should, as far as practicable, be given such effect as the testatrix intended them to have. By the first instrument the testatrix directed the payment

of her debts, appointed executors, and made equal distribution of her estate between her two children, placing in the hands of a trustee the share of the son, providing that he should be paid only the net income therefrom by the trustee, and directing what disposition should be made of the trust estate after the son's death. It also explained why the testatrix gave nothing to a son by her first marriage. The second instrument was not written without a purpose, and it is evident that it was not intended to wholly revoke the first for it does not so declare. What then was its object? In our opinion it was intended and should be treated as a codicil to the original instrument or will, and, if so, the question arises: Is it in any respect repugnant to the will? Obviously it is inconsistent with the third clause thereof. As already stated, the third clause of the will provided the estate of the testatrix should go to her son and daughter equally—that is, a half to each—but the son was given only a life estate in his half, which was to be held in trust and the net income paid him by a trustee of the testatrix's appointment, whereas, the same clause gave the daughter one-half of the testatrix's estate absolutely. The codicil made no change in the share or portion to go to each child. On the contrary, it expressly declares and repeats that each child shall "equally receive" of her estate, and names the sum to which each will be entitled; the amount so named being half the estimated value she then placed upon her estate. The codicil imposes no limitation or restriction upon the bequest to the son. He takes absolutely what the will bequeathes him, as does the daughter what is bequeathed her. The codicil is also silent as to a trust or trustee. So in that respect, as well as in the character of the estate it vests in Rudolph O. Deppen, the codicil is so inconsistent with and repugnant to the third clause of the will as to make it reasonably apparent that the testatrix intended by the codicil to revoke so much of the third clause of the will as limited to a life estate the devise or bequest therein made Rudolph O. Deppen, and placed it in trust. A duly executed will or codicil may operate as a revocation of a prior testamentary instrument by reason of an express clause of revocation, or of an inconsistent disposition of the previously devised property. 30 Am. & Eng. Ency. of Law, 624; *Howard v. Howard*, 4 Bush, 494; 1 Jarman on Wills (5th Ed.) p. 339.

We cannot better express our meaning than by quoting in this connection the brief, yet forceful, opinion delivered by the learned judge of the court below, in overruling the demurrer to the petition: "It seems plain that the testatrix's object in making the codicil in 1905 was to treat her son and daughter alike by giving them equal shares of her estate. She specifically says that each is to receive \$5,000 of her estate, which she erroneously supposed to be \$10,000. Any limi-

tation should apply equally to both legacies; but none was intended. If the estate had amounted to only \$8,000, it would hardly be claimed that any limitation applied to either share." The executors of the will had no greater reason to assume that the object of the codicil was to leave in the hands of a trustee \$2,587.82 of the legacy going to R. O. Deppen than that \$5,000 thereof or the whole of his part of the estate should be taken in charge by the trustee. If the language of the codicil was sufficient to exempt \$5,000 of his share from the trust created by the third clause of the will, it was equally so to exempt the whole of it. We think it plain that the testatrix, after executing the will, came to the conclusion that she wished to treat her children exactly alike and make them equal in all respects; hence four years later and within a few months of her death she manifested this mother love of fairness and equality by writing in her own hand, in the language of her native land, the codicil which in meaning and effect placed her children on the same footing. Where a will and codicil are irreconcilable, the codicil, as the last intention of the testator, must prevail.

We attach little importance to the estimate fixed by the codicil upon the value of the testatrix's estate. That she was mistaken in placing it at \$10,000 is clear, for it turned out to be worth \$16,000; but the mistake was a natural one under the circumstances. As her property consisted of bonds, stocks, and other securities, which vary in price with the laws of supply and demand or fluctuate in value with the fullness or stringency of the money market, it is not surprising that the owner of them, especially a woman, would be unable offhand to even closely approximate their value. Indeed, it is probable that she did not know their value. Therefore the fact that Mrs. Deppen missed the value of hers in the estimate made in the codicil does not invalidate the will or codicil, or show a purpose on her part to die intestate as to a part of her estate. *Lewis' Heirs v. Singleton*, 1 A. K. Marsh. 525. She evidently intended to dispose of her entire estate, whatever may have been her estimate of its value; for as said in 30 Am. & Eng. Ency. of Law, 668: "The natural and reasonable presumption is that, when so solemn and important an instrument as a will is executed, the testator intends to dispose of his whole estate, and does not intend to die intestate as to any part of his property, which presumption is overcome only where the intention of the testator to do otherwise is plain and unambiguous, or is necessarily implied." *Waters v. Waters*, 28 S. W. 958, 16 Ky. Law Rep. 429; *Trusty v. Trusty*, 59 S. W. 1094, 22 Ky. Law Rep. 1127; *Mayes v. Karn*, 115 Ky. 264, 72 S. W. 1111.

We find little force in appellant's contention that the construction given Mrs. Dep-

pen's will by the executors was acquiesced in by appellee. At most, the alleged acquiescence was but temporary, for, when advised of his rights, appellee speedily took steps to assert them, and was not estopped to do so because he did not at once resist the retention by the Fidelity Trust Company of a part of the legacy bequeathed him by the codicil of his mothers' will under the supposed trust created by the third clause thereof, or by his acceptance from it of a part of the income thereof, or the settlement of the estate made by the executors.

Finding no reason for disturbing the judgment of the circuit court, it is hereby affirmed.

#### GILBERT et al. v. GILBERT.

(Court of Appeals of Kentucky. March 23, 1909.)

#### DESCENT AND DISTRIBUTION (§ 82\*)—RIGHTS OF HEIRS—CONVEYANCES BETWEEN HEIRS.

An heir acquired by purchase the interests of his brothers and sisters, except one sister, in the land of his deceased father. The land included land claimed by one of the brothers, who refused to convey unless the heir would give bond for title to the land claimed by the brother. The title bond was executed, and thereafter the heir conveyed land to the sister included in the boundary claimed by the brother. Held that, though the brother was entitled to the land claimed by him, the sister could compel the heir to set apart to her other land of the survey of the deceased father to equalize her with the others.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 318; Dec. Dig. § 82.\*]

Appeal from Circuit Court, Harlan County.  
"Not to be officially reported."

Action by B. F. Gilbert against Jesse Gilbert and another. From a judgment for plaintiff, defendants appeal. Affirmed.

H. C. Clay and G. A. Eversole, for appellants. W. F. Hall and I. G. Lebow, for appellee.

NUNN, J. In the year 1899 appellee made an entry of and obtained a patent for the following described boundary of land, to wit: "Beginning at a hickory and white walnut standing on the west side of the Howard Cove branch, about 4 poles below the falls of said branch; thence N. 43° E., 52 poles, to a sycamore and black walnut; thence N. 80° E., 125 poles, to a stake on the top of the ridge between the Howard Cove branch and Yocum's creek, in a line of a 1,200-acre patent made in the name of James Turner, Sr.; thence a south course, running down with the crest of said ridge to a stake in the south line of a 100-acre patent made in the name of B. F. Gilbert, said stake being on the dividing spur between the lands of Hannah Gilbert and the heirs of John G. Farley; thence N. 71° W., with the closing line of said 100-acre patent, to the place of begin-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ning—containing 60 acres, more or less.” This action was instituted to obtain a conveyance from appellant Jesse Gilbert to this land.

The facts and circumstances leading up to the institution of the action are, in substance, as follows: More than 70 years ago one John Gilbert purchased several surveys of land, all forming one body, in Harlan county, Ky. He then settled upon it, and lived there until about 40 years ago, when he died, leaving surviving him seven or eight children and a widow. The parties to this action are three of his children. The preponderance of the evidence shows that the lands owned and claimed by the father included a considerable portion of appellee's patent boundary. Soon after the death of his father, appellant Jesse Gilbert began to purchase the interests of his brothers and sisters in their father's land. He purchased all of them, except his coappellant's, Mary Gilbert's. The heirs did not make him a conveyance at the time he purchased and paid them for their interests. So, in the year 1902, Jesse Gilbert had a conveyance prepared, including the whole boundary of his father's lands, and by which all the heirs conveyed to him their interests. When the deed was presented to appellee for his signature and acknowledgment, he refused to sign it because, as he claimed, the deed as prepared included the most of his patent boundary as copied herein. Appellant Jesse Gilbert claimed that he did not desire to disturb appellee's interest in the patent, and agreed with him that, if he would sign and acknowledge the deed as prepared, he would execute to him a bond for title to the patent boundary, which he did in a few days thereafter.

The title bond is as follows: “Whereas, B. F. Gilbert is the owner of a junior survey of 100 acres, patented in about 1900, by the commonwealth of Kentucky to said Gilbert; and whereas, Jesse Gilbert, the undersigned, has deed of conveyance from his father John W. Gilbert's heirs, which deed covers a portion of said B. F. Gilbert's junior patent; and whereas, said Jesse Gilbert desires to relinquish his claim by reason of said deed covering said portion of said junior patent, and to convey by his deed the portion thereof covered by said deed, and not by older patents: Now, therefore, in consideration of one dollar in hand paid, the receipt whereof is hereby acknowledged, the said Jesse Gilbert, party of the first part, and B. F. Gilbert, of the second part, witnesseth, that for said consideration the first party does hereby sell by this bond the portion of said junior grant covered by said deed, and not by older patents, by which bond said first party binds himself to convey by deed of relinquishment to second party said lands when a survey thereof shall have been made, and the exact boundary so covered by said deed ascertained, which land so covered by said deed lies

on what is known as the ‘Foxie Hollow,’ a tributary of Howard Cove branch of Yocum's creek of Clover fork, in Harlan county, Kentucky. In testimony whereof, first party hereunto sets his hand this Aug. 5th, 1902. James X Gilbert. Attest: G. A. Eversole.”

It was for the enforcement of the obligations contained in this bond that this action was instituted. Appellant Jesse Gilbert answered, admitting the execution of the bond, and averred that it was obtained by duress of appellee, and alleged his ownership of the land under his father's title and adverse possession thereof for more than 30 years. Appellant Mary Gilbert claimed to be the owner of the land by a deed executed to her by her brother and coappellant, Jesse Gilbert, which is dated after the date of the title bond. She alleged that the conveyance by her brother Jesse to her was made in compliance with an agreement with her brother, in which she accepted the land included therein as her interest in her father's lands. Appellee, by reply, admitted the conveyance to his sister Mary by her brother Jesse, and that she was entitled to an interest in her father's lands, but denied that she was entitled to any part of his survey, and denied any authority on the part of Jesse to convey her any part of his land embraced in the title bond, and averred that his sister accepted the conveyance from Jesse with full knowledge of the existence of his bond for title. He controverted all the affirmative matters contained in the answer of Jesse Gilbert.

From the testimony, we are of the opinion that appellants have shown by a preponderance of the evidence that the title and claim of John Gilbert, and his heirs claiming under him, covered the greater part of appellee's patent boundary, and they should succeed, but for the fact of the execution by Jesse Gilbert to appellee of the bond for title in 1902. There was not the slightest proof showing that it was executed by appellant under duress, and there is no allegation that it was obtained by fraud or mistake, and no proof of that character was introduced. Under the pleadings and proof, the lower court could not well do otherwise than find in favor of appellee. It is true that appellants alleged and introduced some testimony to the effect that appellee gave his consent to the conveyance by Jesse to his sister Mary. The testimony shows conclusively that appellee did not desire to disturb his sister's claim, and endeavored to avoid it by having his brother Jesse convey to him a like number of acres—that is, the same number of acres as was contained in his patent boundary—at some other point on his (Jesse's) survey. This Jesse promised to do; but the agreement was oral, and appellant failed and refused to perform it, and he does not now offer to comply therewith to save

his sister the land conveyed to her. The proof shows that she knew, at the time she accepted the deed from her coappellant, that appellee held a title bond to a considerable portion of the land afterwards included in her conveyance from her brother Jesse. The loss of this portion of her land by the judgment appealed from will not prevent her from yet requiring her brother Jesse to set apart to her other land of her father's survey to equalize her with the others.

For these reasons, the judgment of the lower court is affirmed.

### COOK v. HART et al.

(Court of Appeals of Kentucky. March 19, 1909.)

#### 1. WILLS (§ 470\*)—CONSTRUCTION—INTENTION OF TESTATOR.

In construing a will, the court must determine the intention of the testator from a consideration of the entire will, and the intention, when ascertained, will be carried into effect, though the technical meaning of words is disregarded, and though words must be supplied.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 988; Dec. Dig. § 470.\*]

#### 2. WILLS (§ 531\*) — ESTATES DEVISED — "HEIRS."

Testator devised real estate to the children of a deceased daughter, to a son, and to his daughter C., gave his daughter N. a specified sum, gave \$10,000 in bonds to the son in trust for his daughter B. to pay to her the income for life and at her death the principal to be divided among his "heirs" in accordance to the number of children which each might then have, division to be per stirpes, and gave the residue to his son and two daughters, C. and N., and the children of the deceased daughter. *Held*, that the word "heirs" meant testator's children, and that the trust fund on the death of B. must be divided among the stocks, giving to each stock in proportion to the number of children of that stock; each of the three children of the testator being a stock, and the children of the deceased daughter being another stock.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 531.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3248-3250; vol. 8, pp. 7677, 7678.]

Appeal from Circuit Court, Nelson County.

"To be officially reported."

Suit between Nannie Cook and Clarence Hart and others for the construction of the will of John Johnson, Sr., deceased. From a judgment construing the will, the former appeals. Reversed and remanded.

L. A. Faurest, for appellant. John A. Fulton and N. W. Halstead, for appellees.

SETTLE, C. J. This appeal involves a construction of the will of John Johnson, Sr., who died in Nelson county in May, 1891. The will is in words and figures as follows:

"I, John Johnson, Sr., of the county of Nelson and state of Kentucky, do make and publish this my last will and testament hereby revoking any former will which I may have heretofore made:

"(1) I desire my just debts and funeral expenses paid.

"(2) I devise to the children of my dead daughter Mary Hart, to be equally divided among them, their farm above Bardstown on which their father now resides; and in the distribution of my estate I value said farm at twelve thousand dollars. I make no charge whatever against them for rent or for use of said farm, nor for taxes which I have paid on it. In fact I want this valuation of the farm to cover all advancements to them and their mother. I also give them three thousand dollars.

"(3) I devise to my son, John, all of my real estate south of the Beechfork and in the settlement of my estate I value said land at fifteen thousand dollars, and this valuation is to cover any and all advancements made to him, whether in the way of use of the place, taxes thereon, or otherwise.

"(4) I devise to my daughter, Cassie, my home place, containing about 600 or 700 acres, to be hers as long as she lives, and at her death to go to her children. I also give her all the homestead and kitchen furniture, provisions, live stock, farming implements, gears, buggy and harness. Also all the meat, corn, hay and oats on hand at my death, and \$5,000.00 in money. All of which I value at \$15,000.00.

"(5) I devise to my daughter, Nannie Cook, \$15,000.

"(6) I devise to my son, John, in trust for my daughter Bettie, ten (10) \$10,000.00 Logan county bonds, the net income to be paid her every six months as long as she lives, and at her death the principal is to be divided among my heirs in accordance to the number of children which each may then have; said division to be 'per stirpes.' I also give to my daughter, Bettie, the right to occupy a room in the house which I hereby devise to Cassie as long as she (Bettie) may live or remain unmarried.

"(7) I give to Octavia Barnes \$400.00, provided she stays with and helps Cassie with her work for four years after my death.

"(8) The real estate which I devise to my son, John, is to be his only during his life and at his death to go to his children.

"(9) I also give to my son, John, the stock in the Louisville & Nashville Railroad Company.

"(10) I hereby constitute and appoint my son, John, the executor of this will and ask the court to allow him to qualify without giving security. As executor he is to have no commissions in any part of my estate, except upon that part used in paying my debts and funeral expenses and costs of administration, and that disposed of under the twelfth clause of this will. I appoint my friend Ben Johnson as the legal adviser of my executor.

"(11) In case any of my devisees should institute legal proceedings to break or annul

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

this will then such as do shall have no part of my estate.

"(12) All the remainder of my estate I want equally divided among John Johnson, Nannie Cook and Cassie Barnes, and the children of Mary Hart. The Hart children to have one-fourth, and John, Cassie and Nannie, each to have one-fourth. Bettie is to have no more of my estate than the income from the Logan county bonds and a comfortable room in my house as hereinbefore set out."

At the time of his death the testator owned real and personal estate amounting in value to \$120,000. Four of his children were then living, viz., John Johnson, Jr., Nannie Cook, Cassie Barnes, and Bettie Johnson, the last an unmarried daughter. Another daughter, Mary Hart, died before the testator, leaving surviving her three children, Clarence Hart, Al J. Hart, and John Hart, all adults. It will be observed that the will of the testator, with the exception of \$10,000 in Logan county bonds bequeathed by the sixth clause to his daughter Bettie Johnson, devised all the residue of his estate to his three other children and the sons of his deceased daughter, Mary Hart, one-fourth to each of the children, and one-fourth to the three sons of Mrs. Hart jointly. It will further be observed that the \$10,000 in Logan county bonds disposed of by the sixth clause of the will were bequeathed by that clause to John Johnson, Jr., in trust for Bettie Johnson; the net income thereof to be paid the cestui que trust every six months "as long as she lives and at her death the principal to be divided among my heirs in accordance to the number of children which each may then have; said division to be made per stirpes."

Bettie Johnson died April 27, 1908, and shortly thereafter the appellant, Nannie Cook, filed, in an action which had previously been brought in the Nelson circuit court by the executor to settle the testator's estate and was still on the docket, a supplemental answer and cross-petition setting up the death of Bettie Johnson and averring that at the time of her death she (Nannie Cook) had 12 children, her sister Cassie Barnes 5 children, and her brother John Johnson, Jr., 4 children, all of whom were living, and that the 3 sons of her deceased sister, Mary Hart, were still living, making altogether 24 grandchildren of the testator. The pleading in question contained a prayer for the distribution of the \$10,000, the income of which Bettie Johnson had received down to the time of her death, in the proportion of  $\frac{12}{24}$  to the appellant Nannie Cook,  $\frac{5}{24}$  to Cassie Barnes,  $\frac{4}{24}$  to John Johnson, and  $\frac{1}{24}$  each of the three sons of Mary Hart, deceased. At the succeeding term of the court, Clarence Hart and A. J. Hart filed a joint answer to the cross-petition of the appellant, Cook, in which they claimed to be "heirs" of the testator in the meaning of the sixth clause of the latter's will, and alleged that at the time of

Bettie Johnson's death Clarence Hart had 10 children, A. J. Hart 2 children, and their brother, John Hart, had no children. The answer, while admitting that Mrs. Cook had 12 children, Mrs. Barnes 5, and John Johnson 4, denied the right of the parents to demand a distribution of the fund in question on the basis proposed in the cross-petition, and averred that at the time of the death of Bettie Johnson there were living 33 children of the "heirs" of the testator, and that the fund left by Bettie Johnson should be distributed as follows:  $\frac{12}{33}$  to Mrs. Cook;  $\frac{5}{33}$  to Mrs. Barnes;  $\frac{4}{33}$  to John Johnson;  $\frac{10}{33}$  to Clarence Hart;  $\frac{2}{33}$  to A. J. Hart; and to John Hart nothing. The special judge by whom the case was tried in the court below construed the will according to the contention of the appellees Clarence and A. J. Hart, and entered judgment distributing the fund in controversy as asked by them. Nannie Cook, being dissatisfied with the judgment, prosecutes this appeal.

The language of the sixth clause of the will very clearly shows it was the intention of the testator that the remainder in the trust fund, the income of which his daughter Bettie had enjoyed until her death, should be distributed to certain persons in proportion to the number of children each might have at the time of Bettie's death. The difficulty is as to the identity of all the beneficiaries. It is urged in behalf of appellees that the word "heirs" is a technical term meaning the person to whom the estate would go in case of intestacy, which it is claimed would include them with the children of the testator, and therefore entitle them to take, as to this fund, under the sixth clause of the will as do the testator's own children; that is, in proportion to the number of children each has. While the word "heirs" is generally given the meaning attributed to it by appellees in this case, it is sometimes used in the sense of children. In construing a will the matter of first importance is to arrive at the intention of the testator, and, when ascertained, the intention must be carried into effect, even though the technical meaning of the words must be disregarded in order to do so. Indeed, as held by this court in *Edmonds' Ex'r v. Edmonds' Devises*, 102 S. W. 311, 31 Ky. Law Rep. 396, courts will sometimes supply words to carry into effect the manifest purpose of the testator. The whole context must be considered, and the intent arrived at from a consideration of the entire will, and not from the technical meaning of a single word found in the will. The rule stated is expressed in 21 Cyc. 426, as follows: "'Heirs' is generally construed as meaning children, where the context so requires, where it is necessary that the term should be so construed in order to carry out the clear intent of the instrument." It will also be found that this rule has often been recognized by this court. *Tucker v. Tucker*, 78 Ky. 503; *Mitchell v. Simpson*, 88

Ky. 125, 10 S. W. 372; *Hughes v. Clark*, 26 S. W. 187, 16 Ky. Law Rep. 41. To construe the word "heirs," in the will under consideration, as meaning the testator's children, would seem to carry out the intention of the testator as manifested by all other parts of his will. In disposing of the bulk and residue of his estate, he provided for the three children of his deceased daughter, Mrs. Hart, just as he would have provided for the mother had she been living. So her three children were, together, given the bulk of the estate, what each of the testator's living children, except Bettie, received. Nowhere in the will did the testator indicate that these grandchildren, or any of them, should have any greater rights than their mother would have had if alive, or than the other children were given.

Does the testator, in disposing of the \$10,000 fund by the sixth clause of the will, direct such a distribution of it as manifested any change of his purpose with respect to the sons of Mrs. Hart, as clearly manifested in all other parts of the will? We think not. It is true the sixth clause introduced a new method of distribution as to the \$10,000 fund, viz., that it should be distributed to his children, according to the number of children each might have; but its language indicates no change of the testator's intention, as expressed in all other parts of the will, that the three sons of Mrs. Hart should together take of that fund what their mother, as the parent of three children, would have been entitled to receive of the fund had she been living. The testator knew when the will was executed that his daughter Mary Hart was then dead, so, for the purpose of showing that he did not intend the number of children her children might have should be considered in distributing the fund mentioned in the sixth clause, he therein directed that the division should be "per stirpes." In other words, it was intended by the testator that the fund remaining at the death of his daughter Bettie should be divided among the stocks, giving to each stock in proportion to the number of children there were of that stock. Thus, Nannie Cook was one stock, and had 12 children; Cassie Barnes was another stock, and had 5 children; John Johnson was another stock, and had 3 children. If such was not the basis of distribution in the mind of the testator, the words "said division to be per stirpes" would be utterly meaningless. This construction would carry out the manifest purpose of the testator to give the children of Mary Hart what the mother would have taken if living; but the construction contended for by appellees and adopted by the circuit court would not only render nugatory the words "said division to be per stirpes," but would give two of the testator's grandchildren an advantage over their brother who has no children, and al-

low them more of the estate than their mother could have taken under the will had she lived. We do not believe the language of the will authorizes the conclusion that the testator thus intended to unduly favor one stock; but that his intention, as shown by the entire will, was to so dispose of his property that all of his children and the children of his deceased child should participate in his bounty in the following proportion:  $\frac{1}{2}$  to Nannie Cook;  $\frac{2}{24}$  to Cassie Barnes;  $\frac{4}{24}$  to John Johnson; and  $\frac{3}{24}$  to the Harts—that is,  $\frac{1}{24}$  to each of the Harts.

Wherefore the judgment is reversed, and cause remanded, with directions to the circuit court to set aside the judgment appealed from and enter in lieu thereof another conforming to this opinion.

### LOUISVILLE & N. R. CO. v. LONG'S ADM'R.

(Court of Appeals of Kentucky. March 18, 1909.)

#### 1. NEGLIGENCE (§ 56\*)—ACTIONS—EVIDENCE—PROXIMATE CAUSE.

In an action for negligent injuries, plaintiff must prove negligence naturally resulting in the injury, and, unless the proof connects the proved injury as a rational and proximate result of the proved negligence, there is nothing to submit to the jury, and the absence of evidence upon any material point is as fatal as the absence of all evidence would be.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 56.\*]

#### 2. MASTER AND SERVANT (§ 276\*)—INJURIES—EVIDENCE—SUFFICIENCY.

In an action for the death of a railway brakeman, evidence held not to satisfy the burden upon plaintiff to show that the negligence of defendant's engineer in starting the train was the proximate cause of the death.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.\*]

Appeal from Circuit Court, Kenton County, Criminal, Common Law, and Equity Division.

"To be officially reported."

Death action by Edward J. Long's administrator against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

Benjamin D. Warfield and S. D. Rouse, for appellant. Myers & Howard, for appellee.

CLAY, C. In this action Edward J. Long's administrator recovered a judgment against the defendant, Louisville & Nashville Railroad Company, for the sum of \$8,000, for the death of his decedent. A new trial was denied, and the railroad company appeals.

The main question in the case, and the only one which we deem it necessary to discuss, is whether or not a peremptory instruction should have gone for appellant. In this

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

connection it may be proper to give the different grounds of negligence charged in plaintiff's petition and amended petition. It was alleged in the original petition that Long was killed as a result of the gross negligence of the employes of defendant other than the decedent. Then it was charged that the accident resulted from an open switch. It was also charged that the trainmen were inexperienced and incompetent. There was the further allegation that, after the decedent had been run over, and while he was yet alive, and after the train had come to a stand, the employes thereon put the train in motion and again ran the wheels over the decedent. Appellant then filed an answer denying these allegations of the petition, and also pleading contributory negligence. Thereafter plaintiff filed an amended petition, in which he, in substance, alleged that decedent was ordered by the conductor of the train to pack hot boxes upon some cars of the train, and while so engaged the train, without notice or warning to him, was started forward, and thereby the decedent was caught between the wheels and trucks of one or more cars and run over by same, and thereby met his death, and that the conductor was guilty of gross negligence in not notifying the engineer that Long was so engaged; or, the petition says, upon the starting of said train while Long's work was incomplete, he undertook to stop the train by stepping between two of the cars thereof and pulling what is known as the "Sullivan valve," attached to one of the cars, thereby stopping said train, and in doing so was caught in a switch point, thrown down, run over, and killed. The amended petition further charged that said decedent was caught, run over, and killed in one of the two ways above set out, and in which of said ways the plaintiff does not know, and that, if the decedent stepped between said cars and pulled the Sullivan valve, the decedent was, in so doing, discharging the duty devolving upon him in his position as a member of said train crew. In the second paragraph of the amended petition, it was alleged that the engine was set in motion and the train moved without any signal from the conductor or any other member of the crew, and the decedent was thereby run over and killed. Then the petition further states: "The plaintiff says that this decedent was run over and killed by said train by and because of the gross negligence of defendant hereto in some one of the respects set out in the petition and set out herein, and he does not know which one, or that said decedent was run over and killed because of the concurrence of two or more or all of said causes, and as to this plaintiff does not know."

The record discloses the following facts: Long was killed on January 11, 1906, about 1:15 o'clock a. m. At the time of his death he was flagman and rear brakeman on one

of appellant's freight trains, which was operated on its Kentucky Central division. He had been in appellant's employ for several years. On the night of the accident a north-bound train, composed of 27 cars and manned by a crew of which Long was rear brakeman and flagman, was side-tracked at Cynthiana Station in order to permit a south-bound freight to pass on the main track. When the north-bound freight was side-tracked, the conductor of the train and decedent started along for the purpose of ascertaining whether or not the train was in proper condition to continue its journey to Covington. To this end they began an examination of the hot boxes, broken brake rigging, defective couplings, etc. When the front trucks of the sixth car from the rear were reached, a hot box was discovered. The conductor put Long to work packing this hot box. Long had with him a lantern, a box of saturated waste, and his packing iron. The hot box upon which decedent was at work was situated on the left side of the train. The conductor left decedent engaged at this work and walked towards the front of the train. Very soon the south-bound freight train passed by. Then the north-bound train was started forward and proceeded for a distance of about two car lengths, when it was suddenly stopped by the application of the Sullivan valve. Shortly thereafter the conductor returned to the point where decedent had been employed, and he found him almost at the same point where he was engaged in packing the hot box, lying under and near the front end of the third car. He was lying on his back with his head towards the engine. The Sullivan valve, which had been pulled, was located on the front end of the third car. Decedent's bucket and tools were near by, and the lantern, which had been broken, was on his arm. There was further testimony to the effect that the rules provided that, and as a matter of fact, it was decedent's duty to look after hot boxes or any defects there might be in the running gear, such as broken drawheads, arch bars, brake rigging, or leaks in the air-hose connection, etc., and that it was the duty of a brakeman to make such an examination whenever he had an opportunity to do so. It was further shown that rule No. 119 provided that no train should leave a station without a signal from the conductor. The conductor testified that he gave no signal to the engineer to leave. The head brakeman first testified that he had no recollection of having given a signal to the engineer, but afterwards stated positively that he had not given any such signal. The engineer says that the head brakeman did give him a signal to go forward. The theory of appellee is that Long was either beneath or between the cars when the train was started, and, if so, the presumption is that he was engaged in inspecting or repairing the car, as the rules of the com-



pany required him to do, and that under these circumstances the train was negligently started forward by the engineer.

Appellee relies upon the principle enunciated by this court in *Illinois Central R. R. Co. v. Cane's Adm'r*, 90 S. W. 1061, 28 Ky. Law Rep. 1018. In that case the court used the following language: "But we perceive no reason why we should presume that he (the brakeman who was killed) was unnecessarily between the cars, or that he did not find something to be done which he considered it his duty to do. Having a right to rely upon the fidelity of the engineer, he could act with less caution than would otherwise be incumbent upon him." In that case, however, there were two eyewitnesses to the fact that the decedent was actually between the cars and that the engineer moved up against the coal cars. It will be observed therefore that the court in that case did not indulge any presumption as to where the decedent was when the engine started. The only effect of the opinion was that there was no presumption that the decedent was unnecessarily between the cars, or that he did not find something to be done which he considered it his duty to do. In this case we may concede that it was the duty of Long to examine the brakes, rigging, and other apparatus on the car. We may further concede that the engineer negligently started the train forward. Here, then, we have negligence proven, and injury resulting in death proven. This, however, is not sufficient. In a long line of opinions, this court has recognized the rule that it is necessary for the plaintiff to prove negligence naturally resulting in the injury. Unless the proof connects the proven injury as a rational and proximate result of the proven negligence, there is nothing to submit to the jury. The absence of evidence upon any material point is as fatal to him who has the onus, as the absence of all evidence would be. *O. N. O. & T. P. Ry. Co. v. Zachary's Adm'r*, 106 S. W. 842, 32 Ky. Law Rep. 678; *Hughes v. L. & N. R. R. Co.*, 67 S. W. 984, 23 Ky. Law Rep. 2288; *Hughes v. C., N. O. & T. P. Ry. Co.*, 91 Ky. 526, 16 S. W. 275; *Louisville Gas Co. v. Kaufman*, 105 Ky. 131, 48 S. W. 434; *Wintuska's Adm'r v. L. & N. R. R. Co.*, 20 S. W. 819, 14 Ky. Law Rep. 579.

Does the evidence of plaintiff measure up to the requirements of the rule announced? The evidence shows that the proper way to operate the Sullivan valve is from above. On the occasion of decedent's death the ground was covered by a slight fall of snow. The accident occurred after midnight. If, under these circumstances, the decedent went in between the third and fourth cars, while the train was in motion, for the purpose of operating the Sullivan valve, there can be no doubt that he would not be entitled to recover. We are therefore of the opinion that this whole case depends upon whether or not decedent was under or between the cars when

the train was started. In discussing this question we must keep in mind the one incontrovertible fact that the Sullivan valve had been applied and the train brought to a standstill, that decedent was found under the front trucks of the third car, on which the Sullivan valve was located, and that there was no one else present who could have applied that valve. It is therefore absolutely certain that Long was not under the sixth car where he was engaged in packing the hot box, or under the third car, or any other car, when he was injured. If the train was started while he was at work under any one of the cars, he could not have operated the Sullivan valve.

We are, then, reduced to the single question: Was Long between the third and fourth cars when the train was started, or did he go in between those cars after the train was started? Counsel for appellee make much of the physical fact of the position of Long's body; that he was found lying on his back with his head towards the engine. From this it is argued that Long would not have jumped backwards between the cars. This evidence throws but little light upon the question, for in stumbling, or falling, or being twisted under the wheels, the position of the body may have been entirely changed from what it was when decedent fell. There is therefore nothing in the fact that Long was lying upon his back with his face towards the engine, from which the inference naturally follows that he was between the cars when the train was started. On the other hand, the position of Long's body is incontrovertible evidence of one fact: Long was found right where he was left at work. He was engaged in packing a hot box on the sixth car. He was found under the third car. If, then, he was between the cars when the train was started, he must have left the hot box which he was engaged in packing, and have gone the distance of two car lengths towards the caboose, and been at work between the third and fourth cars. Then he must have walked with and between the cars after the train was started for at least two car lengths before he was killed. Furthermore, if the attitude of the body has any bearing upon the question as contended for by appellee, he must have backed with the cars for at least two car lengths. On the other hand, if the train was started while he was at work on the hot box, and he went in between the third and fourth cars to pull the Sullivan valve as the third car reached the point where he was at work, it would not require the extraordinary feat of walking for two car lengths between two cars of a moving train. While, of course, it can never be known, exactly, under what circumstances decedent was killed, every inference logically deducible from the physical facts and circumstances connected with this case is to the effect that the train started while

decedent was at work on the hot box, and, as the car holding the Sullivan valve approached the decedent, he went between the cars for the purpose of operating the Sullivan valve and thereby stop the train; and this seems to have been the view of the draftsman of the petition. At any rate, there is just as much, if not more, evidence favoring this theory than that of appellee, that the decedent was injured while at work under or between the cars. That being the case, and the burden being upon plaintiff to show that the proven negligence was the proximate cause of decedent's death, and having failed to show that decedent was under or between the cars when the train was started, we are of the opinion that appellant was entitled to a peremptory instruction.

For the reasons given the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

### SERGEANT v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 25, 1909.)

#### 1. HOMICIDE (§ 166\*)—EVIDENCE—MOTIVE.

In a prosecution for murder, evidence that deceased became an enemy of the accused because accused testified against deceased in a prosecution for a misdemeanor, and that accused was much incensed at deceased because he circulated a charge that he had detected accused in the act of committing a crime, is admissible as tending to show ill feeling existing between the deceased and accused, and as showing a motive for the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 821; Dec. Dig. § 166.\*]

#### 2. HOMICIDE (§ 231\*)—WEIGHT AND SUFFICIENCY OF EVIDENCE—MALICE.

Evidence in a prosecution for murder held to show malice, necessary to authorize a verdict of guilty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 479; Dec. Dig. § 231.\*]

#### 3. HOMICIDE (§ 120\*)—EXCUSABLE HOMICIDE—SELF-DEFENSE—PURSUIT OF ADVERSARY.

Harsh treatment by deceased of accused, and the apprehension by accused of injury or death at the hands of deceased, do not justify the accused in lying in wait for deceased and assassinating him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 175; Dec. Dig. § 120.\*]

#### 4. CRIMINAL LAW (§ 1134\*)—APPEAL AND ERROR—SCOPE AND EXTENT OF REVIEW—SELECTION OF JURY.

Under Cr. Code Prac. § 281, providing that the decision of the court upon challenges to the panel and for cause shall not be subject to exception, the appellate court cannot review a decision of the trial court in selecting a jury in a criminal prosecution from an adjoining county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2990; Dec. Dig. § 1134.\*]

#### 5. CRIMINAL LAW (§ 761\*)—INSTRUCTIONS—ASSUMPTION OF GUILT.

An instruction, in a prosecution for murder, that if the jury believed from the evidence

beyond a reasonable doubt that accused was guilty of murder or voluntary manslaughter, but had from the evidence a reasonable doubt as to which, if either, of these crimes he was guilty of, it was their duty to find him guilty of voluntary manslaughter, is not objectionable as assuming that accused was guilty of murder or voluntary manslaughter, or as compelling the jury to find him guilty of one or the other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1756, 1757; Dec. Dig. § 761.\* Homicide, Cent. Dig. §§ 582, 599, 607, 621.]

#### 6. JUDGES (§ 16\*)—SELECTION OF SUBSTITUTE JUDGE.

Ky. St. § 968 (Russell's St. § 2824), provides that, when the judge of the circuit court cannot properly preside in a matter pending in said court, the parties by agreement may elect one of the attorneys of the court to preside on the trial. During the trial of a prosecution for homicide, the regular judge became ill and unable to preside, and the attorneys for the commonwealth and accused agreed that a special judge might be selected to preside during the absence of the regular judge, pursuant to which a member of the county bar was selected, duly sworn, and acted as special judge at the trial for one day, giving place to the regular judge the following day. Held, that there was no error in the selection of the substitute judge of which accused could complain.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 54; Dec. Dig. § 16.\*]

#### 7. CRIMINAL LAW (§ 1049\*)—APPEAL AND ERROR—PRESENTATION IN LOWER COURT OF GROUNDS OF REVIEW—EXCEPTION TO SELECTION OF SPECIAL JUDGE.

The appellate court will not consider whether there was error in the selection of a special judge in a criminal prosecution, where appellant did not except to the vacation of the bench by the regular judge, or to the right of the special judge to preside in his absence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2656; Dec. Dig. § 1049.\*]

Appeal from Circuit Court, Harlan County. "To be officially reported."

Henry Sergeant was convicted of murder, and appeals. Affirmed.

W. F. Hall, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

SETTLE, C. J. The appellant, Henry Sergeant, was indicted by the grand jury of Harlan county for the murder of Henderson Tweed. The trial resulted in a verdict from the jury finding appellant guilty as charged, and fixing his punishment at confinement in the penitentiary for life. Judgment was entered in conformity to the verdict, and, having been refused a new trial in the court below, he has appealed.

The homicide occurred in Harlan county, at the residence of Mrs. Bettie Clemm, a widow, under the following circumstances: Tweed, in passing the house of Mrs. Clemm, stopped to reply to an inquiry she made of him about her cows, which had wandered from home. He was riding a mule, had a bucket on his left arm, and carried in a holster suspended by strap from one shoulder, a six-shooter Colt's pistol. While talk-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing with Mrs. Clemn, Tweed remained on his mule. According to her testimony, he had barely answered her inquiry when a gun was fired from some point near by, immediately following which he fell from the mule to the ground. After he fell to the ground, three other shots were fired from the same direction. During the firing of the gun, Mrs. Clemn, who had been standing in front of her house while talking with Tweed, being frightened by the shooting, ran into the house and closed and locked the doors. She did not see the person by whom the shots were fired at Tweed, but after entering the house looked out of a window and saw that Tweed was still on the ground, and apparently dead. After an interval of some minutes Mrs. Clemn recovered her composure sufficiently to send her little daughter to inform some of her neighbors of the homicide. Several of them went at once to her house, and upon reaching it found Tweed dead, with the bucket still upon his arm and the pistol in the holster attached to his body. An examination was made of the ground surrounding the body of deceased, and at a large rock near Mrs. Clemn's stable, 60 feet from where Tweed was shot, were found four empty cartridge shells. The rock and corner of the fence were together sufficient to afford concealment to a man from Tweed and Mrs. Clemn, at the time of the shooting of the former. The shells were such as were used with a 32 Winchester rifle. As appellant was known to have carried such a rifle, and to have threatened to take the life of the deceased, between whom and himself there had been hostile relations for nearly a year, steps were at once taken to arrest him for the murder, and soon thereafter his arrest was effected.

According to the evidence, deceased became an enemy of appellant because the latter as a witness testified against him in a prosecution for a misdemeanor, and later appellant became very greatly incensed at deceased because he circulated in the community in which both lived a charge that he had detected appellant in the act of committing a nameless crime. The above evidence was introduced for the purpose of proving, and was competent to prove, the ill feeling existing between the parties, and show a motive for the homicide.

When arrested appellant admitted that he shot and killed Tweed, but claimed to have done in his necessary self-defense. His testimony upon the trial was to the effect that he had for several months gone to his work as a miner by an unusual route in order to avoid a difficulty with deceased, who lived on the usual route; that he accidentally met deceased at the time of the homicide, who assumed a hostile attitude, cursed appellant, and placed his hand on his pistol, seeing which, and believing himself about to be shot by deceased, he shot him with a Win-

chester rifle. Appellant admitted that he carried a Winchester rifle for some time previous to the homicide, in anticipation of trouble with deceased, and also admitted that the empty shells found near the place of the killing had been thrown away by him, but denied that he was concealed when he shot deceased. This denial seemed to have no weight with the jury, in view of the testimony of Mrs. Clemn, which clearly showed that deceased, when shot, was not expecting such an attack, and did not see his slayer, and, moreover, that the slayer was not seen by Mrs. Clemn. Her testimony, together with the empty shells and other evidence of appellant's concealment, seem to us sufficient to justify the conclusion, expressed in the verdict of the jury, that deceased was shot from ambush.

However harsh may have been Tweed's mistreatment of appellant, or however great the latter's apprehension of injury or death at his hands, these things did not justify the assassination of Tweed, and the fact that the act was assassination proved the malice necessary to authorize the verdict declaring it murder.

Appellant asks the reversal of the judgment of conviction because he was tried by a jury summoned from Bell county, instead of from Harlan county; his contention being that the circuit court should at least have made an effort to secure a jury from Harlan county before procuring one from another county. We find no just ground for this complaint. The order of the court requiring the summoning of the jury from Bell county seems to substantially comply with section 194 of the Criminal Code of Practice, and was authorized by it. The contention here made was passed on by this court in *Mosely v. Commonwealth*, 84 S. W. 748, 27 Ky. Law Rep. 214, in the opinion of which it is said: "It is insisted, first, that this section is in violation of that part of section 11 of the Constitution which guarantees to a defendant a speedy public trial by an impartial jury of the vicinage; and, if this be not sound, it is urged that the judge violated the section of the Code by not in good faith attempting to obtain an impartial jury in the county where the case was tried. Neither of these propositions can be maintained. The validity of section 194 has been upheld by this court in *Brown v. Commonwealth*, 49 S. W. 545, 20 Ky. Law Rep. 1552; *Massie v. Commonwealth*, 36 S. W. 550, 18 Ky. Law Rep. 367; *Roberts v. Commonwealth*, 94 Ky. 502, 22 S. W. 845."

But, if the action of the court complained of could be pronounced error, we are without power to correct it, because expressly deprived by section 281, Cr. Code Prac., of jurisdiction to review the decision of the trial court in the matter of the selection of the jury. *Mosely v. Commonwealth*, 84 S. W. 748, 27 Ky. Law Rep. 214; *Howard v.*

Commonwealth, 118 Ky. 1, 80 S. W. 211, 81 S. W. 704.

Appellant also complains that instruction No. 3 does not correctly give the law on the point with respect to which it was intended to advise the jury. This complaint is without merit. While not in the form usually followed, the instruction does not, as claimed, assume that appellant was guilty of murder or voluntary manslaughter, or that the jury were compelled to so find. Its language in substance and meaning is simply that if the jury believed from the evidence beyond a reasonable doubt that appellant was guilty of murder or voluntary manslaughter, but had from the evidence a reasonable doubt as to which, if either, of these crimes he was guilty of, it was in that event their duty to find him guilty of voluntary manslaughter.

Finally, it is contended that the judgment should be reversed because during one day of the trial a special judge presided, instead of the regular judge of the court. This contention is also unsound. The orders appearing in the record show that at one time during the trial the regular judge of the court was sick and unable to preside, and that appellant's counsel then agreed with the commonwealth's attorney that a special judge might be selected to preside during the absence of the regular judge, pursuant to which agreement appellant, his counsel, and the commonwealth's attorney agreed upon and selected the special judge, who was a member of the Harlan county bar and possessed all the qualifications required of a circuit judge; that the special judge thus selected was duly sworn and did act as special judge by presiding one day of the trial, vacating the bench on the morning of the following day to give place to the regular judge, who had recovered from his illness; and that the latter then resumed his place and continued to preside in the case until its close.

There was no error in this matter. Section 968, Ky. St. (Russell's St. § 2824), provides: "When, from any cause, the judge of the circuit court fails to attend, or being in attendance cannot properly preside in an action, proceeding or prosecution pending in said court, or if either party shall file with the clerk of the court his affidavit that the judge will not afford him a fair and impartial trial, or will not impartially decide an application for a change of venue, the parties, by agreement, may elect one of the attorneys of the court to preside on the trial, or hear the application or hold the court for the occasion; and if any of the parties to said action, proceeding or prosecution be or are nonresident defendants, who have not entered their appearance, nor have been summoned, or are infant defendants, the attorney appointed to defend for such nonresidents, or the guardian ad litem for such infants, may agree with the other parties to such action,

proceeding or prosecution, upon a lawyer having all the qualifications of a circuit judge to try the action, proceeding or prosecution."

It will be observed that this statute gave the parties the right to agree upon and select a special judge, and, having done so, appellant will not be heard to complain of the failure of the regular judge to preside throughout the trial, or allowed to repudiate his own act of taking part in selecting a special judge to take the place of the regular judge during the time he was incapacitated from service by illness. However, the record fails to show that appellant excepted to the vacation of the bench by the regular judge, or to the right of the special judge to preside in his absence. This, in the absence of any other reason, would prevent us from considering the complaint.

Our examination of the record convincing us that appellant had a fair trial, the judgment is affirmed.

#### ANDERSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 25, 1909.)

##### 1. INDICTMENT AND INFORMATION (§ 61\*) — REQUISITES—MATTER JUDICIALLY NOTICED.

An indictment under St. 1909, § 1175 (Russell's St. § 3709), for false swearing in making an official report of the condition of a bank required by section 593 (Russell's St. § 2182), is not defective because it does not allege that the law required the report to be sworn to, since the court takes judicial notice of the requirements of the statute.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 183; Dec. Dig. § 61.\*]

##### 2. BANKS AND BANKING (§ 310\*)—REGULATION—REPORTS.

St. 1909, § 593 (Russell's St. § 2182), requiring officers of banks to make quarterly reports to the Secretary of State, applies to institutions doing both a banking and a trust business.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1215; Dec. Dig. § 310.\*]

##### 3. OATH (§ 2\*)—AUTHORITY TO ADMINISTER—NOTARIES.

Notaries public did not at common law have the right to administer oaths, and cannot exercise this power unless authorized by statute.

[Ed. Note.—For other cases, see Oath, Cent. Dig. § 6; Dec. Dig. § 2.\*]

##### 4. PERJURY (§ 9\*)—REPORTS BY BANKS—VERIFICATION—AUTHORITY TO ADMINISTER OATH—NOTARIES.

An official report of the condition of a bank required by St. 1909, § 593 (Russell's St. § 2182), may be sworn to before a notary, notaries public being authorized by Civ. Code Prac. § 549, and St. 1909, § 3754 (Russell's St. § 4856), to take affidavits and administer official oaths; and, if such report is false, the officer making it is guilty of false swearing denounced by section 1175 (Russell's St. § 3709).

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 82; Dec. Dig. § 9.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

# 5. PERJURY (§ 26\*)—SWEARING TO FALSE REPORT—INDICTMENT—ASSIGNMENT OF PERJURY.

An indictment under St. 1909, § 1175 (Russell's St. § 3709), for false swearing in making an official report of the condition of a bank required by section 593 (Russell's St. § 2182), which not only negatives the truth of the statements in the report as to the highest amount of indebtedness of any stockholder, but alleges that the defendant, a stockholder, was indebted to the bank in excess of the amount stated in his report, and that another stockholder was also indebted in excess of the sum stated in the report, and charges that the statements made by the defendant in his report were material, that the report was untrue in each of the material particulars, and known to be untrue by defendant at the time, is sufficient to give defendant notice of the charge against him, though it fails to allege how much the real indebtedness exceeded the sum stated in the report.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 91; Dec. Dig. § 26.\*]

# 6. CRIMINAL LAW (§ 370\*)—EVIDENCE—OTHER OFFENSES—ACTS SHOWING KNOWLEDGE.

Where defendant was indicted under St. 1909, § 1175 (Russell's St. § 3709), for false swearing in making an official report of the condition of a bank required by section 593 (Russell's St. § 2182), prior reports were admissible to show that the false statements charged in the indictment were made knowingly, and that defendant was not merely mistaken.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 825; Dec. Dig. § 370.\*]

# 7. JUDGES (§ 43\*)—DISQUALIFICATION—PREJUDICIAL INTEREST.

A judge, who is a director and stockholder in a bank which is a creditor of a defunct rival bank said to have been wrecked by an officer on trial for false swearing in making an official report of the condition of the bank required by St. 1909, § 593 (Russell's St. § 2182), is disqualified to preside at the trial and should vacate the bench on defendant's motion.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 201; Dec. Dig. § 43.\*]

# 8. CRIMINAL LAW (§ 126\*)—VENUE—CHANGE OF VENUE—LOCAL PREJUDICE.

Defendant, the president of one of two banks which failed about the same time, was indicted for false swearing in making a report of the bank's condition required by St. 1909, § 593 (Russell's St. § 2182). The depositors, numbering about 8,000, lost heavily, and there was great public excitement and much bitterness against defendant. Many witnesses testified that defendant could not have a fair trial in the county, and witnesses for the commonwealth testified that a fair trial could be had. Held, that there was great danger, under the circumstances, that defendant could not have a fair trial, and a refusal of his motion for a change of venue was an abuse of the court's discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 243; Dec. Dig. § 126.\*]

Appeal from Circuit Court, Daviess County.  
"Not to be officially reported."

T. S. Anderson was convicted of the offense of swearing to a false report of the condition of a bank, and he appeals. Reversed.

Lockett & Worsham, W. Scott Morrison, and W. Foster Hays, for appellant. Jas. Breathitt, Atty. Gen., and Chas. H. Morris, for the Commonwealth.

BARKER, J. The appellant, T. S. Anderson, was indicted by the grand jury of Daviess county, charged with the offense of false swearing in making an official report of the condition of the Daviess County Bank & Trust Company to the Secretary of State. So much of the indictment as is considered necessary to an understanding of the case is as follows:

"The grand jury of Daviess county, in the name and by the authority of the commonwealth of Kentucky, accuse T. S. Anderson of the crime of false swearing, committed in manner and form as follows, to wit:

"That said T. S. Anderson was, on the 31st day of March, 1908, and prior thereto, and in the county of Daviess, the president of the Daviess County Bank & Trust Company, and then and there acting as such president, which bank was then and there duly and legally created, organized and existing as a body corporate under the laws of the state of Kentucky, and then and there carrying on a banking business in Owensboro, in said county; and as such banking corporation, said Daviess County Bank & Trust Company was required by law to make reports of its condition to the Secretary of State once in every three months, each year, and at such times, and according to such forms as said Secretary of State might prescribe, and said Secretary of State designated and prescribed the close of business on the 31st day of March, 1908, as the time said Daviess County Bank & Trust Company should make a report of its condition to the Secretary of State, and said Secretary of State prescribed the form according to which such reports should be made, and furnished said Daviess County Bank & Trust Company a printed form for the purpose of making such reports thereon, and said report was made in writing by said bank on said form and said T. S. Anderson, did then and there, as president of said Daviess County Bank & Trust Company, and in the county and state aforesaid, unlawfully, willfully, feloniously and knowingly verify and make oath to before R. D. Lashbrooks, a duly appointed, commissioned and qualified notary public in and for the county of Daviess and state of Kentucky, and authorized by law to administer to the said Anderson said oath, a certain written and printed report to the Secretary of State of the condition at the close of business March 31, 1908, of said Daviess County Bank & Trust Company, which day and date was the time designated by the Secretary of State for said banking corporation to make a report of its condition at the close of its business thereon to said Secretary of State, which report was in words and figures, as follows: [Here follows the quarterly report of the Daviess County Bank & Trust Company at the close of business on the 31st day of March, 1908.]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"Supplementary.

"(1) Highest amount of indebtedness of any stockholder, person, company or firm (including in the liability of the company or firm the liability of the individual members thereof), directly or indirectly, if such indebtedness exceeds 20 per cent. of capital stock actually paid in, and actual amount of surplus of that bank, \$15,000.00.

"(2) How indebtedness stated in above item 1 secured? (See section 583, Kentucky Statutes.) See question No. 4.

"(3) Highest amount of indebtedness of any director or officer, if the amount of such indebtedness exceeds 10 per cent. of paid-up capital stock of bank (see section 583, Kentucky Statutes), \$15,000.00.

"State of Kentucky, County of Daviess—ss.:

"T. S. Anderson, president Daviess County Bank & Trust Company, a bank organized, located and doing business at No. 114 W. Third street in the city of Owensboro in said county, being duly sworn, says the foregoing report is in all respects a true statement of the condition of the said bank, at the close of business on the 31st day of March, 1908, to the best of his knowledge and belief; and further says that the business of said bank has been transacted at the location named, and not elsewhere, and that the above report is made in compliance with an official notice received from the Secretary of State designating the 31st day of March, 1908, as the day on which such report shall be made.

"T. S. Anderson, President.

"J. J. Griffin, Director.

"S. H. Anderson, Director.

"T. S. Anderson, Director.

"Subscribed and sworn to before me by T. S. Anderson the ——— day of April, 1908.

"D. R. Lashbrook, Notary Public."

"Which said report, as aforesaid, was false and known to be false by the said T. S. Anderson, at the time he verified the same, as aforesaid, in the following material parts:

"Said report stated that the highest amount of indebtedness of any stockholder, person, company or firm, including in the liability of the company or firm the liability of the individual members thereof, directly or indirectly, did not amount to exceeding \$15,000.00, when in fact and in truth T. S. Anderson, a stockholder in said bank, was then and there indebted to said bank in excess of \$15,000.00, and Mrs. Sue H. Anderson, a stockholder in said bank and wife of said T. S. Anderson, was then and there indebted to said bank in excess of \$15,000.00.

"Said report shows that there was due from state banks and bankers \$38,063.00, when in fact and in truth there was not due and owing to said Daviess County Bank & Trust Company from any state bank or bankers \$38,063.00, or any sum.

"Each and every statement aforesaid was a material statement in said report and re-

quired to be contained therein by the form prescribed by the Secretary of State, and required by law to be contained in said report, and said report was made to the Secretary of State and sworn to by T. S. Anderson, as president, knowing, at the time he did so, that said report was false and untrue in each and every one of the material particulars, parts and items hereinabove set out—contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the commonwealth of Kentucky."

The foregoing indictment and the prosecution under it are based upon the following sections of the Kentucky Statutes:

"Sec. 593. Every bank shall make reports of its condition to the Secretary of State once in every three months each year, and oftener if required, and at such times, and according to such forms, as he may prescribe; and shall cause each alternate report to be published, when made, in a newspaper, if any be published in the county in which the bank is located, and which has the largest bona fide circulation in the county. The reports shall be signed and sworn to by the president, vice president or cashier, and signed by at least three of the directors." Russell's St. § 2182.

"Sec. 1175. If any certificate or written statement be made or written notice given, by the officers of any company incorporated by the laws of this commonwealth, which is required to be verified on oath, and is so sworn to, be false in any material part, each person who swore to the same, knowing it to be false, shall be guilty of false swearing, and, on conviction, be confined in the penitentiary not less than one nor more than five years." Russell's St. § 3709.

When the indictment was returned by the grand jury, a bench warrant was issued for the arrest of the defendant, and he was brought into court on the 31st day of August, 1903, and executed bond in the sum of \$1,000 for his appearance on the first day of the next December term of the court to answer the charge contained in the indictment. Afterwards, on the 15th day of December, which was the first day of the December term of the court, the defendant appeared, and the case was assigned for trial to the 28th day of December, 1908, and on that day the court, on its own motion, continued this case, and two other indictments against the defendant to a special term of the court called for January 9, 1909. On the latter date, when the case was called for trial, the defendant filed an affidavit as by law required and moved for a change of venue. He also filed his affidavit and moved that the regular judge should vacate the bench and not preside upon the trial of the prosecution under the indictment, nor upon the hearing of the motion for a change of venue. Argument was heard upon the motion for the regular judge to vacate the bench, and the motion was overruled,

to which the defendant excepted. Subsequently the motion for a change of venue was heard, and the court, having considered all the evidence adduced for and against the motion, overruled the same, to which the defendant excepted. Afterwards the case came on for trial, whereupon the defendant waived formal arraignment and entered a plea of not guilty, and his case was then and there tried before a jury, with the result that he was found guilty as charged in the indictment, and his punishment fixed at confinement in the penitentiary for a term of three years. His motion for a new trial having been overruled, he is now here on appeal complaining of the adverse judgment against him.

Many errors are assigned as grounds for a reversal of the judgment, which we will now proceed to consider. It is said that the indictment is defective in that it does not allege that the law required the report which constitutes the basis of the indictment to be sworn to. It is insisted that this is a necessary allegation, and its absence is fatally defective to the validity of the indictment. Section 593, Ky. St., above quoted, shows that the law provides that the official reports made by the officers of the bank to the Secretary of State were required to be sworn to, and we do not apprehend that it is necessary that the requirements of the law shall be stated in the indictment. The indictment alleges that he made the report complained of, and that it was verified by his oath. The court takes judicial cognizance of the requirements of the statute, as must every citizen who comes within its purview. Therefore it was not necessary to allege in the indictment the law of the land.

It is also objected that, while the statute requires the officers of banks to make quarterly reports, and requires the officers of trust companies to make reports, this being a combined bank and trust company, there is no statute requiring reports from its officers. It is true the institution of which appellant was president is called the "Davless County Bank & Trust Company," and it is more than likely true that it did both a banking and a trust business; but because it did a trust business did not make it any the less a bank, and, being a bank as well as a trust company, it was amenable to all the requirements of the statute regulating banks.

Appellant further insists that there is no law in the state of Kentucky conferring upon notaries public the power to administer oaths, and therefore he cannot be convicted of false swearing in making a report which was sworn to before a notary public. It may be conceded, as contended for by defendant on this point: That notaries public did not at common law have the right to administer an oath; that they were more particularly officers under the law merchant, and had to do with things mercantile rather than things legal; and that, in order to exercise the authority to administer an oath, they must be

duly authorized by statute. Section 549 of the Civil Code of Practice provides that "an affidavit may be made in this state, before a judge of a court, a justice of the peace, notary public, examiner, clerk of a court or master commissioner." Section 3754, Ky. St. (Russell's St. § 4856), provides that "the official oath of any officer may be administered by any judge, notary public, clerk of a court, or justice of the peace within his district or county." We think these statutes fully authorized the notary public to swear the appellant to the quarterly report involved in this prosecution.

It is further said that the indictment is defective in that it simply negatived the truth of the statement in the report that \$15,000 was the highest amount of indebtedness of any director or officer of the bank, and that \$15,000 was the highest amount of indebtedness of any stockholder, person, company, or firm; whereas, it is said that the indictment should have stated how much the real indebtedness exceeded the given sum of \$15,000. This position, we think, is not only highly technical, but is untenable. The appellant was required to state, under oath, the highest amount of indebtedness of any stockholder, person, company, or firm (including in the liability of the company or firm the liability of the individual members thereof), directly or indirectly, if such indebtedness exceeded 20 per cent. of capital stock actually paid in and actual amount of surplus of the bank. To this question the appellant made answer that \$15,000 was the highest amount of indebtedness, etc. The indictment not only negatives the truth of this statement of the appellant in his report, but alleges that at that time the appellant himself, who was a stockholder in the bank, was indebted to it in excess of \$15,000, and that his wife, Mrs. Sue H. Anderson, who was also a stockholder in the bank, was then and there indebted to said bank in excess of the sum of \$15,000. The indictment then goes on to charge that each and every one of these statements made by defendant was a material statement in said report, that the report was false and untrue in each and every one of the material particulars, parts, and items, and known to be untrue by the defendant at the time he made them. This, we think, was sufficient. It certainly gave the defendant notice of the charge against him, and this was all that was required.

It is also alleged as a ground for reversal that the court erred during the trial of the case in permitting prior reports made by the defendant to the Secretary of State to be read to the jury. Under the admonition of the court that the jury were only to consider these prior reports in so far as they tended to show, if they did so tend, that the defendant knowingly made the false statements charged in the indictment, and that he was not merely mistaken as to the real facts, the

evidence was clearly admissible for the purpose for which it was introduced. Appellant, while admitting the charge that his wife owed more than \$15,000 to the bank at the time he made the report, claims that this was an honest mistake upon his part, and he really believed it was true at the time. The prior reports were admitted for the purpose of showing that he had made the same errors in them as to his wife's indebtedness when all of the circumstances of the indebtedness were then as they were at the time the report in question was made. These prior reports tended to show that appellant could not have been mistaken for so long a time as to the amount of his wife's indebtedness to the bank.

We shall not comment upon the evidence further than to say that there was testimony in the case which tended to support the verdict of the jury. Having disposed of these errors, we come now to discuss two much more serious questions for the commonwealth; one of which was the failure of the judge to vacate the bench upon the motion of appellant, and the other his refusal to grant the defendant a change of venue under the evidence presented in favor of that motion. In support of his motion that the regular judge should vacate the bench, the defendant filed the following affidavit, which, for the purposes of the motion, we must take as true: "The affiant, T. S. Anderson, states that the regular judge of the court, Hon. T. F. Birkhead, will not afford him a fair and impartial trial of this case, nor impartially decide affiant's application for a change of venue herein. In April last the Owensboro Savings Bank & Trust Company and the Daviess County Bank & Trust Company, of which latter bank affiant was then president, failed in business, and the depositors of said banks, which number about 3,000 in this judicial district, principally in Daviess county, will lose heavily by said failures. In consequence thereof there now exists a widespread and bitter prejudice in this district, and especially in Daviess county, against the officers of said banks, and particularly against the presidents of the two banks, and this bitterness and prejudice are intensified on account of the failure of his bank and of the other bank above named at about the same time. This feeling of prejudice and hostility to affiant will influence the voters of the district in the selection of a circuit judge, who is the nominee of his political party and a candidate for re-election to that office. One-third of the voting population of the district and a majority of the depositors aforesaid are in Daviess county, and so bitter and unreasoning is the prejudice against affiant that a ruling in his favor upon any legal question which admits of debate would cause many voters to vote against any judge who would make it. This fact is well known to the regular judge of this court and candidate

for re-election at the approaching November election, and renders him, without having any purpose to do wrong, unable to give affiant a fair and impartial trial of this case, and affiant verily believes the regular judge cannot give him such trial, on account of bias growing out of the existence of this prejudice and hostility. This indictment was found against affiant at the August term, 1908, of this court. At the December term just past, the Hon. T. F. Birkhead, in his charge to the grand jury, being the second grand jury since the closing of said banks, again called attention to the failure of the aforesaid banks, and assuming the guilt of the chief officers thereof, including this affiant, declared, in substance, to the grand jury, that the chief officers of said banks, the affiant being president of one of them, had in receiving deposits herein committed the crime of receiving money under false pretenses, that they were guilty of the most outrageous conduct known to civilization, robbing widows and orphans, and the aged and infirm, and urged them to examine witnesses and present numerous indictment(s) against them, and said, unless they find numerous indictments against said officers, he (the said judge) believed they would not be doing their duty; and when the grand jury took a recess he again, in substance, repeated his charge to them, and under the influence of the judge's denunciation an indictment was returned against defendant for obtaining money under false pretenses, which affiant verily believes would never have been presented by the grand jury had they considered the evidence heard by them free from the influence of the judge's violent charge, and which he verily believes is unwarranted by the facts in the case. And the regular judge is, and was at and before the failure of said Daviess County Bank & Trust Company, a stockholder and director of the Owensboro Banking Company, which was a rival of the said bank of which affiant was president, and manifested hostility to his bank, and by its conduct did what it could to break down the credit of said bank and drive it out of business, and affiant by the failure of his bank was forced to make an assignment for the benefit of creditors, and is in debt to said Owensboro Banking Company, a portion of said indebtedness being secured only by the pledge of the stock of said Daviess County Bank & Trust Company as collateral, and stockholders of said Owensboro Banking Company will sustain a loss thereby. Affiant does not by this statement question the integrity of the regular judge as an officer, but the facts herein stated render him, however desirous of trying the case impartially, unable to do so."

We do not find it necessary to consider the sufficiency of any part of this affidavit, except that which sets forth that the regular judge "is, and was at and before the



failure of said Daviess County Bank & Trust Company, a stockholder and director of the Owensboro Banking Company, which was a rival of the said bank of which affiant was president," and which lost heavily by the failure of the defendant's bank. If this was a civil suit between the Owensboro Banking Company and the appellant to recover the small sum of \$50, nobody would doubt that the learned judge of the Daviess circuit court, being a director and stockholder in the corporation, should not preside at the trial. In the failure of the Daviess County Bank & Trust Company the Owensboro Banking Company had a large monetary interest and suffered a large monetary loss by reason of the failure. This loss was charged to have been the result of the criminal acts of appellant, and he was on trial for his liberty for one of the several offenses connected with the failure of his bank. We do not think it possible for one situated as was the circuit judge with reference to appellant's acts in the matter of the failure of the bank to possess that equipoise of mind, and that unbiased judgment necessary to affording the defendant a fair and impartial trial of his case. That the judge who tries his case should have an unbiased mind and judgment with reference to his acts is what every man charged with crime is entitled to under the law. There should not be the basis of a suspicion that he is biased against the defendant in a criminal case. On the contrary, he should be so impartial as to be able to hold the scales of justice with such equal hand that not even the eye of suspicion can observe that it trembles in the balance. This impartiality, we think, was lacking in the learned judge who tried this case. We do not mean to question his integrity in the slightest, nor do we believe that he was conscious of being biased against the defendant; but the position he occupied with reference to the Owensboro Banking Company, which was a large creditor of the bank said to have been wrecked by the acts of the appellant, disqualified him to preside at the trial against the will of the defendant.

We are furthermore of the opinion that the court erred in overruling the defendant's motion for a change of venue. Not only did the Daviess County Bank & Trust Company fail, under the circumstances shown in this record, but another bank in Owensboro failed about the same time, for practically similar reasons. There were about 3,000 depositors of the defunct banks, all of whom were losers by the failures. There was great excitement among the people of Owensboro, and much bitterness engendered against the officers of the banks. There were many witnesses who testified that they did not believe that the defendant could have a fair and impartial trial in Daviess county. These

witnesses were among the very best men in the county, and while it is true that there were witnesses for the commonwealth: who say they saw no reason why the defendant should not have a fair and impartial trial in the county, or that they believed he could have such a trial, a careful reading of the whole testimony convinces us that the defendant's contention was right, and that he could not, under the circumstances, have a fair trial of his case; or, at least, to put it another way, we are convinced that there was great danger, under the circumstances, that he would not have a fair and impartial trial. Every observing mind knows the effect of public excitement upon a jury, and where the excitement runs high, and the bitterness is deep, there is always great danger that the lawful rights of an unpopular defendant charged with crime will be overthrown under the influence of public passion. Not only is it shown that the depositors were prejudiced against the defendant, but we know that the friends of these depositors sympathized with them in their losses, and were more or less incensed against him who was charged with being responsible for such losses. In short, in a case like this, it is impossible to tell who would be prejudiced against the defendant so situated. Men are frequently prejudiced without being conscious of the fact, and if asked the question would deny the passion. We fully recognize the rule that the granting of motions for change of venue is a matter generally left within the sound discretion of the trial judge, and that his ruling upon the motion will not be disturbed by the appellate court unless that discretion has been palpably abused; but, while we recognize the rule, we are constrained to the belief that the trial judge erred in overruling the motion under discussion. The very fact that the appellate court relies so confidently upon the discretion of the trial judge in such cases accentuates the necessity that the defendant should have as a judge of the merits of his motion one who has no bias against him.

For the foregoing reasons, the judgment is reversed for procedure consistent with this opinion.

# STONE et al. v. MONTICELLO CONST. CO

(Court of Appeals of Kentucky. March 19, 1900.)

## 1. CORPORATIONS (§ 90\*) — CAPITAL STOCK — SUBSCRIPTION TO STOCK — ACTIONS ON SUBSCRIPTION.

Where persons agreed to subscribe for stock in a railroad construction company to be organized, the subscriptions to be binding only upon the bona fide subscription of a certain amount and the execution of an agreement by a committee of subscribers with a railroad company for construction of a railroad, an action

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

could be maintained in the name of the corporation on the subscription agreement; the conditions having been complied with.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 385; Dec. Dig. § 90.\*]

**2. JURY (§ 90\*)—QUALIFICATIONS—RELATIONSHIP TO STOCKHOLDERS IN CORPORATION SUING FOR SUBSCRIPTION.**

A juror would not be disqualified to serve, in an action by a corporation to recover on a subscription for stock, merely because he was related to a stockholder in the corporation other than a party to the action and who had no real interest in the action.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 416; Dec. Dig. § 90.\*]

**3. JURY (§ 131\*)—PEREMPTORY CHALLENGE—EXAMINATION OF JURORS.**

A party in a civil action having the right to strike off three jurors without cause, he may ask questions which may enable him to know who the jurors are and their relationship, that he may exercise his right intelligently, though the answers to them would not disqualify the jurors.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 563; Dec. Dig. § 131.\*]

**4. CORPORATIONS (§ 81\*)—CONDITIONAL SUBSCRIPTION TO STOCK—OTHER SUBSCRIPTIONS—SUBSCRIPTIONS IN GOOD FAITH.**

In an action by a corporation on subscriptions to stock, which were to be binding if a certain amount were subscribed in good faith, a subscription, made by a person whose apparent ability was not such as a person of ordinary prudence would have deemed reasonably sufficient to meet the assessments on the stock as they might be expected to be made, was not made in good faith, though it was not made for the purpose of fraud and the directors did not know of such a fraudulent intention.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 278; Dec. Dig. § 81.\*]

**5. CORPORATIONS (§ 81\*)—CONDITIONAL SUBSCRIPTIONS TO STOCK—SUBSCRIPTION BY CORPORATION—GOOD FAITH.**

A subscription by a corporation is not invalid, within the meaning of such condition as not made in good faith, because made in violation of the subscriber's articles of incorporation; the subscriber having waived that defense and paid the subscription.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 278; Dec. Dig. § 81.\*]

Appeals from Circuit Court, Wayne County.  
"To be officially reported."

Actions by the Monticello Construction Company against E. O. Stone, Leo F. Sanders, A. Miller and others, and Joe Marsh. Judgments for plaintiff, and defendants appeal. Reversed and remanded for a new trial.

Stone & Wallace, McQuown & Beckham, and Harrison & Harrison, for appellants. O. H. Waddle & Son and Cress & Cress, for appellee.

**HOBSON, J.** Some years ago a corporation, known as the "Cumberland River & Nashville Railway Company," was organized for the purpose of building a railroad from Corbin, Ky., through Wayne county, into Tennessee. It made a contract for the building of the road from Tateville to Monticello,

and this contract was sublet by the original contractors to Plunkett, Edwards & Clark. Some work was done upon the road between Tateville and Monticello, and then it developed that the railroad company was without means. The people about Monticello were very anxious to secure a railroad, and they began to organize a construction company which was to finance the building of the road from Tateville to Monticello. With this view the following written contract was signed by a number of persons interested in the building of the railroad: "Whereas it is proposed to organize a corporation with a capital stock of \$100,000.00 divided into shares of \$100.00 each under the name of the Monticello Railroad Construction Company, with its chief office at Monticello, Kentucky; said corporation to be organized for the purpose of constructing and building railroads and especially for the purpose of constructing and building the Cumberland River & Nashville Railroad, and taking over to itself all contracts now existing for building the said railroad from the Cincinnati Southern Railway near Tateville, Kentucky, to Monticello, Kentucky, and for such other work of construction as may be contracted for: Now we, the undersigned, agree to take the number of shares set opposite our names, and to pay for same at the rate of \$100.00 each in installments as called for by the directors hereafter to be elected. It is further agreed that this subscription shall not be binding until there shall have been \$80,000, of the capital stock of the said company subscribed for in good faith. It is further agreed that this subscription shall not be binding until an agreement and contract is entered into by a committee of the subscribers hereto, and the Cumberland River & Nashville Railroad Company, for the construction of said railroad from Tateville to Monticello, Kentucky, nor until satisfactory arrangements shall have been made with the present contractors now at work and holding contracts for work upon said line. Done at Monticello, Kentucky, this October 1, 1907." In October, 1907, when the necessary subscription was said to have been made, the Monticello Construction Company was organized. After the organization of the company, satisfactory arrangements were made with the contractors holding contracts for work upon the line, and a contract was entered into by a committee of the subscribers and the Cumberland River & Nashville Railroad Company for the construction of the railroad from Tateville to Monticello. Certain subscribers refused to pay their subscription when called for, and this suit was brought against them by the Monticello Construction Company to recover the amount they had subscribed. The defendants pleaded that \$80,000 had not been in good faith subscribed, and relied on this fact to defeat

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the action on the subscription paper. On a trial of the action, there was a judgment in favor of the plaintiff, and the defendants appeal.

1. It is insisted for the defendants that the contract is simply an agreement to subscribe for stock when the corporation should be organized and the conditions set out in the agreement complied with, and that under the ruling of this court in *Mt. Sterling Coalroad Company v. Little*, 14 Bush, 429, no action can be maintained upon the contract in the name of the corporation; but the later cases fully maintain the right of action, holding that the rule was correctly stated in the case referred to, but by inadvertence was incorrectly applied. *Twin Creek, etc., Turnpike Co. v. Lancaster*, 79 Ky. 552; *Bullock v. Falmouth, etc., Turnpike Co.*, 85 Ky. 184, 3 S. W. 129; *Cadiz R. R. Co. v. Roach*, 114 Ky. 934, 72 S. W. 280; *Curry v. Ky., etc., R. R. Co.*, 78 S. W. 435, 25 Ky. Law Rep. 1372.

2. On the trial of the case, the defendants desired to interrogate the jurors as to whether any of them were related by blood or marriage to any of the other stockholders in the construction company. The court refused to allow the question answered and of this the defendants complain. The other stockholders in the construction company were not parties to the action. They had no interest in the action except such as the mere fact that they were stockholders in the corporation gave them. The rule is that a juror or judge is not always disqualified in a suit by a corporation merely because he is related to some of the stockholders in the corporation. The stockholders themselves would not be qualified to be jurors, but it would be carrying the rule further than it has been carried to say that in a case like this all their relatives were also disqualified. It was held in *New York Life Insurance Company v. Johnson*, 72 S. W. 762, 24 Ky. Law Rep. 1867, that a policy holder in a mutual life insurance company was not disqualified as a witness, under section 606 of the Civil Code of Practice, on the ground that his interest was so infinitesimal as not to amount to a real interest. We see no reason why this should not apply here, for it clearly appears from the record that the other subscribers to the contract have no real interest in the controversy. Their object was simply to get a railroad, and the proof shows their stock is worth nothing. The authorities holding that a kinsman of a stockholder in a corporation is incompetent as a juror rest upon the ground that the stockholder is beneficially interested in the result of the litigation. 24 Cyc. 274; 17 Am. & Eng. Encyc. 1126. Here the stockholders have no real interest in the litigation. On another trial the court will allow counsel for defendants to ask the panel the questions indicated, as they will thus be

enabled to exercise their right of peremptory challenge more intelligently. Questions may be asked the panel, though the answer to them would not disqualify the juror, where the facts sought might be ground for the party striking off the juror. As he has the right to strike off three without cause, he may ask questions which may enable him to know who the jurors are and their relationships.

3. At the conclusion of the evidence, the court properly instructed the jury that they should find for the plaintiff unless they believed from the evidence that \$80,000 had not been subscribed to the capital stock of the company in good faith, and that in this event they should find for the defendant. To define what was a subscription in good faith, he then gave the jury the following instruction: "If the jury believe from the evidence that the stock subscribed to the plaintiff company was subscribed with the intent and expectation to pay for it, and that the party would be able to do so, and without any purpose or intention to engage or assist in the commission of a fraud, then any such subscriptions were made in good faith; but if any subscription was made without intending and without ability to pay, and for the purpose of committing or assisting in the commission of a fraud upon the co-subscribers and upon the plaintiff, the Monticello Construction Company, and its board of directors knew of such intention or inability to pay and such purpose or intention to assist in committing a fraud, then any such subscriptions would not have been made in good faith." In 1 *Morawetz on Corporations*, § 141, the rule on the subject is thus stated: "It is necessary also that the required amount of capital be subscribed by persons apparently able to pay the assessments which may be made upon their shares. Fictitious subscriptions or subscriptions made by persons unable to contribute their proportion of the capital, do not satisfy the requirement that the whole capital of a corporation shall be subscribed before its members can be assessed; but, if the required number of subscriptions has been obtained in good faith from persons apparently able to perform their duties as shareholders, it is no defense to an action against a shareholder that some of the subscribers have proved to be insolvent." See, also, *Penobscot, etc., R. R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257; *Lewey's Island R. R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 239, 10 Cyc. 400, 20 Am. & Eng. Encyc. 937. The purpose in getting up the Monticello Construction Company was to get up the money necessary to build the railroad. A subscription which was not made by a person apparently able to pay it would not be a subscription in good faith within the meaning of the contract, although it was not made for the purpose of committing a fraud, and the defendants were not

required to show that the board of directors knew of any such fraudulent intention. In lieu of the instruction given, the court should have told the jury that a subscription in good faith was one made by a person apparently able to pay the assessments which might reasonably be expected to be made upon the stock, although the subscriber proved to be insolvent, but that a subscription was not in good faith if made by a person whose apparent ability was not such as a person of ordinary prudence would have deemed reasonably sufficient to meet the assessments on the stock as they might be expected to be made. While the proof was conflicting, there was some evidence tending to sustain the defense. The instruction given by the court did not fairly present the case to the jury and was prejudicial to the substantial rights of the defendants under the evidence.

4. The proof, on another trial, as to the ability of the subscribers in contest to pay, will be limited to the facts known to the witnesses. Hearsay and information from others will be omitted, except it may be shown what information the directors had as to the ability of the subscribers in contest, as this will illustrate whether they exercised ordinary care in accepting the subscriptions as made by persons of apparent ability to pay. The court will allow proof of all statements made in the presence of any of the directors by any of the subscribers tending to show a want of apparent ability to pay on their part.

5. The subscriptions made by corporations which have been paid are not invalid because not warranted by their articles of incorporation. When the corporation has waived this defense and paid its subscription, it cannot be said not to have been made in good faith.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent herewith.

#### MCCONNAGHY v. MONTICELLO CONST. CO.

(Court of Appeals of Kentucky. March 19, 1909.)

#### CORPORATIONS (§ 81\*) — SUBSCRIPTION TO STOCK—LIABILITY OF SUBSCRIBER—ACQUIESCING IN BINDING FORCE OF SUBSCRIPTION.

The subscribers to the stock of a corporation to be formed, on the condition that the subscriptions should not be binding unless a specified sum should be subscribed in good faith, met, passed on the question of the amount of bona fide subscriptions, and proceeded to organize the corporation, electing, as treasurer and director, defendant, who was a subscriber and present at the meeting, and who acquiesced in the action taken. He acted as director for over a month, making no objection that the necessary amount of stock had not been subscribed for in good faith. *Held*, that his conduct was such as to necessarily induce his associates to believe that he consented to the subscriptions

as satisfying the condition, and he could not contend, in an action against him by the corporation to recover his subscription, that it was not binding because the condition as to the amount of bona fide subscriptions had not been fulfilled.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 276; Dec. Dig. § 81.\*]

Appeal from Circuit Court, Wayne County.  
"To be officially reported."

Action by the Monticello Construction Company against Charles McConnaghy. Judgment for plaintiff, and defendant appeals. Affirmed.

Stone & Wallace, Harrison & Harrison, and McQuown & Beckham, for appellant. Cress & Cress and O. H. Waddle, for appellee.

HOBSON, J. This case is in all respects similar to the case of *E. O. Stone and Others v. Monticello Construction Company* (this day decided) 117 S. W. 369, except that one question is made here which did not arise in those cases. McConnaghy subscribed for 20 shares of stock. When the persons who were getting up the subscriptions had obtained subscriptions amounting to \$80,000, they called a meeting of the subscribers. McConnaghy was present at that meeting and presided. At that meeting the question was discussed whether the necessary subscriptions had been raised. The paper was footed up, and thereupon the meeting concluded to organize the company. About three-fourths of the subscribers were present, and they signed the articles of incorporation, McConnaghy among the rest. Thereupon a board of directors was elected, which included McConnaghy. He accepted the position of director and attended several meetings of the board. A committee was appointed to make the necessary arrangements with the railroad company and with the contractors. McConnaghy participated in these matters. The committee reported, their report was accepted, and the contracts were closed; McConnaghy being present when the contracts were discussed. He remained a director for something over a month, and then resigned; but at no time during this month did he make any objection that any of the subscriptions had not been made in good faith or were insufficient. It was distinctly understood at the meeting at which the company was organized that they were organizing because they had secured bona fide subscriptions amounting to \$80,000.

We do not decide that McConnaghy would be estopped by acquiescing in the organization of the company that night, if he did not in fact know as much about the subscribers then as he learned afterwards; but he was a managing agent of the corporation. He knew that the subscribers were proceeding upon the idea that the necessary subscrip-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tions had been obtained. His acquiescence in the organizing of the company, and his subsequent action as a director in proceeding with the business of the company, was a consent on his part that the necessary subscribers had been obtained. In any view of the case, it was incumbent on him, when he knew the company was organized and was going on with its business upon the idea that the necessary subscribers had been obtained, promptly to look into the matter and to make known his objections before his associates proceeded further in a matter, where he knew they were assuming that he was consenting to the acceptance of the subscriptions as made in good faith. The company was preparing to assume considerable liabilities, and, while he does show by his own testimony that he objected to the contracts being made, he does not show that he at any time objected on the ground that the necessary subscribers had not been obtained in good faith. His conduct was such as would necessarily induce his associates to understand that he consented to the subscription as satisfying the terms of the written contract. He was in a position where he was bound to speak and act promptly, and where silence necessarily misled his associates, and therefore was equivalent to consent. The managing agent of a corporation, in a matter of this sort, stands on a different footing from one of the subscribers who takes no active part in its affairs. His proceeding with the business of the corporation as he did was necessarily a consent on his part to treat the subscriptions valid, and this consent he cannot withdraw to the prejudice of his co-subscribers. In the case of *Stone v. Monticello Construction Company*, above referred to, we decided in fact that a subscription was not made in good faith if the directors in the exercise of ordinary prudence should not have accepted it. Whether the necessary subscription had been obtained was the first question the directors were to decide. If the necessary subscription had not been raised, there was nothing to do as the company had no means outside of the subscription. It was incumbent on *McConnaghy*, as one of the directors, to decide whether the necessary subscription had been raised before anything was done by the company. They elected him treasurer, and he accepted the office. His conduct was an acceptance of the subscription for the company, and, after he so accepted it for the company, he cannot be permitted to say for himself against it that the subscription was not sufficient. Under the evidence, the court, for the reasons given, should have instructed the jury peremptorily to find for the plaintiff, and the defendant was therefore not prejudiced by the instructions which the court gave.

Judgment affirmed.

# BRUNER v. SEELBACH HOTEL CO. et al.

(Court of Appeals of Kentucky. March 24, 1909.)

## 1. EVIDENCE (§ 285\*)—ADMISSION—CONCLUSIVENESS—EFFECT.

An admission by defendant, in an action for personal injuries caused by the throwing of a bottle from the roof garden of a hotel, that he was the man who threw the bottle is not conclusive, where at the time he first made the admission he was so much intoxicated that he had no distinct recollection of the matter, and must have based his admission upon information given him by others.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 285.\*]

## 2. NEGLIGENCE (§ 134\*)—ACTIONS—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.

In an action for personal injuries occasioned by the throwing of a bottle from a roof garden of a hotel, evidence held to support a verdict for defendant.

[Ed. Note.—For other cases, see *Negligence*, Dec. Dig. § 134.\*]

## 3. APPEAL AND ERROR (§ 1003\*)—REVIEW—CONCLUSIVENESS OF VERDICT.

A verdict will not be disturbed on appeal unless it is flagrantly against the weight of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.\*]

## 4. NEGLIGENCE (§ 138\*)—ACTIONS—INSTRUCTIONS.

In an action for injuries received in a street by being struck with a bottle that was thrown by W. from the roof garden of a hotel, there was no evidence to show that W. was boisterous, or that he threatened any one, and no evidence from which it could be inferred that he would throw the bottle in question. An instruction as to the liability of the hotel company that if the jury believed that W. threw the bottle from the roof garden, and plaintiff was injured thereby, and if at the time he was intoxicated and his behavior was such as would indicate to a man of average prudence that he might throw a bottle to the street below, and that these facts were known, or by ordinary care could have been known, to the defendant or its agents, then it became the duty of the defendant and its agents to remove W. from the roof garden or otherwise control him, and that the law in that event is for the plaintiff, is not erroneous, as basing the liability of defendant on knowledge rather than on belief or reasonable grounds for belief.

[Ed. Note.—For other cases, see *Negligence*, Dec. Dig. § 138.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"To be officially reported."

Action by Henry C. Bruner against the Seelbach Hotel Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. O. Bradley and J. L. Richardson, for appellant. O'Neal & O'Neal, Edwards, Ogden & Peak, and Rob't J. Hagan, for appellees.

CLAY, C. Plaintiff, Henry C. Bruner, instituted this action against the Seelbach Hotel Company, the Seelbach Realty Company, and George Wolf to recover damages

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for personal injuries alleged to have resulted from the negligence of defendants. The jury returned a verdict in favor of the Seelbach Hotel Company and George Wolf, and from the judgment based thereon the plaintiff prosecutes this appeal. Plaintiff's grounds for reversal are (1) that the verdict is flagrantly against the weight of the evidence; and (2) that the court erred in its instructions to the jury concerning the liability of the Seelbach Hotel Company.

The petition charges that on the night of July 25, 1907, while plaintiff was standing at or near the intersection of Fourth and Walnut streets, the defendant George Wolf, with gross and wanton carelessness, negligence, and recklessness, and while in an intoxicated condition, threw a bottle over the wall of the roof garden conducted and operated by the Seelbach Hotel Company; that the bottle descended with great force and rapidity, and struck plaintiff upon the left shoulder, breaking the blade or bone thereof, and seriously and permanently injuring him. The petition further charges that the Seelbach Hotel Company, its servants, agents, and employes were negligent and careless in maintaining and operating said roof garden, and were grossly negligent and careless in that they did not eject defendant Wolf from said premises and restrain him in his conduct, or prevent him from doing the injury complained of; that immediately prior to the injury George Wolf was boisterous, disorderly, and quarrelsome, and that he indulged in dangerous conduct and carousing, which deportment was known to the Seelbach Hotel Company, its agents, servants, and employes, who were negligent and careless, in that they did not eject said defendant Wolf from their premises, or prevent him from injuring other persons.

The testimony for the plaintiff was to the effect that he was injured while standing on the corner of Fourth and Walnut streets. Suddenly a beer bottle descended and struck him with great force on the left shoulder. Some facts were stated which would go to show the probability of the bottle having come from the roof garden conducted by the Seelbach Hotel Company. Plaintiff at the time he was injured was talking to Dr. Ben. L. Bruner, his brother. As soon as plaintiff was struck, Dr. Bruner immediately rushed up to the roof garden. There he met the defendant Wolf, and asked him if he threw the bottle. Wolf replied that he did, but he did not mean any harm by it. Wolf then handed Dr. Bruner his card with his name, George Wolf, on it. About a week later Wolf and his wife called on plaintiff at the Hast building, and Wolf told the plaintiff, in the presence of the latter's brother, Dr. Ben. L. Bruner, that he threw the bottle, and was sorry for it. The above facts were brought out in the evidence of plaintiff and his brother, Dr. Bruner. Thomas J. Green, a witness for the plaintiff, testified that he

was a night watchman of the Seelbach Hotel Company upon the occasion in question, that he was present when the bottle was thrown, and saw defendant Wolf throw the bottle. This witness further testified that Wolf was not boisterous or misbehaving at the time. There was nothing in his manner to indicate any violent or improper conduct towards any one, or that he was going to throw any missiles off the garden, or to do anything of that kind. Wolf was intoxicated at the time. A few minutes later he intercepted one Lew Dale, mistaking him for Wolf. He approached Dale, and said, "Mr. Wolf, I want to know something more about throwing that bottle off the roof," or something to that effect, and Dale answered, "I am not the man." The witness then discovered his mistake when Dr. Roberts came up, and explained that it was not Mr. Wolf. The defendant George Wolf testified that he was intoxicated on the occasion in question, and that he had no recollection of what transpired. He denied emphatically having admitted to plaintiff or Dr. Bruner that he threw the bottle off the roof. His statement was that, if he did throw it, he was sorry for it. Some three or four witnesses who were with Dale testified that, when Green intercepted Dale, Green insisted that Dale was the man who had thrown the bottle of beer. It required several minutes and the testimony of various witness to convince Green that he was mistaken in this regard. Other witnesses testified that they were present on the roof garden at or about the time it is charged the bottle was thrown, and that they never saw Wolf throw it. There was also testimony to the effect that Wolf and his companion were sitting together at the table, that they never drank any bottled beer at all, but were drinking draught beer, which was served in glasses.

Taking as true the statements of the plaintiff and his brother, Dr. Bruner, to the effect that the defendant Wolf stated that he threw the bottle in question, it is manifest from the whole record that Wolf was very much intoxicated at the time, and had no distinct recollection of the matter. If he did make the statement, he must have made it upon information given him by others. That being the case, Wolf's statement that he had thrown the bottle would not necessarily be conclusive of the fact. Furthermore, even according to Green's statement, he mistook Dale for Wolf within a few minutes after the occurrence took place. This fact alone was sufficient to raise in the minds of the jury a doubt as to his identification of Wolf as the man who threw the bottle. According to the testimony of defendant's witnesses, it was not a case merely of mistaken identity, but Green actually charged Dale with having thrown the bottle. Several witnesses who claimed that they were in position to see and were watching Wolf testified that he did not throw the bottle. Others said that he was not drinking bottled beer, but the beer which

he drank was served him in glasses. Wolf's liability depended upon the sole question whether or not he threw the bottle. This issue was presented to the jury in the instructions, which are not subject to criticism. The jury heard the evidence on both sides, and observed the attitude and demeanor of the witnesses while testifying, and we are unable to say that their finding was flagrantly against the weight of the evidence. Perhaps, if we had occupied the place of the jury, we might have reached a different conclusion; that fact, however, would not be sufficient to justify a reversal of this case. In a long line of decisions this court has adhered to the uniform rule that it is only where the verdict is flagrantly against the weight of the evidence that a reversal will be directed. The facts of the case before us do not bring it within this rule, and the verdict will not be disturbed on the ground that it is not sustained by the evidence.

But it is further insisted that the instructions relating to the liability of the Seelbach Hotel Company are erroneous. In instruction No. 1 the jury were told that, if they believed from the evidence that George Wolf threw the bottle on the occasion in question, they should find for the plaintiff. Instruction No. 2 was the converse of instruction No. 1. Instruction No. 3, which is complained of by counsel for appellant, is as follows: "If the jury shall believe from the evidence that the defendant George Wolf did throw the bottle from the roof garden on the occasion in evidence referred to, and that the plaintiff was thereby injured, and if you shall further believe from the evidence that the defendant Wolf was at and prior to the time that he threw the bottle in the roof garden of the defendant Seelbach Hotel Company, and that he was intoxicated, and that his manner and behavior were such as would indicate to a man of average prudence operating the roof garden that he (Wolf) might throw a bottle or other missile from the said garden to the street below, and that these facts were known, or by the exercise of ordinary care could have been known, to the defendant Seelbach Hotel Company, or its agents, or any of them, controlling the roof garden, then it became the duty of the defendant and of its agents to remove the said Wolf from the said roof garden or otherwise control him, and that the law in that event is for the plaintiff against the said Seelbach Hotel Company." Instruction No. 4 is the converse of instruction No. 3. The question, then, is: Does instruction No. 3 present the law as applicable to the facts of this case? The first objection to the instruction is the use of the expression, "known, or by the exercise of ordinary care could have been known to the defendant Seelbach Hotel Company, or its agents, or any of them, controlling the roof garden." Counsel for appellant insist that, in order to hold the hotel company liable, it was not necessary for them to know; that

the instruction should have been confined to a belief or reasonable grounds for belief that Wolf might do the particular thing, even conceding that the jury should have been confined to the particular act. It is further insisted that the instruction is radically wrong in another respect; that the jury should not have been required to believe that the hotel company knew, or could have known by the exercise of reasonable care, that Wolf was going to throw a bottle from the roof. All that was necessary was that it was perfectly apparent from his conduct that he was liable to commit a breach of the peace, or that he was liable to do some injury, it matters not how, or to whom. We have not been referred to a single authority upholding this position. Under the early English rule the innkeeper was not liable either for assaults committed by his servants upon a guest or upon guests by other guests. *Calve's Case*, 8 Coke, 32. In the recent case of *Rommel v. Schambacher*, 120 Pa. 579, 11 Atl. 779, 6 Am. St. Rep. 732, the innkeeper was held liable for assaults by other guests. In 22 Cyc. 1094, the rule is thus stated: "The innkeeper is not generally liable to strangers for the acts of his guests; but may be made so by statute."

Recognizing the rule above laid down, let us see whether or not the instruction complained of covered the law of the case. There might, of course, arise a case where the conduct persisted in by the guest was such as would probably result in injury to others. The guest might show by his conduct that he was violent; that, unless restrained, he would injure some one. In such a case it might not be necessary that the innkeeper should know that the guest was going to commit the particular act resulting in the injury, for instance, that he was going to cut another with a knife, or shoot another with a pistol. The reasonable probability that such an act would result from the guest's previous conduct might be sufficient to impose upon the innkeeper the duty of exercising ordinary care to restrain the guest or prevent the injury. No such case, however, is presented by this record. There is absolutely no proof to the effect that Wolf (conceding it was he who threw the bottle) was boisterous or violent in his conduct. There is no evidence that he threatened or assaulted any one. There is nothing from which it could be reasonably inferred that he would throw the bottle in question. The throwing of a bottle of beer from a roof garden is an unusual occurrence. There was nothing in Wolf's previous demeanor that would justify the conclusion that he would injure some one either by throwing a bottle of beer or in any other manner. Even if there could arise a case where the law should be given as insisted by counsel for appellant, such a rule would not be applicable to the facts of this case. The liability of the hotel company was based upon the proposition that if Wolf was intoxicated and

his manner of behaving was such as to indicate to a man of average prudence operating the roof garden that he might throw a bottle or missile to the street below, and that these facts were known, or by the exercise of ordinary care could have been known, by the hotel company, or its agents controlling the garden, it became the duty of the hotel company or its agents to remove Wolf therefrom, or otherwise control him. It was not error to use the expression "known, or by the exercise of ordinary care could have known," instead of "believed, or had reasonable grounds to believe." Negligence is ordinarily predicated in terms of knowledge, and liability attaches only in case the defendant knows, or by the exercise of ordinary care could know. Besides, the fact must be remembered that ordinarily innkeepers have no control over their guests. It is only when they know, or by the exercise of ordinary care could know, that the guest's conduct is such that injury will naturally result to others, that they have the right to eject the guest, or take precautions to control his conduct. There being no evidence tending to show that the roof garden was a nuisance, and nothing in Wolf's previous conduct from which the hotel company or its agents might have known that he would injure some one walking on the street, it was not error to confine the inquiry of the jury to the question whether or not the hotel company or its agents knew, or by the exercise of ordinary care could have known, that Wolf's manner and behavior were such as to indicate to a man of average prudence operating the roof garden that Wolf might throw a bottle or other missile from the garden into the street below.

For the reasons given, the judgment is affirmed.

#### WESTERN & SOUTHERN LIFE INS. CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 25, 1909.)

**LICENSES (§ 7\*)—CONSTITUTIONAL LAW (§ 62\*)—STATUTES (§ 74\*)—EQUALITY AND UNIFORMITY—DELEGATION OF LEGISLATIVE POWER—UNIFORM OPERATION OF LAW IMPOSING LICENSE TAX.**

Const. § 60, provides that no law shall be enacted to take effect upon the approval of any other authority than the General Assembly. Section 171 provides that taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws. Section 180 provides that every act, ordinance, or resolution levying a tax shall specify the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose. Section 181 provides that the General Assembly may by general laws only provide for the payment of license fees. *Held*, that St.

1909, § 637 (Russell's St. § 4284), providing that when, by the laws of any other state, any taxes are imposed on insurance companies organized or incorporated under the law of this state and transacting business in such other state, greater than those imposed upon similar companies by the laws of this state, the same taxes shall be imposed upon all insurance companies doing business in this state which are organized under the laws of such state, imposes a license tax, and is unconstitutional, and a foreign insurance company cannot be taxed a higher rate on its annual gross premiums than the rate taxed resident insurance companies, because a higher rate is taxed in the state where the foreign insurance company is domiciled.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 7;\* Constitutional Law, Cent. Dig. § 93; Dec. Dig. § 62;\* Statutes, Cent. Dig. § 76; Dec. Dig. § 74.\*]

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Action by the Commonwealth against the Western & Southern Life Insurance Company. Judgment for the Commonwealth, and defendant appeals. Reversed and remanded, with instructions to dismiss the petition.

T. L. Edelen and D. W. Lindsey, for appellant. Jas. Breathitt, Atty. Gen., and Jno. F. Lockett, Asst. Atty. Gen., for the Commonwealth.

**HOBSON, J.** Section 637 of the Kentucky Statutes (Russell's St. § 4284) is as follows: "When by the laws of any other state any taxes, fines, penalties, deposits of money, or of securities or other obligations, prohibitions or requirements, are imposed upon insurance companies organized or incorporated under any general or special law of this state, and transacting business in such other state, or upon the agents of such insurance company, greater than those imposed upon similar companies by the laws of this state, or when such laws of other states shall require insurance companies of this commonwealth to deposit money or security for the benefit or protection of citizens of such other states, or when the laws of any other state, or the officers thereof, shall prohibit companies of this commonwealth from transacting business in said state without a special examination of said companies, or a computation of their liabilities by the officers of said state, the same taxes, fines, penalties, deposits, examinations, obligations and requirements shall be imposed upon all insurance companies doing business in this state, which are incorporated or organized under the laws of such state, and upon their agents." The Western & Southern Life Insurance Company is a corporation organized under the laws of Ohio, having its principal office in Cincinnati. It paid its taxes regularly to the state under section 4226, Ky. St. (Russell's St. § 8006), which provides that every insurance company shall

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



pay a tax of \$2 upon each \$100 of premiums collected by it. The laws of Ohio provide that life insurance companies doing business in that state must pay a tax of  $2\frac{1}{2}$  per cent. of the annual gross premiums. This suit was brought by the commonwealth against the Western & Southern Life Insurance Company to recover the amount of one-half of 1 per cent. of the annual gross premiums received by it in the state, on the ground that, as Kentucky companies are required to pay at the rate of  $2\frac{1}{2}$  per cent. in Ohio, Ohio companies should pay at a like rate in this state. The circuit court entered judgment against the defendant for the amount claimed, and it appeals.

The only question to be determined on the appeal is the validity of section 637, Ky. St., in so far as it makes the amount of the taxes which the taxpayer is to pay dependent upon the law of the state where the taxpayer has his domicile. We have no doubt that the Legislature may require of foreign companies the same deposits, examinations, obligations, and the like which are required by the state of their domicile from Kentucky companies; but whether the amount of taxes to be paid here may be made to depend upon the law in force at the residence of the foreign companies is a different question. It would not be contended that, if Ohio taxed insurance companies at 1 per cent. of the yearly premiums, Ohio companies could do business here by paying at the rate of 1 per cent., although other companies paid taxes at the rate of 2 per cent. We have been referred to a number of decisions upholding this retaliatory legislation; but in a number of the cases the question of taxation was not presented, and in others the decision of the court turned upon provisions of the Constitution different from our Constitution. Thus the case of *Talbot v. Fidelity & Casualty Co.*, 74 Md. 563, 22 Atl. 395, 13 L. R. A. 584, involved simply the question whether Maryland might exclude New York companies when New York excluded Maryland companies. *Phillips v. Fidelity & Casualty Co.*, 77 Iowa, 648, 42 N. W. 509, turned upon the question whether Iowa might prohibit a foreign insurance company from making more than one kind of insurance in that state, when by the law of its domicile foreign companies were permitted there to make only one kind of insurance. *Union Central Life Insurance Co. v. Durfee*, 164 Ill. 186, 45 N. E. 441, was rested upon a provision of the Constitution of Illinois, which, as held, gave the General Assembly full power to so regulate the matter. Such a statute was upheld in *People v. Fire Association*, 92 N. Y. 311, 44 Am. Rep. 380, *Phoenix Ins. Co. v. Welch*, 29 Kan. 672, *Goldsmith v. Home Ins. Co.*, 62 Ga. 379, *State v. Insurance Co.*, 115 Ind. 257, 17 N. E. 574, and *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547, 80 Am. Dec. 123. In

passing on the question the Kansas court expressly said that the Legislature may constitutionally pass a law whose operation is made to depend upon some contingency; and the other opinions, while they do not expressly say this, are evidently based upon that construction of the state Constitution. It was held in *Fire Association v. New York*, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342, that such a statute does not infringe any provision of the Constitution of the United States.

But still the question remains: Is it in keeping with the Constitution of Kentucky? Section 60 of the Constitution provides that, with certain exceptions not material here, no law shall be enacted to take effect upon the approval of any other authority than the General Assembly. Section 171 provides as follows: "The General Assembly shall provide by law an annual tax which, with other resources, shall be sufficient to defray the estimated expenses of the commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws." Section 180 provides: "Every act enacted by the General Assembly, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose." Section 181 provides: "The General Assembly may by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax."

It will thus be seen that the power of the Legislature to enact laws whose operation will depend upon the approval of any other authority is denied, except in the cases named in the Constitution; that the General Assembly is authorized to provide by law an annual tax sufficient to defray the estimated expenses of the commonwealth; that these taxes must be levied and collected only by general law; that every act levying a tax must specify the purpose for which it is levied; and that the General Assembly may by general laws only provide for the payment of a license tax. The tax for 2 per cent. on the gross amount of premiums received by insurance companies is a license tax. The Constitution clearly imposed upon the General Assembly the duty of determining what levy was necessary, and required it by a general law to levy such a tax as was necessary, the tax to be equal and uniform. It was not contemplated by the Constitution that the amount of taxes paid by

a taxpayer in Kentucky should depend upon the amount of taxes paid by some other corporation in the state where the taxpayer has its domicile. On the contrary, the Constitution contemplated that the Legislature should determine what tax should be paid, and that only the taxes necessary for the support of the government should be levied. To allow one person to be taxed at one rate and another at a different rate, not because of any other fact than to retaliate for the mode in which a corporation of this state is taxed in some other state, is to lose sight entirely of the fundamental idea of equality in the public burdens aimed at in our Constitution.

The conclusion we have reached is supported by the decision of the Supreme Court of Alabama in *Clark v. Mobile*, 87 Ala. 217. The court there well said: "This section of the Code authorizes, in effect, the Legislature of Mississippi, speaking through its statutes, which are the subjects of extrinsic proof, and not of judicial knowledge, in our courts, to fix by law the amount which the Treasurer of Alabama shall demand of appellants as a license tax to do an insurance business in this state. If the lawmaking power of that state should, in a day, modify, amend, or repeal their revenue laws, ipso facto, such legislative action would modify, amend, or repeal the legal operation of our laws, provided the principle contended for by appellant's counsel is a sound and prevailing one. This cannot be, for it would be confiding to a foreign jurisdiction that legislative discretion which the General Assembly of Alabama are constitutionally bound to exercise themselves, and which they cannot delegate or commit to another." See, also, a note by the editor in 10 Ins. Law J. 361.

Retaliation rarely brings about the result aimed at. Its effect is usually to intensify the evil. It is strictly forbidden by Him who taught as one having authority and not as the scribes; and we are constrained to believe that the rule we have announced is more in keeping with the spirit of American institutions than the rule allowing taxes to be collected in one state, not for public necessity, but in retaliation for those collected in another state from foreign corporations doing business there. The state may exclude foreign corporations from doing business here if it sees fit, and it may impose such conditions as it sees fit to impose within the constitutional inhibitions. But the people of the state who desire insurance will not be benefited in the end by laws that drive foreign insurance companies from the state or cripple competition in the insurance business.

Judgment reversed, and cause remanded, with instructions to the circuit court to dismiss the petition.

**HAMILTON et al. v. STEELE. BROWN v. SAME. CROUCH et al. v. SAME.**

(Court of Appeals of Kentucky. March 17, 1909.)

**1. PUBLIC LANDS (§ 151\*)—PATENTS—PRIORITIES.**

A patent to land previously patented is void, under the statutes.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 431; Dec. Dig. § 151.\*]

**2. ADVERSE POSSESSION (§ 40\*)—DURATION—SUFFICIENCY.**

Eight years' actual possession of land is insufficient to give title by adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 160; Dec. Dig. § 40.\*]

**3. TAXATION (§ 810\*)—TAX TITLES—REQUISITES.**

The statute requiring the original owner of land, in order to defeat a tax title, to show that the assessment of taxes, the levy, and sale were defective, shifted the burden from the tax sale purchaser to the owner, but did not change the rule that, before one can obtain a complete tax title, each legal step required by law to subject land to sale must be complied with.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1606; Dec. Dig. § 810.\*]

**4. TAXATION (§ 825\*)—INVALID TAX TITLES—RIGHTS OF PURCHASER.**

When a tax sale is held invalid, the purchaser is entitled to a lien for the amount paid on the purchase for all taxes thereafter paid in good faith, with proper interest thereon, and for improvements on and expenditures in caring for the property, and he is entitled to a lien for money expended in having land surveyed to protect the timber thereon against trespass.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1632; Dec. Dig. § 825.\*]

**5. TENANCY IN COMMON (§ 15\*)—ADVERSE POSSESSION.**

Title by adverse possession cannot be based on the possession of one of several joint tenants or tenants in common, as against the others, where they have no notice of an adverse claim.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 42-52; Dec. Dig. § 15.\*]

Appeal from Circuit Court, Laurel County.  
"Not to be officially reported."

Action by C. G. Steele against W. J. Hamilton and others; Henry P. Brown and Katie D. Crouch and others intervening. From the judgment, defendant Hamilton and others, intervener Brown, and interveners Crouch and others severally appeal. Affirmed as to first and third appeals; reversed and remanded as to second appeal.

T. Z. Morrow and Brown & Brock, for appellants Hamilton, Crouch, and others. W. L. Brown, L. A. Nuckols, and Eli H. Brown, Jr., for appellant Henry P. Brown. James M. Hays, J. Smith Hays, and Saml. C. Harding, for appellee C. G. Steele.

NUNN, J. On the 6th day of March, 1907, appellee instituted this action in trespass against appellants, W. J. Hamilton, Richard Nelson, and Daniel Barnett, for the purpose of preventing further trespass by them upon his land. He alleged that he was the owner of three surveys situated on the Cumberland

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

river at and near the mouth of Laurel river, and in the counties of Laurel and Whitley; most of it being in Laurel county. He described the land by metes and bounds; one tract containing 190 acres, one 100 acres, and the other 750 acres. It appears, not clearly, however, that these surveys were patented, the first in the name of Benjamin F. Herndon, the second, or the 100-acre tract, in the name of Richardson Herndon, and the third, the 750-acre tract, in the name of Benjamin F. Herndon, Samuel Hogan, and Richardson Herndon. One Tompkins, 10 or 12 years before this action was instituted, procured a patent for 100 acres of land lying wholly within the boundary of the 750-acre patent, and sold his claim to Richard Nelson, one of the appellants, who erected a cabin on it, cleared and fenced about 4 acres around the house. These 4 acres were specifically excluded in the conveyance to appellee of the three surveys. Appellants did not confine themselves within the 4 acres, but cut timber beyond its boundary. Hence this suit. Appellants denied appellee's title, and asserted title in themselves. The proof was heard, and the court found for appellee.

In our opinion the court did not err in this. The testimony shows that appellants' patent is of later date than the 750-acre patent above referred to. Consequently their patent is void under the statutes, and they have been in the actual possession of their claimed boundary for only something near eight years, which is not sufficient to give them any right of title by possession or any title whatever. Appellee's testimony shows title in himself. The same questions were considered in the case of *Williams et al. v. Hays*, 93 S. W. 1063, 29 Ky. Law Rep. 583. Appellee is the vendee of Hays, and appellants, *Williams et al.*, in that case were sued for trespass upon the identical lands in controversy herein, and this court, on practically the same testimony, adjudged the title to the land in Hays, appellee's vendor. We are therefore of the opinion that the judgment of the lower court is correct as to these appellants.

We will next consider the appeal of Henry P. Brown against the same appellee. After the first-styled action had been on the docket for some time, Brown filed an intervening petition and asked to be made a party defendant to appellee's action. He denied appellee's ownership and alleged title in himself to the three surveys of land above described. He claimed to own it by virtue of a purchase at a tax sale made by the sheriff of Laurel county in the year 1894, for the taxes assessed against it for the years 1891, 1892, and 1893. The amount of the taxes was \$59, with the cost added, making a total of \$87, which sum he paid for the land. He alleged that he had paid the taxes for each year since to the filing of his petition, and

had also expended \$183 in having the lands surveyed and the outside boundary well marked for the purpose of giving notice to others of his claim and to protect the property from trespassers. Brown did not content himself with his prima facie title by virtue of his deed from the sheriff, but undertook to allege and prove that all necessary steps were taken to pass a good title under the statutes. Appellee controverted appellant's pleading, but produced no testimony. He relied upon the defects and irregularities shown by appellant's testimony. The lower court adjudged that Brown did not obtain a good title to the land in controversy by his deed, but gave him judgment for the money he paid at the sale and for all money he had paid as taxes on the land since his alleged purchase, but dismissed his claim for the \$183.

We do not feel warranted in disturbing the action of the lower court with reference to his claim of title to the land. See the cases of *Durrett v. Stewart*, 88 Ky. 665, 11 S. W. 773, and *Jones v. Miracle*, 93 Ky. 639, 21 S. W. 241. In the last-named case the court said: "In the case of *Durrett v. Stewart*, 88 Ky. 665, 11 S. W. 773, it was said to be well settled that a sale of property for taxes is void unless each legal step that the law requires in order to subject it to sale has been complied with. Moreover, it was held in *Magular v. Henry*, 84 Ky. 1, 4 Am. St. Rep. 182, that it was not in the power of the legislative department to make a tax deed conclusive evidence of a complete title. \* \* \* But it seems to us there is no reason for placing the burden upon the taxpayer and original owner in any case, but, on the contrary, a person claiming under a tax deed should be required to show, in order to resist recovery by the taxpayer and owner, that he has a valid title acquired by strict compliance with statutory requirement, for otherwise, while a purchaser at a tax sale is always in a position to be reimbursed and placed in statu quo, owners of land, sometimes nonresident or laboring under disability of coverture, infancy, or lunacy, are liable to have their property sacrificed or lost by irregular or fraudulent conduct of the officer or purchaser." These cases were decided before the change in the statute requiring the owner of the land to allege and prove that the assessment of the taxes, the levy and the sale of the land were defective and irregular. In other words, the statute, enacted since the opinions above referred to were rendered, shifted the burden from the purchaser to the owner of the land; but it did not change the rule as to the requirement that, before a person can obtain a complete title under a tax sale, each legal step that the law requires in order to subject it to sale must be complied with. See the case of *Husbands v. Pollick*, 96 S. W. 825, 29 Ky. Law Rep. 890. We have examined the record with reference

to this tax title, and quote with approval the words of the lower court, viz.: "A very careful review of the evidence of title, the assessment, the tax sale, the certificate of purchase, and the sheriff's deed under which the intervening plaintiff, H. P. Brown, claims the land herein, has convinced me that the assessment, sale, purchase, certificate thereof, and the deed for the land was so irregular and imperfect as that it does not confer upon him any title to any part of the land claimed by plaintiff, Steele, herein."

We are of the opinion, however, that the court erred to the prejudice of appellant Brown in refusing to allow him the \$188 claimed by him. When a tax sale is held invalid, the purchaser is entitled to a lien for and to recover the amount paid on such purchase and for all taxes thereafter paid in good faith, with proper interest thereon; also for improvements on and expenditures made to care for and protect the property. It appears from the proof that the expenditures for surveying and looking after these lands were made in good faith and such as reasonably appeared to be necessary to protect the property. These lands were situated miles out in a sparsely settled country, and persons were cutting and hauling off the timber, and nothing could have been more beneficial to care for such property than to have it surveyed so that it might be determined where the timbers were being cut and who was wrongfully coming upon the land. For this reason the judgment as to appellant Brown is reversed and remanded, with directions that his claim, with interest, be allowed as a lien on the land.

Lastly, we will consider the appeal in last-styled case, Crouch et al. v. Steele. After the action of appellee against Hamilton et al. had been pending for some time, Crouch and others filed an intervening petition, in which they alleged that they were the owners of one-third of the land described in appellee's petition under a deed from Richardson Herndon, which is as follows: "This indenture made and entered into this 8th of May, 1845, between Richardson Herndon of Knox, state of Kentucky, of the one part, Oliver Perry Herndon and Jane Herndon, children of Benjamin F. Herndon, of county and state aforesaid, of the other part, witnesseth, that is to say: The above Richardson Herndon for good will and affection and for the sum of one dollar in hand paid by the above Oliver and Jane Herndon before the selling and signing of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, and conveyed, and by these presents doth grant, bargain, and convey, alien, and confirm to the said Oliver P. Herndon and Jane Herndon, etc., all my interest in the several tracts of land at mouth of Laurel river and Cumberland river, Whitley county, Ky., that is, two thirds of said land entered by myself or by Benjamin Herndon. The

other third part I give a bond to Martin Beatty for his benefit to have and to hold the said tracts or parcels of land and agreeable to said bond, and further give bequeath and sell and confirm to said Oliver and Jane Herndon the two thirds above-stated free from me, my heirs or assigns, forever, for their benefit as above stated, but from no other persons whatsoever. In testimony whereof I hereunto set my hand and seal the day and date above written. Richardson Herndon. [Seal.] China Herndon. [Seal.]" The certificate of acknowledgment of the above deed is as follows: "Knox County —ss.: I, Robert H. Redd, deputy for James I. Ballinger, clerk of the county court of county aforesaid, do certify that this deed from Richardson Herndon and his wife, China Herndon, was on the 20th day of May, 1845, and acknowledged by the said Richardson Herndon to be his act and deed and the said China Herndon, wife of the said Richardson Herndon, being by me examined privately and apart from her husband, declared that she did freely and voluntarily seal and deliver the said writing and wishes not to retract it, and acknowledged the said writing again shown and explained to her to be her act and deed, and consented that the same may be recorded, whereupon the said hath been duly admitted to record in my office. Att: Robert H. Redd, D. C. K. C. C."

They alleged that Jane Herndon, one of the grantees in the above deed, afterwards intermarried with one ——— Neilson, and that there were born to her by this marriage only two children, Nellie and Sallie. Nellie intermarried with George S. Crouch, and to this marriage there were born only two children, Katie D. and Janie R. Sallie intermarried with A. G. Stewart, and there were born to her by this marriage only three children, Alex V., Gaines F., and Benjamin R. Stewart, all of whom are appellants herein. They alleged: that their mothers, Sallie and Nellie, and their grandmother, Jane Herndon, died many years ago intestate; that they were the only living children or grandchildren and only lineal descendants and heirs at law of Jane Herndon, and as such were the owners of the one undivided one-third of all the lands mentioned in the petition; that appellee, Steele, in violation of their rights, and in hostility to their title, was claiming to be the owner of the land; that he was giving it out in speech that he was the owner, and was casting a cloud upon their title. They alleged that they and the appellee were asserting title to the land from the same source—that is, from Richardson Herndon—and the only claim appellee or his vendors had to the land was through the deed of Richardson Herndon to O. P. Herndon and Jane Herndon, and that her interest had never been alienated or conveyed, nor had their interest ever been alienated or conveyed. Appellee, by a proper pleading, controvert-

ed every allegation of their pleading, except the one stating that they were the only descendants, now living, of grantee, Jane Herndon, and interposed a plea of the 15 and 30 year statutes of limitations. Appellants denied this plea, but did not allege any reason why it was not applicable to them. However, their counsel contend in their briefs that, as they were joint tenants, or tenants in common, with appellee and his remote vendors, they had no notice of the adverse claim and possession of the land and are not barred by reason thereof.

This principle is sound as a general rule, but the facts of this case do not support it. There is not a scintilla of evidence in the record that appellants were joint owners, or tenants in common, with appellee or his remote vendors. The only allegations in appellants' pleadings with reference to this matter were denied positively by appellee, and no testimony was introduced to support the allegations. The testimony introduced shows that appellee claimed to own this land by reason of a remote conveyance from one Joseph Logan, who, with his father, had been in the actual adverse possession of the land for more than 40 years claiming it as agents and tenants of one James H. Herndon and his heirs. It is not shown when James H. Herndon died, but it does appear that he died leaving eight children, and that appellee's vendors received a conveyance for this land from the eight children and their descendants. There is no testimony in the record showing that James H. Herndon was even related to Richardson Herndon or Benjamin F. Herndon, two of the original grantees of the land; nor is there any proof in the record showing how James H. Herndon became the owner or claimant of the land. For these reasons the contention of appellants' counsel that, as they were joint owners, or tenants in common, the plea of the statutes of limitations cannot apply to them, must fail. The statutes of limitations are applicable to appellants as in the first-styled case.

There is another reason presented why appellants' claim to this land cannot be sustained in this action. It appears that one L. E. Bryant agreed, as their agent and attorney in fact, to investigate their title to the land and to institute suit for the recovery thereof, to furnish the money to prosecute the action, and to take one-half of the land recovered as his compensation. In view of what we have already said, we deem it unnecessary to pass upon this question.

For these reasons the lower court did not err in dismissing their action, and the judgment on their appeal, as well as the appeal of Hamilton et al., is affirmed; and reversed on the appeal of Henry P. Brown, and remanded for a judgment consistent with this opinion.

LOUISVILLE & E. R. CO. v. HARDIN et al  
(Court of Appeals of Kentucky. March 12, 1909.)

1. EMINENT DOMAIN (§ 307\*)—DAMAGES—RAILROAD—CONSTRUCTION THROUGH FARM—INJURIES TO TENANT.

The rights of a farm tenant against a railroad company for injuries to his possession, in constructing its roadway through the premises, is entirely severable from his landlord's rights under a contract with the railroad company for breach of its agreement to provide crossings, and hence it was error, in an action by the tenant against the railroad company for injuries to his possession, to give an instruction predicated on his right to recover under the contract with his landlord.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 307.\*]

2. EMINENT DOMAIN (§ 155\*)—DAMAGES—RAILROADS—CONSTRUCTION THROUGH FARM—INJURIES TO TENANT.

A railroad company entitled to a right of way through a farm must build its roadway without unnecessarily injuring the tenant in possession, and has no right to build its roadway in front of his house without furnishing him a reasonable way to come and go from it, and if it fails in this respect he is entitled to a fair remuneration for the inconvenience; and it could not lawfully tear down the fences and expose his growing crops to wandering cattle without being answerable to him for the damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 421; Dec. Dig. § 155.\*]

3. APPEAL AND ERROR (§ 882\*)—ERROR COMMITTED BY PARTY COMPLAINING—INSTRUCTIONS.

If error in instructions given for the prevailing party also went to the jury in instructions requested by the losing party, it cannot be deemed prejudicial to the latter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

Appeal from Circuit Court, Shelby County.  
"Not to be officially reported."

Action by John H. Hardin and others against the Louisville & Eastern Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Willis & Todd, for appellant. Gilbert & Gilbert, for appellees.

BARKER, J. Mrs. Fannie Harrington owned a farm of 160 acres in Shelby county, Ky. She sold to the appellant, Louisville & Eastern Railroad Company, a right of way through her property, 50 feet wide, for the sum of \$300, and in the contract it was stipulated, among other things, that the vendee would construct for her two grade crossings at such places as she should designate. After making this contract, Mrs. Harrington leased the farm to appellee John H. Hardin, and put him in possession of it. The appellant, by and through its contractors, constructed the roadway through the farm, and for this purpose it was necessary to, and they did, tear down the fences, and make a deep cut in front of the dwelling house in which Hardin resided. Complainant that appellant, by making the cut in front of his

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

house, had shut him off from the pike and had failed to construct for him a reasonable way of ingress and egress to and from his dwelling, and also that by tearing down his fences and failing to replace the same in a reasonable time appellant permitted stray stock to enter his place and eat, trample, and otherwise damage his corn and oats which were growing thereon, he instituted this action against it, laying his damages in the sum of \$500. After the issues were made up by denial of all the allegations of the petition, a trial before a jury was had, which resulted in a verdict in favor of appellee in the sum of \$200; and of the judgment based upon this verdict the appellant complains.

In so far as the evidence which was directed to the amount of damages sustained by the appellee is concerned, it may be said that it was very conflicting, and we are of opinion that the sum of \$200 is not so excessive as would authorize us to set aside the verdict of the jury on that account.

The court, on its own motion, instructed the jury as follows: "No. 1. If the jury believe from the evidence that the defendant, the Louisville & Eastern Railroad Company, while in and about the construction of said railroad, through the farm occupied by the plaintiff, destroyed his passway or crossings out to the public road, it was their duty to provide a crossing in reasonably good order and condition, and within a reasonable time after the original crossing was destroyed, and if the jury believe from the evidence that said crossing was not provided in a reasonable time, after the destruction of the then existing crossing, they should find for the plaintiff. No. 2. If the jury believe from the evidence that the defendants, or either of them, agreed with Mrs. Harrington to furnish her two grade crossings at any point she might designate, and they further believe that she did designate said crossings, and the present crossings are not at either of the places designated by her, they should find for the plaintiff. No. 3. If the jury believe from the evidence that the defendant negligently tore down plaintiff's fences, or if they believe from the evidence that it was necessary to tear down said fences in the prosecution of the construction of said road, and defendants tore down said fences and failed for an unreasonable length of time to provide fences so as not to expose his farm and premises to the depredations of stock, they should find for the plaintiff."

To the giving of each of these instructions the appellant excepted, and thereupon it tendered two instructions, which the court, upon its motion, gave to the jury. These are as follows: "(a) The court instructs the jury if they believe from the evidence that plaintiff's landlord Mrs. Fannie Harrington, granted to the defendant, Louisville & Eastern Railroad Company, a right of way over her land and before the plaintiff leased same,

then unless the jury further believe from the evidence that the defendant in the construction of the Louisville & Eastern Railroad broke or violated the contract between Mrs. Harrington and said company, and by such violation the plaintiff was damaged as hereinafter defined, they should find for the defendant. (b) If the jury should find for the plaintiff, they should find such sum as will fairly and reasonably compensate plaintiff for such damages which he has sustained, if any, as are the direct and natural result of defendant's failure to comply with the terms of the contract between Mrs. Harrington and the defendant, Louisville & Eastern Railroad Company, if there was such failure, and in fixing such damages, if they find for the plaintiff, they are confined to the deprivation of ingress to and egress from said farm of Mrs. Fannie Harrington for plaintiff's stock and crops, and depredation of stock of other persons on plaintiff's premises resulting from the violation of the aforesaid contract, if any, such damages to be confined between April 1, 1907, to March 1, 1908, not exceeding in all \$500, the amount claimed in the petition."

We quite agree with appellant that the court erred in giving instruction No. 2. The appellee's right to recover for the injury done to his possession is entirely severable from Mrs. Harrington's rights under the contract. We do not now express any opinion as to what Mrs. Harrington's rights are; it being said in the briefs that she has an action for damages pending against appellant. But, whatever those rights are, they have nothing in common with the rights of the appellee here. The appellee was in possession of the farm under a contract of lease from the owner, and while the appellant had a right to go through the farm and build its roadway, still it was required to do this without unnecessarily injuring the tenant in possession. It had no right to build its roadway in front of his house without furnishing him a reasonable way to come and go from and to his dwelling, and, if it failed in this regard, he was entitled to a fair remuneration for the inconvenience sustained. Nor could it lawfully tear down the fences and expose the tenant's growing crops to the ravages of wandering cattle without being answerable to him for the damage done. The rights of the appellee were fairly and fully expressed in instructions 1 and 3. Instruction 2 should have been entirely omitted. But the appellant, in the instructions offered by it, also grounded the right of the tenant to recover upon the contract existing between Mrs. Harrington and it, so that, if instruction 2 had been entirely omitted, the very error of which it now complains would have gone to the jury in its own instructions. For this reason we do not deem the error of giving instruction 2 prejudicial.

A careful reading of the transcript fails to

disclose any incompetent evidence admitted which was excepted to by appellant.

These are the only errors complained of by appellant which are contained in its grounds for a new trial, and, as they are without merit, the judgment is affirmed.

### COMMONWEALTH v. CAMPBELL.

(Court of Appeals of Kentucky. March 24, 1909.)

#### 1. INTOXICATING LIQUORS (§ 6\*)—LEGISLATIVE POWER.

Under Const. § 59, subsec. 27, and Id. §§ 61, 154, requiring the General Assembly to provide a general local option law for counties, cities, etc., and authorizing it to prescribe necessary laws for the prohibition of the sale of intoxicating liquors on election days, etc., the Legislature is without authority to prohibit a citizen from having in his possession intoxicating liquors for his own use, though it has power to regulate the sale of liquor or any other use of it which in itself is inimical to the public health, morals, or safety.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 4; Dec. Dig. § 6.\*]

#### 2. CONSTITUTIONAL LAW (§ 81\*)—POLICE POWER—RIGHT TO INVADE PRIVACY.

The Legislature cannot invade the privacy of a citizen's life, and regulate his conduct in matters in which he alone is concerned, or prohibit him any liberty the exercise of which will not directly injure society.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 148; Dec. Dig. § 81.\*]

#### 3. INTOXICATING LIQUORS (§ 10\*)—MUNICIPAL REGULATION—VALIDITY.

A city clothed with the police power possessed by the General Assembly and prohibiting the sale of intoxicating liquor within its limits cannot prohibit one from having in his possession, within the city, intoxicating liquors for his own use.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 9; Dec. Dig. § 10.\*]

Appeal from Circuit Court, Jessamine County.

"To be officially reported."

Peter Campbell was charged with violating an ordinance of the city of Nicholasville, and from a judgment of the circuit court dismissing the case, rendered on appeal from a judgment of conviction, the Commonwealth appeals. Affirmed.

Everett B. Hoover, Jas. Breathitt, Atty. Gen., and Tom B. McGregor, for the Commonwealth. John H. Welch, for appellee.

**BARKER, J.** The appellee, Peter Campbell, was arraigned before the police court of Nicholasville (a city of the fourth class) under the following warrant: "Nicholasville Police Court. The Commonwealth of Kentucky, to the Chief of Police of Nicholasville, or to Any Sheriff, Coroner, Jailer, Marshal or Policeman in This State: You are commanded to arrest Pete Campbell and bring him before the Nicholasville police court to

answer to the charge of said commonwealth (which sues for the use and benefit of the board of councilmen of the city of Nicholasville) of a breach of the ordinances of said city, to wit: Bringing into the town of Nicholasville spirituous, vinous or malt liquors upon his person or as his personal baggage exceeding a quart in quantity, committed by him in said city on or before the 19th day of February, 1908. Given under my hand as judge of said court, this 19th day of February, 1908. John Traynor, J. N. P. C." He was tried and found guilty in the police court, and a fine of \$100 assessed against him. Upon appeal to the Jessamine circuit court, the judgment of the police court was reversed, and the warrant dismissed. From this judgment the commonwealth has appealed.

The ordinance, by virtue of which the warrant was issued, is as follows:

"An ordinance to regulate the carrying, moving, delivering, transferring or distributing intoxicating liquors in the town of Nicholasville.

"Be it ordained by the board of councilmen of the town of Nicholasville:

"(1) It shall be unlawful for any person or persons, individuals or corporations, public or private carrier to bring into, transfer to any other person or persons, corporations, carrier or agent, or servant, deliver or distribute in the town of Nicholasville, Kentucky, any spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may be called; either in broken or unbroken packages, provided individuals may bring into said town, upon their person or as their personal baggage, and for their own private use, such liquors in quantity not exceeding one quart.

"(2) Each package of such spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may be called, whether broken or unbroken packages, brought into and transferred to other person or persons, corporations, carrier or agents, or servants, delivered or distributed in said town shall constitute a separate offense.

"(3) Any person or persons, individual or corporation, public or private carrier violating the provisions of this ordinance shall be fined not less than \$50 nor more than \$100 for each offense.

"(4) Provided the provisions of this ordinance do not apply to interstate commerce carriers when engaged in interstate commerce transportation.

"(5) This ordinance shall take effect and be in force from and after its passage and publication.

"Approved this 7th day of February, 1908.

"W. L. Steele, Mayor."

The following subsections of section 3490, Ky. St. (charter of cities of the fourth class),

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

are referred to in the briefs of counsel as having a bearing upon the question in hand:

"The board of council shall have power \* \* \* within the city—

"(1) To pass ordinances not in conflict with the Constitution or laws of this state or of the United States, and to impose and collect license fees and taxes on stock used for breeding purposes, and on all franchises, trades, occupations and professions."

"(7) To prevent and remove nuisances at the cost of the owners or occupants, or of the parties upon whose ground they exist, and define and declare by ordinance what shall be a nuisance within the limits of the city, and to punish by fine any person for causing or permitting a nuisance."

"(27) The council shall have power, by ordinance, to license, permit, regulate or restrain the sale of all kinds of vinous, spirituous or malt liquors within the limits of the city, or to restrain or prohibit the sale thereof within one mile of the limits thereof, provided nothing herein shall be construed as granting the power or right to one town or city to license, permit, regulate, restrain or prohibit the sale of vinous, spirituous or malt liquors in any other town or city, and may fix the penalty or fine for violation of an ordinance under this section at any sum not exceeding one hundred dollars; provided, that no license to sell such liquors, to be drunk on the premises where sold, granted under this section, shall be for a less amount than two hundred and fifty dollars nor for a greater amount than one thousand dollars. For license to sell same by retail, for medical purposes, they may charge not less than fifty dollars nor more than five hundred dollars. For license to sell same by retail in quantities not less than a quart they may charge not less than one hundred dollars nor more than five hundred dollars. The board of council shall, at any time, have the power and authority to refuse to grant any license, and to suspend or revoke any license granted under or by virtue of the authority conferred by this section, when the board shall deem it necessary so to do in order to preserve the peace or good morals of said towns, and said board of council shall be the exclusive judges of the necessity."

"33. Said city council shall have legislative power to make by-laws and ordinances for the carrying into effect of all the powers herein granted for the government of the city, and to do all things properly belonging to the police of incorporated cities. Said board of council may change the boundary line of any ward or wards of any city now divided into wards, or hereafter divided into wards, under the provisions of this act, not less than sixty days previous to any November election."

It will be observed that the warrant issued against the defendant charges him with bringing into the town of Nicholasville spirituous, vinous, or malt liquors, upon his per-

son or as his personal baggage, exceeding a quart in quantity. So far as the warrant is concerned therefore there is nothing to negative the idea but what the defendant had the liquor for his own use, and for no other purpose. We presume it will not be controverted that, if the council of Nicholasville could limit the quantity of liquor which a person might have in his possession for his own use to a quart, it could prohibit his having in his possession any quantity whatever. We are confronted therefore with the proposition as to whether or not, in this state, it is competent under the police power for any legislative body to prohibit the possession or use of liquor by one for his own necessity or comfort. Broadly stated, the question before us is whether or not it is competent for the Legislature to prohibit a citizen from having in his own possession spirituous liquor for his own use. It will not require any elucidation to show that, if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it, because, of necessity, no one can drink that which he has not in his possession. So that if it is competent for the legislative body of any given city or district, or even the Legislature of the state, to prohibit the citizen from having liquor in his own possession, then a new and more complete way has been discovered for the establishment of total prohibition, not only in any precinct, town, or county, but throughout the state, because, if it is competent to prohibit the citizen from having liquor in his possession, it necessarily follows that he can neither sell nor use it, as it is a physical impossibility to do either without first having had the possession of the interdited liquor.

When the constitutional convention was in session, it was confronted with the question of how the use of spirituous liquor should be regulated. There were two forces brought strongly to bear upon the convention: First, there were the Prohibitionists, who desired to facilitate and advance in every way the means of banishing liquor from the state; and, on the other hand, there were those who were engaged in the business of manufacturing and selling liquor, who strongly advocated the utmost freedom of the citizen with reference to its use. The convention gave patient and full hearing to both parties to this controversy, and, as a result, formulated a system by which the sale of vinous, spirituous, or malt liquors throughout the state was to be regulated by general laws. By subsection 27 of section 59 of the Constitution, it is provided that the General Assembly shall not pass local or special acts to provide a means of taking the sense of the people of any city, town, district, precinct, or county, whether they wish to authorize, regulate, or prohibit therein the sale of vinous, spirituous, or malt liquors or alter the liquor laws. And by section 61 it is provid-



ed that the General Assembly shall, "by general law, provide a means whereby the sense of the people of any county, city, town, district or precinct may be taken, as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated. But nothing herein shall be construed to interfere with or to repeal any law in force relating to the sale or gift of such liquors. All elections on this question may be held on a day other than the regular election days." Section 154 is as follows: "The General Assembly shall prescribe such laws as may be necessary for the restriction or prohibition of the sale or gift of spirituous, vinous or malt liquors on election days." It will thus be seen that the Constitution prescribes fully the power of the Legislature with reference to the regulation of liquor. The General Assembly is given ample power by general laws to submit to the people the question of whether or not any given district shall have prohibition, and by section 154 they are authorized to prohibit either the sale or gift of liquor on election days.

Now, can it be contended with any show of reason that the framers of the Constitution intended to leave the question of the retailing of liquor in a given district to a vote of the majority of the qualified voters in the district, and yet leave it in the power of the Legislature upon its own motion to prohibit the possession of liquor by the citizen? Before the present Constitution, it was competent for the Legislature to prohibit the sale of liquor by retail in any county, town, or district without any vote being taken by the citizens, or without giving them any voice in the matter; but no one doubts that, under the present Constitution, it is not competent for the Legislature, without a vote of the citizens, to declare the retailing of liquor in any part of the state unlawful. How vain it would be, then, for the framers of the Constitution to thus take from the Legislature the power to regulate the retailing of liquor and place that question within the competency of the qualified voters, and yet leave within the competency of the Legislature the greater power of prohibiting the citizen either from possessing liquor or using it for his own benefit or comfort. It is self-evident that, if the Legislature may pass a general law prohibiting any citizen from possessing or using liquor in any quantity, this would in itself be the most perfect prohibition law possible, because no man could retail liquor without first having possession of it. We cannot believe that the framers of the Constitution intended to thus carefully take from the Legislature the power to regulate the sale of liquor, and at the same time leave with that department of the state government the greater power of prohibiting the possession or ownership of liquor. The fact that the Constitution, by section 154, leaves with the General Assem-

bly the power of restricting or prohibiting the sale or gift of liquor on election days, clearly shows that the convention had it in mind that but for this special power the Legislature could not even regulate the sale of liquor on election days. The history of our state from its beginning shows that there was never even the claim of a right on the part of the Legislature to interfere with the citizen using liquor for his own comfort, provided that in so doing he committed no offense against public decency by being intoxicated; and we are of opinion that it never has been within the competency of the Legislature to so restrict the liberty of the citizen, and certainly not since the adoption of the present Constitution. The Bill of Rights, which declares that among the inalienable rights possessed by the citizens is that of seeking and pursuing their safety and happiness, and that the absolute and arbitrary power over the lives, liberty, and property of freeman exists nowhere in a republic, not even in the largest majority, would be but an empty sound if the Legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public. Man in his natural state has a right to do whatever he chooses and has the power to do. When he becomes a member of organized society, under governmental regulation, he surrenders, of necessity, all of his natural right the exercise of which is, or may be, injurious to his fellow citizens. This is the price that he pays for governmental protection, but it is not within the competency of a free government to invade the sanctity of the absolute rights of the citizen any further than the direct protection of society requires. Therefore the question of what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen. It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society.

The difference between the absolute and relative rights of man, and the power of the government with reference thereto, is thus set forth by Blackstone in his Commentaries on the Laws of England: "The rights of persons considered in their natural capacities are also of two sorts, absolute and relative: Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons; relative, which are incident to them as members of society, and standing in various relations to each other. The first—that is, absolute rights—will be the subject of the present chapter. By the absolute rights of individuals, we mean those which are so in their primary and strictest sense; such as would belong to

their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute duties, which man is bound to perform considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behavior of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself (as drunkenness, or the like), they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstances of publication is what alters the nature of the case. Public sobriety is a relative duty, and therefore enjoined by our laws; private sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction." Book 1, pp. 123, 124.

Cooley, in his work on Constitutional Limitations, thus states the rule with reference to sumptuary laws, and the right of the Legislature to enact them: "In former times sumptuary laws were sometimes passed, and they were even deemed essential in republics to restrain the luxury so fatal to that species of government. But the ideas which suggested such laws are now exploded utterly, and no one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal right of others, is accepted among the fundamentals of our law." Pages 549, 550.

John Stuart Mill, in his great work on Liberty, says: "The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their numbers is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will

make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign." Pages 22, 23. And again: "Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong." Page 28.

In discussing the limits of the authority of society over the individual, our author says: "Though society is not founded on a contract, and though no good purpose is answered by inventing a contract in order to deduce social obligations from it, every one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest. This conduct consists: First, in not injuring the interests of one another, or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights; and, secondly, in each person's bearing his share (to be fixed on some equitable principle) of the labors and sacrifices incurred for defending the society or its members from injury and molestation. These conditions society is justified in enforcing, at all costs to those who endeavor to withhold fulfillment. Nor is this all that society may do. The acts of an individual may be hurtful to others, or wanting in due consideration for their welfare, without going the length of violating any of their constituted rights. The offender may then be justly punished by opinion, though not by law. As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age, and the ordinary amount of understanding). In all such cases there should be perfect freedom, legal and social, to do the action and

stand the consequences." Pages 144, 145 and 146. Again: "In like manner, when a person disables himself, by conduct purely self-regarding, from the performance of some definite duty incumbent on him to the public, he is guilty of a social offense. No person ought to be punished simply for being drunk, but a soldier or a policeman should be punished for being drunk on duty. Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law." Pages 157, 158.

Black, in his work on Intoxicating Liquors (page 50, § 38), says: "But it is justly held that a provision in such a law that no person, without a state license, shall 'keep in his possession, for another, spirituous liquors,' is unconstitutional and void. 'The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public, and therefore the statute prohibiting such keeping in possession is not a legitimate exertion of the police power. It is an abridgment of the privileges and immunities of the citizen without any legal justification, and therefore void.'"

In the case of *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847, the Supreme Court of West Virginia held that a statute prohibiting the citizen to keep in his possession, for another, spirituous liquors, is unconstitutional and void. It is from the opinion in this case that Black adopted the quotation given above. The principle is rested upon the broad proposition that every person has a right to keep or use liquor for his own benefit, or to keep it for another, provided in so doing he does not attempt to sell it or otherwise use it so as to injure the public.

In the case of *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 17 L. R. A. (N. S.) 299, it was held by the Supreme Court of North Carolina that a statute forbidding one under penalty to carry into a county where the sale of intoxicating liquor is prohibited more than a half gallon of such liquor on any one day deprives him of his constitutional property right in case he has no intent to sell it. In the opinion in this case the question before us is most learnedly discussed in all of its phases, and the principle which we have announced is upheld after a review of all the authorities.

In discussing the question before us, we have assumed that the general council of the city of Nicholasville has been clothed with all the authority to enforce what is called the police power which the General Assembly possesses, and also that the city

of Nicholasville has by regular proceedings prohibited the sale of liquor within its boundary; but with these assumptions we have not been able to uphold the warrant in this case. It will be observed that the defendant is not charged with having the liquor in his possession for the purpose of selling it, or even giving it to another. The sole charge against him is that he had it in his possession, and therefore we must presume that he had it there for a lawful purpose if he could so hold it. Nothing that we have said herein is in derogation of the power of the state under the Constitution to regulate the sale of liquor, or any other use of it which in itself is inimical to the public health, morals, or safety; but as spirituous liquor is a legitimate subject of property, its ownership and possession cannot be denied when that ownership and possession is not in itself injurious to the public. The right to use liquor for one's own comfort, if the use is without direct injury to the public, is one of the citizen's natural and inalienable rights, guaranteed to him by the Constitution, and cannot be abridged as long as the absolute power of a majority is limited by our present Constitution. The theory of our government is to allow the largest liberty to the individual commensurate with the public safety, or, as it has been otherwise expressed, that government is best which governs the least. Under our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men in matters in themselves indifferent, and to make them conform to a standard, not of their own choosing, but the choosing of the lawgiver; that inquisitorial and protective spirit which seeks to prescribe what a man shall eat and wear, or drink or think, thus crushing out individuality and insuring Chinese inertia by the enforcement of the use of the Chinese shoe in the matter of the private conduct of mankind. We hold that the police power—vague and wide and undefined as it is—has limits, and in matters such as that we have in hand its utmost frontier is marked by the maxim: "Sic utere tuo ut alienum non lædas."

The judgment of the circuit court, quashing the warrant in this case, is affirmed.

#### MCGOWAN v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 25, 1909.)

#### 1. HOMICIDE (§ 190\*)—EVIDENCE—ADMISSIBILITY.

Where the commonwealth proved that accused was the aggressor and first struck decedent, and then stabbed him, and accused showed that decedent first struck him and was in a threatening attitude with a pistol when he drew his knife and stabbed decedent, evidence of a difficulty between accused and decedent about an hour before, and that decedent then threatened accused, was admissible to show the state of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

feeling between the parties, and to help illustrate which one of them struck the first blow when the fatal difficulty occurred.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 400; Dec. Dig. § 190.\*]

**2. CRIMINAL LAW (§ 366\*)—EVIDENCE—DECLARATIONS OF DECEDENT—RES GESTÆ.**

Declaration of decedent made some two or three hours after he was fatally stabbed that he was to blame in the difficulty, and that accused was not to blame, is inadmissible as a part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 819, 820; Dec. Dig. § 366.\*]

**3. HOMICIDE (§ 216\*)—DYING DECLARATIONS—EVIDENCE.**

Declaration of decedent made some two or three hours after he was stabbed, resulting in his death three days later, that he was to blame in the difficulty, and that accused was not to blame, is inadmissible as a dying declaration, in the absence of testimony making it competent as a dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 457; Dec. Dig. § 216.\*]

**4. CRIMINAL LAW (§ 415\*)—EVIDENCE—DECLARATIONS OF DECEDENT—ADMISSIBILITY.**

Declaration of decedent, made some two or three hours after he was fatally stabbed, that he was to blame in the difficulty, and that accused was not to blame, is not competent as substantive evidence for accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 937-949; Dec. Dig. § 415.\*]

**5. HOMICIDE (§ 300\*)—SELF-DEFENSE—INSTRUCTIONS.**

Where the evidence was conflicting as to whether decedent or accused struck the first blow, an instruction that if accused brought on the difficulty and continued it up to the time of the fatal wounding, and in so doing he made the danger to himself, he should not be acquitted on the ground of self-defense, was erroneous for failing to define how accused brought on the difficulty, and the jury should have been charged that, if accused brought on the difficulty by striking or attempting to strike decedent, he should not be excused on the ground of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 616, 617; Dec. Dig. § 300.\*]

Appeal from Circuit Court, Russell County.  
"Not to be officially reported."

Henry McGowan was convicted of murder, and he appeals. Reversed, and new trial granted.

Bertram & Phelps, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

**CARROLL, J.** The judgment of conviction in this case, which fixed the punishment of the appellant at life imprisonment, must be reversed for two reasons: First, for error in excluding evidence of a quarrel between appellant and the deceased, Lozler Dunbar, a short time before the affray in which deceased was stabbed; and, second, for error in instructing the jury upon the subject of self-defense.

Briefly, the facts are these: The deceased and appellant were both young men, and previous to the night of the homicide had been friends. In returning home about 8

o'clock at night from a church service, they became involved in a difficulty that ended in appellant cutting deceased with a knife, from the effects of which he died three days afterwards. Several persons, including appellant and deceased, were walking along the road on the way home, and appellant, who was under the influence of liquor, was a short distance in front. He turned around, walked back towards the crowd in which the deceased was, and, using profane language, dared anybody to fight him, accompanying his speech by walking up to and placing his hand on the deceased. The deceased requested him to go away and let him alone, and a few angry words were exchanged between them. There is conflict in the evidence as to who struck the first blow. Witnesses for the commonwealth said that appellant first hit the deceased, and followed up the blow by cutting him with a knife. The appellant testified that the deceased struck and almost knocked him down, and was in a threatening attitude with a pistol when he drew his knife and stabbed him. While they were at the church house about an hour before deceased was stabbed, appellant testified that deceased cursed him and drew a pistol on him.

Asked to relate what took place at this time, objection was made by the commonwealth, sustained by the court, and it was avowed that the witness, if permitted to answer, would say: "I did have some little trouble with Lozler something like an hour before the cutting. I had some whisky hid off a little distance from Clear Fork church, which I had put there so as not to carry it about the church. Before meeting broke, I went to get it, and took Lucien Stephens with me to give him a drink. When we got in a short distance to where the whisky was hid, we saw two persons standing near the place where the whisky was; and I called to them, and said, 'Boys, don't drink all the whisky up.' The boys were Lozler Dunbar and Esto Dunbar. Lozler said: 'By G——, we are not bothering your whisky. I have got plenty of whisky and plenty of money to buy more.' I told Lozler I didn't mean any harm. He said: 'G—— d—— you, I never got your whisky, but I can whip you.' I said: 'You haven't whipped me yet, but I don't want any trouble.' Lozler had a pistol in his hand, and said if I come over there he would shoot me. I told him I wasn't coming over to where he was, and he said: 'G—— d—— you, you had better not.' I went on and got my whisky. It had not been bothered. I then said to Lozler: 'I don't want any trouble, and I want to make friends with you.' He replied: 'I don't give a d—— whether we are friends or not.' I turned to go away, and a pistol fired twice behind me, and in a few steps of me. I don't know who fired it. I saw no

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

one there with a pistol but Lozier Dunbar. He had it in his hand when I turned to go away." He offered to make the same evidence by one or two other witnesses. In our opinion this evidence was competent to show the state of feeling between the parties, and to help illustrate which one of them struck the first blow when the final affray took place between them. The appellant also offered to prove that some two or three hours after Dunbar was cut he said "that he was to blame in the difficulty, and that Henry McGowan was not to blame for it." The ruling of the court in rejecting this offered evidence was correct. No testimony was offered to make it competent as a dying declaration, and it was too remote in time and distance from the scene of the difficulty to make it competent as a part of the *res gestæ*. Neither was it on any ground competent as substantive evidence in behalf of the accused. If evidence of this character was admitted, not as a dying declaration or as a part of the *res gestæ*, the commonwealth would often be defeated by hearsay evidence of real or pretended declarations of the prosecuting witness.

The court in the instruction defining the right of self-defense qualified it by this language: "But if the jury believe from the evidence beyond a reasonable doubt that the defendant sought and brought on the difficulty with deceased, and continued or engaged in and urged it up to and including the time of the cutting and wounding, and in so doing made the harm or danger to himself, if any there was, necessary or excusable on the part of the deceased in his own necessary self-defense, they should not acquit or excuse the defendant on the ground of self-defense or apparent necessity." The error in this instruction is that it fails to define how the defendant "brought on the difficulty." The jury should have been instructed that if the defendant brought on the difficulty by striking or attempting to strike the deceased, or by cutting or attempting to cut him, he should not be excused on the ground of self-defense. *Allen v. Commonwealth*, 86 Ky. 643, 6 S. W. 645; *Greer v. Commonwealth*, 85 S. W. 160, 27 Ky. Law Rep. 333.

For the errors mentioned, the judgment of the lower court is reversed, with directions for a new trial in conformity with this opinion.

PROBST et al. v. HINESLEY.

HINESLEY v. BEATTIE et al.

(Court of Appeals of Kentucky. March 24, 1909.)

**1. ADJOINING LANDOWNERS (§ 8\*)—ACTION FOR DAMAGES BY BLASTING—ISSUES, PROOF, AND VARIANCE.**

A petition for damages caused by an excavation for a building, which charged not only

that it was a nuisance, but that it was negligently and carelessly done, warrants the reception of testimony as to blasting below a depth to which the petition charged that the excavation was made and submission of the question to the jury.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Cent. Dig. § 8.\*]

**2. PLEADINGS (§ 398\*)—SURPRISE IN EVIDENCE INTRODUCED THEREUNDER.**

Parties cannot claim to be surprised by evidence as to an issue where, prior to the trial, a deposition was taken in which the matter was fully gone into and discussed.

[Ed. Note.—For other cases, see *Pleadings*, Cent. Dig. § 1338; Dec. Dig. § 398.\*]

**3. ADJOINING LANDOWNERS (§ 8\*)—DANGER FROM BLASTING—QUESTION FOR JURY.**

Evidence held to present a question for the jury whether damage was done to adjoining property by blasting in excavating for a building.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Cent. Dig. § 63; Dec. Dig. § 8.\*]

**4. JUDGMENT (§ 239\*)—JOINDER OF DEFENDANTS—JUDGMENT AGAINST PART.**

In an action for negligence, it was not error to permit all defendants to be joined in one suit and judgment go against part of them.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 417; Dec. Dig. § 239.\*]

**5. TORTS (§ 22\*)—PERSONS LIABLE.**

While several may be guilty of several and distinct negligent acts, yet, if their concurrent effect is to produce an injury, they are all liable, jointly and severally, and the comparative degree in culpability will not affect the liability of either.

[Ed. Note.—For other cases, see *Torts*, Cent. Dig. § 29; Dec. Dig. § 22.\*]

**6. ADJOINING LANDOWNERS (§ 8\*)—ACTION FOR DAMAGES FROM BLASTING—QUESTIONS FOR JURY.**

In an action for damages by blasting in excavating for a building, no error as to the defendant principal contractor can be predicated on a failure to hold as a matter of law that the defendant who did the blasting for it was an independent contractor, or in not submitting this question to the jury, where the question as to the latter's ordinary care was submitted and the jury told to find for him, unless they believed that the blasting alone, or in connection with negligence of others, caused, or helped to bring about, the defective condition of plaintiff's wall, and that the evidence showed he was competent, and they should find for the principal contractor unless they believed that the blasting was naturally and reasonably dangerous to plaintiff's building, and that the natural and probable result was to injure his property, and where, besides, the evidence showed that the architect told him to use blasting to remove the concrete foundations, and that the superintendent of the building, selected by the principal contractor, was frequently present and knew that the blasting was going on, and that its effect was frequently brought to the attention of those in charge of the work.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Cent. Dig. § 63; Dec. Dig. § 8.\*]

**7. ADJOINING LANDOWNERS (§ 8\*)—EXCAVATION FOR BUILDING—WHEN LIABILITY FOR BLASTING ACCRUES.**

In an action for damages to adjoining property by blasting in excavating for a building, the court properly left to the jury the question whether, under the circumstances, the natural

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and probable result was to injure plaintiff's property.

[Ed. Note.—For other cases, see Adjoining Landowners, Dec. Dig. § 8.\*]

**8. APPEAL AND ERROR (§ 1062\*)—HARMLESS ERROR—FAILURE TO SUBMIT QUESTIONS TO JURY.**

In an action for damages to adjoining property, caused by a subcontractor in blasting in excavating for a building, there was no prejudicial error in failing to submit to the jury the question of whether the principal contractor had notice of the nuisance and took prompt means to suppress it, where it was conclusively shown that notice of the blasting was brought home to its architect and its superintendent, and there was no evidence that it undertook, after such notice, to suppress the nuisance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4213, 4218; Dec. Dig. § 1062.\*]

**9. LANDLORD AND TENANT (§ 142\*)—MEASURE OF DAMAGES BY THIRD PERSON FOR INJURY TO LEASEHOLD.**

In an action for damages to a leasehold, caused by blasting an excavation for an adjoining building, the court properly fixed the measure of damages as the diminution in the value of its use for plaintiff's unexpired term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 515; Dec. Dig. § 142.\*]

**10. LANDLORD AND TENANT (§ 142\*)—INJURY TO LEASEHOLD—ADMISSIBILITY OF EVIDENCE.**

In an action for damages to a leasehold, caused by blasting in excavating for an adjoining building, evidence of the amount of plaintiff's restaurant business and the profits was admissible to determine the value of the use of the property.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 142.\*]

**11. LANDLORD AND TENANT (§ 142\*)—ACTION FOR INJURY TO LEASEHOLD—NONPAYMENT OF RENT AS DEFENSE.**

In an action against a third person for damages to a leasehold, a plea that plaintiff was behind in his rent, and had no rights under the lease, is not available where the damage was done prior to proceedings for his eviction.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 142.\*]

Appeals from Circuit Court, Jefferson County, Common Pleas Branch, Second District. "To be officially reported."

Action by George W. Hinesley against Lawrence Jones, the Jefferson Realty Company, Mrs. Pamela Beattie, John Hoertz and others. From a judgment against certain defendants, including Herman Probst, they appeal, and plaintiff prosecutes a cross-appeal from judgment in favor of Mrs. Pamela Beattie and John Hoertz. Affirmed on both appeals.

O'Neal & O'Neal, for appellant Probst. W. W. Watts and Kohn, Baird, Sloss & Kohn, for appellant Jefferson Realty Co. M. A., D. A. & J. G. Sachs and Augustus E. Willson, for appellee Hinesley. Clem W. Huggins, for appellee Hoertz. Wallace A. McKay, for appellees Galvin & Fox. C. B. Seymour, for appellee Beattie.

CLAY, C. Lawrence and Saunders Jones were the owners of a lot situated on the southwest corner of Fourth and Jefferson

streets, in the city of Louisville, upon which stood the Masonic Temple building. In November, 1903, the improvements on this lot were destroyed by fire. The old walls were torn down, and the property remained vacant until October, 1905. In the meantime the Joneses conveyed the lot to the Jefferson Realty Company. In the fall of 1905 the Jefferson Realty Company entered into a contract with certain persons for the erection of a large building on the lot. The building is now known as the "Paul Jones building." Galvin & Fox were the contractors who undertook to clean off the premises and remove the debris and foundation walls of the destroyed building. Another contract was made by the Jefferson Realty Company with Herman Probst to do certain work in connection with the erection of the building. Probst then subcontracted with Galvin & Fox to dig the trenches and do part of the general excavating for the new building. Mrs. Pamela Beattie owned the house and lot adjoining the old Masonic Temple on the west. The house thereon was occupied and used by George W. Hinesley as a restaurant. This restaurant was known as the "English Kitchen." Notice in writing was served upon Mrs. Beattie, the owner, giving full details of the nature and character of excavating that would be done upon the Paul Jones property, and the time when the work would begin. Mrs. Beattie in turn notified Hinesley. When the west wall of the Masonic Temple had been removed, the wall of the English Kitchen was left exposed. The earth beneath was soft, and the foundation extended to a depth of only three feet. Mrs. Beattie, after conference with Hinesley, employed Kenneth McDonald, Jr., as architect to make plans and specifications for the underpinning of her east wall. Plans were drawn, and the contract for this work let to Galvin & Fox, who in turn sublet the contract for the masonry part of the underpinning to John Hoertz. The excavating on the Paul Jones lot was made to a depth of 19 feet below the street level. Below this level 60-odd pier pits were dug; each pit being about 14 feet wide and 27 feet 10 inches deep. After the work had progressed to some extent, it was found that part of the excavating called "pier pits," though made according to plans and specifications, were not deep enough, and the contractor, Probst, was directed by the architect of the Jefferson Realty Company to make them deeper by blasting them out with dynamite. This blasting was done by Probst, and lasted for four or five days. While the work of excavating and underpinning was going on, the walls of the English Kitchen cracked and bulged out and pulled away from the rafters. Sometimes part of the ceiling would fall on guests who were at dinner in the restaurant. Soon thereafter the building was condemned by the authorities of the city of Louis-

ville and ordered to be torn down. At this time Hinesley had a lease on the premises in question, which extended to July, 1906. He vacated the building on January 15, 1906.

On February 6, 1906, Hinesley instituted this action against the defendants Lawrence and Saunders Jones (who were dismissed on peremptory instructions), the Jefferson Realty Company, Herman Probst, Galvin & Fox, Pamela Beattie, and John Hoertz. The petition charges that the work of excavating, removal of earth, and underpinning, made and undertaken by the defendants, were from their very character a nuisance and dangerous to the house and premises under lease and occupied by plaintiff. The petition then charges that the damages to plaintiff were caused by said excavation and underpinning, and the careless and negligent manner in which said excavation and underpinning were done by defendants. Negligence was denied by all the defendants, and the realty company and Mrs. Pamela Beattie also entered a plea of nonliability because the work was done by an independent contractor. Trial before a jury resulted in a verdict in favor of Hinesley, against the Jefferson Realty Company, Herman Probst, and Galvin & Fox, for the sum of \$2,500, and judgment was entered accordingly. There being no finding against Mrs. Beattie and John Hoertz, judgment was entered in their favor. From this judgment the Jefferson Realty Company, Herman Probst, and Galvin & Fox prosecute this appeal, and George W. Hinesley prosecutes a cross-appeal as to Mrs. Beattie and John Hoertz.

It would extend this opinion to too great length to set out in detail the various questions raised on the appeal. We shall briefly discuss those that we deem necessary to consider.

As the petition charged that the excavation was done to a depth of 19 feet, and subsequently, in reference to the damage sustained, spoke of said excavation, and as the blasting was done at a depth greater than this and was only for the purpose of removing the foundations after they had been found to be of insufficient depth, it is insisted that the court improperly received testimony on the question of blasting, and improperly submitted this question to the jury. We cannot accede to the view that the evidence of excavations to a depth greater than 19 feet should have been excluded because the petition spoke of excavations made only to that depth. This would be taking entirely too narrow a view of the allegations of the petition. The petition charges, not only that the excavation was of such a character as to constitute a nuisance, but that it was negligently and carelessly done. Under these circumstances, we think any evidence of the manner in which it was done and the dangerous character of the means employed was perfectly proper. Indeed, the questions of blasting, and of whether or not it was done with ordi-

nary care, and the question of underpinning, were the only ones submitted to the jury. Appellants could not have been surprised by the evidence in regard to the blasting, for some time prior to the trial a deposition was taken, in which the matter of the blasting was fully gone into and discussed. A very sharp issue was made as to whether or not any of the damage was done by blasting. The testimony for Hinesley was to the effect that whenever a blast took place the house was violently shaken, and the ceiling fell on his guests. The shock from the blast was also felt some distance away. The testimony for the defendants was to the effect that only small quantities of powder were used in the blasting, that the place where the blasting occurred was properly covered by timber, and that every care was used in discharging the blast. It was further shown that, between the point where the blasting was done and the wall in question, there was a large portion of ground consisting of sand, which would counteract the effect of any vibration caused by the explosion. There was also testimony to the effect that the underpinning was not properly done. Upon these issues there was abundant evidence upon which to submit the case to the jury, and we are unable to say that the verdict is flagrantly against the weight of the evidence.

It was not error to permit all the defendants to be joined in one suit and judgment to go against part of them. The rule is now well settled in this state that while several may be guilty of several and distinct negligent acts, yet, if their concurrent effect is to produce an estimable injury, they are all liable therefor. The comparative degree in the culpability of the two will not affect the liability of either. If both are negligent in a manner contributing to the result, they are liable jointly and severally. *Pugh v. Chesapeake & Ohio R. R. Co.*, 101 Ky. 77, 39 S. W. 695, 72 Am. St. Rep. 392; *Brown v. Cox Bros. & Co. (C. C.)* 75 Fed. 689; *Cumberland Telephone & Telegraph Co. v. Ware's Adm'r*, 115 Ky. 581, 74 S. W. 289; *Rutherford v. Illinois Central R. R. Co.*, 120 Ky. 15, 85 S. W. 199.

But it is insisted that the court erred as to the Jefferson Realty Company in not holding, as a matter of law, that Probst was an independent contractor, or, at least, in not submitting this question to the jury. As to Herman Probst, the question whether or not he exercised ordinary care with reference to the blasting was submitted to the jury. Indeed, the jury were told to find for the defendant Probst, unless they believed from the evidence that the blasting as done was not in the exercise of ordinary care, and unless they further believed from the evidence that the blasting alone, or in connection with the negligence of others, caused or helped to bring about the defective condition of the wall. As to the Jefferson Realty Company, the jury

were told that the evidence in the case showed that Andrews, the architect, was competent and capable, that Probst was competent as a contractor, and that they should find for the Jefferson Realty Company, unless they believed that the blasting was naturally and reasonably dangerous and unsafe to the building of the plaintiff, and that the natural and probable result of such blasting was to injure the plaintiff's property. It will be observed that this instruction does not in any sense make the realty company liable for the negligent manner in which the blasting was done. The evidence shows that Andrews told Probst to use blasting for the purpose of removing the concrete foundations; also, that the superintendent of the building, selected by the Jefferson Realty Company, was frequently present and knew that the blasting was going on; also, that the effect of the blasting was frequently brought to the attention of those in charge of the work. Upon the question of blasting there are two classes of cases. In one line of cases, it is held that injuries to a house from blasting caused merely by the shaking of the earth or pulsation of the air, or both, give no right of action in the absence of negligence in doing the blasting. *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, 31 N. E. 328, 17 L. R. A. 220, 30 Am. St. Rep. 649; *Holland House Co. v. Baird*, 169 N. Y. 136, 62 N. E. 149. In the other line of cases, it is held that the work of blasting is necessarily and inherently dangerous, and that a person who undertakes to blast near or so close to another's property as to cause injury assumes all risk of his operation. *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17; *Colton v. Onderdonk*, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556; *City of Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166. In the case at bar the court did not fully adopt either one of these views, but very properly, we think, left to the jury the determination of the question whether or not, under the circumstances of the case, the natural and probable result of the blasting was to injure the plaintiff's property. Unless the jury so believed, they had to find for the Jefferson Realty Company. In *James' Adm'r v. McMinimy*, 93 Ky. 471, 20 S. W. 435, 40 Am. St. Rep. 200, the rule is thus stated: "But where he (the owner of the building), as a prudent man, has no reason to believe that the act contracted to be done is a nuisance, but is in itself lawful, and it turns out during the progress of the work that it is necessary to create a nuisance in order to do the work, then the contractee is not liable for injuries to third persons resulting from the nuisance before he had notice of its existence. But, in such case, upon receiving notice, it would be his duty to take such reasonably prompt and efficient means as are in his power to suppress the nuisance, else he will be responsible for injuries to third persons resulting from the nuisance after no-

tice. See *Wood on Master & Servant*, pp. 598-612; *Robinson v. Webb*, 11 Bush, 480." While the court, in the case before us, did not submit to the jury the question of whether or not the Jefferson Realty Company had notice of the nuisance, and whether or not it took prompt and efficient means to suppress it, we are of the opinion that under the facts of this case this was not a prejudicial error, for it was conclusively shown by plaintiff (and there was no evidence to the contrary) that notice of the blasting was brought home to the architect and to the Jefferson Realty Company's superintendent, and there was no evidence to the effect that the Jefferson Realty Company undertook, after such notice, to suppress the nuisance.

It is next insisted that the court erred in fixing the measure of damages, and in permitting evidence of the amount of business done by plaintiff and the profits thereon. The measure of damages, as fixed by the court, was the diminution of the value of the use of the English Kitchen property for the unexpired term of plaintiff's leasehold. The evidence concerning the amount of business done and the profits thereon was permitted to be heard by the jury for the purpose only of assisting them in determining the value of the use of the property. Under the facts of this case, we think the measure of damages fixed by the court was proper, and that the evidence referred to was properly admitted. *Hinesley* was not the owner of the property. He was the tenant and in occupation of it. In the case of *King v. Board of Council of Danville*, 107 S. W. 1189, 32 Ky. Law Rep. 1188, where damages were sought by the owner of a mill against a party for building a dam above his mill and diverting the water therefrom, this court held that it was not error to permit the introduction of evidence to the effect that roller flour had supplanted burr flour; that such evidence tended to show the value of the use of the mill. And in *Brown & Otto v. Werner*, 40 Md. 18, the court said: "Now, if the plaintiff is to be allowed to recover for this injury to his business, it would seem to follow, as a necessary consequence, that the value of that business before the injury, as well as after, not only might, but should, be shown, as an indispensable means of showing the amount of loss from the injury. If the business were a losing one to the plaintiff before, his loss from its being broken up or diminished would certainly be less than if it were a profitable one. It is not the amount of business done, but the gain and profit arising from it, which constitutes its value." In this case the plaintiff had an established and well-advertised business. The building and location were known to his customers, and the value of the use of the building depended altogether upon the value of the business done by plaintiff.

The plea that *Hinesley* was behind in his rent, and that he therefore had no rights un-



der his lease, was not available by appellant. The damage was done prior to the proceedings instituted for the plaintiff's eviction. The right to declare a forfeiture was a personal right belonging to Mrs. Beattie.

In the matter of the cross-appeal from the judgment in favor of Mrs. Beattie and John Hoertz, we have concluded that there is no error in the record prejudicial to the substantial rights of Hinesley.

The judgment is affirmed, both on the original appeal and cross-appeal.

# FIDELITY & DEPOSIT CO. OF MARYLAND v. CHAMPION ICE MFG. & COLD STORAGE CO.

(Court of Appeals of Kentucky. March 24, 1909.)

## 1. EVIDENCE (§ 157\*)—NECESSITY OF PRODUCING BEST EVIDENCE.

The best evidence obtainable must be produced by the party who has the burden of proving any issue.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 460; Dec. Dig. § 157.\*]

## 2. EVIDENCE (§ 157\*)—BEST EVIDENCE OF AMOUNT OF EMPLOYÉ'S DEFALCATIONS.

The best evidence of the amount of an employé's defalcations would be the testimony of witnesses from whom he collected the money that he failed to account for.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460-462; Dec. Dig. § 157.\*]

## 3. EVIDENCE (§ 177\*)—PROOF OF EMPLOYÉ'S DEFALCATION—EXCEPTION TO RULE REQUIRING BEST EVIDENCE.

If, from an examination of the books and records of a storage company, alone, the amount of an employé's defalcations may be ascertained, and a summary of what the books and records showed was placed at the disposal of the surety company before the trial of a suit against it for his default, and reasonable time and opportunity given it to examine the same, a witness, who examined them for the storage company and made up the statement of the losses, might be offered by it, and his summary offered in evidence, showing the persons from whom the employé collected money and the amount in each case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 557, 570; Dec. Dig. § 177.\*]

## 4. EVIDENCE (§ 320\*)—HEARSAY—SUMMARY OF STATEMENTS BY NUMEROUS PERSONS.

In an action on a policy of fidelity insurance, the amount of the employé's defalcations was shown by a witness, who testified to what he ascertained from books of the employer and from persons who had paid the employé money not accounted for and not shown by the books, and by a written statement made by him showing the name of each person from whom the employé received money and the amount. In some instances the information in the written statement was obtained from the books and records of his employer, but in the majority of instances they did not disclose the amount paid, and it was necessary to see the persons who made the payments. *Held*, that the exception to the rule requiring the best evidence, made necessary by the volume of record evidence in particular cases, did not go so far as to authorize the admission of such hearsay evidence as to the amount paid by the different persons who should have

been produced as witnesses, notwithstanding an objection that it would be impracticable and involve great and unnecessary expense.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1201; Dec. Dig. § 320.\*]

## 5. TRIAL (§ 40\*)—RECEPTION OF EVIDENCE—NUMEROUS DEPOSITIONS AS TO PAYMENTS MADE—INTRODUCTION OF BRIEF SUMMARY OF FACTS.

If it is necessary to take the deposition of a large number of witnesses to prove payments made by them, it would be admissible for a party offering their evidence to have an intelligent and brief summary of the essential facts stated by them made up in such form that the court or jury might understand it without the necessity of hearing all that the witnesses had to say.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 99; Dec. Dig. § 40.\*]

## 6. INSURANCE (§ 177\*)—FIDELITY INSURANCE—CONSTRUCTION OF BOND—RENEWALS—AMOUNT OF LIABILITY.

A fidelity bond provided that it might be continued from year to year, at the option of the employer, at the same or agreed rates, so long as the surety company should consent to receive it, in which event the company should remain liable for any act of an employé between its original date and the time to which it should be continued, and that the company should be bound for any loss "occurring during the continuance of this bond, and discovered during said continuance or within six months thereafter." In the original bond, which was continued from time to time, and in the certificates of continuance, it was provided that the company's liability should not exceed a specified sum, whether the loss occurred "during the term above mentioned or during any continuation or continuations thereof, or partly during the said term and partly during said continuation or continuations." *Held*, that the company could not be held responsible for loss exceeding the sum specified, no matter when it occurred, provided that it was within the period covered by the bond or the continuation certificates, and that each renewal could not be treated in such case as a separate contract so as to authorize recovery for an amount exceeding the sum specified.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 355; Dec. Dig. § 177.\*]

Appeal from Circuit Court, Kenton County, Criminal, Common Law, and Equity Division.

"To be officially reported."

Action by the Champion Ice Manufacturing & Cold Storage Company against the Fidelity & Deposit Company of Maryland on a fidelity insurance policy. From a judgment for plaintiff, defendant appeals. Reversed, with directions for new trial.

Jones & James and Ernst & Cassatt, for appellant. S. D. Rouse and C. B. Thompson, for appellee.

CARROLL, J. The appellee storage company had in its employ as bookkeeper Edward S. Blick, and applied to the appellant surety company to execute a policy of fidelity insurance for Blick. Thereupon the surety company executed its policy in the sum of \$2,500, guaranteeing the fidelity of Blick for one year from the 1st day of July, 1900, to the 30th day of June, 1901. The policy,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

among other things, provided that during said period "it is hereby agreed and declared that subject to the provisions and conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover on this bond, the company shall at the expiration of three months next after proof of a pecuniary loss as hereinafter mentioned has been given to the company, reimburse the employer to the extent of the sum of \$2,500.00, and no further; such pecuniary loss as the employer shall have sustained by any act of larceny or embezzlement on the part of the employé in the performance of the duties of the office or position in the service of the employer hereinbefore referred to, as the same have been or may hereafter be stated in writing by the employer to the company, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, or within six months after the death, resignation or removal of the employé from the service of the employer when the same occurs prior to the expiration of this bond. This bond may be continued from year to year at the option of the employer at the same or an agreed rate, so long as the company shall consent to receive the same, in which event the company shall remain liable for any act of larceny or embezzlement committed by the employé between the original date of this bond and the time to which it shall have been continued, provided that the liability of the company as surety for the employé to the employer shall not exceed the amount above written, whether the loss shall occur during the term above named, or during any continuation or continuations thereof, or partly during said term and partly during said continuation or continuations."

The policy was continued from year to year until the 30th day of June, 1905; the certificates of continuance executed each year being as follows: "In consideration of the sum of \$12.50, the Fidelity & Deposit Company of Maryland hereby continues in force bond No. —, in the amount of \$2,500.00, on behalf of Edward S. Blick, \* \* \* subject to all the covenants and conditions of said original bond heretofore issued on the 1st day of July, 1900; provided, that the liability of the Fidelity & Deposit Company of Maryland as surety for the employé to the employer shall not exceed the amount above written, whether the loss shall occur during the term of the bond above named, or during any continuation or continuations thereof, or partly during the said term and partly during any continuation or continuations thereof."

The storage company did not discover any defalcations on the part of Blick until November, 1905, which was within six months after the expiration of the last continuance certificate. When the defalcation was dis-

covered, an examination of the accounts of Blick was made by an expert accountant, and it was found that the defalcations all occurred between July 1, 1901, and July 1, 1905. The amounts embezzled during each of these years, beginning the 1st of July and ending on the 30th day of June, were as follows: In 1901-02, \$34.52; 1902-03, \$456.29; 1903-04, \$1,011.17; 1904-05, \$1,513.68—aggregating \$3,015.66. When the defalcation was discovered, notice was at once given to the surety company, and demand made upon it to reimburse the storage company in the amount of the loss. The surety company declining to pay, this suit was brought upon the bond and the certificates of continuation. By agreement the law and facts were submitted to the court, and a judgment rendered against the surety company for the full amount of the loss. We are asked to reverse the judgment upon the following grounds pointed out in brief of counsel for the surety company: (1) Because there was no competent evidence introduced to establish the alleged losses sustained by the storage company; and (2) because the court, in any event, erred in rendering a judgment for a sum in excess of \$2,500.

The embezzlements occurred in this way: The storage company did a large business in receiving for storage articles and goods for a great number of people. When these goods were received by the storage company, an entry would be made upon the books of the articles received and the name of the owner, and when the articles were removed from the storage warehouse, Blick would receive from the owner the fee charged for storage and give him a receipt therefor, but would not put upon the books any statement of the delivery or the money received, and in this way he embezzled from the company and appropriated to his own use the amounts received from these customers. The owners of the goods stored, and from whom Blick received the storage fees, numbered over 100, and the amount received from each was usually small. As the books of the company did not show the amounts received from all these different persons, it became necessary to see many of them and obtain statements of the sums paid to Blick by them. Upon the trial of the case, the storage company did not introduce any of the persons who paid Blick, but offered a witness who had seen these persons and procured from them information of the amount paid Blick, and in connection with this witness offered a written statement made by him showing the name of each person from whom Blick had received money and the amount so received. The witness testified that he ascertained from the books the names of the persons who had stored goods, and then saw the owners of the goods, and obtained the data from which he made the statement. From

this evidence, and some other obtained from an inspection of the books of the storage company alone, all of which was objected to, the court ascertained the amount of the defalcation. In some instances the information in the written statement containing a summary of the defalcations was obtained from the books and records of the company alone, but in the majority of instances the records of the company did not disclose the amount paid, and hence it was necessary to see the persons who made the payments.

The first question to be determined is: Was this evidence competent to establish the loss suffered by the storage company and ascertain the amount due to it by the surety company? As the surety company denied all liability, the burden of proving the amount for which it was responsible under the bond was placed upon the storage company. It was therefore essential that the storage company should prove the extent of its losses before it could recover against the surety company. This being true, the next inquiry is: How should the losses have been proven? It is a rule, to which there are few exceptions, that the best evidence obtainable must be produced by the party who has the burden of proving any issue. Manifestly the best evidence of the amount of Blick's defalcations would be the testimony of the witnesses from whom he collected the money that he failed to account for; but it is insisted by counsel for the storage company that to obtain this evidence would be impracticable and entail great and unnecessary expense, and we are furnished with some authority holding that, in exceptional cases, it is allowable to pursue the course adopted by the storage company in the preparation of its case; but the authorities do not go to the extent of supporting the contention of counsel. If, from an examination of the books and records of the storage company alone, the amount of Blick's defalcations could have been ascertained, and a summary of what these books and records showed had been placed at the disposal of the surety company before the trial, and reasonable time and opportunity given to it to examine the books and records, the witness who examined them for the storage company and made up the statement of the losses might have been introduced by it, and the summary made by him offered in evidence, showing the names of the persons from whom Blick collected money and the amount so collected from each. This method of proving the loss, although not the best, would, under the established exception to the rule requiring the best evidence, have been competent.

The reason given for the admissibility of secondary evidence in this class of cases is very well stated in *Louisville Bridge Company v. P., C., & St. L. R. Co.*, 116 Ky. 258, 75 S. W. 285. In that case, which in-

involved a complicated settlement of accounts extending over a period of years and innumerable items, a summary made by the clerks was verified by the officer of the company under whose supervision and oversight the work was done, and who testified to its correctness. In holding this summary under the circumstances to be admissible, the court said: "It was unnecessary to bring in all the clerks who had made out the original waybills or prepared the numerous statements. The waybills, being the records of the company of its transactions made at the time, were original evidence, and admissible without further proof, because made and kept as a record in the usual course of business. The proof by the two witnesses who testify to the correctness of the statements made up from these waybills was sufficient to make out a prima facie case, which was supported by the commissioner's own investigation, and his finding the statements correct in so far as he tested them; but, of course, he could not examine all of the items. The papers would perhaps have filled the courtroom, and no good could have come from bringing them in before the judge, for no court could go through all these papers and make up a statement. If he did it, not being a practiced accountant, his work might have been worth intrinsically less than his commissioner's. \* \* \* The issue in this case depended upon a statement to be made up from thousands of waybills, which, if all brought in, would have filled up the commissioner's office. The only practical way of getting at the truth was to make out a statement from these waybills. If either party doubted the accuracy of the statement when prepared, the court could afford him access to the papers, and give him opportunity to manifest the truth to him. To demand of the plaintiff more than was shown here would be to deny a recovery in cases of this character. The rule of evidence is that no evidence shall be received where there is better evidence which may reasonably be had. It is intended to prevent fraud, but it is not intended to prevent the administration of justice, where all the evidence is produced by the party of which the case is reasonably susceptible. \* \* \*

The evidence in the case is the original record kept by the railroad company of the transactions as they occurred. The statements or tables prepared by the clerks are not, properly speaking, evidence at all. They are only exhibits of the facts shown by the evidence. If the court doubted their correctness, he should have had correct statements or tables prepared; but it was not necessary to do this when those offered were proved to be presumptively correct, and there was no showing made that they were incorrect. The court has a sound discretion in determining matters of this sort, in the interest of sub-

stantial justice, and we see no error in the admission of the matters in question."

In *Rollins v. Board of Commissioners*, decided by the United States Circuit Court of Appeals, and reported in 90 Fed. 575, 33 C. C. A. 181, the question at issue involved an examination of a multitude of accounts, a summary of which was made and offered in connection with the testimony of one Crump. Objection was made to the introduction of this summary, and in overruling it the court said: "A number of exceptions were taken to the testimony of John W. Crump, a witness on behalf of the defendant county, who had prepared tabulated statements from records and books of the county, and which were admitted in evidence. It is clearly apparent that on the trial of a case of this character before a jury, which involved the ascertainment of the amount of the indebtedness of the county on many different dates through a period of a number of years, and also required proof of the dates of the creation of the debts represented by the warrants sued on, it would be absolutely impossible for the jury to retain in their memories the dates and amounts of the numberless items put in evidence, and it would be different for them to take a memoranda thereof; and yet without such an aid to their memories it would be impossible for them to reach an intelligent verdict. In such cases it is admissible to pursue the method adopted by the trial court; that is to have the books, papers, and other items of original evidence offered and received, and in connection therewith to admit the testimony of a competent person who has prepared a tabulated statement in writing summarizing the numerous items offered in evidence. The original sources of information being in evidence, the correctness of the tabulated statement can be readily verified by an examination of the witness and a comparison with the sources from which the statement has been compiled, and, being thus verified, it becomes a very valuable aid to the jury. Where no statements of this kind are offered in connection with the testimony of the person who has tabulated the same, care must be taken to confine the same to matters included within the primary evidence properly introduced, for this method of summarizing for convenience sake numerous items giving the date and amounts cannot be made the means of putting before the jury the conclusions of the witness drawn from sources of information which are not in evidence." To the same effect is *Northwestern Pacific R. Co. v. Keys* (C. C.) 91 Fed. 47.

We fully indorse the rule laid down in these cases, but do not feel disposed to extend it as we are asked to do in this case. The exception, which is an innovation upon the established rules of evidence made necessary by the volume of record evidence in particular cases, does not go so far as to au-

thorize the admission of the hearsay evidence upon which the judgment appealed from was rested. The case of *L. & N. R. Co. v. Daniel*, 122 Ky. 256, 91 S. W. 691, 3 L. R. A. (N. S.) 1190, relied on by counsel for appellee, does not support the propositions that the information obtained from the persons who paid Blick, by the witness who testified, was admissible. In that case the record of the train dispatcher, testifying from entries made at the time in his train sheet, as to the arrival and departure of trains, which information was received by him from various operators, was admitted upon the ground that it was as reliable, "as salesman's, drayman's, porter's, or wharfinger's information conveyed to a bookkeeper, who makes the original entries thereof, all of which is now nearly everywhere allowed to be proven by the introduction of the book entries so made as evidence of the facts shown by the entries. The entrant discharges a duty which he has assumed, only in the keeping of an accurate record of his entries. He makes them contemporaneously with the act which they represent. They are made in the regular course of transactions, which, to be utilized in the business, must from greatest necessity be precise and true. They are made in the habit and system of keeping such a record with regularity. Every consideration by which it is possible to establish the existence of a past event, by testing the accuracy of the evidence of it, is satisfied by such a record." In the case of *Standard Oil Co. v. Fidelity & Casualty Co.*, 51 S. W. 571, 21 Ky. Law Rep. 399, the evidence offered and rejected was within the rule of admissibility approved by us, and the same observation may be made respecting the case of *United States Fidelity & Guaranty Co. v. Blackly, etc., Co.*, 117 Ky. 127, 77 S. W. 709.

But to permit a witness to state what A., B., C., and D. told him, not in the presence of any person representing the surety company, would be to approve the introduction of hearsay evidence of the most objectionable character. Of course, the surety company could have sent an agent to see these various persons, and have thus ascertained the truth of the statement made to the representative of the storage company upon which his summary was based; but the surety company was under no obligation to do this. It was the duty of the storage company to make out its case by competent evidence, and, although the procuring of this evidence may have entailed a great deal of trouble and expense, this fact cannot be allowed to dispense with the necessity of proving a claim by the best evidence that it is practicable to obtain. If, however, in cases like this, it becomes necessary to take the depositions of a large number of witnesses, it would be admissible for the party offering the evidence to have an intelligent and brief summary of the essential facts stated by the witnesses made up in such form as that the court or jury might under-

stand it without the necessity of hearing all that the witnesses had to say. We therefore think it was error to permit the summary of the statements obtained from persons who paid money to Blick to be introduced as evidence in connection with the testimony of the witness who obtained these statements. The record does not disclose what part of the defalcation was shown by the books and records of the company alone; but, as to so much of it as could be shown in this way, it would be competent to permit a witness who made a summary of the losses from the books and records to state the amount, provided his summary was previous to the trial furnished to the surety company, and it was given reasonable time in which to make such an examination of the books, records, and accounts as it desired to make.

The next question is: Did the court err in rendering a judgment in excess of \$2,500? It will be observed that the bond, among other conditions, contained this: "This bond may be continued from year to year at option of the employer at the same or agreed rate so long as the company shall consent to receive the same, in which event the company shall remain liable for any act of larceny or embezzlement committed by the employé, between the original date of this bond and the time to which it shall have been continued." And the further stipulation that the liability of the surety company should be bound for any loss "occurring during the continuance of this bond, and discovered during said continuance or within six months thereafter." In accordance with these stipulations, the surety company was liable for any loss sustained by the larceny or embezzlement of Blick at any time between the date of the original bond and the termination of the last certificate of continuance, provided the defalcation was discovered within six months after the termination of the last certificate. In other words, the effect of the continuation certificates was to extend the period of time the bond should run, thereby making it cover any loss that occurred between July 1, 1900, and the 30th of June, 1905. But, in the original bond, and in each certificate of continuance, there is the following condition: "Provided that the liability of the company as surety for employé to employer shall not exceed the amount above written (\$2,500), whether the loss shall occur during the term above mentioned or during any continuation or continuations thereof, or partly during the said term and partly during said continuation or continuations."

So that, in no event, and under no conditions, could the surety company be held responsible for a loss exceeding \$2,500, unless the plain unmistakable language of the contract is to be disregarded. There is no ambiguity in this language limiting the liability, nor can there be any doubt that it was immaterial when the loss occurred, provided it was within the period covered by the terms

of the bond and the continuation certificates. Under this contract of indemnity, including the continuation certificates, if the whole embezzlement had occurred during the first year, but had not been discovered until within six months of the expiration of the last continuance certificate, the surety company would nevertheless be liable for the full amount specified in the bond, and so, if the defalcation was partly in one year and partly in another, the company would be liable. The lower court, however, took the position that each continuance certificate was a separate independent contract, and hence the surety company was liable in an amount not exceeding \$2,500 each year. In other words, according to this construction of the bond, the surety company might have been required to pay, if there had been a defalcation of \$2,500 in each of the five years, a total sum of \$12,500. In our opinion this is not the fair construction of the bond. It is not susceptible of this interpretation. If it is possible for a surety company to limit its liability upon a bond of this character to a specified sum, the language of this bond and the continuation receipts accomplish this purpose.

The case of *Dejernet v. Fidelity & Casualty Co.*, 98 Ky. 553, 33 S. W. 828, relied upon by counsel for the appellant, is not in conflict with the views herein expressed, nor does it in our opinion sustain the judgment of the lower court. The principal, in fact only, question before the court in the *Dejernet* Case, was one of limitation—whether or not the defalcation was discovered within the time limited in the bond—and the court held that, as it was not, there could be no recovery. It was also decided that each of the renewal certificates was in effect a new contract of assurance, and constituted a separate and distinct policy of indemnity for the time covered by each renewal. In the case before us, it is also true that each certificate of renewal was issued for a consideration, covering a specified time, and was a new contract in the sense that it extended the indemnity provided for in the original contract. *First Nat. Bank v. Fidelity & Guaranty Co.*, 110 Tenn. 10, 75 S. W. 1076, 100 Am. St. Rep. 765. But the conditions contained in the original contract and each of the certificates of continuation heretofore referred to, limiting the liability of the company to \$2,500, must be read together as part of the same contract. The original contract contemplated that certificates of continuation might be issued, and expressly provided that, no matter how many were issued, the liability under the bond and all of the certificates should not exceed the amount specified. So that, if we should treat each renewal as a separate contract, there must be read, in connection with and as a part of it, the stipulation in the bond and certificate limiting the liability. In response to the argument that the liability should be limited

to \$2,500, it is said that this construction would have the effect of releasing the surety company from any liability during the period covered by the continuation certificates if the employé should embezzle during the year covered by the original bond the sum of \$2,500, and hence the storage company would be without indemnity for all of the years covered by the continuation certificates, although during each of those years it had paid for the indemnity. It is true that, under our construction of the contract, the surety company would not be liable for any embezzlements occurring during the period covered by the continuation receipts provided the employé embezzled, during the period of the original bond, the full amount, specified therein; but we are unable to perceive how this fact can operate to make the surety company responsible for losses it did not agree to protect the employer against. It would do violence to the plain letter of the undertaking to say, in the face of the contract, that the surety company was responsible in any sum exceeding \$2,500.

Wherefore the judgment is reversed, with directions for a new trial in conformity with this opinion.

### COMMONWEALTH v. WALSH'S TRUSTEE.

(Court of Appeals of Kentucky. March 25, 1909.)

#### 1. TAXATION (§ 117\*)—ASSESSMENTS—CORPORATE FRANCHISES—CORPORATIONS ASSESSABLE.

The statutes on revenue and taxation deal with two classes of corporations, one of which exercises some special or exclusive privilege not enjoyed by natural persons, upon which St. 1909, § 4077 (Russell's St. § 6050), imposes a franchise tax in addition to other taxes imposed by law, the other class, being the ordinary commercial corporations which under section 4065 (Russell's St. § 6058), providing that the property of all other corporations shall be assessed in the same manner as that of natural persons, does not pay a franchise tax.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 117.\*]

#### 2. TAXATION (§ 117\*)—ASSESSMENTS—CORPORATE FRANCHISES.

A tax against a corporate franchise under St. 1909, § 4077 (Russell's St. § 6050), is purely a property tax, being a tax upon all intangible property of the corporation, including its capital.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 117.\*]

#### 3. TAXATION (§ 47\*)—ASSESSMENTS—DOUBLE TAXATION.

The scheme of taxation adopted in this state seeks to avoid double taxation, not only in not taxing the same property twice in the same year for the same purpose, but in not taxing the same thing twice, whatever its form; double taxation being recognized as oppressive and vicious.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 104-114; Dec. Dig. § 47.\*]

#### 4. TAXATION (§ 42\*)—CLASSIFICATION OF SUBJECTS.

While Const. § 171 requires all property to be taxed, and the General Assembly is prohibited from exempting from taxation any property not specially exempted by section 170, every element of the property need not be taxed, the manner of classifying property for taxation being left to the Legislature, and, when the thing itself is taxed as a whole, each of its constituent elements is also taxed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 90-95; Dec. Dig. § 42.\*]

#### 5. TAXATION (§ 42\*)—CLASSIFICATION—LEGISLATIVE DISCRETION.

It is within the legislative discretion either to tax the constituent elements of the property as by taxing separately the corporate capital and corporate shares or the separate estate of the life tenant, remainderman, etc., or to tax at its full value the thing which represents those various elements of property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 90-95; Dec. Dig. § 42.\*]

#### 6. WORDS AND PHRASES—"PROPERTY"—DEFINITION.

"Property" is the right to or interest in a thing.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5693-5700; vol. 8, pp. 7768-7770.]

#### 7. TAXATION (§ 47\*)—DOUBLE TAXATION—CORPORATE SHARES.

It would not be double taxation to tax a shareholder upon the shares in addition to taxing the corporation upon its capital.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 110; Dec. Dig. § 47.\*]

#### 8. TAXATION (§ 122\*)—PROPERTY ASSESSABLE—CORPORATE SHARES.

Under St. 1909, § 4088 (Russell's St. § 6061), providing that individual shareholders of corporations required to pay taxes upon their corporate franchises shall not be required to list their shares in such corporations so long as the corporation pays taxes on the corporate property and franchises, the shares of the capital stock of a telegraph company paying a tax upon its franchise and tangible property situated in this state, which constitutes 1 per cent. of its total property, are not subject to taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 221; Dec. Dig. § 122.\*]

#### 9. TAXATION (§ 166\*)—CORPORATE PROPERTY—PROPERTY ASSESSABLE.

Under the constitutional provision requiring all property to be taxed, what is property as to a domestic corporation is property as to a foreign corporation.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 166.\*]

Nunn, J., dissenting.

"To be officially reported."

On motion for rehearing. Rehearing granted, former opinion reversing the judgment withdrawn, and judgment affirmed.

For former opinion, see 106 S. W. 240.

O'REAR, J. The sole question on this appeal is whether 500 shares of the capital stock of the Western Union Telegraph Company held by appellee at the several assessment periods for taxation for the years 1902, 1903, 1904, and 1905 were by the laws of Kentucky subject to taxation. It is agreed that appellee owned the stock in the several

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

years named, and did not list it for taxation, and that each share of stock was worth \$90. The lower court held the shares to be non-taxable, and the commonwealth has appealed. The corporation itself, the Western Union Telegraph Company, fully complied with the laws of Kentucky governing the taxation of foreign corporations doing business and exercising a franchise within this state. It made reports to the state board of valuation and assessment conforming in all respects to the law as the basis of the assessment of its franchise as provided by law, which reports were approved and accepted by the state board, and that the corporation had paid in full the state, county, and city taxes due on the assessment, and all taxes due on tangible property owned by it in this state. It is conceded that only about 1 per cent. of the property of the Western Union Telegraph Company is situated and taxed in the state of Kentucky, and 99 per cent. of it is situated and taxed in other states.

It is contended by counsel for appellee that section 4068 of the Kentucky Statutes (Russell's St. § 6061) exempts from taxation the shares of stock of that corporation in the hands of its stockholders. The section reads as follows: "The individual stockholders of the corporations which are, by this article, required to report and pay taxes upon their corporate franchises shall not be required to list their shares in such companies so long as the corporations pay the taxes on the corporate property and franchise as herein provided." There are two kinds of corporations treated of in our statutes on revenue and taxation. One kind is that which has or exercises some special or exclusive privilege or franchise not allowed by law to natural persons, or performing some public service, many of which are named, but all classified as corporations which must pay a franchise tax "in addition to other taxes imposed by law" (section 4077, Ky. St. [Russell's St. § 6060]) the other is the commercial corporation, which enjoys no privilege not exercised by natural persons, and which does not pay a franchise tax. *Louisville Tobacco Warehouse Co. v. Commonwealth*, 106 Ky. 165, 49 S. W. 1009, 57 L. R. A. 33; section 4085, Ky. St. (Russell's St. § 6058). Not a little confusion has existed as to what the franchise is that it is subjected to taxation by the statute. But from the first decision of this court construing it—*Henderson Bridge Co. v. Commonwealth*, 99 Ky. 623, 31 S. W. 486, 29 L. R. A. 73—to the latest, and consistently throughout, it has been held that the tax laid upon the corporate franchise is a property tax purely, and is in fact the taxation of all the intangible property of the corporation, including its capital. Throughout the whole scheme of taxation adopted by this state there is an evident purpose to avoid double taxation, not alone in not taxing the same property twice in the same year for the same purpose, but as well in not taxing the same thing, what-

ever its form, twice in the same year for the same purpose. Double taxation is recognized as oppressive, and, where it is imposed upon some classes of property and not upon others, works an inequality that is fundamentally vicious. While the Constitution requires that all property shall be taxed (Const. § 171) and the General Assembly is prohibited from exempting any property from taxation not specifically exempted by section 170 of the Constitution, it is not required that every phase of property shall be taxed. Nor is it. Nor has it ever been. Property is the right to or interest in a thing. A life tenant owns property in land; so does the remainderman; so does the reverser; so does the tenant for a term of years. Yet there is but the one thing. A corporation owns land. All its capital is invested in the land. The corporation owns its capital stock. The shareholders own each their share of capital stock. Each is property. Yet, there is but one thing. When the thing itself is taxed at its full value, every element of it is made to bear the tax. The whole includes all its parts. When the state lays a tax upon the whole, it has made each of its constituent parts contribute to the support of the government. The manner of classifying property for purposes of taxation, so as to tax all that is not exempted by the Constitution, is a matter left to the legislative wisdom. While it would be permissible without double taxation as that term is used to tax the corporation upon its capital, and the shareholder upon his share, or the life tenant upon his estate, and the remainderman upon his, whether the state should resort to that form, or to the simpler one of taxing once and at full value the thing which represents the various properties based upon it, is a matter of legislative discretion always. It may be remarked that no state taxes every right or interest in things which the law recognizes as property. On the contrary, the general course is to lay the tax upon the thing itself, whether land, chattel, chattel real, or chose in action, without noticing the various minute subdivisions of property that may be carved out of or imposed on the thing upon the notion that property for purposes of taxation is the sum of its various estates and rights. Instances occur where the particular estates or interests each are taxed. But they are comparatively rare, and upon examination will be found to present exceptional reasons for the legislative action in segregating the principal thing into parts for the purpose of taxation. As we have said, and repeated, a corporate franchise for purpose of taxation is the sum of its intangible property. The Legislature might have directed the constituents of the franchise to have been assessed separately, as for example, its capital, its surplus, its choses in action. But it has seen proper, instead, to group these things into one, and tax the sum. In no instance does the state require the corporation and the shareholder

to each pay the tax upon the actual property, the title to which is in the corporation. On the contrary, it is expressly provided in every instance that, where one pays the tax, the other need not. It is a misnomer to say that that is an exemption from taxation. It is not. It is choosing the form of the property from among several forms it may have assumed, which the state prefers for its own convenience and security to lay the tax upon.

Domestic and foreign corporations that pay a franchise tax are assessed alike. Where they are common carriers, or telegraph, or telephone companies, whose lines extend into other states also, the concerns are capitalized by the length of their lines and amount of earnings in and out of Kentucky, and the proportion the part in Kentucky bears to the whole is deemed to represent all the intangible property of the concern in Kentucky, including its capital employed here. Section 4081, Ky. St. (Russell's St. § 6054). As a matter of fact none of their shareholders may be citizens of Kentucky, or some or all may be. The Legislature pursuing a consistent course in the treatment of corporations doing business in the state has selected the phase of that property which the corporation owns and employs here, which is the easiest to find, and most certain to be reached, and taxed it in lieu of the other phases of property which it may have assumed. No corporation operating a railroad or telegraph line in this state could conceal the fact. Any one owning shares in such corporation might easily conceal the fact of his ownership, and thereby escape taxation on his shares. The Legislature has laid hold of the substance, and ignored its shadow. When the corporation has paid the tax on its franchise, and on its tangible property in this state (which it is also required to do), it has paid on all its property in this state, including all its capital employed here whether the shares be owned by citizens of this state or not. The shares owned by appellee gave the right to share in the dividends from the earnings of all the corporation's properties, whether in or out of Kentucky. But the state was ignoring the shares here in order to justify its taxing the capital here; the latter being deemed the most certain and feasible subject of taxation. Its course included taxing that which was represented by and had the equivalent in value of the evidence of the property held by appellee. As a matter of fact, the franchise of the Western Union Telegraph Company assessed in Kentucky is something near \$1,000,000. How much of the capital stock is owned by citizens of Kentucky is not shown, nor is there any feasible way of finding out. While it is true that the state may have taxed the franchise, which includes the capital of the corporation, and taxed also the shareholder upon his shares (*Franklin Co. Ct. v. Deposit Bank*, 87 Ky. 370, 9 S. W. 212), it has not done so. On the contrary, it has expressly

said (Ky. St. § 4088, *supra*) that so long as the corporation pays taxes upon its corporate franchise and property the shareholder shall not be required to list his shares in such company. *Commonwealth v. Lovell, Jr's., Trustee*, 125 Ky. 491, 101 S. W. 970, is thought to sustain a contrary view. But it does not. In that case the opinion discloses that the corporation did not pay a tax in this state upon its franchise, but did pay taxes upon its tangible property here. It was held that section 4088, Ky. St. (Russell's St. § 6056), did not apply in such state of case. To that construction we still adhere. *City of Lexington v. Walsh's Trustee*, 102 S. W. 891, 31 Ky. Law Rep. 446, is also cited, wherein it was observed, *inter alia*: "It may not be inappropriate to say that in our opinion the court erred to the prejudice of the city in holding the \$90,000 of the Western Union Telegraph Company stock not assessable in the hands of the appellee, but, as the city did not prosecute a cross-appeal, we are powerless to correct it. It seems to us upon the whole case that appellee had been charged with a much less sum than it should have been. *Commonwealth, by, etc., v. Mrs. H. L. Lovell's Trustee* (opinion rendered April 26, 1907), 125 Ky. 491, 101 S. W. 970; *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240." The excerpt quoted and relied on shows without referring to the other parts of the opinion that it is obiter dictum. The opinion in *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240, has been cited as sustaining the appellant's view of this case. There the question for decision was the construction of a tax statute of Ohio, which read: "No person shall be required to include in his statement, as a part of the personal property, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, which he is required to list, any share or portion of the capital stock or property of any corporation or company which is required to list its capital and property for taxation in this state." Another section of the Ohio statute reads: "No person shall be required to list for taxation any certificate of the capital stock of any company, the capital stock of which is taxed in the name of the company." The Western Union Telegraph Company did not pay taxes to Ohio upon its capital, or any part of it, and paid taxes on a small part only of its tangible properties—the part actually situated in Ohio. The supreme Court of the United States followed the Supreme Court of Ohio in construing the statute of that state (*Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547), which had declared that shares owned by a resident of Ohio in a foreign corporation, none of whose capital was taxed in Ohio, but all of it in the state where the corporation had its home, was taxable in Ohio, and followed the latter case in the state Supreme Court (*Jones v. Davis*, 35 Ohio St. 474), holding that the statute exempting the shareholder ap-



plied only to shares of those corporations which were required to return their capital and property for taxation in the state, and consequently held that the holder of the Western Union shares in Ohio was taxable upon his shares, as that company was not one which paid the capital stock tax.

Sturges v. Carter is in line with Commonwealth v. Lovell, Jr's, Trustee, supra. The case we have here is entirely different. Our statute provides that, if the corporation "pay the taxes on the corporate property and franchises as herein provided," the shareholder shall not be required to pay. Section 4088, Ky. St., supra. The corporation, the Western Union Telegraph Company, did pay taxes on its franchise and property in Kentucky, as provided in that section and the preceding sections alluded to in it. In applying our statutes relating to the assessment of corporate property one course only is allowed. Either the property which is to be taxed must be treated as is above indicated, and assessed to the corporation, or, if it fails to list it, then to the shareholders as the statute requires, or we must hold our statute to be unconstitutional, and say that every form of property which the law recognizes as property must be assessed under the requirements of the Constitution that all property must be assessed. In the latter event it would result that every corporation should pay taxes upon all its tangible property, and bonds, notes, and choses in action, also upon all its capital stock, and that each shareholder in this state should pay taxes upon each share of the capital stock of every corporation owned by him. This would apply as well to domestic as to foreign corporations. What is property in one is property in the other, and the Constitution respecting taxation means the same thing to each. Nor can we find any warrant for saying that, if a substantial part of the corporate franchise, or capital is paid upon in Kentucky, then the shareholder need not list his shares here. The statute makes no distinction between corporations that pay upon all, or a majority, of the stock as a part of their franchise in this state, and those that pay upon less than a majority. In truth the very requirements of the statutes regulating the proportion of the franchise that is deemed as being owned in Kentucky shows that the Legislature contemplated that any part of it might be owned and enjoyed beyond the jurisdiction of this state, and that the purpose was to tax that only which was here, and that in every instance, without exception, where the franchise and property tax is paid by the corporation, that that settled the bill, and the shareholder need not bother about it.

Unless we should read into the statute a qualification which the Legislature did not place in it, namely, that if the corporation should pay on its franchise and property as

herein provided, and if the franchise and property so paid upon is a substantial part of all its property and capital, then the shareholder shall not be required to list his shares, it is impossible to uphold the effort to tax these shares in appellee's hands.

The opinion delivered herein December 13, 1907, is withdrawn, a rehearing is granted, and the judgment of the circuit court is affirmed.

NUNN, J., dissenting.

L. & J. A. STEWART v. BLUE GRASS CANNING CO. et al.

(Court of Appeals of Kentucky. March 25, 1909.)

1. EVIDENCE (§ 433\*)—PAROL EVIDENCE—VARYING TERMS OF WRITTEN AGREEMENT.

In an action on a written contract, where defendant pleaded as a defense that the contract as written was executed by mistake, testimony was admissible to vary the terms of the written agreement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1990-2004; Dec. Dig. § 433.\*]

2. SALES (§ 288\*)—BREACH OF WARRANTY—RIGHT TO RECOVER.

If defects in tin cans bought for use in canning fruit were latent so that they could not be discovered until the fruit had been placed in the cans and time allowed for fermentation to take place, the buyer would not be estopped to recover damages for breach of warranty as to the quality of the cans because it retained and made use of them.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 818, 822; Dec. Dig. § 288.\*]

3. APPEAL AND ERROR (§ 1046\*)—REVIEW—HARMLESS ERROR—TRANSFER OF COMMON-LAW ACTION TO EQUITY.

The transfer of a common-law action to equity after a verdict for plaintiff, resulting in the rendition of judgment for plaintiff for the same amount as the verdict, was not prejudicial to defendants; they having in effect a retrial of the case by the chancellor.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1046.\*]

4. PROCESS (§ 100\*)—CONSTRUCTIVE SERVICE—NONRESIDENTS—NECESSITY FOR WARNING NOTICE.

Where a summons is served on a nonresident when he is actually within the state, and the jurisdiction of the court, a warning order is not necessary.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 100.\*]

5. ATTACHMENT (§ 207\*)—INTEREST IN JOINT PROPERTY.

In an action against two nonresidents, where one was legally served with summons, even if an attachment of their joint property was void as to the interest of the other defendant, because the action had not begun as against him by service of process, the whole of the joint property then undisposed of could upon judgment against both defendants and the sustaining of the attachment be subjected to the satisfaction of the judgment, under Civ. Code Prac. § 209.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 207.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
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# 6. ATTACHMENT (§ 5\*)—ACTIONS EX CONTRACTU.

Under statutes confining attachments to causes of action arising ex contractu to entitle plaintiff to the writ, contractual relations must exist between him and defendant or a contract be made for his benefit, and the character of the claim growing out of the contract is not affected so as to preclude an attachment by the fact that tortious elements are involved.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 12-20; Dec. Dig. § 5.\*]

Appeal from Circuit Court, Daviess County

"To be officially reported."

Action by the Blue Grass Canning Company and another against L. & J. A. Stewart. Judgment for plaintiffs, and defendants appeal. Affirmed.

C. S. Walker and J. D. Atchison, for appellants. George W. Jolly, B. D. Ringo, and Little & Slack, for appellees.

CLAY, C. Plaintiff Blue Grass Canning Company instituted this action against defendants, L. & J. A. Stewart, to recover the sum of \$789.95 as damages for breach of warranty. The jury returned a verdict in favor of plaintiff for \$627.90. The defendants moved for a judgment notwithstanding the verdict, and also filed grounds for a new trial. These motions were all overruled. The court thereupon transferred the case to equity, and rendered judgment for plaintiff for the same sum fixed by the verdict of the jury. From that judgment, L. & J. A. Stewart appeal.

The Blue Grass Canning Company was a corporation engaged in the business of canning fruits and vegetables at Owensboro, Ky. The defendants, L. & J. A. Stewart, were manufacturers of tin cans for canning fruits and vegetables. Their place of business was at Rutland, Vt. The basis of plaintiff's claim was that in February, 1903, it made an agreement with the defendants whereby the latter undertook to furnish it as many as 100,000 cans and 50,000 more if it elected to take such additional quantity. At the time of the purchase it was agreed that the cans were to be so manufactured as to exclude the air therefrom, and preserve the contents of the cans if the tomatoes were properly processed. The defendants defended on the ground that the contract executed between the parties was in writing and contained the whole contract. This contract is as follows:

"Washington, D. C. Feb. 15, 1903.

"Order No. ———.

"L. & J. A. Stewart.

"Ship to the Blue Grass Can. Co.

"At Owensboro.

"How ship—By freight. When—June 13th.

"Terms: Sight draft, bill of lading attached.

"50 M. 3 lb. cans, 21.50.

"Seamer furnished free of rent but to be returned at end of season, or to be paid for at \$400.00 their option. Guarantee the cans against leaks caused by leaks in manufacture all above 2 to the thousand.

"L. & J. A. Stewart,

"Blue Grass Canning Co., Inc.,

"By J. Ed. Guenther, Pres't."

By amended petition the plaintiff charged that this contract was executed by mistake. Under the circumstances it was proper to admit testimony to vary the terms of the written agreement. During the progress of the trial the court permitted the Central Trust Company, as trustee in bankruptcy of the Blue Grass Canning Company, to file its petition and become a party to the action. It may be true that the question whether or not the Central Trust Company should prosecute this action was considered at a meeting of the creditors, and it was decided not to do so, but application was made to the United States Court for the Western District of Kentucky, and authority there given to the trustee to prosecute the action on condition that the sureties in the attachment bond execute bond in this action for the payment of all costs that might accrue. This bond was executed, and the case accordingly proceeded. It is contended that authority was given the trustee merely to prosecute the suit in its own name, and not to prosecute it in the name of the plaintiff. Whether this be true or not, it is immaterial, as the result in either case would be the same.

Some point is made of the duty of plaintiff to return the cans purchased of defendants immediately, or to make complaint of their imperfection. According to the testimony for plaintiff, however, the defects were latent, and the effect upon the tomatoes could not be shown until they were placed in the cans and time allowed for the fermentation process to take place. Under this state of facts we would not hold, as a matter of law, that plaintiff was estopped to recover damages because it retained the cans and made use of them. *Summers Fiber Co. v. Walker*, 109 S. W. 883, 33 Ky. Law Rep. 153.

In the court's instructions the question whether the writing filed with defendants' answer constituted the whole contract, or whether the contract was as claimed by plaintiff, was fairly submitted to the jury. In case the written contract contained the whole contract, the instructions authorized a recovery for loss by leakage of cans from defective manufacture above two in a thousand, and in case the jury believed the paper of February 15, 1903, did not contain the whole contract between the parties, then a recovery was authorized for damages based upon plaintiff's evidence as to what the contract was. The jury were further told that, if the cans were defective in manufacture

above two in a thousand, and plaintiff could have discovered the defects by ordinary care and inspection, and failed to do so, then defendants were not liable for any loss of fruits or vegetables placed therein in excess of two to the thousand. In giving the measure of damage the jury were told to find the value of the lost fruit. While the court should have used the expression "market value," its failure to do so was not prejudicial error. It may be admitted that the instructions given by the court are subject to criticism, but we are of opinion that issues involved were fairly presented to the jury.

There was a sharp conflict in the evidence as to whether the damages resulted from insufficient sterilization on the part of the plaintiff or from the alleged defects in the cans furnished by the defendants; but there was abundant evidence upon which to submit plaintiff's theory of the case to the jury, and we are unable to say that the jury's verdict was flagrantly against the evidence. As this was a common-law action for damages, we fail to see any necessity for the court's order transferring the case to equity. This action, however, was not prejudicial to the defendants, for it in reality afforded them a retrial of the case by the chancellor, who reached the same conclusion as the jury.

The court did not err in overruling defendants' motion for a judgment notwithstanding the verdict. While plaintiff filed a number of amendments in an effort to state a cause of action, we are of opinion that the petition and the various amendments thereto do state a cause of action, and amply sustain and support the verdict. But it is insisted that the attachment obtained in this action is void; it being argued that, under the Code, an attachment cannot be obtained until the suit is commenced, and that suit is not commenced until it is filed and process issued, or, in the case of nonresidents, a warning order is had. At the time of the institution of this action on September 3, 1904, one of the defendants, J. A. Stewart, was in Owensboro, Ky., and summons was served on him on that day. The mere fact that he was a nonresident did not require a warning order as to him when he was actually within the state and within the jurisdiction of the court. Suit, therefore, was begun as to him. Section 208 of the Civil Code of Practice has no application to a case like this. This action is controlled by section 209, which provides: "In an action against joint debtors, in which an interest in joint property is attached under an order of attachment against only a part of them, if judgment be rendered against all of the defendants, and the attachment be sustained, the court may subject the whole of the joint property, then undisposed of, to the satisfaction of the judgment." Even admitting

that the property was improperly attached under the order of attachment against L. Stewart, it was properly attached under the attachment against J. A. Stewart, who had been served with process. On October 17, 1904, L. and J. A. Stewart filed their joint answer, and thereby entered their appearance to the action. Afterwards judgment was rendered against them, and the attachment sustained. As judgment had been rendered against all of the defendants and the attachment sustained, the court therefore had the power to subject the whole of the joint property then undisposed of to the satisfaction of the judgment. Under these circumstances the levy of the attachment under an order of attachment against both L. and J. A. Stewart, when the order should have gone against J. A. Stewart alone, was not prejudicial to the substantial rights of appellant L. Stewart or either of the appellants.

But it is earnestly insisted that an attachment does not lie in this case because the damages sought to be recovered are unliquidated, and the contract furnishes no measure nor standard for ascertaining them; but resort must be had to extrinsic facts or circumstances. In support of this position we are cited to several well-considered opinions. In this case, however, the court did not permit a recovery of damages by way of possible profits. It confined plaintiff's recovery to the market value of the goods spoiled. If the contract was as claimed by plaintiff, then all that the jury had to determine was the number of cans of spoiled goods and the market value thereof. There was nothing speculative or uncertain about this. It could be easily determined. Furthermore, with all due respect to the courts holding to the contrary, we are of the opinion that the correct rule applicable to attachments on demands arising *ex contractu* is announced in 4 Cyc. 440, where it is said: "Under some statutes the right to issue attachments is confined to causes of action arising *ex contractu*, and where this is the case, in order for plaintiff to be entitled to the writ, it is essential that contractual relations exist between him and defendant, or else that the contract be made for his benefit. Under such statutes the remedy has been held to be authorized in actions on bonds and undertakings, for breach of warranty, for breach of contract to deliver goods, and in other actions on money demands arising *ex contractu*. Where the claim grows out of contract, its character as such is not affected, so as to preclude an attachment, by the fact that tortious elements are involved."

It may be conceded that there were a number of irregularities in the proceedings in this case. To consider all the errors alleged to have been committed would extend this

opinion to too great length. Suffice it to say that we have carefully considered the whole record, and are of opinion that none of the errors relied upon as grounds for reversal were prejudicial to the substantial rights of appellants.

Wherefore the judgment is affirmed.

**SALE et al. v. PULASKI STAVE CO.**  
(Court of Appeals of Kentucky. March 16, 1909.)

**1. PRINCIPAL AND AGENT (§ 62\*)—PURCHASE OF PROPERTY FOR PRINCIPAL—TRANSFER TO PRINCIPAL—DUTY OF AGENT.**

Where plaintiff purchased land at judicial sale through his agent, he is entitled to land described in the sale, and is not limited by the language used by the agent in assigning the bid to him.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 99, 100; Dec. Dig. § 62.\*]

**2. BOUNDARIES (§ 40\*)—LOCATION—QUESTION FOR JURY.**

The uncertainty of the location of a call in a survey raises a question which must be submitted to the jury.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 201, 202; Dec. Dig. § 40.\*]

Appeal from Circuit Court, Lee County.

"Not to be officially reported."

Action by C. W. Sale and another against the Pulaski Stave Company. From a judgment for defendant, plaintiffs appeal. Reversed.

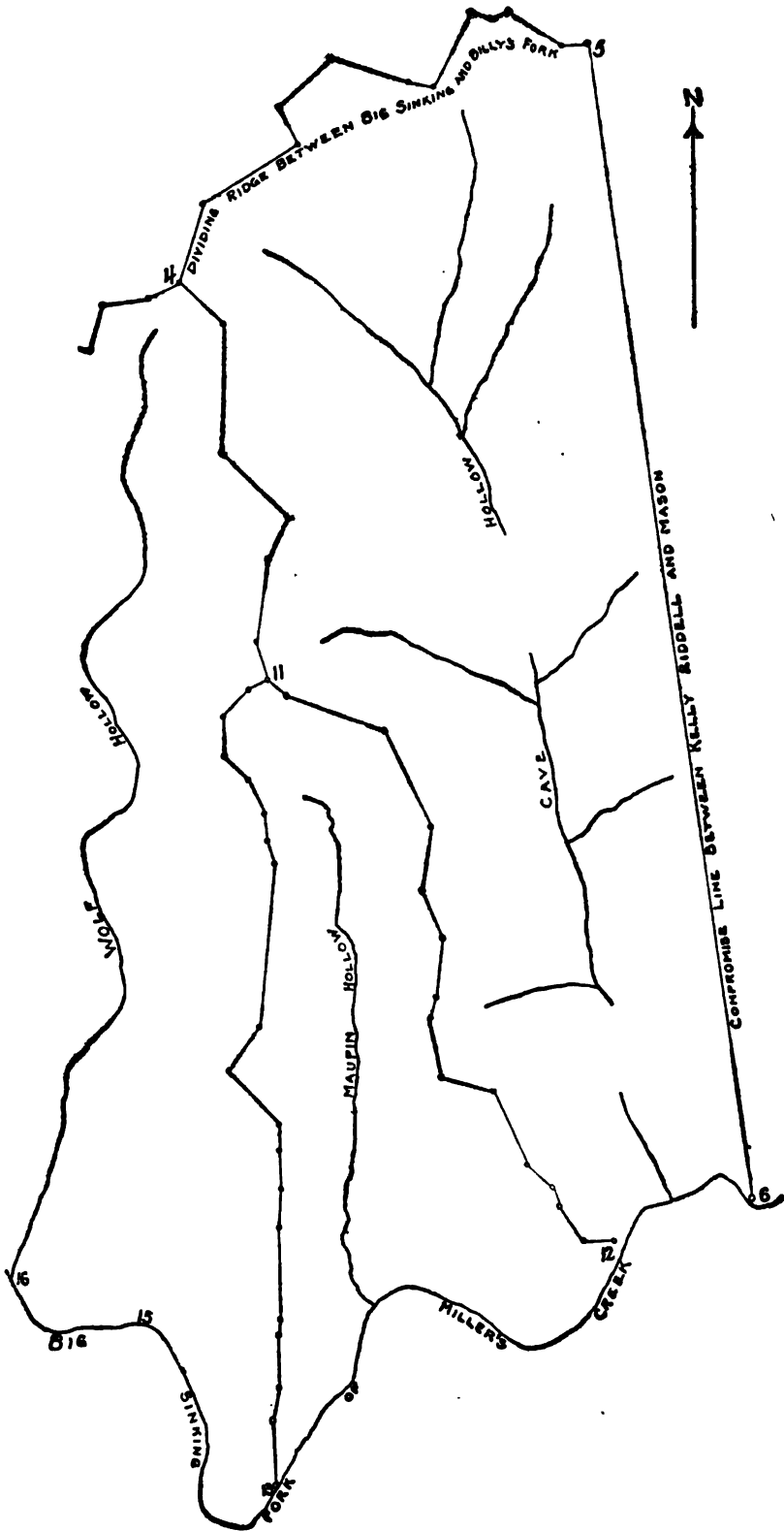
Grant E. Lilly, for appellants. Gourley, Redwine & Gourley, for appellee.

**BARKER, J.** The appellants in this action sought to recover damages for trespasses alleged to have been committed upon a tract of land in Lee county, Ky., of which they claimed to be the owners. The boundary as described in the petition is as follows: "Beginning 175 yards above the mouth of Cave Hollow; thence with the compromise line made by G. B. Kelly and Mason to the top of the ridge, between Billy's Fork and Big Sinking; thence with the divide of the ridge to the head of Wolfe's Hollow; thence with the divide of the ridge between Cave and Wolfe Hollow to Big Sinking; thence up Big Sinking to the beginning." The real object of the action, however, was to establish the plaintiffs' title to a part of the land in the foregoing boundary. The defendants, who

are appellees here, in their answer controverted the allegation that appellants (plaintiffs below) owned all the land described in the petition, and set up title in themselves to that portion of the boundary which we shall hereafter speak of as "Maupin Hollow," and which lies between Cave Hollow and Wolfe Hollow. After the issues were duly made up, the case came on for trial before a jury, and after the plaintiffs' testimony was all in, upon motion of the defendants, the court peremptorily instructed the jury to return a verdict in their favor, which was done, and thereupon a judgment was entered dismissing their petition, to review which this appeal has been prosecuted.

Both appellants and appellees claim title through a common vendor, G. B. Kelly, now deceased. G. B. Kelly, in his lifetime, owned quite a large tract of land on the waters of Big Sinking creek, in Lee county, Ky., of which he sold and conveyed to Robert Riddell an undivided half interest, first, however, reserving to himself an exception from the boundary so sold. After his death an action was brought to settle G. B. Kelly's estate and pay his debts, and it was sought in this last-named action to sell the exception reserved by the vendor in the tract in which Riddell acquired an undivided half interest, as above stated; and afterwards, by regular and unquestioned procedure, this was done. The petition for the settlement, which was drawn by Riddell, who was an attorney at law, the exception which was sought to be sold, the judgment ordering the sale of it, and the report of sale by the commissioner, all described the land in the identical terms used in describing it in the petition in this case. At the judicial sale had, the property was bought by O. H. Pollard, an attorney who was agent for appellants, and who afterwards assigned the benefits of his purchase to the appellant C. W. Sale, who conveyed half of it to appellant Kelly. Afterwards, by amended petition, the whole tract out of which the exception had been carved, and in which Robert Riddell was an undivided half owner, was sold by a judgment of the court, and purchased by J. O. Parker, who transferred it to the Pulaski Stave Company. It will simplify this statement of the facts to say that the strip of land in dispute is Maupin Hollow, which, as said before, lies between Cave Hollow and Wolfe Hollow, as shown on the subjoined map:

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



The real dispute between the parties litigant is the correct location of the fourth call in the description of the exception reserved in the deed from G. B. Kelly to Robert Riddell. In other words, it is admitted by the appellees that the appellants are the owners of all the exception reserved by G. B. Kelly; but they dispute that Maupin Hollow is a part of the exception. On the part of appellants, it is admitted that, if the fourth call in the boundary of the exception is as claimed by the appellees, they have no title to the property in dispute. The appellants introduced their muniments of title, which showed clearly that they were the owners of the property described in the petition, leaving undetermined the question whether Maupin Hollow is within this description. They also proved the trespasses complained of, and they urgently insist that the court was without authority to take the case from the jury and to peremptorily decide that the fourth call in their description was located as claimed by the appellees, instead of as claimed by them. The first call of appellants' property commences at No. 6 on the plat, and runs with the compromise line to No. 5; thence along the divide between Big Sinking and Billy's Fork to No. 4; thence with the divide between Wolfe Hollow and Cave Hollow to No. 11; and this is where the difficulty begins. At No. 11 the ridge which divides Wolfe Hollow from Cave Hollow separates and runs in two lines to Big Sinking creek at Nos. 12 and 13 on the plat, leaving it in doubt which ridge is to be followed in completing the call. One of these ridges is shown on the plat by the line from 11 to 12; the other by the line from 11 to 13. Between them lies the debatable land. The triangular piece of land lying between Nos. 11, 12, and 13 is called Maupin Hollow. On the part of the appellants, it is claimed that the fourth call in their boundary is from 11 to 13; whereas, the appellees claim that the correct fourth call of appellants' boundary is from 11 to 12. Upon the correctness of the one or the other of these conflicting claims depends the ownership of Maupin Hollow, the property in dispute.

It is said in the briefs that the reason the trial court peremptorily instructed the jury to find for the defendants was based upon the language of the transfer by Pollard to Sale, which is as follows: "I hereby transfer and assign to C. W. Sale the benefit of my bid and purchase of the land in the Cave Hollow sold by commissioner in the case in the Estill circuit court of G. B. Kelly's heirs against G. B. Kelly's heirs, and purchased by me, and said court will have the legal title made to said Sale. Said land is in Lee county, Ky., in Cave Hollow waters of Big Sinking. This 19th day of June, 1901. [Signed] O. H. Pollard. Attest: Ada Johnson." It seems that the court was of opinion that,

because the land in the transfer of Pollard's bid is described as being in Cave Hollow, the appellants' claim was limited to Cave Hollow, and therefore could not include Maupin Hollow. There is nothing in the record to show upon what the trial court based the conclusion that the peremptory instruction for the defendants should be awarded; but, even assuming that the suggestion in the brief is correct, we cannot agree to the conclusion reached. The transfer, although it uses the words "in Cave Hollow," manifestly intended to transfer to C. W. Sale the benefit of the whole purchase made by Pollard at the judicial sale. Indeed, it appears that he was only the agent of Sale in making the purchase for him, and as such agent he was bound to turn over to his principal all that he acquired. He could not lawfully have done less. Pollard purchased at the judicial sale the boundary of land described in the petition and in the judgment; so that whatever land was described within that boundary is now owned by appellants, and their title does not turn upon the language of the transfer from Pollard to Sale, even if we assume that the language of the transfer is different from the description of the land as contained in the judgment. The correct location of the fourth call in the description of the land contained in the judgment was the real and only issue between the parties. It was a simple question of fact, and peculiarly within the province of the jury to determine. The court had no right to say that the correct fourth call was the line 11-12, instead of 11-13, on the plat.

There may be substantial grounds in favor of both the theory of appellants and that of appellees; but, as the conclusion we have reached will necessitate a retrial of the case, we refrain from entering into any discussion of them now. We are clearly of opinion that the court erred in awarding the peremptory instruction to the jury to find for the defendants, and we therefore reverse the judgment, for further proceedings consistent with this opinion.

JAMES. Auditor, et al. v. UNITED STATES FIDELITY & GUARANTEE CO.

SAME v. AMERICAN SURETY CO. OF NEW YORK.

(Court of Appeals of Kentucky. March 24, 1909.)

1. TAXATION (§ 25\*) — ASSESSMENT — LEVY — POWER OF LEGISLATURE.

The power to fix the rate of taxation is in the General Assembly, and it must fix a well-defined rule as a guide to the ministerial officers throughout the state who have to carry it into effect.

[Ed. Note.—For other cases, see 'Taxation, Dec. Dig. § 25.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 2. TAXATION (§ 28\*)—NATURE OF POWER—DELEGATION OF POWER.

The power of the Legislature to determine the method to be employed in arriving at the taxable value of property cannot be delegated.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 60; Dec. Dig. § 28.\*]

## 3. STATUTES (§ 189\*)—CONSTRUCTION—GENERAL RULES OF CONSTRUCTION.

Where the words used in a statute are plain, clear, and unambiguous and the language expresses the legislative intent, there is no room for construction, and the statute must be accepted and enforced as it is written.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 268; Dec. Dig. § 189.\*]

## 4. STATUTES (§ 181\*)—CONSTRUCTION—GENERAL RULES OF CONSTRUCTION.

A statute which does not clearly express the legislative intent because of its wording or the use of particular words will be construed so as to make it, if possible, express the true legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 259; Dec. Dig. § 181.\*]

## 5. STATUTES (§ 184\*)—CONSTRUCTION—GENERAL RULES OF CONSTRUCTION.

Where words used in a statute do not convey the meaning intended by the Legislature, and from the context, the attendant circumstances, and the object to be accomplished the intent is made apparent, the words may be modified, altered, or supplied to express the legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 262; Dec. Dig. § 184.\*]

## 6. STATUTES (§ 197\*)—CONSTRUCTION—GENERAL RULES OF CONSTRUCTION—"OR."

The word "and" may be substituted for the word "or" when necessary to make a statute express the true legislative intent as gathered from the context and the circumstances attending its enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 275; Dec. Dig. § 197.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5002-5009; vol. 8, p. 7739.]

## 7. TAXATION (§ 28\*)—TAXING POWER—DELEGATION OF POWER—"OR."

Ky. St. 1909, § 4080 (Russell's St. § 6053), which authorized the assessing board to consider the gross earnings of a foreign corporation in the state in fixing the value of its franchise, was amended to meet the objectionable feature that the board could not consider the net income in the state in fixing the valuation, the amended act being Ky. St. 1909, § 4080, which provides that: "If the corporation \* \* \* be organized under the laws of any other state or government, except as provided in the next section, the board shall fix the capital stock in this state by capitalizing the net income derived in this state, 'or' it shall fix the capital stock as hereinafter provided, and will determine from the amount of the gross receipts of said corporation \* \* \* in this state and elsewhere, the proportion which the gross receipts of this state, \* \* \* bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock 'or' the capitalizing of the net earnings in this state, less the assessed value of the tangible property assessed, \* \* \* shall be the correct value of the corporate franchise of such corporation \* \* \* for taxation in this state." *Held*, that the evident intent of the Legislature in amending the law was not to provide the board with an alternative means of arriving at the value of a franchise, but to require the board to consider the two items of gross earnings and net income

of the corporation in this state in fixing the valuation, and to effectuate this intent the word "or," as used in the amended act, should be read "and," and, when so construed, the act is not unconstitutional as a delegation of the taxing power.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 28.\*]

## 8. TAXATION (§ 397\*)—ASSESSMENT—CORPORATE PROPERTY—VALUATION OF FRANCHISES.

In fixing the valuation of the franchise, of a foreign corporation under Ky. St. 1909, § 4080 (Russell's St. § 6053), the assessing board should consider the two items of gross earnings and net income of the corporation in the state as required by the statute.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 397.\*]

Appeals from Circuit Court, Franklin County.

"To be officially reported."

Suits by the United States Fidelity & Guarantee Company and the American Surety Company of New York against F. P. James, Auditor, and others, to enjoin the enforcement of franchise taxes. From a judgment for plaintiffs, defendants appeal. Affirmed.

Jas. Breathitt, Atty. Gen., and Jno. F. Lockett, Asst. Atty. Gen., for appellants. Lindsay & Edelen and Bodley & Baskin, for appellees.

LASSING, J. These suits involve a common question, and are considered together. Prior to 1906 the franchises of foreign corporations, such as surety and guaranty companies, were assessed as provided in section 4080 of the Kentucky Statutes (Russell's St. § 6053). This court in Hager, Auditor, v. American Surety Company, 121 Ky. 791, 90 S. W. 550, held that the board of valuation and assessment was without authority to adopt any other method of arriving at the value of a franchise of such a company than that provided by statute. The litigation in Hager, Auditor, v. American Surety Company grew out of an effort on the part of the assessing board to use the net income of such companies as the basis of fixing the values of their franchises. It was the contention of the board that, by capitalizing the net income in Kentucky of such companies at 6 per cent., a fair and equitable value of their franchises could be had, but that, by following the plan as laid down by section 4080, the valuations were too low. At the time this contention of the board of valuation and assessment was decided against the state the Legislature was in session, and it at once amended section 4080 so as to meet the objectionable features thereof, as pointed out in the opinion to which we have referred. This amended act is now section 4080 of the Kentucky Statutes of 1909, and is as follows: "If the corporation, company or association be organized under the laws of any other state or government, except as

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

provided in the next section, the board shall fix the capital stock in this state by capitalizing the net income derived in this state, or it shall fix the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of said corporation, company or association in this state and elsewhere, the proportion which the gross receipts of this state, within twelve months next before the thirtieth day of June of the year in which the assessments were made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock or the capitalizing of the net earnings in this state, less the assessed value of the tangible property assessed, or liable to assessment in this state, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this state." When the said board proceeded to assess appellees under this statute, appellees enjoined it from doing so on the ground that the Legislature had undertaken to delegate to the assessing board a discretion as to the method which it should use in fixing the value of their franchises, and this attempted delegation of power rendered the statute inoperative and void, and, for this reason, the board was without authority to proceed under said statute, and had no right to adopt either plan provided for in said statute in ascertaining the value of their franchise. Appellee American Surety Company contends that, as the statute under consideration is void, it should be assessed under the old act or law as it was before its amendment in 1906. Appellee United States Fidelity & Guarantee Company contends that as the old law was repealed, and the present act is void, the board is without authority to assess its franchise at all. Each pleaded that the board had adopted the capitalization of its net income or profits in Kentucky as the basis of fixing the valuation on its franchise, and that the valuations arrived at under this method were much higher than they would be if the other method were adopted, and, in fact, much higher than they should be. The trial judge was of the opinion that the act was unconstitutional and void, and so held. With this finding and judgment the commonwealth is dissatisfied, and appeals.

In each of these appeals the constitutionality of section 4080 of the Kentucky Statutes, Compilation of 1909, is assailed. The ground upon which it is attacked is that it provides alternative methods by which the board of valuation and assessment may fix the valuation of the franchises of corporations of the character described in the act. If we must accept the statute literally as written, then this contention is correct, for the taxing power has been confided by the people to the legislative department of government, the General Assembly, and this body alone has the right to exercise a judgment or discretion as to the method that

shall be employed in arriving at the valuation of the property sought to be taxed. While it has ample authority to determine how the property shall be taxed—that is, the method that shall be employed in arriving at its fair taxable value—yet it is without authority of law to delegate this power, and any attempt on the part of the General Assembly to delegate this power to the board of valuation and assessment is ultra vires and void. There is no rule of law better settled than that the power to fix the rate of taxation is in the General Assembly, and it must fix a well-defined rule to serve as a guide to the ministerial officers throughout the state who have to carry it into effect. It is equally well settled that this power cannot be delegated to a board or any subordinate body, or even to a court, but it alone can exercise it. Cooley on Constitutional Limitations, p. 163; 1 Sutherland on Statutory Construction, p. 145; *Owensboro & Nashville Railroad Company v. Todd, Trustee*, 91 Ky. 175, 15 S. W. 56, 11 L. R. A. 285; *Jernigan v. City of Madisonville, etc.*, 102 Ky. 313, 43 S. W. 448. There is no exception to this rule. The fact that the General Assembly has the power to authorize municipal corporations, through their legislative boards, to fix assessments, and levy and collect taxes for municipal purposes, does not militate against the rule, for the reason that such power is expressly provided for by section 181 of the Constitution. The General Assembly alone has the right to levy taxes for state purposes, and is expressly forbidden to impose taxes for county, city, town, or district purposes; but is required to confer upon the local authorities of such county, city, town, or district the power to levy and assess all taxes for local or municipal purposes. This constitutional provision, instead of being an exception to the rule, is an exemplification of it, and illustrative of the democratic idea of local self-government which is one of the perfections of our republican form of government. The acts of the General Assembly are but the expressions of the legislative intent upon the various subjects with which they deal. Where the words used are plain, clear, and unambiguous, and the language of the act expresses the legislative intent, there is no room for construction, and the act must be accepted and enforced as it is written. Cases frequently arise, however, where, from the wording of the act, or the arrangement of the words or phrases therein, or the use of some particular word or words in the act, the legislative intent is not clearly expressed, if expressed at all, and in such cases it becomes necessary to construe the act so as to make it, where this may be done, express the true legislative intent. As said by Sutherland in his work on Statutory Construction, the intent is the law; the statute is but expressive of that intent.

Adopting this idea in passing upon the va-



lidity of the act under consideration, it is first necessary to determine the purpose the Legislature had in its passage. As heretofore stated, the amendment to section 4080 was brought about by the discovery on the part of the board of valuation and assessment that the old statute provided no adequate means for arriving at the true value of the franchises of those corporations for whose assessment it provided; the statute to which we have referred being that which required that the board of valuation and assessment should take into consideration the gross earnings of the corporation in this state, and fix the value of the franchise at that proportion of its entire capital stock, surplus and undivided profits which its gross business in Kentucky bore to its gross business everywhere. To correct this evil the statute was amended. Since the old method had been found inadequate and unsatisfactory no good reason can be assigned why it should have been continued in force. It would have been a waste of time to have done so if it was the purpose of the Legislature that it should still constitute a complete plan in itself for fixing the value of the corporate franchise; hence we must conclude that the Legislature, in retaining this language in the amended statute, purpose that it should still be used in determining the value of the franchises of the corporations described in that section, necessarily not alone, but in connection with the remainder of the section, to wit, that portion thereof which provides that the board might take into consideration the net income of the corporation as well. If this was the purpose of the Legislature, then the section presents a perfect and complete system or plan for assessing franchises of the corporations with which it deals. We are confronted then with the question: Did the Legislature, in amending this act, intend to continue the old method of ascertaining the value of such franchises in force, and, in addition, provide another method and give to the board the right to adopt either of said methods that the exigencies of the case might require, or was it the aim of the Legislature in amending the law to create one perfect plan or system by which the valuation of the franchises could be determined? It may be fairly presumed that, if the board had the right to exercise such discretion, it would exercise that discretion always in favor of the commonwealth, and would adopt that plan in each particular case which would produce the greatest amount of revenue; whereas, if the company sought to be assessed were given a voice in the matter, it would insist upon the application of that plan which would place upon it the least burden in the shape of taxation. When it is remembered that in the General Assembly there were a great many lawyers, and that the special commission which had in charge the preparation of the revenue and taxation laws included among

its members some of the best legal talent in the state, it is altogether unreasonable to presume that they would, in attempting to cure a defect in the law, have adopted an amendment thereto so repugnant in form as to carry with it its own destruction.

Again, when it is remembered that the taxation of franchises at all in this state is of comparatively recent date, and that the Legislature has, from time to time, been called upon to amend the laws relative thereto so as that the franchises of such corporations as are chargeable with the franchise tax may be assessed at their fair and reasonable value, it is very apparent that the legislative intent all along has been to arrive at some plan which would enable the board of valuation and assessment to place upon the franchises of corporations subject to a franchise tax such a valuation as would make them bear their just proportion of the public burden. In no other section of this comprehensive act regulating assessment and taxation is a dual method for arriving at values provided for. The evident purpose of the Legislature in the amendment of the act under consideration was not to provide the board with an alternative means of arriving at the value of the franchises under consideration, but to provide the board with an additional means of evidence to serve as a guide in reaching a just and fair conclusion as to the proper value of the franchise, and therefore the word "or," as used in the act, was evidently intended to be "and." We are constrained to believe that the true purpose and intent of the Legislature was to have the board in fixing the value of the franchises take into consideration the gross earnings of the corporation in this state and its net income as well, and from a consideration of these two items fix the value of the corporate franchise, as in the remainder of the act provided. Now, if the word "and" is substituted for the word "or," the aim of the Legislature, as expressed in the various acts amending the law bearing upon this subject, is carried out, and the board, by being empowered to consider additional evidence as to value, is enabled more nearly to fix the true value of the franchises of those corporations. Bearing in mind always that the sole purpose for which this legislation was enacted was to devise a plan that would enable the board to fix a fair, just, and reasonable valuation upon the franchise of the company, we must conclude that the Legislature intended, not to provide an alternative method for arriving at this valuation, but simply to provide the board with additional evidence, as it were, showing value, and, when this construction is placed upon the act, its objectionable features are removed, and it is made to present one entire harmonious plan for arriving at the valuation for, assessment of franchises of corporations of that class therein described,

and thereby carry into effect the evident legislative intent. This brings us, then, to the question as to whether or not the word "and" may be substituted for the word "or."

The object sought to be attained by the enactment of this statute being clearly ascertained, it furnishes a most excellent aid in determining whether or not the words used convey the meaning which the Legislature intended they should. Where they do not, and from the context, the attendant circumstances, and the object sought to be accomplished this fact is made to appear, then the words may be modified, altered, or supplied so as to keep the act from being inconsistent with the legislative intent. In dealing with this subject, Mr. Endlich, in his work on Interpretation of Statutes (page 400, § 295), says: "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This is done sometimes by giving an unusual meaning to particular words, sometimes by altering their collocation, or by rejecting them altogether, or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language, and really give true intention." This court in the case of *Commonwealth v. Grinstead, etc.*, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471, in construing section 3917 of the Kentucky Statutes (Russell's St. § 3719), held that, in order to effectuate the legislative intent and preserve the statute, the word "person" as used in the first part of the section was superfluous, a mere inaccuracy in the drafting of the statute, and in that opinion this word was left out of consideration. Again in the case of *Sams v. Sams' Administrator*, 85 Ky. 400, 3 S. W. 594, this court, speaking through Judge Pryor, said: "It is a well-settled rule of construction that the letter of a statute will not be followed when it leads to an absurd conclusion; but, on the contrary, the reason for the enactment must enter into its interpretation, so as to determine what was intended to be accomplished by it"—and in that opinion this court read into the statute the word "unmarried," so as to make it express the true legislative intent. Where the statute used the word "man," it was construed by this court to mean "unmarried man," although the word "unmarried" was omitted from the statute. And in the case of *Bird, etc., v. Board of*

Commissioners of Kenton County, 95 Ky. 195, 24 S. W. 118, this court substituted the word "depth" for the word "width" in order to meet the apparent legislative intent. Instances of this character might be multiplied almost without number by reference to the decisions of courts of last resort of other states. However, as we deem the decisions of our own court conclusive upon this point, we will refer to but one such, the case of *Geiger v. Kobilka*, 26 Wash. 171, 66 Pac. 423, 90 Am. St. Rep. 733, which is directly in point. In construing certain exemption statutes and harmonizing the various provisions thereof, the Supreme Court of Washington said: "The word 'and' is often used interchangeably with 'or,' the meaning being determined by the context"—and then quoted with approval the following extract from Sutherland: "Sec. 397: The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of another in deference to the meaning of the context." In that case the language of the statute "for the support of himself and family" was construed to read "for the support of himself or family" in order to carry out the evident legislative intent as gathered from other sections of the exemption statutes.

Being satisfied that the Legislature, in the amendment of this statute, intended that the board should take into consideration the two items of gross earnings and net income of the corporation in this state in fixing the valuation of its franchise, the word "or," as used in this statute, should be read "and." The authority authorizing this substitution, where it becomes necessary in order to effectuate the legislative intent, is so clearly established by the decisions of this and other state courts, as well, that further comment is deemed unnecessary. The board having attempted to fix the valuation of the franchise of appellees by taking into consideration only part of the evidence which it was required to receive, the trial court properly enjoined the enforcement of the collection of the taxes estimated upon such a valuation. Upon the return of these cases the board will fix the valuation of the franchise of each company by taking into consideration the gross earnings of the company in this state, and its net income, as well, and from a consideration of both of these items fix upon its franchise its fair taxable value, as in section 4080 provided.

Judgment in each case affirmed.

**JAMES, Auditor, v. AMERICAN SURETY CO. OF NEW YORK.**

(Court of Appeals of Kentucky. March 24, 1900.)

**1. TAXATION (§ 397\*)—ASSESSMENT—CORPORATE PROPERTY—FOREIGN CORPORATION.**

In fixing the valuation of the franchise of a foreign corporation under St. 1906, § 4080 (Russell's St. § 6053), the assessing board should consider the two items of gross earnings and net income of the corporation in the state, as required by the statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 672; Dec. Dig. § 397.\*]

**2. TAXATION (§ 365\*)—ASSESSMENT—CORPORATE PROPERTY—STATUTORY PROVISIONS.**

The act of March 15, 1906 (Laws 1906, p. 88, c. 22), which amends St. 1909, § 4080 (Russell's St. § 6053), so as to authorize the assessing board to consider the two items of gross earnings and net income of a foreign corporation in the state in fixing the valuation of its franchise, is intended to be prospective in its operation, and not retrospective.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 608-610; Dec. Dig. § 365.\*]

**3. TAXATION (§ 40\*)—UNIFORMITY—ASSESSMENT—CORPORATE PROPERTY—VALUATION OF FRANCHISES.**

Where a foreign corporation made the statement required by St. 1909, § 4078 (Russell's St. § 6051), as a basis for the valuation of its franchise for the year 1905, and the board failed to assess the corporation until 1907, an assessment made under section 4080, St. 1909 (Russell's St. § 6053), as amended by act of March 15, 1906 (Laws 1906, p. 88, c. 22), instead of under the law as it stood before the amendment, thereby materially increasing the tax, was illegal, as being a violation of the rule requiring uniformity in the levy of taxes.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 40.\*]

**4. TAXATION (§ 109\*)—OMITTED PROPERTY—ASSESSMENT—CORPORATE PROPERTY.**

Under the provisions in the revenue law (Laws 1906, p. 88, c. 22) for the assessment of omitted property, the assessing board has power to assess the franchise of a foreign corporation according to the law in force when the assessment should have been made.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 142; Dec. Dig. § 109.\*]

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Suit by the American Surety Company of New York against F. P. James, Auditor, to restrain the collection of a franchise tax. From a judgment for plaintiff, defendant appeals. Affirmed.

Jas. Breathitt, Atty. Gen., and Jno. F. Lockett, Asst. Atty. Gen., for appellant. Bullitt & Bullitt and Lindsay & Edelen, for appellee.

LASSING, J. This suit involves the right of the board of valuation and assessment to assess appellee's franchise for taxation for 1905 under the provisions of the revenue law of 1906, approved March 15, 1906 (Laws 1906, p. 88, c. 22). Prior to September, 1905, the appellee delivered to the Auditor of Pub-

lic Accounts its verified statement, as required by section 4078 of the Kentucky Statutes of 1909 (Russell's St. § 6051), in which it set out in detail the facts required to be set out therein. No action was taken upon this statement by the board of valuation and assessment until in June, 1907, when the board fixed the tentative value of the franchise as of September 1, 1905, at \$122,084, the taxes on which sum would amount to \$610.42. Of this action the board notified appellee, and stated that under the law it had 30 days from the receipt of notice to appear and show cause why the valuation fixed should not become final. On July 8th following, and within 30 days, appellee appeared, and requested that the valuation, as fixed by the board, be changed. This request was refused, and on the same day the board entered an order making said assessment final, and served notice upon appellee company that it would require appellee to pay the taxes, as fixed in said assessment, within 30 days, or else the penalty fixed by law would be enforced. The valuation, as fixed by the board, was made from the statement alone. No proof was taken, and no other information received by the board upon which to base its assessment. This assessment was based, not upon the law in force in September, 1905, but upon section 4, art. 4, c. 22, p. 129, Acts 1906, which is in the same words identically as section 4080 (6053), the law that was in force in 1905, except that in the act of 1906 the board is authorized to consider the net earnings of appellee in this state, and arrive at the valuation of its franchise by capitalizing same. Upon receiving notice that the tentative assessment had been made final, appellee instituted a suit in the Franklin circuit court attacking the validity of the act of 1906, and sought to have the board of valuation and assessment enjoined and restrained from attempting to penalize appellee for failing to pay the taxes under said assessment, which it alleged was unconstitutional, illegal, and void. At the time of the institution of this suit the judge of the Franklin circuit court was absent from his judicial district, and upon notice, accepted by the Auditor and Treasurer, members of the board of valuation and assessment, the application for a restraining order was heard by the Honorable Emmett Field, judge of the Jefferson circuit court, who granted a temporary restraining order to become effective upon the execution by the appellee of an injunction bond in the sum of \$500, conditioned according to law, and to remain in force until final decree, unless sooner dissolved according to motion made as provided by law. To the petition the defendant the board of valuation and assessment in time filed a general demurrer, and also an answer. In said an-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

swer they traversed each of the material allegations of the petition, and pleaded affirmatively in the second paragraph that they were required from the best data and evidence at their command to assess the intangible property of appellee at its fair cash value, estimated at the price it would bring at a voluntary sale; that the fair cash value of the intangible property, based upon the net earnings of appellee's business done in this state for the fiscal year ending June 30, 1906, was \$122,084; and that on this valuation the taxes levied against plaintiff for this year should be estimated. The plaintiff filed a demurrer to this answer. The case was submitted for judgment on the pleadings, and the court thereupon entered the following judgment: "The court being sufficiently advised is of the opinion that section 4, subdv. 1, of article 4 of the act relating to revenue and taxation, approved March 15, 1906, is in conflict with and in violation of the Constitution of the state of Kentucky, and is void." He thereupon entered a judgment overruling the demurrer to the petition as amended, and sustained the demurrer of the plaintiff to the answer, and, defendants declining to plead further, the prayer of the petition was granted, and the injunction made perpetual, in accordance with the prayer of the petition. From that judgment the board of valuation and assessment prosecutes this appeal.

For appellee it is contended: That its assessment for the year in question should have been based upon section 4080 of the Kentucky Statutes prior to its amendment by the Legislature in 1906. That, under the law as it then stood, it was clearly entitled to have the valuation of its franchise determined by ascertaining what per cent. its gross earnings in Kentucky for the fiscal year ending June 30, 1906, was of its entire gross earnings during that period, and then this per cent. of its capital stock, surplus, and undivided profits, less any tangible property located in Kentucky, should be the taxable value of its franchise. Its report shows that its entire gross earnings in Kentucky amount to \$12,617. That its gross earnings everywhere amounted to \$2,505,752. In round numbers, therefore, its gross earnings in Kentucky equaled one-half of 1 per cent. of its entire gross earnings. That its capital stock was \$2,000,000, and its surplus and undivided profits \$2,873,589, making a total of \$4,873,589. One-half of 1 per cent. of this sum equals \$24,367.94, which is, under section 4080, the entire sum that would have been charged to appellee as the value of its franchise in Kentucky, subject to taxation, and not \$122,084, as fixed by the board of valuation and assessment, and that the taxes which it should be required to pay the commonwealth should be \$121.86, instead of \$610.42, as determined by the board. That the taxes which the board sought to require it to pay is five times as

great a sum as it should have been required to pay under the then existing law. Clearly the assessment was made under the act of 1906, and this assessment the board of valuation and assessment claims is a fair and reasonable assessment of the value of appellee's franchise in Kentucky. For appellant, it is urged that the case of Hager, Auditor, v. Citizens' National Bank, 32 Ky. Law Rep. 95, 105 S. W. 403, 914, is determinative of this question, while appellee says that opinion is not applicable because in that case this court said: "It would scarcely be contended that the failure of an assessing officer to make an assessment within the time allowed by law would prevent him from making it within a reasonable time thereafter, or render invalid the assessment so made, unless it could be shown that the meritorious rights of the property owner were prejudiced by the delay." It is insisted that the assessment of this tax under the act of 1906, which increased appellee's assessment five times over what it should have been under the law in force in 1905, takes it without the reasoning of the rule announced in the case of Hager, Auditor, v. Citizens' National Bank, supra. From the conclusion which we have reached it becomes unnecessary to enter upon a consideration of this question.

In the cases of James, Auditor, v. United States Fidelity & Guarantee Company, and James, Auditor, v. American Surety Company of New York (this day decided) 117 S. W. 406, it is held that, in fixing the valuation of the franchises of appellee and kindred corporations, it is the duty of the assessing board to take into consideration both the gross earnings of said corporations in this state and the net income in this state, and from a consideration of both of these items fix a fair and reasonable valuation upon the franchise. The board in the instant case having taken into consideration only the net income in fixing this valuation, as is evident from an inspection of the record, the chancellor did not err in enjoining and restraining the collection of the tax upon their franchise, the valuation of which was not fixed in accordance with the provisions of the statute. Conceding that it might be assessed under the act of 1906, the case under consideration is very unlike that of Hager, Auditor, v. Citizens' National Bank, and is not controlled by that case, for the reason that the Legislature clearly intended that the bank should be assessed under the act of 1906 for the fiscal year beginning June 30, 1905, and ending June 30, 1906; but in the act under consideration there is nothing which is indicative of an intention on the part of the Legislature to assess corporations like appellee for the taxes of 1905 under the act of 1906. All of the provisions of this act show conclusively that it was intended to be prospective in its operation, and not retrospective. Appellee

in filing its statement prior to September, 1905, fully complied with the requirements of the law then in force, and it was the duty of the board to fix the valuation upon that statement. There is nothing in the record before us indicating or showing why it failed to do so, nor is there any indication that it had not assessed all kindred corporations under the law in force in 1905; and, in the absence of a showing to the contrary, it must be presumed that the board did its duty, and did assess all kindred corporations under that law. If this be true, then to assess appellee under a different law, which would materially increase its taxes, would be an unwarranted discrimination against appellee, and a violation of that provision of law which requires uniformity in the levy of taxes. We are of opinion that this assessment should have been made under the old law, and not under the provisions of the new, as it was attempted to be. The levy not having been made until after the old law had been repealed, may it now be assessed under the provisions of the old law, or must appellee escape taxation for that year altogether? In the revenue law ample provision is made for the assessment and taxation of omitted property, whether the failure to assess has been due to dereliction on the part of the assessing board, or to the failure of the property owner, is entirely immaterial. The statute is broad enough to search out and subject to taxation all property that may have been omitted without regard to a consideration as to how it came to be omitted. Under this statute, even though appellee had filed no statement at all or made no effort to comply with the law, the state would still have ample power to reach and assess its property at its fair taxable value, and that, according to the law that was in force at the time, the property should have been assessed for taxation. No case just like the present one has heretofore been before us, but cases similar to it have frequently been passed upon in the application of the local tax laws in the collection of taxes on omitted property. For instance the tax rate in local taxing districts varies from year to year, and where property has escaped assessment for taxation for a number of years, when it is finally assessed, it is subjected to the tax rate for the several years during which it has escaped taxation, and this rate not infrequently varies, some years being higher and others lower, and, perhaps, none of them being the same as that for the year in which the property is actually listed as omitted property. In such cases the property is listed and taxed for each year as though it had been listed and taxed when it should have been.

Applying this rule to the case at bar, we have no difficulty in the solution of the question. The property is subject to taxa-

tion under the law in force at the time when it should have been assessed and taxed. Upon a return of the case, it is the duty of the assessing board to assess the franchise of this appellee for the year in question under the law then in force, to wit, the law prior to its amendment in 1906.

Judgment affirmed.

# **PINE MOUNTAIN R. CO. et al. v. FINLEY.**

(Court of Appeals of Kentucky. March 24, 1903.)

## **1. MASTER AND SERVANT (§ 319\*)—INDEPENDENT CONTRACTORS—NECESSARY CONSEQUENCES OF WORK—BLASTING.**

A railroad company is bound to know that in blasting to make excavations for a roadbed called for by the plans and specifications, rock and earth will necessarily be thrown on and injure land lying adjacent to the right of way and separated from it only by a narrow stream.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1260; Dec. Dig. § 319.\*]

## **2. MASTER AND SERVANT (§ 315\*)—INJURIES TO THIRD PERSONS—INDEPENDENT CONTRACTOR—INCOMPETENT CONTRACTOR.**

Where an employer lets a contract to an unsuitable person, he cannot escape liability for injuries to a third person on the ground that the one to whom he let it is an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1256; Dec. Dig. § 315.\*]

## **3. MASTER AND SERVANT (§ 318\*)—INJURIES TO THIRD PERSONS—INDEPENDENT CONTRACTOR—CONTROL OF WORK.**

Where the employer, after giving a contract, undertakes to manage and control the work, he destroys the relation of independent contractor and renders himself liable for an injury to a third person through the negligence of the employes of such contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 318.\*]

## **4. MASTER AND SERVANT (§ 323\*)—INJURIES TO THIRD PERSONS—INDEPENDENT CONTRACTOR—UNLAWFUL WORK.**

If the work contracted to be done by an independent contractor is unlawful, the employer is not excused from liability for negligent injuries to a third person.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1264; Dec. Dig. § 323.\*]

## **5. MASTER AND SERVANT (§ 319\*)—INJURIES TO THIRD PERSONS—INDEPENDENT CONTRACTOR—NECESSARY CONSEQUENCES.**

Where the business undertaken by an independent contractor is of such a hazardous nature that it will necessarily injure a third person, the employer does not escape liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1259; Dec. Dig. § 319.\*]

## **6. MASTER AND SERVANT (§ 315\*)—INJURIES TO THIRD PERSONS—INDEPENDENT CONTRACTOR—DUTIES SPECIALLY IMPOSED.**

Where the law requires of an employer a certain standard of duty absolutely, he cannot escape liability for injuries to a third person on the ground that the work was done by an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1241, 1254; Dec. Dig. § 315.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**7. MASTER AND SERVANT (§ 332\*)—INJURIES TO THIRD PERSONS—INDEPENDENT CONTRACTOR—QUESTION FOR JURY.**

The liability of the employer to a third person for injuries from the use of dynamite or other explosives in the conduct of the work undertaken is ordinarily a question for the jury, though there may be instances, where, from the character of the work to be done and its proximity to the property of others, the undertaking is so hazardous and the probability of injury to the adjoining property so certain as to warrant the court in holding, as a matter of law, that the employer could not escape liability for injuries on the ground that the work was done by an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1276; Dec. Dig. § 332.\*]

**8. HIGHWAYS (§ 72\*)—CHANGING LOCATION—VALIDITY.**

Where it is shown that the damages have been paid to the owners of land over which a road, as changed, is located, and the new road is opened and used by the public, it is immaterial that the orders of the county court do not show acceptance of the road as changed.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 247; Dec. Dig. § 72.\*]

**9. HIGHWAYS (§ 78\*)—EFFECT OF DISCONTINUANCE—OBSTRUCTION—RECOVERY OF DAMAGES.**

Recovery of damages for the obstruction of the approach to a highway cannot be had, where the highway itself was discontinued before the obstruction occurred.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 277; Dec. Dig. § 78.\*]

Appeal from Circuit Court, Whitley County.

"Not to be officially reported."

Action by R. H. Finley against the Pine Mountain Railroad Company and others. From a judgment for plaintiff, defendants appeal. Reversed.

Benjamin D. Warfield and J. W. Alcorn, for appellants. T. Z. Morrow, J. N. Sharp, and R. L. Pope, for appellee.

LASSING, J. Appellee is the owner of a farm of about 400 acres of land in what is known as "Finley Bottom," on the east side of the Cumberland river, in Whitley county, Ky. In 1907 the Pine Mountain Railroad Company built a line of road along the Cumberland river just across from the Finley farm. The river makes quite a bend at that point and runs for three-quarters of a mile or more along the Finley farm. In January, 1908, appellee filed suit against the Pine Mountain Railroad Company, the Alabama Construction Company, a corporation, and Burk Bros. & Tye, a partnership, wherein he sought to recover of them damages which he alleged he sustained by reason of the negligent, careless, and reckless manner in which the excavating for the roadbed was done. The items of damage, as alleged in the petition, are, in substance, as follows: For gravel and stones thrown upon his land by the blasting, \$2,500; for injury to his land by causing a change in the channel of the river, whereby it was made to flow against, up-

on, and over a part of his land, \$2,500; for obstructing the public road leading from his farm across the Cumberland river, and connecting with the public road leading from Patterson creek to Williamsburg, the county seat, thereby depriving him of an outlet from his said farm to the county seat, his church, and the public school for the district, \$2,000; and for loss sustained in the use of all that portion of his farm lying adjacent to the river, because of the dangers attendant upon the blasting which prevented him and his hands from working the crops upon said land, and prevented him from pasturing stock upon any portion of his farm adjacent to the river, \$1,000—making in all \$8,000, for which sum he prayed judgment.

The answers of the Pine Mountain Railroad Company and the Alabama Construction Company simply traversed the allegations of the petition. The answer of Burk Bros. & Tye, in addition to traversing the allegations of the petition, pleaded affirmatively that by reason of the blasting some stones were thrown upon the land of plaintiff, that they offered to have these stones removed from his land without expense to him, and he refused to permit it to be done, that they could have removed all of the stones thrown upon the land therefrom at an expense of not to exceed \$25, and they therefore denied that they had damaged him by reason thereof in any sum in excess of \$25. A motion was made to require plaintiff to paragraph his petition, and, in compliance with the order of the court, he did so, making each item of damage a separate paragraph. The Louisville & Nashville Railroad Company was not a party to the suit, but after the issues had been joined, as above indicated, it tendered its verified petition and asked to be made a party defendant, alleging that it had undertaken with the Pine Mountain Railroad Company to build said road, and that, pursuant to its agreement, it had contracted with the Alabama Construction Company to do the work, and it, in turn, had let certain portions thereof out to Burk Bros. & Tye, independent contractors, and that it was interested in the result of the litigation in that, if it should be held that the character of the work was such as that the owner could not relieve himself of responsibility to third persons who might be injured in carrying out the work, on the ground that it was done by an independent contractor, then, as between it and the said independent contractor, it would be liable. On its said petition the Louisville & Nashville Railroad Company was made a party defendant, and, in addition to pleading that the work was done by independent contractors, who were thoroughly qualified to do the work in a proper, skillful, and workmanlike manner, it traversed all of the allegations of the petition. The affirmative matter of the answer of Burk Bros. & Tye was tra-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

versed of record, and some other pleadings were filed by each party bearing upon the question of independent contractor; but, for the purposes of determining the questions before us, it is not deemed necessary to consider them. The issues, as finally made by the pleadings, and which were submitted to the jury for their consideration, were those bearing upon the question as to whether or not plaintiff had been damaged in the way and manner alleged in his petition, and the extent thereof.

The trial judge was evidently of opinion that, on account of the character of the work which they contracted with the Alabama Construction Company and Burk Bros. & Tye to do, neither the Louisville & Nashville Railroad Company nor the Pine Mountain Railroad Company could relieve itself of liability on the ground that the injury, if any, was done by the said independent contractors. The case was submitted to a jury, nine of whom returned the following verdict: "We, the undersigned jurors, find for the plaintiff, under instruction No. 2, one hundred and fifty dollars, and instruction No. 3, eleven hundred dollars." Instruction No. 2 is the instruction which authorizes a recovery for injury by reason of stones being thrown upon plaintiff's land. Instruction No. 3 is the instruction which authorizes a recovery for the obstruction of the public road. Nothing was allowed for damage because of stones thrown into the river by blasting so as to change the current and cause it to wash against, upon, and over plaintiff's land, and no instruction was offered or given bearing upon the question of item 4 of plaintiff's petition, to wit, that for which he sought to recover because of inconvenience in operating his farm, occasioned by blasting, or loss of the use of portions thereof because of the dangers with which the blasting was attended. As the instructions given were prepared by plaintiff's counsel, and all that were asked for by him were given, the failure to instruct upon the fourth paragraph of the claim was, no doubt, due to the fact that the evidence offered in support thereof was not regarded as sufficient to justify such an instruction. The jury having rejected the claim of plaintiff for damage growing out of the throwing of stones into the river, and there being no cross-appeal, there is left for our consideration but three questions: First, the correctness of the ruling of the trial court in refusing any instruction on the question of "independent contractors"; second, the correctness of the instructions as given, including the ruling of the trial court in refusing the peremptory instruction asked for by defendants at the close of plaintiff's testimony and again at the close of all of the testimony; and, third, are the damages awarded excessive?

The evidence shows that the line of the road at the point in question ran along the

river bank or cliff but a short distance from the river for quite a distance in front of appellee's farm, and separated from it by the river, that the character of the place selected for the roadbed was such that heavy blasting with dynamite or other highly explosive substances was absolutely necessary in order to reduce it to grade, and, as the plans and specifications for the work had been prepared before the contract was entered into with the Alabama Construction Company or Burk Bros. & Tye, both the Louisville & Nashville Railroad Company and the Pine Mountain Railroad Company were familiar with this fact. The evidence further shows that the independent contractors were skilled in their line of business, and it is not shown that the blasting was not done in a proper manner, or, at least, in the manner that was necessary in order to accomplish the desired results. Under this evidence, can the railroads relieve themselves of responsibility to appellee for such damage as he sustained by reason of the prosecution of the work undertaken in the manner and way in which it is shown to have been done?

Blasting with dynamite and other high explosives is known to be attended with great danger, and the rock, earth, or other substances which it is used to displace or remove will, necessarily, be thrown a greater or less distance, according to the force of the charge, and the railroads were bound to know that in blasting to make the excavations in the roadbed, which the plans and specifications in this case called for, stone, earth and gravelly substances would necessarily be thrown upon plaintiff's land, which was lying adjacent to the right of way and separated from it by only a narrow river. Ordinarily, where one employs another to execute a piece of work, and the one so employed has the right to select his own assistants or help, the employer having no control over the hands of the employé, and no right to direct the manner in which the work shall be done further than to require that it shall be done in compliance with the specifications under which it is contracted to be done, the one so contracted with is an "independent contractor." The relationship of "master and servant" does not exist between the contractor and the contractee, and the employer is not liable for any injury which may be sustained by third persons from the negligent manner in which the work may be done by the employés of such "independent contractor," provided the said "independent contractor" is a person of sufficient skill, ability, and experience to justify the belief that he can properly carry out his undertaking. To this rule there are the following well-recognized exceptions: First, if the employer is negligent in the selection of his independent contractor, and, by reason of such negligence, lets the work to an unsuitable person, then

he cannot excuse himself on the ground that the one to whom he has let it is an "independent contractor"; second, if he personally interferes with, undertakes to do, manage, control, or direct the work of the independent contractor, these acts on his part destroy the relationship of "independent contractor" and render him liable for any injury that may result to third persons, through the negligence of the employes of such independent contractor; third, if the thing contracted to be done is an unlawful act, the law will not excuse the employer on the ground that it is done by an independent contractor; and, fourth, where the character of the business undertaken is of such a hazardous nature that the very undertaking itself will, necessarily, work an injury to or impose a hardship upon third persons, or where the law requires of the employer a certain standard of duty absolutely, he cannot escape liability on the ground that the work is done by an independent contractor. The law imposes upon every one the duty to so use his property as not to injure that of others, and what a man may not do in person he may not contract with another to do.

In some jurisdictions it is held, as a matter of law, that the employer is liable to third persons for any injuries which they may sustain by reason of the use of dynamite or other high explosives in the conduct of the work undertaken, and in these jurisdictions the question of "independent contractor" cannot be taken into consideration for the purpose of shifting the liability from the employer; but he is, in all instances, made liable for any damage that may result to third persons by the use of these explosives. In other jurisdictions the question of the liability on the part of the employer in instances of this kind is left to the jury, under proper instructions, and this is the rule that has been recognized in this state, though there might be instances where, from the nature of the contract, the character of the work to be done, and its proximity to the property of others, the court would be justified in declaring that, as a matter of law, the undertaking was so hazardous, and the probability of injury to the adjoining property so certain, as to warrant the court in saying, as a matter of law, that the employer could not excuse himself on the ground that the work was done by an "independent contractor," for, in such instances, he could not help but know that no degree of care on the part of the employe in the use of dynamite or other high explosives under such circumstances, and in such cases could prevent loss or damage being inflicted upon the adjoining property. While we are of opinion that the evidence in this case does not measure up to the requirements of the rule which would justify the judge in taking this question from the jury, still, from the conclusion which we have reached, appellants were not prejudiced by his having done so.

This brings us to a consideration of the second ground urged for a reversal, to wit, error in the instructions.

The form of the verdict in this case is such that this question is much simplified. Under instruction No. 2, which authorizes a recovery for injury sustained by reason of stones and other material being thrown upon appellee's land, the jury found for appellee in the sum of \$150. Appellee is not complaining of this finding, nor do appellants seriously complain of it, although they insist that the award should not have been above \$50 on account of this item of damage; but an examination of the record upon this point shows that the jury reached about the proper conclusion. While appellants' evidence tended to show that the stones could be moved from the land for a much less sum, still the evidence for appellee showed that he had been damaged in a sum largely in excess of that fixed by the jury, by reason of the stones and other material being thrown upon his land. The jury, with the witnesses before them, and a knowledge of the land and its value, and under a most admirable instruction upon this point, having fixed the damage at \$150, we are of opinion that this finding should not be disturbed.

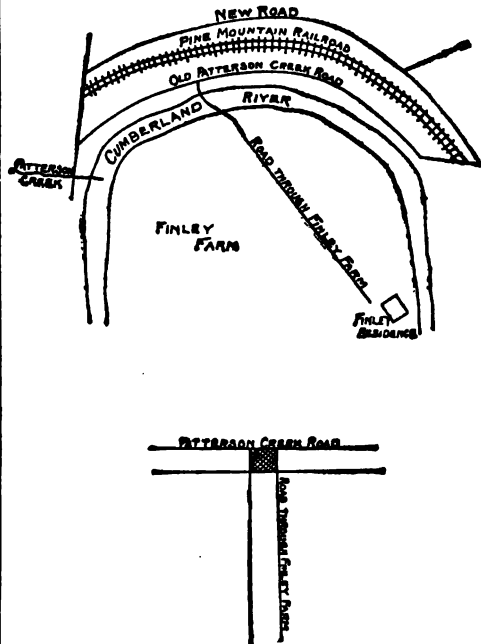
Under instruction No. 3, which authorized a recovery for obstructing the highway, the jury awarded \$1,100, and it is of this instruction and this award that appellants complain most seriously. They insist that the road which they are charged with obstructing was discontinued by an order of the county court before the work was done, or any obstruction placed therein, that upon this showing the trial court should have instructed the jury peremptorily to find for them as to this item of damage, and that appellee should not have been permitted to recover any sum whatever on this account. As above stated, the farm of appellee is separated from the railroad right of way by the Cumberland river, and the road leading from Patterson creek to Williamsburg ran along the river bank on the opposite side of the river from appellee's farm. Another road ran through appellee's farm and intersected the Patterson creek road at a point between Patterson creek and the schoolhouse further down said road toward Williamsburg. Before the work of blasting or excavating for the roadbed was commenced, an application was made to the county court of Whitley county to change the Patterson creek road at the point between Patterson creek and the schoolhouse, so that the road could be put upon higher ground above the railroad, and that portion of it between Patterson creek and the schoolhouse closed. This was done evidently because the railroad people recognized that in the construction of the railroad the old county road, as it then ran, would be practically useless. In July a petition, conforming to the requirements of the statute



regulating the alteration and discontinuance of public roads, was filed in the county court of Whitley county, and, upon a showing that the proper notices had been posted for the requisite length of time, notifying the public that the application would be made to discontinue that portion of the Patterson creek road running along and in front of appellee's farm, the county judge appointed viewers, as the law directs, to go upon the land and view the proposed change in the road and report the damage that would result to any landowners affected thereby, whether direct or incidental, as the statute required, and report back their action to the August term of court. The viewers so appointed, in due time, entered upon the discharge of their duty and later made their report in writing, which conformed to the requirements of the law, and, there being no exceptions or objections taken to said report, it was confirmed, and that portion of the old Patterson creek road, which it was sought to change, was, by an order duly entered in the Whitley county court, discontinued, and the new road was accepted by the county.

Complaint is made that the orders of the county court did not show an acceptance in terms, but, as they show that the damages accruing to the owners of the land over whose property the road, as changed, would run, were paid, and this payment acknowledged in open court, we must conclude that this point is not well taken. Besides, the evidence in this case shows that the road, as altered or changed, was, when this evidence was being taken, open for public travel, and being used by the public, thereby showing conclusively that there was an acceptance on the part of the county; but if we should be mistaken in this, appellee's rights would be in no wise prejudiced thereby for the reason that he is concerned in this case, not with the opening of the new road or way, but with the discontinuance of the old way. His claim is for damages resulting by reason of the obstruction of the old way. Appellants defend on the ground that this way was, by a proper order of the county court, discontinued. If it was, then appellee must fall in his claim for damages that resulted after the date upon which the order was entered discontinuing this road. Since it did not run upon his land, he was in no position to complain of its obstruction if it was no longer a public road, open for public travel. Appellee himself testified that the road was not obstructed until along in the fall of 1907, in September or October of that year, he thinks October, and as the order of the county court discontinuing this road was entered on the 5th of August, 1907, it is most strongly urged for appellants that they were entitled to a peremptory instruction to find for them. Evidently realizing the force of this contention, counsel for appellee insists that this should not have been done for the

reason that, in obstructing the old Patterson creek road at the point where it intersected the public road leading through appellee's farm, appellants committed an unlawful act for which they should be held answerable to appellee, and the point made is illustrated in brief by the following diagram:



It will be observed, from an inspection of the diagram, that the Patterson creek road was discontinued both north and south from the point of its intersection with the road leading through appellee's farm, so that, in going out the road through appellee's farm, one could go neither up nor down the river after reaching the old line of the Patterson creek road, as this road had been discontinued, and the new road had been placed on the opposite side of the railroad right of way and high up on the bluff. This being true, appellee cannot complain that the intersection, the point of connection between the road leading through his farm and the old Patterson creek road, was stopped up. It would have been of no possible service to him, and, as he did not own the land along it, no damages or cause of action accrued to him by reason of the obstruction of this intersection. After the discontinuance of that portion of the Patterson creek road in question, the owner of the land, to whom it reverted, might have stretched a fence along the entire border of said road and across the mouth of the old public road leading through appellee's farm, and appellee would not have had any just cause of complaint thereat, for the reason that the public road through his place, when it reached the line of the Patterson creek road, ceas-

ed, and appellee, having no right to it further than the right to use it in common with the traveling public, is certainly not damaged by reason of obstructions placed at the intersection of this road with the old Patterson creek road, when, even had there been no obstruction there, he could not have gone or traveled any further. He is in no wise damaged by reason of the obstructions placed at the intersection of the road through his place with the old Patterson creek road. There is no substance in such a claim, and on this showing the trial judge should have instructed the jury peremptorily to find for appellants as to this item of damage.

The jury refused to award any damages on account of injury supposed to have been done appellee by reason of rocks and other material being thrown into the river, thereby changing the current of the stream, and throwing it upon appellee's side and causing his land to wash, and it is unnecessary to enter upon a consideration of this question, as no complaint is made of the action of the jury in refusing to award damages upon this point.

Upon the return of the case, judgment will be entered in favor of appellee for \$150 the damage awarded under instruction No. 2 for stones thrown upon the land of appellee. So much of the judgment as awards \$1,100 for injuries sustained because of obstructions placed in the public road is reversed, and a new trial ordered upon this item of damage, and, if upon the next trial the evidence is practically the same as that offered upon the last, the jury should be instructed peremptorily to find for defendants.

The judgment is reversed, and cause remanded for further proceedings consistent herewith.

#### J. I. CASE THRESHING MACH. CO. v. BARNES et al.

(Court of Appeals of Kentucky. March 24, 1909.)

#### 1. TRIAL (§ 203\*)—INSTRUCTIONS—THEORIES OF CASE.

While, generally, it is proper to give instructions presenting the theory of the case advanced by the pleadings of each party, yet where, in an action based on a sale having taken place, the defense was an agreement by which the contract of sale never went into effect, and the jury were instructed to find for plaintiff unless said agreement was entered into, it was not necessary to give instructions presenting plaintiff's contention in respect to the binding force and effect of the contract.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 478; Dec. Dig. § 203.\*]

#### 2. EVIDENCE (§ 444\*)—PAROL EVIDENCE—VARYING CONTRACT.

An agreement, on which a written contract of purchase of a machine was made, that the contract was not to become effective unless on a preliminary test the machine should

do certain work, does not vary the contract, and so may be shown by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1941; Dec. Dig. § 444.\*]

#### 3. SALES (§ 85\*)—CONTRACT—CONSTRUCTION—CONDITIONS.

A contract of sale of a machine and notes for the purchase price, executed and delivered in escrow on an agreement that they should not go into effect unless on a preliminary test the machine should do certain work, did not become operative; the machine failing on the test to do the work.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 236; Dec. Dig. § 85.\*]

#### 4. ESCROWS (§ 4\*)—DELIVERY TO AGENT.

There is a valid delivery in escrow of a contract of purchase of a machine and notes for purchase price, where delivered on an agreement that they shall not go into effect unless on a preliminary test the machine shall do certain work, though the delivery is to the seller's agent; he for purposes of the escrow being the buyer's agent.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. § 7; Dec. Dig. § 4.\*]

Appeal from Circuit Court, Wayne County.  
"To be officially reported."

Action by the J. I. Case Threshing Machine Company against M. H. Barnes and others. Judgment for defendants. Plaintiff appeals. Affirmed.

C. C. Bagly, Joe Bertram, and Stone & Wallace, for appellant. Harrison & Harrison and O. H. Waddle, for appellees.

CARROLL, J. On July 10, 1905, the appellant company sold to the appellees a threshing outfit, consisting of an engine and separator, for \$1,863. For this sum the appellees executed three notes due, respectively, in September, 1905, and August and September, 1906. As security for the payment of the notes, the appellees on the same day executed and acknowledged before the proper officer a mortgage upon the machinery purchased. When sued upon the notes, the appellees filed an answer and counterclaim setting up various defenses. In one paragraph they averred, in substance: That the agent of the company who negotiated the sale agreed with them that he would remove the machinery to a place where it could be tested on the day the notes were executed, and further agreed that, as they were at a place convenient for the execution of the notes and mortgage, they should be then executed and taken possession of by the agent to be held by him, and, in the event the machinery fulfilled the representations made by the agent, the notes and mortgage were to be delivered to the company and become binding upon the purchasers; but, if the machinery failed in the test to do the work it was represented it would do, then and in that event the notes and mortgage were to become null and void and not binding upon the purchasers. That in pursuance of this agreement they did make a test, and found that the machinery was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

not of the character and quality represented and would not do the work it was guaranteed to do, and upon making this discovery they at once notified the agent that they would not accept the machinery, and demanded the return and cancellation of the notes and mortgage and return to the local agent of the company the machinery. They further averred that the agent to whose keeping the notes and mortgage had been committed without their knowledge and consent delivered the same to the company in violation of his agreement.

In a reply all the allegations of the answer were denied, and it was averred that the agent had no authority to make any agreements or representations concerning the machinery or the work it would perform, and that the entire contract between the parties was in a writing, which provided in part that: "The machinery is purchased upon and subject to the following mutual and interdependent conditions, and no other, viz.: It is warranted to be made of good material and durable, with good care, to do as good work under same conditions as any made in the United States of equal size, and rate and capacity, if properly operated by competent persons, with sufficient steam or horse-power, and the printed rules and directions of the manufacturers intelligently followed. If by so doing after trial of ten days by the purchaser said machine shall fail to fulfill the warranty, written notice thereof shall at once be given to J. I. Case Threshing Machine Company, at Racine, Wis., and also to the agent through whom received, stating in what parts and wherein it fails to fulfill the warranty, and reasonable time shall be given to said company to send a competent person to remove the difficulty, the purchaser rendering necessary and friendly assistance; said company reserving the right to replace any defective part or parts; and if then the machinery cannot be made to fulfill the warranty the part that fails is to be returned by the purchaser free of charge to the place where received, and the company notified thereof; and at the company's option another substituted therefor that shall fill the warranty, all the notes and money for such part immediately returned and the contract rescinded to that extent and no further claim made on the company. Failure so to make such trial or give such notice in any respect shall be conclusive evidence of due fulfillment of warranty on the part of said company, and that the machinery is satisfactory to the purchasers, and the company hereby released from all liability under the warranty." This contract also contains a stipulation that: "No person has any authority to waive, alter or enlarge this contract or to make any new or substitute or different contract, representation or warranty." As a part of its reply, and in connection with the conditions contained in this contract, the

company averred that it was at all times able, ready, and willing to fully satisfy the conditions of the contract, but that through no fault on its part the purchasers declined to accept the terms of the contract, and therefore could not defeat a recovery upon the notes.

It will thus be seen that the issues raised between the parties may be resolved into two propositions. The purchasers' contention is that they only made a conditional purchase, and that under it they were not obliged to take or pay for the machinery unless it fulfilled the representations made before the writings were executed, and that, pending the test to be made for the purpose of ascertaining whether or not the machinery was satisfactory, the notes were to be held by the agent of the company, and if the machinery proved satisfactory were to be delivered by him to the company; if it did not prove satisfactory, they were to be returned to the purchasers. On the other hand, the company's contention is that no agreement of this kind was made, and that the only contract was the written one upon which it relied to defeat the claim asserted by the purchasers, and, furthermore, that the agent had no authority to make the agreements relied on by the purchasers. After the pleadings were made up, the action on motion of the defendants was transferred to the ordinary docket for trial of the legal issues presented. Upon a trial before a jury, a verdict was returned in favor of the defendants, now appellees. A reversal is asked for errors in the admission and rejection of evidence, in the instructions given and refused, and because the court failed to give a peremptory instruction to find for the company.

The evidence upon the principal issue was very conflicting; but, if no other error was committed, there is not sufficient disparity between the evidence and the finding of the jury to justify us in holding that the verdict was not supported by the evidence, so that we will proceed to consider the legal questions raised by counsel for appellee.

In *Wisdom v. Nichols & Shephard Co.*, 97 S. W. 18, 29 Ky. Law Rep. 1128, and the cases therein cited, it was held that, under a contract similar to the written contract relied on by the company in this case, the rights and remedies of the parties were to be determined by the contract; the court saying: "Contracts similar to this have been before this court in a number of cases, and it has uniformly been ruled that, when the parties to a contract have agreed upon the warranties and remedies that accrue upon a breach of them, these remedies constitute the only relief in this particular that the purchaser has, and he must look to his contract and be governed by its stipulations." But the principle laid down in this and the other cases is not involved in this one. There is no pretense that the agent who

sold the machine altered the written contract, or that he had any right to make any changes in it, or any representations or warranties as to what the machine would do if it had been accepted under the contract. The validity or integrity of the written contract that was executed in connection with the notes and mortgage does not enter into this case. The defense was not an attack on the contract, or an effort to avoid its conditions, but was whether or not the written contract became effective or binding upon the purchasers at all. In other words, the contract upon which the purchasers relied was made before the written contract upon which the company depends was executed. If there was a valid prior contract between the parties, upon the faith of which the written contract was entered into, it follows that the validity of the written contract depends upon the prior contract. The purchasers staked their whole case upon the prior verbal contract under which the notes and mortgage were delivered, and, when the trial judge came to instruct the jury, he said: "You will find for the plaintiff, J. I. Case Threshing Machine Company, unless you shall believe from the evidence that prior to the signing of the order, notes, and mortgage introduced in evidence, the plaintiff by its agent, Carter, represented to the defendants that the boiler and engine in controversy was of sufficient horse power to pull the threshing machine in controversy over the country in which they proposed to operate, and that it was of sufficient power and capacity to run said threshing machine and perform first-class work; and further believe from the evidence that prior to the signing of the papers above mentioned the agent agreed with the defendants that he would make a test for them, demonstrating the power and capacity of the boiler and engine and guarantee that the same had the power and capacity to do the work as represented by him; and further believe from the evidence that, under the agreement of the agent to make said test, he induced the defendants to sign said papers as a matter of convenience to the parties before the test was made, and agreed that he would return same to them in the event the test proved and demonstrated that said boiler and engine did not have the power and capacity as represented by him; \* \* \* and further believe from the evidence that such test by them proved the power and capacity of same to be insufficient; and further believe from the evidence that, within a reasonable time after making such test, the defendants, or either of them, notified the plaintiff company or its agent of such test, and the result of same. And if you so believe, you will find for the defendants."

It will thus be seen that under this instruction the jury were directed to find for the company, unless they believed that the

agent induced the purchasers to sign the papers under an agreement that he would return them in the event the machinery did not fulfill the representations the agent made concerning it. Generally, it is proper to submit to the jury instructions that present the theory of the case presented by the pleadings of each of the parties; but when, as in this case, the jury were told that they must find for the company unless they believed the agreement in respect to the execution of the notes was entered into, every other issue except this was eliminated from the case, and hence it was not necessary to submit to the jury any instructions presenting the defendants' contention in respect to the binding force and effect of the written contract, because, if the jury found that the agreement upon which the written contract was based was not entered into, they were instructed to find for the company.

Did the agent have authority to make the agreement relied on by the purchasers? It is earnestly argued by counsel for the appellant that the agreement made by the agent, assuming that one was made, was in excess of his authority, and, aside from this, contained representations and warranties that it was expressly provided in the written contract no agent should make; but, the agreement made by the agent did not undertake to vary or contradict the writing. It was entirely independent of it. The purpose and effect of the evidence respecting the agreement was to show that no contract was in fact entered into—that whether it became effective or not depended entirely upon the performance of certain subsequent conditions. The execution of the writings and their delivery under the agreement did not constitute them a contract, because they were not to become operative until certain conditions were performed. If the conditions upon which the writings were executed and delivered to the agent were never fulfilled, the contract did not become operative or binding upon the purchasers, and so it was admissible to show by parol evidence the antecedent agreement under which they were delivered. This evidence did not vary or contradict the writings, but only went to show that no contract between the parties ever went into effect, and its admissibility is fully supported by the following authorities: *McCormick Harvesting Machine Co. v. Morland*, 121 Iowa, 451, 96 N. W. 976; *Cleveland Refining Co. v. Dunning*, 115 Mich. 238, 73 N. W. 239; *Burns & Smith Lumber Co. v. Doyle*, 71 Conn. 742, 43 Atl. 483, 71 Am. St. Rep. 235; *Bedell v. Wilder*, 65 Vt. 406, 26 Atl. 589, 36 Am. St. Rep. 871; *Michels v. Olmstead*, 157 U. S. 198, 15 Sup. Ct. 580, 39 L. Ed. 671; *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. 127; *Reiner v. Crawford*, 23 Wash. 669, 63 Pac. 516, 83 Am. St. Rep. 848; *Bishop on Contracts*, § 349; *Page on Contracts*, § 1209. In fact, where the rights

of no third parties intervene, we do not know of any authority denying the correctness of this principle. *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698.

It is next insisted that the delivery of the writings to the agent of the company was in fact a delivery to the company itself. The argument is made that a writing intended as an escrow, or to take effect upon the performance of a condition subsequent, must be held by a third person, and that the delivery of it to the party to whom it is executed or his agent destroys any parol agreements respecting the terms or conditions under which the writing was to become operative. It must be conceded that the ancient rule was as contended for by counsel for appellant. *Bouvier's Law Dict.* title "Escrow"; *Blackstone*, vol. 2, p. 307; *Worrall v. Nunn*, 5 N. Y. 229, 55 Am. Dec. 330; *Curry v. Colburn*, 99 Wis. 319, 74 N. W. 778, 67 Am. St. Rep. 860; 16 Cyc. 573; 11 Am. & Eng. Ency. of Law, p. 339. But the better authority is to the effect that when the rights of no third parties intervene, and there is nothing inconsistent with the agent's duty to his principal in holding the paper subject to the conditions agreed upon when it was executed, the writing may be delivered to the agent of the adverse party to be held by him until he receives instructions to deliver it to his principal; and we think this the more sensible rule. No good reason can be assigned why the writing may not be held by an agent of one of the parties until the conditions upon which it is to become operative take effect. When a paper is executed and delivered to a third party or to the agent of one of the parties, under an agreement previously made that it is not to become operative until certain specified conditions have been performed, the contract between the parties is not an executed, but a conditional, one; and unless the conditions upon which the contract is to become effective are performed, there is no contract. We do not hold that a delivery to one of the parties to hold pending the performance or fulfillment of the conditions upon which it was to become effective would be valid as an escrow; but it is said that a delivery to an agent is a delivery to the principal, and hence, if a paper cannot be held as an escrow by one of the parties, neither can it be so held by his agent—that the agent and the principal are in law one. This reasoning and conclusion would be very forceful if it were true that the paper was delivered to the agent as the agent of the other party, but a person may be the agent of both of the parties to a transaction if it can be plainly shown that there is nothing inconsistent or antagonistic between his acts for the one and the other. In many business transactions the same person frequently acts as agent for both of the parties under specific instructions from each as to his duties, and

when the nature of the employment or transaction is such that he can faithfully discharge his obligations to the one without conflicting with his fidelity to the other. And so, in the present case, the agent for the company might and did receive and hold the papers as the agent of the purchasers without conflicting with his duty to the company. In holding the writings he was not acting as the agent of the company, but as the agent of the purchasers, and it was admissible to prove the agreement under which the papers were placed in the hands of the agent. *Hansford v. Freeman*, 99 Ga. 376, 27 S. E. 706; *Bank v. Bailhache*, 65 Cal. 327, 4 Pac. 106; *Harnickell v. New York Life Ins. Co.*, 40 Hun (N. Y.) 558; *Id.*, 111 N. Y. 390, 18 N. E. 632, 2 L. R. A. 150; *McCormack Harvesting Machine Co. v. Morland*, supra; *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111; *Reynolds v. Robinson*, supra; *Burke v. Dulaney*, supra; *Wilson v. Powers*, 131 Mass. 539; *Page on Contracts*, §§ 594, 595; *Ashford v. Prewitt*, 102 Ala. 264, 14 South. 663, 48 Am. St. Rep. 37.

There is a wide difference between a delivery to an agent, as under the circumstances of this case, and a delivery to the adverse party. When a writing, fully executed, is delivered to the party for whom it is intended, the other party, in the absence of fraud or mistake, will not be permitted to set up either an antecedent or a contemporaneous parol agreement that will contradict or vary the writing, which is to be treated as the whole contract between the parties and the best evidence of what their agreement was. If an executed and delivered paper could be explained away, or contradicted by parol evidence, the integrity of every writing would be placed in jeopardy, and the party who, after its execution, became dissatisfied, would be strongly tempted to overthrow or avoid its conditions. So firmly is this principle imbedded in the law that the rule is everywhere recognized and enforced that a completed and delivered written contract cannot be varied or contradicted by antecedent or contemporaneous parol evidence unless it is assailed for fraud or mistake. *Farmers' Bank v. Wickliffe* (Ky.) 116 S. W. 249; *Chitty on Contracts*, vol. 1, p. 153; *Greenleaf on Evidence*, vol. 1, § 275.

Several Kentucky cases are relied upon by counsel in support of the proposition that a paper, to be an escrow, must be placed in the hands of a third party, but a careful reading of these cases will show that they are not in conflict with the views expressed in this opinion. We have only extended the rule announced in those cases to embrace agents who are deemed to occupy the relation of third parties to the transaction. No question of agency arose in the cases relied upon, and the court, merely following the strict common-law rule, announced that an escrow

must be delivered to a third party, and that, if delivered to one of the parties, it ceased to be an escrow, and its terms could not be contradicted or varied by contemporaneous parol expressions. In *Wood v. Kendall*, 7 J. J. Marsh. 212, the court in a dictum said that the obligation in controversy could not have been an escrow after its delivery to the obligee. In *Wight v. Shelby R. Co.*, 16 B. Mon. 5, 63 Am. Dec. 522, the court, in holding that a subscription paper delivered to one of the parties to the paper could not be treated as an escrow, said: "It must be placed in the hands of a third party, by the party making it, to be delivered to the other party on the happening of a specified contingency." To the same effect is *Millett v. Parker*, 2 Metc. 608; *Hubble v. Murphy*, 1 Duv. 279; *Dils v. Bank of Pikeville*, 109 Ky. 757, 60 S. W. 715.

There being no substantial error in the record, the judgment is affirmed.

# TURNER et al. v. CITY OF MIDDLESBORO et al.

(Court of Appeals of Kentucky. March 12, 1909.)

## 1. INFANTS (§ 115\*)—JUDGMENT AGAINST—SEASONABLE APPEAL AFTER REACHING MAJORITY.

Where an appeal from a judgment against an infant was filed in the Supreme Court on July 18, 1908, and it appears that he became of age on July 22, 1907, it is prosecuted within 12 months after he became of age, as required by Civ. Code Prac. § 391, allowing such time for an infant to show cause against a judgment, and is in time.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 328; Dec. Dig. § 115.\*]

## 2. APPEAL AND ERROR (§ 837\*)—APPEAL FROM JUDGMENT AFTER REACHING MAJORITY—CONSIDERATION OF AMENDED PETITION.

In determining an appeal, an amended petition in the case, to which no appearance was entered, and on which no process was issued, should be ignored.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 837.\*]

## 3. TAXATION (§ 647\*)—ACTION ON TAX BILLS—VARIANCE IN DESCRIBING LAND IN PETITION AND JUDGMENT.

Tax bills against land on which an action by a city was based did not describe it, but merely mentioned it in one bill as 57 acres, and in the others as 60.29 acres northwest, and 81.51 acres southwest, and the judgment under which the land was sold described it as being in three tracts, giving the metes and bounds and courses and distances of each, the first tract containing 11.28 acres, more or less; the second containing 17.35 acres, more or less; and the third containing 44.52 acres, more or less. *Held*, that as there was no similarity between the description of the land in the petition referring to the tax bills as a part thereof, and the description in the judgment, and as it could not be told by an inspection of these two papers whether or not the land, or any part of it on which the city asserted its lien, was sold, the judgment was erroneous, and should be vacated and set aside.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1312; Dec. Dig. § 647.\*]

## 4. INFANTS (§ 41\*)—SALE OF LAND UNDER JUDGMENT—RIGHTS OF PURCHASER.

The general rule that, when a judgment is reversed, the reversal does not affect the title or possession of the purchaser at a sale made thereunder before the reversal, though he may be the plaintiff or a party to the action, does not apply to the sale of infants' land to one not a bona fide purchaser.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 41.\*]

## 5. INFANTS (§ 41\*)—SALE OF LAND UNDER JUDGMENT FOR TAXES—"BONA FIDE PURCHASER."

An assignee of a judgment in favor of a city against an infant for taxes before sale thereunder to himself of the infant's land took the position of the plaintiff in the action, and is not a bona fide purchaser in the meaning of the Code, and hence is not entitled to hold the land as such on reversal of the judgment, though he should be adjudged to have a lien thereon for the money paid in satisfaction of the judgment, with interest thereon from date of payment.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 41.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 825-830; vol. 8, p. 7591.]

Appeal from Circuit Court, Bell County.

"Not to be officially reported."

Action by the City of Middlesboro and others against J. P. K. Turner and another. There was a judgment for plaintiffs, and defendant Turner appeals. Reversed.

N. J. Weller, for appellant. T. G. Anderson, for appellees.

CARROLL, J. In 1892 the city of Middlesboro, a city of the fourth class, caused a tax bill for \$256.50 to be issued against Turner, the appellant, and Calvin Hurst, his guardian, for taxes for that year on 57 acres of land valued at \$17,100, owned by the infant Turner, which was assessed as of November 1, 1891. Again in the year of 1894 the city issued a tax bill for \$138.60 as the amount due on an assessment made as of April 1, 1894, on two tracts of land, one containing 60.29 acres valued at \$6,000 and the other of 81.58 acres valued at \$4,079. On June 6, 1895, the city filed its petition in equity in the Bell circuit court against Hurst, the guardian, and Turner, who was then an infant about 10 years of age, and the Middlesboro Town & Lands Company, seeking a personal judgment against the infant and the guardian, and also to enforce its lien for the aforesaid taxes upon 57 acres of land assessed as the property of Turner, and the 60.29 acres and 81.58 acres, being the three tracts of land described in the tax bills filed with the petition, with interest and penalties. On July 3, 1895, the guardian filed an answer, controverting the allegations of the petition, and putting in issue all of the averments of the petition relating to the assessment and taxation of the land. In June, 1899, the plaintiff filed an amended petition, in which, after reaffirming the averments of the original petition, there were de-

scribed three separate tracts of land alleged to be in the city of Middlesboro, the first tract containing 11.26 acres, more or less, the second 17.35 acres, more or less, and the third 44.52 acres, more or less, aggregating 73.13 acres, and it was charged that the tax bills sued on were for taxes due on these three tracts of land. In the tax bills upon which the action was based the land is described in one tax bill as 57 acres. In the other tax bill it is described as 60.29 acres northwest and 81.51 acres southwest. It will thus be seen that the description in the amended petition does not correspond with the description in the petition or the tax bills; nor can we say from an inspection of the record that the land described with particularity in the amended petition is the same land or any part of it mentioned in the tax bills. No process was issued on this amended petition, and no appearance was entered thereto. No proof was taken by either party, and on June 27, 1899, a judgment was entered against Turner and his guardian for \$742.36, with interest from the 27th of June, 1899, until paid, and costs; and it was further adjudged that the city had a lien upon the three tracts of land described in the amended petition, which was ordered to be sold. On July 1, 1899, Turner, by his guardian, moved the court to set aside the judgment because the same was prematurely rendered, was a clerical misprision, and was procured by fraud. On the 3d day of July, 1899, the judgment was set aside, and each party allowed to file additional pleadings. No other order or proceeding was taken in the case until February 1, 1901, when the judgment appealed from was rendered. This judgment ordered a sale of the three described tracts of land in the amended petition for the purpose of satisfying the taxes stated in the judgment to be \$256.50 with interest at the rate of 12 per cent. per annum from the 1st day of May, 1892, and \$138.60, with interest at 6 per cent. from the 1st day of November, 1894. In April, 1901, the judgment was assigned on the margin of the record by the city of Middlesboro through its mayor to the appellee M. J. Moss, and on the 27th day of May following the three tracts of land were sold by the commissioner under the judgment, and Moss became the purchaser at the price of \$771.49. Afterwards the report of sale was confirmed, deed made to the purchaser, and a writ of possession awarded. The appellant Turner seeks by this appeal to vacate and set aside the order of sale, the report of confirmation thereof, and to have restored to him the property sold. This appeal was filed in this court on July 18, 1903, some seven years after the judgment appealed from was entered.

The first question to be considered is: Was the appeal prosecuted within due time? Section 391, Civ. Code Prac., provides: "An infant—other than a married woman—may,

within twelve months after attaining the age of twenty-one years, show cause against a judgment, unless it be for a tort done by, or for necessities furnished to, the infant; or unless it be rendered upon a set-off or counterclaim stated in an answer; but the vacation of such judgment shall not affect the title of a bona fide purchaser under it." We find in the record an affidavit made by Turner in which it is stated that he was born on the 22d day of July, 1886, and was 21 years of age on the 22d day of July, 1907. Accepting this statement as true, the appeal was prosecuted within 12 months after he became of age, and is therefore in time. As no process was issued on the amended petition, we think it should be ignored in the consideration of this case; and we will therefore look to the petition and the judgment for the purpose of determining whether or not the judgment is erroneous.

The petition states "that defendants are indebted to plaintiff in the sum of \$256.50, with interest thereon at the rate of 12 per cent. per annum from May 1, 1892, until paid, for taxes due for the year 1892 on 57 acres of land in the southwest section of Middlesboro, Ky., as shown by plat on file in the Bell county clerk's office at Pineville, Ky., and as evidenced by tax bill No. 1603, a certified copy of which will be filed as part hereof if required; that said defendants are indebted to plaintiff in the further sum of \$138.60, with interest thereon at the rate of 6 per cent. per annum from November 1, 1894, until paid, for taxes due on said land in said section of said city as shown by plat on file as aforesaid, and as evidenced by tax bill No. 608, a certified copy of which will be filed herewith as part hereof if required." The prayer of the petition is: "That said land or enough thereof be sold, and a sufficiency of the proceeds of said sale to satisfy said judgment be applied to that purpose, and for all proper relief." In the tax bills heretofore set out there is no description whatever of the land; it being merely mentioned in one tax bill as 57 acres, and in the other as "60.29 acres N. W. and 81.51 acres S. W." The judgment under which the land was sold describes the land as being in three tracts, giving the metes and bounds and courses and distances of each tract; the first tract containing 11.26 acres, more or less, the second containing 17.35 acres more or less, and the third containing 44.52 acres, more or less.

There is no similarity whatever between the description of the land in the petition and the description in the judgment. No person can tell by an inspection of these two papers whether or not the land or any part of it upon which the city asserted its lien was sold. It is therefore manifest that the judgment is erroneous, and should be vacated and set aside. But the point is made that, although the judgment should be reversed, the purchaser ought not to be disturbed. The gener-

al rule is that, when a judgment is reversed, the reversal does not affect the title or possession of the purchaser at a sale made under the judgment before the reversal, although he may be the plaintiff or a party to the action. But this rule has no application to the sale of infants' land not bought by a bona fide purchaser. In *District of Clifton v. Pfirman*, 110 S. W. 407, 83 Ky. Law Rep. 529, this court, in speaking of the general rule and citing cases that support it, said: "It is not, however, necessary here to do more than mention these cases as illustrating that the purchaser at a judicial sale who is the plaintiff or a party to the action in which the judgment is rendered will not in every instance be permitted to hold the property purchased without in some way accounting to the judgment creditor when the judgment is reversed. And we have no hesitation in declaring that, if a judgment against infants is reversed, the purchaser, if he be the plaintiff or a party to the action, will not be permitted to hold against their interests real property bought under it at a judicial sale. In such case the infants may either elect to allow the sale to stand, or they may have the sale set aside and take the property upon the payment of

the debt, which is a lien upon it." In this case the judgment was assigned on April 24, 1901, to M. J. Moss, who purchased the land at the sale made on May 27, 1901. As the assignee of the judgment before the sale, Moss took the position of the plaintiff in the action, and as the sale was made for his benefit and he became the purchaser the principle announced in the *Pfirman* Case must be held to embrace him. He was not a bona fide purchaser in the meaning of the Code. But Moss should be adjudged a lien upon the land for the amount of money that he paid to the city in satisfaction of the judgment, with interest thereon from the date of payment; and, if this sum is not paid, the land described in the petition may be sold to satisfy it. Upon a return of the case the city, Moss and Turner may each file such pleadings as may be necessary to present any controversy that may arise between them.

Wherefore the judgment is reversed, with directions to set aside the judgment and the sale of the land, and for such further proceedings in conformity with this opinion as may be necessary to give to the parties the relief they are entitled to.



**WILKIN v. GEO. W. OWENS & BROS.**

(Supreme Court of Texas. March 31, 1909.)

**APPEAL AND ERROR (§ 1175\*)—DISPOSITION CAUSE ON APPEAL—RENDITION OF JUDGMENT.**

Where the object for which the court on the original hearing remanded the cause will be accomplished by the court rendering judgment as prayed for on rehearing, the court will grant the motion for rehearing and render judgment accordingly.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4578-4587; Dec. Dig. § 1175.\*]

On motions for rehearing. Overruled in part; granted in part.

For former opinion, see 114 S. W. 104.

**GAINES, C. J.** These are motions for a rehearing—No. 2,000, by defendants in error, which urges that the previous decision of this court is radically wrong; No. 2,025 is by plaintiff in error, in which it is prayed that the judgment of this court should be rendered for the appellant for the land, conditioned upon his paying to defendants in error the money originally paid the administrator for the land, with legal interest thereon. We are of opinion that No. 2,000 should be overruled, and it is accordingly so ordered. No good reason suggests itself to our minds why the prayer of No. 2,025 should not be granted. It accomplishes the object for which we had remanded the cause.

It is therefore ordered that the motion in this respect be granted, and that judgment be here rendered that the plaintiff in error do have and recover of the defendants in error the land in controversy, on condition that he pay defendants in error the amount bid for said land at the attempted sale, and interest thereon to this date.

**ST. PAUL'S SANITARIUM et al. v. FREEMAN.**

(Supreme Court of Texas. March 24, 1909.)

**WILLS (§ 602\*)—CONSTRUCTION—NATURE OF ESTATE—LIMITATION OVER.**

Under a will giving plaintiff "all my property, real and personal and mixed, that I may own and be possessed of at the time of my death," and in a subsequent paragraph providing that, if plaintiff "should die without issue, then it is my will and desire that all of my said property willed as aforesaid be given" to another devisee named, if plaintiff dies without issue, the limitation over to the other devisee takes effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1354; Dec. Dig. § 602.\*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Robert M. Freeman against the St. Paul's Sanitarium and others. Judgment for plaintiff, and defendants brought error to the Court of Civil Appeals (111 S. W. 443), where the judgment was affirmed,

and defendants bring error. Reversed, and judgment rendered.

Wm. P. Ellison, for plaintiffs in error.  
Geo. A. Titterton, for defendant in error.

**GAINES, C. J.** On the 8th day of November, 1901, Julian Reverchon made his will, in the second and third clauses of which he provided as follows:

"Second. I give and bequeath to Robert M. Freeman, of Dallas county, Texas, all my property, real and personal and mixed, that I may own and be possessed of at the time of my death.

"Third. It is my will and desire that in the event the said Robert M. Freeman shall die without issue then it is my will and desire that all of my said property willed as aforesaid be given to St. Vincent de Paul Institution or order, for the benefit of the sick Sisters of that order in Dallas county, Texas."

In the fourth clause he nominated Freeman as his executor without bond. Reverchon having died, and his will having been admitted to probate, and Freeman never being married, brought this action to have the will construed and to determine the question whether he is entitled to a fee simple in the devised property, or whether the estate he holds therein is subject to be defeated by his death without issue. The trial court held that Freeman was entitled to the property in fee simple and gave judgment accordingly. The Court of Civil Appeals affirmed the judgment of the trial court.

In Jarman on Wills it is laid down: "Hence it has become an established rule that where the bequest is simply to A., and in case of his death, or if he die, to B., A., surviving the testator, takes absolutely." 2 Jarman on Wills, p. 690. The reasons for this rule are variously stated. One is that death is a certain event, and that, if death at any time be meant, there is no contingency about it, and therefore, in order to make the death contingent, it is construed to be a death before that of the testator. Another reason ascribed for the rule is that the law favors the vesting of estates, and hence, if the construction be that the death meant is a death before that of the testator, the estate vests upon the survivorship of the legatee over that of the testator. But in every case the law looks diligently to the context of the will, and if there be any words in the will that indicate, though slightly, that it was not the intention of the testator to vest the estate, they will be given that effect.

In the present case the second clause of the will gives to the defendant in error all the testator's property that he may own at the time of his death. This, however, is qualified by the third clause, which prescribes that it is his will and desire that, in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the event the said Robert M. Freeman shall die without issue, then that all of his property willed as aforesaid be given to St. Vincent de Paul Institution or order, for the benefit of the sick Sisters of that order in Dallas county, Texas. Now dying without issue is no certain event. Freeman may die without issue, or he may not. It follows that the first ground for holding that in case of a will that gives to the first taker a fee-simple title to land, with a gift over to a third party in case of the death of the first taker, has no applicability to the present case. Nor do we see that the second ground is applicable to the present question. There is no language in the will which indicates that the testator had in mind the probability that Freeman would not outlive him. On the contrary, the fact that Freeman is nominated as the sole executor of the will strongly evinces that it was contemplated that Freeman would probably survive him.

We recognize the fact that upon this question there is a decided conflict of authority. It seems to us that this conflict is settled in England by the case of *O'Mahoney v. Burdett*, L. R. 7 H. L. 388, in which it is held that "a bequest to A., and if he shall die unmarried or without children to B., is an absolute gift to A., defeasible by an executory gift over in the event of A. dying at any time unmarried or without children." In the American courts the cases which hold the contrary doctrine are quite numerous. On the other hand, there is a very respectable array of American authority which holds in accordance with *O'Mahoney v. Burdett*, supra. In *Britton v. Thornton*, 112 U. S. 526, 532, 5 Sup. Ct. 291, 294, 28 L. Ed. 816, Mr. Justice Gray says: "It is equally clear that, upon her death under age and without issue then living, her estate in fee was defeated by the executory devise over. When, indeed, a devise is made to one person in fee, and 'in case of his death' to another in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring only to death in the testator's lifetime. 2 Jarman on Wills, c. 48; *Briggs v. Shaw*, 9 Allen (Mass.) 516; *Lord Cairns in O'Mahoney v. Burdett*, L. R. 7 H. L. 388, 395. But when the death of the first taker is coupled with other circumstances, which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator. *O'Mahoney v. Burdett*, above cited; 2 Jarman on Wills, c. 49." And the decision of the case was in accordance with the principles so announced. This decision has been

cited and followed in *Summers v. Smith*, 127 Ill. 649, 21 N. E. 191, in *Smith v. Kimbell*, 153 Ill. 378, 38 N. E. 1029, in *Matter of New York, etc.*, Ry. Co., 105 N. Y. 95, 11 N. E. 492, 59 Am. Rep. 478, and in *Shadden v. Hembree*, 17 Or. 25, 18 Pac. 572. To the same effect are *Parish's Heirs v. Ferris*, 6 Ohio St. 563, *Moore v. Moore*, 12 B. Mon. (Ky.) 651, and *Daniel v. Thomson*, 14 B. Mon. (Ky.) 662, to which others might be added.

It follows that in our opinion the death without lawful issue, referred to in the clause of the will, means the death of Freeman at any time, and not his death before that of the testator. Accordingly the judgments of the trial court and that of the Court of Civil Appeals are reversed, and judgment is here rendered that, should Freeman die at any time without issue, the limitation over to the St. Vincent de Paul Institution shall take effect.

#### GUTIERREZ v. EL PASO & N. E. R. CO.

(Supreme Court of Texas. March 24, 1909.)

#### 1. DEATH (§ 11\*)—ACTION FOR CAUSING DEATH—RIGHT OF ACTION.

At common law there is no right of action for the negligent death of a person.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 10, 15; Dec. Dig. § 11.\*]

#### 2. DEATH (§ 19\*)—ACTIONS FOR DEATH—STATUTORY PROVISIONS.

A widow instituting a suit for the negligent death of her husband must show a compliance with the statutory conditions.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 19.\*]

#### 3. DEATH (§ 31\*)—ACTIONS FOR DEATH—PERSONS ENTITLED TO SUE—"PERSONAL REPRESENTATIVE."

Under the federal employer's liability act (Act Cong. June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]), making a carrier liable in case of the death of any of its employes to his "personal representative" for the benefit of his widow and children, a widow of an employe killed through the negligence of the employer may sue as administratrix for the use of herself as widow; there being no child.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 38; Dec. Dig. § 31.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5358-5362; vol. 8, p. 7753.]

#### 4. COURTS (§ 97\*)—DECISIONS OF FEDERAL COURTS—BINDING EFFECT.

The decisions of the federal Supreme Court on the invalidity of the federal employer's liability act (Act Cong. June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]), in its application to the territories will be followed by the state Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 332; Dec. Dig. § 97.\*]

#### 5. TERRITORIES (§ 11\*)—LEGISLATIVE POWER OF CONGRESS—COMMERCE.

The federal employer's liability act (Act Cong. June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]), is constitutional in its application to the territories, notwithstanding its unconstitutionality in its application to interstate commerce; the provisions

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defining the liabilities of carriers engaged in commerce in any territory being within the constitutional power of Congress to govern territories and independent of the provisions relating to carriers engaged in interstate commerce, based on the constitutional power of Congress to regulate interstate commerce.

[Ed. Note.—For other cases, see Territories, Cent. Dig. § 8; Dec. Dig. § 11.\*]

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Enedina Gutierrez against the El Paso & Northeastern Railroad Company. There was a judgment of the Court of Civil Appeals (111 S. W. 159) reversing a judgment for plaintiff, and she brings error. Reversed, and judgment of trial court affirmed.

F. G. Morris, for plaintiff in error. Hawkins & Franklin, for defendant in error.

BROWN, J. This suit was instituted in the district court of El Paso county on April 19, 1907, by the plaintiff in error, as administratrix of the estate of Antonio Gutierrez, for the benefit of herself as the widow of the said deceased. It was alleged that the said Antonio Gutierrez left no child. It was also alleged: That on or about the 22d day of June, 1906, in the territory of New Mexico, the said Antonio Gutierrez was in the employ of the defendant railroad company, and on that day was riding upon a flat car at the direction and command of the servants and agents of the railroad company for the purpose of being transported to another place on the said road in order to engage in the work of repairing the track; that on the said date the agents and employees of the defendant railroad company, who were engaged in handling and controlling the train in which the said car was, by their negligence in making a flying switch without giving notice to the said Antonio Gutierrez, caused him to fall upon the track of the said road and to be run over by one of its cars and thereby killed. Proper allegations were made of his earning capacity and all the facts necessary to entitle the plaintiff to recover, except that there was no allegation that he had made affidavit and given notice to the company, as required by a statute of the territory of New Mexico, which statute prescribed that no right of action should accrue to any person on account of such an accident unless the affidavit prescribed should be made within 90 days from the date of the injury. The defendant excepted to the plaintiff's petition on several grounds, among them that she could not recover as administratrix of the estate of the deceased. The railroad company also pleaded the statute of the territory of New Mexico to the effect that the plaintiff, in order to entitle her to recover, must have made an affidavit and given the notice prescribed in the statute, which it is alleged had not been done. The allegation

set out the substance of the statute in detail, which it is not necessary to repeat here. Plaintiff excepted to that portion of the answer which set up the statute of New Mexico as a defense, and the trial court sustained the exception. Plaintiff also filed a supplemental petition, in which she alleged that at the time of the accident the act of Congress known as the "Employer's Liability Act," approved June 11, 1906 (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]), was in force in the territory of New Mexico. The judge of the district court gave a charge to the jury, in which he virtually submitted the plaintiff's case upon the act of Congress above stated. The jury returned a verdict for \$3,500 in favor of the plaintiff, and judgment was entered accordingly, which judgment the Court of Civil Appeals reversed and remanded the cause, from which judgment Associate Justice Fly dissented. The validity of the act of Congress of June 11, 1906, before mentioned, was involved in this litigation. The railroad company, in its brief presented to the Court of Civil Appeals, set up no question of fact, except that the plaintiff had failed to prove that she made and presented an affidavit required by the law of New Mexico, which was not controverted. The following questions of law are presented to the court in that brief: (1) That the plaintiff, as administratrix of the estate of the deceased, could not maintain her action in the courts of Texas. (2) That under the law of the territory of New Mexico she had no right of action because she had failed to make the affidavit required by law. (3) That the trial court erred in submitting the case upon the act of Congress before mentioned.

The Congress of the United States enacted a statute, from which we make the following extract, which statute was approved June 11, 1906: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, en-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gines, appliances, machinery, track, roadbed, ways or works." At common law the widow of Antonio Gutierrez would have no right of action on account of the death of her husband. She must rely upon the statute of the territory of New Mexico, or upon the act of the Congress of the United States, commonly known as the "Employer's Liability Act," hereafter called the "liability act." In her suit she has claimed a recovery under each of said laws. In order to recover under the act of the territorial Legislature, the plaintiff must show that she has complied with all of the conditions which that act imposed upon her, and, having failed to make such proof in the fact that she has not made the affidavit required by the statute nor given the notice to the railroad company which that statute made a condition precedent to the vesting of her right, she cannot recover under that law. At the death of Antonio Gutierrez, the act of Congress known as the "liability act," if valid, was in force in the territory of New Mexico. By the terms of that act a right of action was given to the "personal representative" of the deceased, and the plaintiff could sue as the administratrix of the estate of Antonio Gutierrez for the use of herself as widow; there being no child. It is claimed by the defendant that the act of Congress was declared void by the Supreme Court of the United States in the Employer's Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, and the Court of Civil Appeals so held in this case. The first question for us to determine is: Does the decision in the Liability Cases cited declare the statute invalid in its application to the territories? Of course, the decision of the Supreme Court of the United States upon that question will be followed by this court.

It is true that in the case cited the Supreme Court of the United States held the act of Congress, as applied to interstate commerce, to be void. That court said: "Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that (if) any one who conducts such business be a 'common carrier engaged in trade or commerce in the District of Columbia or in any territory of the United States or between the several states,'" etc. "That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the states. \* \* \* Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce, and is not confined solely to regulating the interstate commerce business which such persons may do; that is, it regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate com-

merce." It is evident that the court considered the act only as it affected those who were engaged in interstate commerce, and had not in mind that portion of the statute which relates to the territories or the District of Columbia. As showing that the scope of the decision must be limited to interstate commerce and matters connected with it, we note the fact that, of the five judges who constituted the majority that made the decision, Justices Peckham and Brewer concurred only in the result. Justice Peckham said: "I concur in the proposition that, as to traffic or matters within the state, the act is unconstitutional, and it cannot be separated from that part which is claimed to be valid as relating to interstate commerce. As that is all that is necessary to decide in this case, I place my concurrence upon that part of the opinion which decides it." Justice Brewer concurred with Mr. Justice Peckham, so that, of the five who rendered the opinion, only three indorsed it as a whole. This results in limiting the effect of the opinion to the subject stated by Mr. Justice Peckham; that is, to traffic or commerce within a state by corporations or persons engaged in interstate commerce. It is manifest that the Supreme Court of the United States did not decide the question before us. It rests with this court to determine whether the part of the bill which relates to the territories is so separable from that which was held invalid as to stand notwithstanding the invalidity of a portion of the law.

Subdivision 3, § 8, art. 1, of the Constitution of the United States, reads: "The Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." In the exercise of the power conferred by that provision, Congress enacted that portion of the employer's liability act which declared that "common carriers engaged in commerce between the states, etc., shall be liable to any of their employes," etc. That language was by the Supreme Court of the United States in the Employer's Liability Cases held to embrace injuries which might be received by employes of such carriers when not engaged in commerce between the states. Therefore the court held that the law exceeded the powers of Congress and was void. Because the liability to the two classes of employes was inseparably blended in the language of the act, the court held that the provision with regard to liability of carriers engaged in interstate commerce was void as a whole. Congress is by the Constitution invested with full power to legislate for and make all rules and regulations necessary for the government of the territories of the United States. In the exercise of that power Congress, in enacting the employer's liability law, provided for the liability of carriers engaged in commerce within the territories to any of their

employés, whether engaged in interstate commerce or otherwise. This part of the act, being strictly within the powers of Congress, must be held valid, unless it is rendered invalid by reason of its being inseparably connected with that portion of the act which is void. We will now proceed to examine the relation which these two provisions bear to each other.

Thus we see that the liability law is the product of two distinct powers, embracing two distinct subjects, and might with propriety have been enacted into separate statutes. Indeed, for construction and application it must be divided thus: "That every common carrier engaged in trade or commerce in the District of Columbia or in any territory of the United States \* \* \* shall be liable to any of its employés," etc. This is a complete law with regard to the liability of carriers within the territories, and its separation from the other portions of the statute does not in the least impair either; but there remains intact ample provision as to the liability of the carrier engaged in commerce between the states, which would read: "That every common carrier engaged in trade or commerce \* \* \* between the several states or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with any foreign nation, or between the District of Columbia or state or states or foreign nations, shall be liable," etc. The learned judge who wrote the opinion in the Employer's Liability Cases so separated these subjects by not considering the portion we have under examination. Indeed, that law cannot be applied to either class of employers without separating the provisions as above. The terms of one clause cannot be applied to the subject of the other. The provision of the law under which defendant in error claims damages being independent of the invalid clause, we will presume that Congress would have enacted the valid part without that which was condemned by the court. Congress was not only authorized to legislate for the territories, but it was its duty to do so, and we are unable to see any reason for supposing that that body would not have performed the duty in this instance. In a well-considered and able opinion by Chief Justice Shepard, the Court of Appeals for the District of Columbia has sustained the validity of the employer's liability law in its application to that district. *Hyde v. Southern Ry. Co.*, 37 App. D. C. 466; *Hanley v. Railway Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333.

The Court of Civil Appeals erred in reversing the judgment of the district court.

It is therefore ordered that the judgment of the Court of Civil Appeals be reversed, and the judgment of the district court be affirmed.

WHITIS v. ROBISON, Land Commissioner, et al.

(Supreme Court of Texas. March 31, 1909.)

PUBLIC LANDS (§ 173\*)—COMPETITIVE BIDDING—DEPOSITS REQUIRED.

The highest bidder for school land open to competitive bidding deposited in the State Treasurer's office before 10 a. m. on the day fixed to open the bids a check on a bank for the first payment. He had been informed by the chief clerk that a check would be received for the first payment, and it was received as a payment and collected on the afternoon of the same day. Held, that the check was a payment, entitling the bidder to the land.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 173.\*]

Original petition for mandamus by Thomas P. Whitis against J. T. Robison, Commissioner of the General Land Office, and another, to set aside an award of a section of school land, and to award the same to relator. Refused.

N. A. Rector, for relator. R. V. Davidson, Atty. Gen., and Wm. E. Hawkins, Asst. Atty. Gen., for respondent commissioner. Chas. Rogan, for respondent Blauser.

GAINES, C. J. The relator, Whitis, seeks by his petition, to compel the Commissioner of the General Land Office to set aside an award of a section of school land made to the co-respondent, Blauser, and to award the section to him. The land was on the market, and was set down for competitive bidding on the 24th day of October, 1908. The relator made application to purchase the section at \$12.51¼ per acre, and before the 24th day of October aforesaid had paid into the state treasury one-fortieth of the purchase money as required by law. He also avers that the co-respondent, Blauser, previous to the 24th day of October, made application to purchase the section, bidding therefor the sum of \$14.65 per acre, but that, instead of depositing his first payment of one-fortieth of the purchase money, he, before 10 o'clock a. m. of that day, deposited a check on a bank in Austin, which check was not collected until the afternoon of the same day.

The co-respondent Blauser's answer shows that one Gibbs acted for him as agent in making his application to purchase the land, and that Gibbs, upon repairing to the State Treasurer's office, was informed by the chief clerk that a check on a bank would be received for the first payment. Now, it seems to us that when he was informed that a check would be taken as payment of the money, and a check was received, it should be taken as a payment; but, at all events, it was received as a payment, and was collected and applied to the first payment of the land. This is unlike the case of *Rawls v. Terrell* (Tex.) 105 S. W. 488. There no money was paid until after the bids were opened and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Rawls declared the successful bidder. It was said in that case that to allow Rawls to pay after the bids were opened would be to allow him to decline to pay and then to purchase the land at its appraised value. In this case Blauser could no more have withdrawn his check than he could have withdrawn his money. The relator's proposition is that since, when the bids were opened, he had his one-fortieth of the purchase money in the treasury, and Blauser had only a check there, Blauser's bid was not effective, and that, his bid being the next highest, he was entitled to an award of the land.

But we think the check in this case should be deemed a payment of the first part of the purchase money for the land, and therefore the petition for the writ of mandamus is refused.

#### GILMER'S ESTATE v. VEATCH.

(Supreme Court of Texas. March 24, 1909.)

##### 1. APPEAL AND ERROR (§ 747\*)—PARTIES ENTITLED TO ALLEGE ERROR—CROSS-ASSIGNMENTS OF ERROR.

Where one of several plaintiffs appealed, but neither defendant nor any of the coplaintiffs perfected an appeal, cross-assignments of error having no reference to appellant, nor to that part of the judgment appealed from, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3054; Dec. Dig. § 747.\*]

##### 2. VENDOR AND PURCHASER (§ 230\*)—BONA FIDE PURCHASER—NOTICE.

A deed purporting to convey the grantor's interest as an heir does not apprise the purchaser, acquiring the land in good faith and for value, of the fact that the grantor was a son, and that his father had been a married man, and that the property might have been acquired in the lifetime of the grantor's mother, in the absence of anything to indicate that when the deed was executed the grantor's mother was then living.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 509; Dec. Dig. § 230.\*]

Error from Court of Civil Appeals of Fourth Supreme Judicial District.

Action by John A. Veatch and others against A. Gilmer and others. There was a judgment of the Court of Civil Appeals (111 S. W. 746), affirming a judgment in part for plaintiffs, rendered on the appeal of one of the plaintiffs, John A. Veatch; and the estate of A. Gilmer brings error. Modified and affirmed.

Geo. E. Holland, for plaintiff in error. W. D. Gordon, for defendant in error.

**GAINES, C. J.** This is an agreed case. The agreement shows that John A. Veatch during his lifetime became the owner of the south half and of an undivided one-eighth interest in the north half of the Kennard league of land, and that he sold 1,427 acres, and died possessed of 1,349 acres. This was the community property of John A. Veatch and

his deceased wife, who died in 1845. Veatch lived until 1870. He left only six children, all having been born of his said wife—Andrew A., Samuel H., Ada, Fannie, James J., and Alfred. Fannie and Alfred still live. Andrew A. died in 1871, and left John A. and Mary Veatch as his heirs. His widow married G. H. Snow, and is still living. Samuel died about 1904. Ada married J. M. Gitchell, and died May 31, 1898, and her husband died November 23, 1897. They left surviving them Ada, Corwin, Allan V., and Myrtle Gitchell. A son, Charles, died before his father and mother, without ever having been married. It is also agreed that the defendants own all the land in suit, the title to which has never passed out of the heirs of John T. Veatch, and that they acquired the property in good faith, for value, holding proper deed therefor. It is further agreed that under said powers of attorney Samuel H. Veatch, acting for himself and for Fannie Veatch and James J. Veatch, conveyed to D. J. Henderson the south half of the W. S. Kennard league, except 1,427 acres sold and conveyed by John A. Veatch in his lifetime, and also that he (Samuel H. Veatch), acting for himself and as attorney in fact for John A. Veatch, May Veatch, Ada V. Gitchell, J. M. Gitchell, and J. Alford Veatch, conveyed all the right, title, and interest they have as heirs at law in the W. S. Kennard league. It was further agreed that the Gitchell power of attorney was made, executed, and delivered in California, and by the law of that state it is provided by statute that "agency is terminated by notice to the agent of the death of his employer." The judgment of the trial court was that certain of the plaintiffs should recover of defendants 762 acres of the land in controversy. The judgment was affirmed by the Court of Civil Appeals. But, for the reason that only the defendant in error appealed, and that the plaintiff in error complained of the judgment only by cross-assignments, but one of which affected the defendant in error's interest in the judgment, the Court of Civil Appeals declined to consider any of them, except the latter, and, holding that it showed no error, affirmed the judgment.

We think this action of the Court of Civil Appeals, in not considering the cross-assignments against parties who had not appealed, was correct; but we think they erred in not sustaining the cross-assignment which they did consider. That cross-assignment asserts that the court erred in not holding that the deed of John A. Veatch, by his attorney in fact, Samuel H. Veatch, did not convey the equitable title inherited from his mother in the land, and in decreeing that the vendee in such deed was an innocent purchaser of that interest. The agreed statement is "that the defendants own all the land in suit, the title to which has never passed out of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

heirs of John A. Veatch, and that they acquired the property in good faith, for value, holding proper deed therefor." But the Court of Civil Appeals held that, by reason of the fact that the deed purported to convey John A. Veatch's interest as an heir, this apprised the purchaser of the fact that he was a son, and that his father had been a married man, and that the property may have been acquired in the lifetime of his mother. It seems to us that this is pushing the doctrine of notice too far. There was nothing upon the face of the deed to indicate that at the time it was executed John A. Veatch had a wife then living, so there is nothing on the face of the papers to give notice of that fact. We are unable to discern any fact in the case that should have put the purchasers of the land upon notice that Mrs. Veatch was living at the time the land was acquired by her husband, John A.

Therefore we are of the opinion that, instead of recovering of John A. Veatch 111 acres of the land, the defendant should have recovered 222 acres; and accordingly the judgment will in that respect be reformed, and in all other respects affirmed.

### BECKHAM v. COLLINS.

(Court of Civil Appeals of Texas. Feb. 27, 1909.)

#### 1. EVIDENCE (§ 397\*)—PAROL EVIDENCE AFFECTING WRITINGS.

In the absence of fraud, accident, or mistake in the execution of a written contract, parol evidence of prior conversations and negotiations is inadmissible to vary its terms.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1758-1765; Dec. Dig. § 397.\*]

#### 2. MALICIOUS PROSECUTION (§ 67\*)—ACTIONS—DAMAGES.

Attorney's fees as such, are not recoverable in a suit for damages for malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 155, 156; Dec. Dig. § 67.\*]

#### 3. MALICIOUS PROSECUTION (§ 67\*)—ACTIONS—DAMAGES.

Attorney's fees are not recoverable as such in a suit for the malicious suing out of an attachment.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 155, 156; Dec. Dig. § 67.\*]

#### 4. MALICIOUS PROSECUTION (§ 68\*)—ACTIONS—DAMAGES.

Fees which a party has promised to pay his attorneys for prosecuting his claim for damages for the malicious suing out of a distress warrant are not recoverable as part of the exemplary damages sought to be recovered.

[Ed. Note.—For other cases, see Malicious Prosecution, Dec. Dig. § 68.\*]

#### 5. LANDLORD AND TENANT (§ 274\*)—RENT—DISTRESS—WRONGFUL DISTRESS.

To recover damages for suing out a distress warrant under Sayles' Ann. Civ. St. 1897, arts.

3236, 3240, the tenant must show that the warrant was both illegally and unjustly sued out.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1154-1166; Dec. Dig. § 274.\*]

#### 6. DAMAGES (§ 87\*)—EXEMPLARY DAMAGES—NATURE AND THEORY.

Exemplary damages cannot be recovered in the absence of a showing of actual damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 191; Dec. Dig. § 87.\*]

#### 7. MALICIOUS PROSECUTION (§ 68\*)—ACTIONS—DAMAGES.

Vexation is not an element of exemplary damages recoverable in a suit for the malicious suing out of a distress warrant.

[Ed. Note.—For other cases, see Malicious Prosecution, Dec. Dig. § 68.\*]

#### 8. DAMAGES (§ 220\*)—VERDICT—CONFORMITY TO PLEADINGS.

The jury cannot give damages for items not sued for.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 220.\*]

Appeal from Limestone County Court; James Kimbell, Judge.

Action by J. J. Beckham against F. P. Collins. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The appellee not having entered an appearance in this court, we take the statement of the case from the brief for the appellant, as follows: F. P. Collins, appellee, defendant below, rented from appellant in the year 1907, under a written contract, 75 acres of land, for which he was to pay as rents one-third of the corn and one-fourth of the cotton, cotton seeds, etc. Prior to December 4, 1907, the tenant had removed from the rented premises four bales of cotton without his landlord's consent and one bale over his protest and that of his manager. On the day last named appellant sued out a distress warrant before the justice of the peace in the precinct in which the premises were situated, and the constable levied on certain corn and cotton, gathered and ungathered, that he valued at \$204. Plaintiff claimed in his suit \$161.58 for rents and advances and asked for foreclosure of his landlord's lien. He also sued for \$35 damages for breach of contract, but for the security of these damages he claimed no lien. On January 7, 1908, the parties appeared, and defendant moved to quash the distress warrant and to dismiss the case, because the return of the officer showed that the property was valued by him at more than \$200. These motions were overruled. He filed a written answer, claiming that the distress warrant was illegally and unjustly sued out, and laid his damages at \$37.50 actual and \$160 exemplary damages. The case was tried by a jury in the justice court and resulted in a verdict for \$100 damages in favor of defendant. Plaintiff appealed to the county court. On March 9, 1908, the case was tried by a jury in the county court and resulted in a verdict and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

judgment in favor of defendant for \$317.81. Plaintiff perfected an appeal to this court.

Thomas J. Gibson, for appellant.

BOOKHOUT, J. (after stating the facts as above). Upon the trial defendant was permitted to testify, over plaintiff's objection, as follows: "After I had been on the place about a month, and about the 1st of February, 1907, Mr. Beckham came to my house and stayed all night. After supper we were sitting before the fire, and I said to him that he told me he had had the burrs and weeds cleaned off the land the year before, and that such was not the case, and unless he released me from that part of my contract in which I agreed to keep the land clean of burrs and weeds I would have to leave the place. He replied: 'All right. Go ahead and do the best you can. I will do what is right.'" The objection made to this evidence was that it sought to vary the terms of the written contract between the parties. The plaintiff had read in evidence a written contract between himself and defendant, wherein defendant had agreed to cultivate all the land and allow no burrs or weeds to go to seed upon the land. The conversation testified to by defendant took place prior to the execution of the written contract, and in effect varies its terms. The rule is that all conversations and negotiations had prior to the execution of the written contract are merged in the same. There being no allegation in the pleading that there was any fraud, accident, or mistake in the execution of the contract, parol evidence was inadmissible to change or vary its terms. For the same reason the trial court erred in admitting the testimony of the witnesses Agnes Collins, May Collins, and T. M. Leamons to the same conversation.

Complaint is made of the paragraph of the court's charge, wherein the jury were instructed that defendant would be entitled to recover reasonable attorney's fees if they found the distress warrant was sued out maliciously and without probable grounds. The appellee alleged that he had been compelled to pay \$50 attorney's fees because of the malicious acts of plaintiff, and prayed judgment therefor as part of the exemplary damages sought to be recovered by him. He testified he had promised to pay his attorneys \$50 for their services, but had not paid them because he did not have the money. In the case of *Landa v. Obert*, 45 Tex. 540, which was a suit to recover damages for malicious prosecution, the court, on page 540, says: "When a party is entitled to vindictive damages, the jury in making up their verdict may, no doubt, if they are so disposed, consider the plaintiff's expenses in prosecuting the suit, and if their verdict is not so grossly excessive as to warrant the court in setting it aside, no inquiry can be made as to the inducement operating on their minds in reach-

ing their conclusion, and there are, unquestionably, cases in which the court has suggested such expenses as a proper subject for the consideration of the jury in fixing damages that should be allowed the plaintiff; but we are of the opinion that the decided weight of authority is against the proposition that the plaintiff has the right to claim his counsel fees, even in such cases, as a part of his damages, for, if so, and the jury failed to allow them, it would seem their verdict should be set aside." This case we regard as authority that attorney's fees, as such, are not recoverable in this state in a suit for damages for malicious prosecution. It has been held attorney's fees are recoverable where made necessary by the wrongful act. *Findley v. Mitchell*, 50 Tex. 143; *Anderson v. Larremore*, 1 White & W. Civ. Cas. Ct. App. § 948. In the case of *Findley v. Mitchell*, above cited, Mitchell sued Findley, a constable, and his sureties, for wrongfully refusing Mitchell the right to replevy certain personal property seized by the constable under a writ of sequestration. Mitchell employed counsel to aid in replevying the property and set up the counsel fees as part of his damages. The trial court admitted evidence of the attorney's fees paid by Mitchell for services rendered in inducing Findley to approve his replevin bond. On appeal it was held that the evidence was properly admitted; the court saying: "Mitchell in his petition had alleged such employment as caused by a denial of his right; and in view of that fact and of his claim for vindictive damages, we are of the opinion that there was no error in admitting the evidence." In that case the attorney's fees were made necessary by the wrongful act. In the instant case attorney's fees are no part of the damages resulting as the natural and proximate consequence of the wrong complained of. This court has repeatedly held that attorney's fees are not recoverable as such in a suit for the malicious suing out of an attachment. *Yarborough v. Weaver*, 6 Tex. Civ. App. 215, 25 S. W. 468; *Strauss v. Dundon* (Tex. Civ. App.) 27 S. W. 503; *Jackson v. Poteet* (Tex. Civ. App.) 89 S. W. 980; *Chisenhall v. Hines* (Tex. Civ. App.) 100 S. W. 362. See, also, *Sherrick v. Wyland*, 14 Tex. Civ. App. 299, 37 S. W. 345; *Webb v. Harris*, 1 White & W. Civ. Cas. Ct. App. § 1035. We hold that the plaintiff Collins, was not entitled to recover fees which he had promised to pay his attorneys for their services for prosecuting his claim for damages.

It is contended that the verdict for exemplary damages is without evidence to support it, and is contrary to the evidence, for that the uncontradicted evidence shows that defendant owed plaintiff an account for rents and advances due and owing him, and while said account was so due and owing, defendant removed four bales of cotton raised on the rented premises from said premises with-



out plaintiff's consent, and removed another bale over the protest of plaintiff. The defendant admits removing the cotton from the rented premises without the consent of plaintiff. As we understand defendant's evidence, he admits owing some money to plaintiff on the rents and advances, but seeks to offset this with grubbing done by him on the premises. If defendant was owing plaintiff any sum for rents or advances made by plaintiff to enable defendant to raise a crop on the rented premises, then under the statute the plaintiff had a lien on said crops to secure the same, and it was unlawful for defendant to remove said crops or any part thereof from the rented premises without the consent of the landlord. Article 3236, Sayles' Ann. Civ. St. 1897; Wilkes v. Adler, 68 Tex. 690, 5 S. W. 497. If the defendant was owing plaintiff for rents and advances and was removing any of the agricultural products from the rented premises without the consent of the landlord, then under the statute plaintiff was authorized to sue out a distress warrant, and the suing out of the writ, under such circumstances, was not illegal. Article 3240, Sayles' Ann. Civ. St. 1897. In order to entitle defendant to recover damages, he would have to show that the distress warrant was both illegally and unjustly sued out. Slay v. Milton, 64 Tex. 421. Unless the suing out of the distress warrant by plaintiff was both illegal and unjust, he was not entitled to damages. If defendant was not entitled to actual damages, he could not recover exemplary damages.

The defendant claimed actual damages as follows:

Corn eaten up in field while under levy	\$ 12 50
Cotton destroyed while under levy....	25 00

**Exemplary damages:**

Attorney's fees he was compelled to pay	\$ 50 00
Time lost.....	50 00
Anxiety of mind.....	60 00

A total of.....	\$160 00
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**The verdict of the jury is as follows:**

Damages on corn.....	\$ 5 00
Damages on cotton.....	12 00
Damages gathering crop.....	36 00

Total actual damages.....	\$ 53 00
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Attorney's fees.....	\$ 50 00
Lost time.....	25 00
Vexation.....	25 00
Two-thirds corn.....	48 60
Three-fourths of cotton.....	132 40
Cotton seed.....	20 00

Total exemplary damages.....	\$301 00
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And a total of actual and exemplary damages, \$354. This was \$197.50 more than claimed by defendant in his answer. We have held that attorney's fees were not recoverable, and we know of no authority for a recovery for vexation in a suit of this char-

acter. The jury under no circumstances could give damages for items not sued for.

The judgment is reversed, and the cause remanded.

**WHITMIRE et ux. v. POWELL et al.**

(Court of Civil Appeals of Texas. Jan. 30, 1909. On Rehearing, March 20, 1909.)

**1. EXECUTORS AND ADMINISTRATORS (§ 431\*)—CLAIMS—ACTIONS TO ESTABLISH CLAIMS—CONDITIONS PRECEDENT.**

Under Rev. St. 1895, arts. 2015-2018, 2062, providing for the presentation of claims against a decedent's estate, and authorizing action on a rejected claim, a suit cannot be maintained on a claim against an estate unless it has been presented to the executor or administrator and by him rejected, and this is true even though the claim be secured by lien.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1679-1682; Dec. Dig. § 431.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 431\*)—ESTABLISHMENT OF CLAIMS—"ANY CLAIM FOR MONEY."**

The words "any claim for money," in Rev. St. 1895, art. 2062, providing that when any claim for money, against an estate, has been rejected by the executor or administrator, the claimant may, within a specified time, sue to establish the same, do not mean both the debt and the lien as security therefor, but mean only the debt, and the claim only need be allowed and proved, or established, by suit.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1679-1681; Dec. Dig. § 431.\*]

For other definitions, see Words and Phrases, vol. 2, p. 1213.]

**3. EXECUTORS AND ADMINISTRATORS (§ 431\*)—CLAIMS—ENFORCEMENT.**

A husband, after purchasing land on which a vendor's lien was reserved for the price, and executing a deed of trust to secure the price, conveyed one-half thereof to his wife on her assumption of one-half of the debt. The wife died before the foreclosure of the deed of trust and before the payment of the half of the price. Held, that the only remedy of the holder of the purchase-money notes was to present his claim, properly authenticated, to the administrator of the wife for allowance and to establish the claim by suit on the administrator rejecting it, and then enforce payment in due course of administration.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 431.\*]

**On Rehearing.**

**4. JUDGMENT (§ 747\*)—REQUISITES—DETERMINATION OF ALL ISSUES—PARTITION.**

Where a suit to partition land, one half of which belonged to the estate of a decedent, subject to the life estate of her husband, and the other half of which was owned by a third person as his separate property, was brought against the third person and his wife, a judgment disposing of the rights of the parties to the land effectually disposed of the rights of the wife of the third person so as to be a final judgment, though it did not mention her name; her interest being wholly dependent on that of her husband.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1286; Dec. Dig. § 747.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**5. EXECUTORS AND ADMINISTRATORS (§ 227\*)—CLAIMS—PRESENTATION—SUFFICIENCY.**

The affidavit required by Rev. St. 1895, art. 2070, prohibiting the allowance of any claim for money against an estate, unless the claim is accompanied by an affidavit that the same is just, etc., must contain the statutory requisites, and where any one of such requisites is omitted, the affidavit is defective, and the allowance of the claim is forbidden, and, if made without such affidavit, is without force.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 815; Dec. Dig. § 227.\*]

**6. EXECUTORS AND ADMINISTRATORS (§ 227\*)—CLAIMS—PRESENTATION—SUFFICIENCY—"PRESENTATION OF CLAIM AGAINST ESTATE."**

To constitute a legal presentation of a claim against an estate within Rev. St. 1895, art. 2090, providing that no judgment shall be rendered in favor of a claimant on any claim for money which has not been legally presented to the executor or administrator, and by him rejected, the claim, when presented, must be verified by an affidavit stating the requisites prescribed by article 2070.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 815; Dec. Dig. § 227.\*]

**7. EXECUTORS AND ADMINISTRATORS (§ 443\*)—CLAIMS—SUIT TO ESTABLISH.**

A claimant suing on a claim against an estate must not merely allege the presentation and rejection of the claim, but must also allege the proper authentication of the claim when presented.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1808; Dec. Dig. § 443.\*]

**8. APPEAL AND ERROR (§ 909\*)—PRESUMPTIONS IN SUPPORT OF JUDGMENT.**

Where judgment was rendered against a claimant seeking to establish a claim against an estate, the court on appeal could not presume that the claim, when presented to the administrator and by him rejected, was verified, as required by statute.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 909.\*]

**9. EXECUTORS AND ADMINISTRATORS (§ 437\*)—CLAIMS—SUIT TO ESTABLISH—LIMITATIONS.**

Rev. St. 1895, art. 2082, providing that when any claim for money against an estate has been rejected by the executor or administrator the claimant may within 90 days after rejection, and not thereafter, sue to establish the claim, extinguishes a claim which has been rejected by an administrator and for the establishment of which suit has not been brought within the statutory time, and the bar created by the statute cannot be waived by the administrator, either by failure to plead the bar, or by agreement with the creditor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1758; Dec. Dig. § 437.\*]

**10. APPEAL AND ERROR (§ 916\*)—PRESUMPTIONS.**

Where, on appeal from a judgment disallowing a claim against an estate, the record did not show whether the original pleading demanded the allowance of the claim, or whether the original pleading was filed within 90 days after the rejection of the claim, and it appeared that an amended pleading praying for the allowance of the claim was filed after the expiration of 90 days, the court would not presume that the allegations, asking for the allowance of the

claim, were made in the original pleading, and that the same was filed within the 90 days.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8699-3705; Dec. Dig. § 916.\*]

**Error from District Court, Dallas County.**

Action by R. H. Powell, as administrator of Jennie E. Pippin, deceased, and another, against A. P. Whitmire and wife. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

Geo. H. Plowman and M. T. Connor, for plaintiffs in error. Harry P. Lawther, for defendants in error.

**TALBOT, J.** This suit was instituted by R. H. Powell, as administrator of the estate of Jennie E. Pippin, deceased, and J. M. Powell in his own right and as next friend of Clark Powell, to partition the land described in the plaintiffs' petition. J. D. Pippin, who was the husband of Jennie Pippin at the time of her death, and whose whereabouts it seems had been unknown since 1897, was subsequent to the filing of the suit made a party defendant. The petition alleged the appointment and qualification of R. H. Powell as the administrator of the estate of Jennie Pippin, deceased, and the pendency of administration upon her estate; that Clark Powell was a minor and the only surviving child of the said Jennie Pippin, who had no legally appointed guardian; that plaintiffs and the defendants, A. F. Whitmire and wife, were the owners and tenants in common of the tract of land described in plaintiffs' petition; that the plaintiffs owned jointly in fee simple an undivided one-half of said land and the said defendants the other one-half. It was further alleged that if the defendant J. D. Pippin was alive he had a life estate of one-third interest in the plaintiffs' one-half of said land, and that the defendant A. F. Whitmire, since the 25th day of January, 1901, had been and was then in the exclusive possession of the entire tract of land, appropriating to himself all the rents arising therefrom, and had denied the plaintiffs joint possession with him. There was a prayer for partition and for rents. J. W. Thompson, Esq., an attorney, was appointed by the court to represent J. D. Pippin, and in writing admitted the truth of plaintiffs' pleadings and adopted the same. The defendant A. F. Whitmire, by an amended answer filed June 20, 1904, pleaded a general denial, and specially: That on February 1, 1897, F. H. Doran and wife conveyed to J. D. Pippin the land in question for \$625 in cash and five promissory notes for \$100 each, of even date with his deed, payable to F. H. Doran on the 1st day of February, 1898, 1899, 1900, 1901, and 1902, respectively, with 10 per cent. interest from date, and providing for 10 per cent. attorney's fees. That said notes were secured by a vendor's lien

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

retained in said deed and notes, and by deed of trust on said property executed by Pippin to W. H. Lewis, trustee. That on February, 13, 1897, Pippin, then being the husband of Jennie E. Pippin, conveyed to her an undivided interest of one-half in said land for the recited consideration of \$312.50 cash, and the assumption on her part of the payment of one-half of said five promissory notes of \$100 each executed by J. D. Pippin to Doran for the 15 acres of land. That at the time of the death of said Jennie E. Pippin said notes were outstanding and unpaid, and were by transfers assigned and conveyed for value by Doran to Mrs. E. E. Waller, and by her assigned to A. F. Whitmire. That heretofore A. F. Whitmire had presented said notes and claim for said unpaid purchase money to Powell, administrator of said estate of Jennie E. Pippin, deceased, for allowance to the extent of one-half of the unpaid purchase money. That Powell, administrator, rejected said claim and refused to pay same, and it became necessary to place said notes in the hands of an attorney for collection. That the rejected claim against the estate of Jennie E. Pippin, deceased, was sued upon in the county court of Dallas county within the proper time, and averred that said land should not be partitioned until said claim and lien of Whitmire was tried and determined, and prayed that said claim be established and allowed, and that if the land be partitioned that it be declared subject to said unpaid purchase money to the extent of one-half of same, and that said lien be foreclosed. Whitmire also pleaded permanent and valuable improvements of \$2,000 made in good faith, and that if the land be partitioned that he be allowed the value of said improvements, or that said part on which said improvements were located be set aside to him.

In reply to this pleading of the defendant Whitmire, the plaintiffs filed a supplemental petition, and specially pleaded the bar of the statute of limitation of four years to the notes declared on by said Whitmire and maturing respectively February 1, 1898, 1899, and 1900; that the remaining two notes had been satisfied in full to the holder of the same in December, 1900, by a sale under the deed of trust referred to in defendant's answer; that the holder of such of the notes as were not barred had elected to pursue her remedy for their satisfaction by sale under said trust deed; that P. C. Whitmire, from whom plaintiff in error claimed, had elected to stand upon said trustee's sale, and, claiming thereunder, had instituted suit in trespass to try title against defendants in error for the land; and that thereafter judgment had been rendered by the district court of Dallas county vesting title to an undivided one-half interest in said land in defendants in error, which judgment had been made final by the Supreme Court of the state. Plaintiffs further alleged that if defendant had made any improvements on the land he had

made same pending the suit of P. C. Whitmire v. May et al., and that same were not made in good faith. Defendant Whitmire, by supplemental answer, alleged: That the conveyance of the land in controversy by the trustee, under the deed of trust on December 11, 1900, vested in Mrs. Waller the superior title to the same, which had up to this time remained in Doran; that subsequently Mrs. Waller conveyed said land and transferred the notes she held to P. C. Whitmire; that by transfer of said land and notes from P. C. Whitmire the superior title to the same had been vested in him (A. F. Whitmire), and that he was subrogated to all the right of the original vendor. The prayer of this pleading was that the land be decreed to defendants, and that they be quieted in their title. The case went to trial, and after the conclusion of the evidence the court instructed the jury to find: That plaintiffs, Clark Powell and J. M. Powell, own an undivided one-half of the land, and that the defendant, A. F. Whitmire, owns the other one-half, and were entitled to a partition thereof; that J. D. Pippin owns a life estate of an one-third interest in plaintiff's one-half of said land; that R. H. Powell, as administrator of Jennie Pippin, deceased, was entitled to the possession and control of plaintiffs' one-half of said land during the continuance of the administration. They were further instructed to find for the defendant Whitmire on the issue of rents and against him on the issue of improvements in good faith and on his claim of lien. A verdict was returned by the jury as instructed, and judgment entered in accordance therewith. From this judgment A. F. Whitmire and wife prosecute this writ of error.

The facts, so far as we deem it necessary to state them, are as follows: On February 1, 1897, F. H. Doran sold to J. D. Pippin the tract of land involved in this suit. Pippin paid \$625 in cash and executed to Doran five promissory notes of \$100 each, maturing respectively on the 1st day of February, 1898, 1899, 1900, 1901, and 1902, as a consideration for said land. Doran's deed reserved a lien on the land to secure the payment of said notes and, in addition thereto, Pippin on the date of said deed executed a deed of trust which empowered the trustee, W. H. Lewis, to sell the land for the payment of said notes in case of default. On February 13, 1897, Pippin, for a recited consideration of \$312.50 in cash and the assumption of the payment of one-half of said purchase-money notes given Doran, conveyed to his wife, Jennie E. Pippin, an undivided one-half interest in the land. Mrs. Pippin died February 5, 1900, and left surviving her two children, plaintiff Clark Powell and Claud Powell. These children were sons by J. M. Powell, a former husband, and Claud Powell died childless, unmarried, and intestate. Plaintiff R. H. Powell qualified as administrator of Mrs. Jennie E. Pippin's es-

tate August 5, 1900, and the administration is still pending. Before their maturity F. H. Doran indorsed and delivered the five notes, executed by J. D. Pippin as a part of the consideration for the land, to Mrs. E. E. Waller. There was also indorsed on the first of said notes falling due the following: "For value received I hereby transfer this note to A. F. Whitmire without recourse on me. It is further agreed that this note becomes a second lien on the within described property as against the four \$100 notes unpaid. Jan. 31, 1898. Mrs. E. E. Waller. Gahagan." And the second of said notes falling due bears also the following indorsement: "For value received this note is transferred to A. F. Whitmire, and it is agreed that this note becomes a second lien to the three unpaid notes, not yet due. 2—2—99, Mrs. E. E. Waller, G." Default having been made in the payment of said five notes, Mrs. Waller, as she was authorized to do by a provision in said notes, declared them all due, and at her request the trustee, Lewis, on December 5, 1900, in pursuance of the power conferred by the deed of trust, after the death of Mrs. Pippin, and during administration upon her estate, sold the entire tract of land in controversy, and Mrs. E. E. Waller became the purchaser at the sale. After her purchase at this sale, Mrs. Waller conveyed the land to P. C. Whitmire, the father of plaintiff in error, A. F. Whitmire, for a recited consideration of \$388. Upon his purchase P. C. Whitmire brought suit against Sallie May, the tenant in possession, to recover the property, and R. H. Powell, as administrator of the estate of Mrs. Pippin, who had put Sallie May in possession of said land, appeared and defended the suit. The trial of that suit resulted in a judgment in favor of the plaintiff P. C. Whitmire for an undivided one-half of said land and in favor of the estate of Mrs. Pippin for the other one-half, and on appeal it was affirmed by the Court of Civil Appeals for the Fourth District, and writ of error having been granted, was later affirmed by the Supreme Court. On November 25, 1901, P. C. Whitmire for a recited consideration of \$1 paid, and love and affection, deeded the land to plaintiff in error A. F. Whitmire. At the time Mrs. Waller deeded the land to plaintiff in error's father, P. C. Whitmire, she also transferred to him the three notes given by J. D. Pippin to F. H. Doran, maturing respectively February 1, 1900, 1901, and 1902, and the said P. C. Whitmire, when he deeded said land to A. F. Whitmire, gave and transferred to A. F. Whitmire said notes. There was no proof whatever that the notes declared on by A. F. Whitmire or either of them had ever been presented and rejected by the administrator of the estate of Mrs. Pippin.

We are of the opinion the plaintiff in error was not entitled, under the state of the evidence and statutes of this state, as construed by our decisions, to have his alleged debt and

lien established against the estate of Mrs. Jennie Pippin to be enforced in the probate court and paid in due course of administration. By the statutes of this state relating to estates of deceased persons, every claim for money against a testator or intestate must be presented to the executor or administrator of the estate, accompanied by an affidavit in writing that the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed, etc. Without such presentation the executor or administrator is not authorized to allow, nor shall the county judge approve, the same. Rev. St. 1895, arts. 2015-2018. Article 2062 of said statutes provides that: "When any claim for money against an estate has been rejected by an executor or administrator either in whole or in part, the owner of such claim may, within ninety days after such rejection, and not thereafter, bring suit against the executor or administrator, for the establishment thereof in any court having jurisdiction of the same." By a number of decisions, beginning with *Cummings v. Jones*, Dall. Dig. (Tex.) 532, it has been held that such suit cannot be maintained unless the claim has been presented and rejected. *Hall v. McCormick*, 7 Tex. 269; *Millican v. Millican*, 15 Tex. 460; *Fulton v. Black*, 21 Tex. 424; *Wiley v. Pinson*, 23 Tex. 486; *Mortgage & Investment Co. v. Jackman*, 77 Tex. 622, 14 S. W. 305; *Bank v. Higgins*, 72 Tex. 66, 9 S. W. 745. In the case of *Mortgage & Investment Co. v. Jackman*, supra, it is said that, under the statute last above quoted, "it is only when a claim for money against the estate of a deceased person has been rejected by the administrator that the holder of the claim is entitled to bring an independent suit for its establishment." And, of course, it is essential in such case not only that the petition contain an allegation of the presentation and rejection of the claim, but that it be proven. *Cummings v. Jones*, supra. The words "claim for money," as used in the statute, do not mean both the debt and lien that may exist for securing its payment, but only the debt, and the claim only need be allowed and approved or established by suit. *Mortgage & Investment Co. v. Jackman*, supra. But the statute requiring the presentation of the claim and its approval or rejection applies with equal force to a claim secured by a vendor's or other lien as it does to any other character of claim, and that such presentation and rejection of the debt itself is a condition precedent to suit to establish it as a valid claim against the estate is well settled by the authorities cited. In the case at bar the presentation and rejection of the plaintiff in error's claim by reason of the notes set out in his answer was alleged, but no evidence in support thereof is pointed out in the brief, and after a careful search through the record we have found none. It follows that without proof of these allegations plaintiff in error was not entitled to a judgment of the court establishing his claim

against Mrs. Pippin's estate, and that the trial court's action in refusing such judgment must be sustained. We do not wish, however, to be understood as holding or indicating that, if the defendant Whitmire was entitled to have his debt established in this suit, a partition of the land should be delayed thereby.

We are also of the opinion that the plaintiff in error was not entitled to recover the land in question on the theory that he had, in addition to the notes, acquired the superior title thereto, which remained in F. H. Doran as the original vendor by reason of the express reservation in his deed of a lien to secure the payment of the unpaid purchase money. No deed from Doran conveying such title directly to him was shown. The claim is based upon the sale and conveyance made by the trustee, Lewis, at the instance of Mrs. E. E. Waller under the deed of trust executed by J. D. Pippin upon the land to secure said notes, and the deeds from her to P. C. Whitmire and from P. C. Whitmire to defendant; and that the sale made under said deed of trust, in view of Mrs. Pippin's prior death, was void and passed no title whatever to her interest in the land, is definitely settled by the decisions of the Court of Civil Appeals for the Fourth District, and of the Supreme Court in the case of Whitmire v. May et al., 29 Tex. Civ. App. 244, 69 S. W. 100, and s. c., 96 Tex. 317, 72 S. W. 375. In that case the Supreme Court, in affirming the judgments of the district court and Court of Civil Appeals, held, in effect, that Mrs. Pippin's death before the sale made by the trustee suspended, during the pendency of administration upon Mrs. Pippin's estate, the power of sale contained in the deed of trust, so far as her interest in the land was concerned, and that the purchaser, Mrs. Waller, at such sale, and those claiming through and under her, acquired no title to that interest. Therefore, plaintiff in error not having obtained any title to the undivided one-half of the land bought by Mrs. Pippin from J. D. Pippin, directly from F. H. Doran or by and through the conveyances introduced in evidence and upon which he relied, the superior legal title which remained in F. H. Doran by reason of the executory character of the sale of the land made by him, and the express reservation of the vendor's lien in his deed to secure the notes set up by defendant, is still held in trust by him, and the plaintiff in error's only remedy, if he had any, was to present his claim properly authenticated to the administrator of Mrs. Pippin's estate for allowance and approval, and, if rejected, to establish it by suit as provided by law, and then enforce its payment in due course of administration. It is clear he was in no position to recover the land, and, in the state of the evidence as we find it in this record, it is equally clear, for the reason already stated, that he was in no position in the trial court, nor is he in this court, to ask for and obtain a judgment establishing any claim he may have

against Mrs. Pippin's estate, to be enforced through the probate court.

No other question raised and discussed in the briefs need be passed upon, for, if correct in what we have said, those matters become immaterial on this appeal.

The judgment of the court below is affirmed.

#### On Rehearing.

Plaintiff in error, in his motion for a rehearing, contends that we "erred in not holding on the motion of defendant heretofore made that the judgment rendered in said cause was not a final judgment." The contention seems to be based on the fact that Mrs. Whitmire, wife of plaintiff in error, was joined in the suit with him, and that the final judgment of the court makes no mention of her. This matter was not assigned as error, and the nearest approach to a motion "heretofore made that the judgment rendered was not a final judgment" is the following statement made by plaintiff in error in a reply to and contest of defendants in error's motion to dismiss the writ of error, namely: "The plaintiff in error in his motion for a new trial moved the trial court to set aside the judgment because it did not dispose of Mrs. A. F. Whitmire, one of the parties defendant in the suit, and plaintiff in error now respectfully calls the attention to same and submits for determination whether or not the judgment herein is a final judgment." If we admit that the question is sufficiently presented to require notice of it by this court, yet it is quite clear, we think, that Mrs. Whitmire was neither a necessary nor a proper party to the suit. It seems to be undisputed that she had no interest in the land sought to be partitioned, separate from her husband's interest. One-half of said land belonged to the estate of Mrs. J. D. Pippin, deceased, subject to the life estate of J. D. Pippin, and the other one-half was owned by A. F. Whitmire as his separate property. It appears very clearly from the evidence that an undivided one-half interest in said land was acquired by A. F. Whitmire by gift from his father, P. C. Whitmire. Any interest Mrs. Whitmire may have had by reason of being A. F. Whitmire's wife was effectually disposed of by the judgment entered disposing of his interest, and was not less final because of its failure to dispose of her as a party to the suit by express mention of her name.

It is contended that we erred in holding, in our original opinion, that the record fails to show that the claim of plaintiff in error by reason of the notes set out in his answer had not been presented to and rejected by the administrator of the estate of Mrs. Jennie Pippin, deceased. In support of this contention plaintiff in error quotes certain statements found in defendants in error's brief and supplemental petition, which were not theretofore called to our attention. From the brief he quotes the following: "Pending this suit and on the 18th of February, 1904,

A. F. Whitmire, claiming to be the owner thereof, presented said five notes to R. H. Powell, administrator of the estate of Jennie Pippin, for allowance. On that day said first three notes being barred by limitation, and the last two having been declared due by their then holder, Mrs. E. E. Waller, in November, 1900, and having been satisfied by trustee's sale at her direction on December 4, 1900, the title in fee of one-half of the land having been decreed to the estate of Jennie Pippin by the Supreme Court in *Whitmire v. May et al.*, supra, said Powell, administrator, refused to allow same. On the 14th day of April, 1904, A. F. Whitmire, plaintiff in error herein, brought suit in the county court of Dallas county, Tex., against said Powell, administrator, on said five notes and for foreclosure of the vendor's lien on the land. The first three notes were barred by limitation, and the other two satisfied and discharged when presented to the administrator for allowance and when suit was brought on same in the county court." From the supplemental petition he quotes the following: "The five promissory notes for \$100 each were never presented to the plaintiff as administrator of the estate of Jennie Pippin, deceased, until the 18th of February, 1904, and they were barred by the statute of limitations, and the plaintiff could not legally allow same; that the defendant \* \* \* never made any claim against said estate on account of said notes, and never presented same until February 18, 1904, to the plaintiff as administrator of the estate of Jennie Pippin, deceased."

In further support of this contention, plaintiff in error refers to the following questions asked him when he was on the witness stand, and answers made thereto: "Q. Did you ever present these notes that you say you own to Powell, administrator, for allowance? A. I turned the matter over to Mr. Conner, for my father, and I don't know whether he presented them or not. I suppose that he did. I understood that he did. Q. Is it not a fact that Conner never presented these notes to this administrator until after the final determination of this suit that your father had instituted against Sallie May? A. I understood that he did before. That was my understanding." We were of the opinion when the original opinion was written, and are still of the opinion, that this oral testimony of the plaintiff in error practically amounted to no testimony as going to establish the fact alleged that the notes were presented and rejected, and if it should be conceded that the excerpts, quoted above from the brief and pleadings of the defendants in error, were sufficient to show prima facie such presentation and rejection, still we think the plaintiff in error was not entitled, for the reasons hereinafter stated, to have his alleged debt and lien or any part of said debt established in this suit against Mrs. Pippin's estate and its collection enforced through the pro-

bate court in due course of administration. Article 2070 of our Revised Statutes of 1895 provides that: "No executor or administrator shall allow any claim for money against his testator or intestate, nor shall any county judge approve the same, unless such claim is accompanied by an affidavit in writing that the claim is just and that all legal offsets, payments and credits known to affiant have been allowed. Such affidavit if made by any other person than the owner of the claim, shall state further that the affiant is cognizant of the facts contained in his affidavit." The affidavit required by this statute for the authentication of a claim against an estate must contain all the requisites prescribed by said statute. If any one of its essential requisites is omitted, the affidavit is fatally defective, and the administrator of the estate is forbidden to allow the claim. Should the claim be allowed or approved without such affidavit, the allowance or approval will be of no force or effect. Article 2075. Article 2090 of the statute provides that: "No judgment shall be rendered in favor of a claimant upon any claim for money, which has not been legally presented to the executor or administrator, and rejected by such executor or administrator, either in whole or in part." To constitute a legal presentation of the claim within the meaning of this statute, it is essential that the claim when presented be verified by an affidavit stating all the facts required to be stated by article 2070. So that the presentation of the claim to the executor or administrator authenticated in the manner prescribed by law and its rejection by him, either in whole or in part, is a condition precedent to a suit for its establishment against the estate. Such authentication, presentation, and rejection must be averred and proved. It is not enough to merely allege its presentation and rejection, but its proper authentication should also be alleged. It has been so held under statutes practically the same as those herein referred to and now governing the subject. *Walters v. Prestidge*, 30 Tex. 74; *Gillmore v. Dunson*, 35 Tex. 436; *Thompson v. Branch*, 35 Tex. 20. Until presented, properly authenticated, and rejected by the administrator, the claim has no judicial standing and cannot be made the foundation of an action having for its purpose the collection of such claim out of the assets of the estate. To the end that an estate may be protected from fraud and imposition, the statute, which declares that no executor or administrator shall allow any claim for money against his testator or intestate, nor shall any county judge approve the same unless such claim is accompanied by an affidavit as in such statute prescribed, is mandatory, and prohibits the representative of the estate from allowing or paying any claim not so authenticated. In addition to this statute, article 2090, above quoted, by which the courts are inhibited from rendering judg-

ment in favor of a claimant suing on a claim which has not been legally presented to the executor or administrator and by him rejected, was enacted as a further safeguard and protection of the estate.

In the instant case plaintiff in error neither alleged, nor did he prove, that the claim sought to be established by him against the estate of Mrs. Pippin was properly authenticated. It was merely alleged that said claim had been presented and rejected, and neither by any statement made in defendants in error's brief or pleading, nor in any other way, does it appear that the claim was accompanied by the affidavit prescribed by the statute. The notes were introduced in evidence, and while the record shows that certain indorsements were made upon them, yet it does not appear that either of said notes was accompanied by the affidavit prescribed in article 2070 of the statute, nor does it appear that either had indorsed thereon or annexed thereto a memorandum in writing signed by the administrator of Mrs. Pippin's estate showing its rejection by said administrator. It follows that, in the absence of allegations and proof that plaintiff in error's claim, based on the notes set out in his answer, was duly authenticated as prescribed by the statute, he failed to make out such a case as authorized a judgment in his favor. Judgment having been rendered against plaintiff in error as to the establishment of his claim, no presumption can be indulged that said claim, when presented to the administrator and by him rejected, if it was so presented and rejected, was properly verified.

But again, article 2082 of our statute, which is quoted in our original opinion, provides that, when any claim for money against an estate has been rejected by the executor or administrator of the estate either in whole or in part, the owner of such claim may within 90 days after such rejection, and not thereafter, bring suit against the executor or administrator for its establishment in any court having jurisdiction of the same. This article is not a general statute of limitation which must be pleaded in order to avail one's self of it, but by its very terms is a prohibitory statute, and extinguishes a claim which has been rejected by an administrator and for the establishment of which suit has not been brought within the time therein prescribed. The language is that the owner of the rejected claim "may within ninety days after such rejection, and not thereafter, bring suit," etc. This language is positive and forbids the bringing of the suit after the expiration of 90 days from the date of the rejection of the claim. The bar created by this statute cannot be waived by the personal representative of the estate either by failure to plead the bar, or by agreement with the creditor. Such statute absolutely extinguishes the right of the claimant, instead of affecting the remedy merely. 18 Cyc. p. 937, and

authorities cited. The answer of the plaintiff in error, setting up in the lower court the notes sought to be established as a just claim against the estate of Mrs. Pippin, as appears from the record sent to this court, was filed June 20, 1904, and the statements made in the brief and pleadings of the defendants in error, and which are invoked by plaintiff in error as admissions on the part of defendants in error of the presentation and rejection of his said claim by the administrator of Mrs. Pippin's estate, show without contradiction that such presentation and rejection occurred on the 18th day of February, 1904. Thus it appears that the suit of plaintiff in error to establish, in the district court, said claim against said estate, was not filed within 90 days after its rejection by the administrator, and for that reason he was not entitled to the judgment sought. In the case of Crosby v. McWille, et al., 11 Tex. 94, after stating that the plaintiff had three months from the date of the rejection of his claim to bring suit, and not thereafter, it is said: "This not having been done, the claim was fully and completely barred by the limitation to this right imposed. The debt was no longer a subsisting debt against the estate." It is true in that case the failure to bring the suit within three months was pleaded, but the language quoted clearly shows that the court was of the opinion that the debt sued on was extinguished by such failure, and furnished no basis for a judgment. To the same effect is the case of Gaston v. Boyd, 52 Tex. 282. It follows that, inasmuch as it affirmatively appears that plaintiff in error's claim was not sued on within 90 days after its rejection, no judgment could legally be rendered establishing it as a valid claim against Mrs. Pippin's estate. The foregoing particular phases of the case discussed on this motion were not discussed in our original opinion because of our conclusion, when that opinion was written, that the record contained no evidence whatever of the presentation and rejection by the administrator of plaintiff in error's claim.

In reference to plaintiff in error's answer setting up the notes and asking that they be established as a valid claim against Mrs. Pippin's estate, and which appears to have been filed on June 20, 1904, as stated, we will further state that said pleading appears to be an amendment of an original answer, but whether the said original answer set up said notes with a like prayer as is found in the amendment, or whether such original answer was filed within 90 days after the rejection of said claim, nowhere appears in the record, and we are not authorized to presume that such allegations were made, or that the original answer was filed within such time.

We have no doubt of the correctness of our decision of the other question discussed in our original opinion, and will add that we have carefully examined all of plaintiff in

error's assignments in the consideration of this motion for rehearing, and conclude that none of them point out any such error as would justify this court in reversing the case. The action of the trial court in directing a verdict against plaintiff in error on the question of improvements made by him, and in entering judgment against him for the amount of the fee allowed the attorney for representing the nonresident defendant, J. D. Pippin, was authorized by the facts. It seems to have been conclusively established that such improvements as plaintiff in error made upon the land were not made in good faith within the meaning of the law authorizing a recovery for such improvements; and, as to the attorney's fee allowed, it may be said that plaintiff in error denied that J. D. Pippin, the nonresident defendant, had any interest in the land whatever, and contested his right to any character of judgment. Besides, plaintiff in error was in possession of the land sought to be partitioned denying joint possession to the defendants in error, or either of them, and resisting their claim of title. We are not prepared to say, under all the circumstances, that the trial court's judgment in either of the respects complained of was error.

The motion for rehearing is in all things overruled.

#### **E. L. WILSON HARDWARE CO. v. F. J. & R. C. DUFF et al.**

(Court of Civil Appeals of Texas. March 3, 1909. Rehearing Denied March 24, 1909.)

#### **1. GARNISHMENT (§ 110\*)—NATURE OF PROCEEDINGS.**

Garnishment proceedings are purely statutory and cannot be extended beyond reaching the effects of a defendant in the garnishee's hands; the writ under Sayles' Ann. Civ. St. 1897, art. 225, providing that it shall not be lawful for the garnishee to pay defendant any debt or deliver him any effects after service of the writ, giving the creditor merely a lien on the debt in so far as it restrains the garnishee from paying it over to the original debtor.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 230; Dec. Dig. § 110.\*]

#### **2. GARNISHMENT (§ 109\*)—SCOPE OF LIEN—PAYMENT BY GARNISHEE AFTER SERVICE OF WRIT.**

A law firm on April 2d drew on a railroad company for a sum agreed upon in settlement of a suit against it by their client. On April 4th the client was sued, and a garnishment was served on the railroad company through its local agent, who did not notify the company's officers until after the draft was paid by the company on April 13th, without knowledge of the garnishment. On April 10th the client drew orders on the law firm to pay two of his creditors from the fund when received by the firm, which orders were presented to the firm on April 10th and 16th, when they were left with the firm, which received the money on April 14th. On April 16th the garnishers of the railroad company served a writ of garnishment on the law firm. Held, that the client had the

right to the money in the law firm's hands; the payment by the company's treasurer after service on the company as prescribed by law, in ignorance of the writ, not affecting the client's rights, and the lien not extending to the money in the attorney's hands.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 109.\*]

#### **3. GARNISHMENT (§ 51\*)—RIGHT TO FUNDS.**

Defendant's orders on the attorneys executed and delivered prior to the service of the garnishment upon the attorneys constituted an absolute assignment of the client's interest in that portion of the fund in their hands, and, having been presented to the attorneys prior to service of the garnishment upon them, the holder was entitled to the sum assigned.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 97-101; Dec. Dig. § 51.\*]

Appeal from District Court, Jefferson County; L. B. Hightower, Jr., Judge.

Consolidated actions by the E. L. Wilson Hardware Company against F. J. & R. C. Duff and others, in which the Texas & New Orleans Railway Company intervened and W. P. H. McFaddin and others were interpleaded; by W. P. H. McFaddin and others against the Texas & New Orleans Railway Company, garnishee, in which the E. L. Wilson Hardware Company was interpleaded; and by W. P. H. McFaddin and others against F. J. & R. C. Duff, garnishees, in which the E. L. Wilson Hardware Company was interpleaded and the Texas & New Orleans Railway Company intervened. From the judgment the E. L. Wilson Hardware Company appeals. Reversed and rendered.

J. D. Wilkerson and Geo. D. Anderson, for appellant. Greers & Nall, for appellees.

NEILL, J. The original suit, No. 3,963, was brought by the E. L. Wilson Hardware Company against F. J. & R. C. Duff upon two orders drawn on the defendants therein by D. R. Sims, one for \$541.45 in favor of the plaintiff, and the other for \$484 in favor of Wilson Bros. & Co.; the latter order having been assigned by the payees to plaintiff without consideration. Each of the orders were executed and delivered on April 10, 1903, and the suit was brought on them on May the 15th following. Two garnishment cases, based upon a demand of W. P. H. McFaddin, V. Wiess, and W. W. Kyle against D. R. Sims, upon which suit No. 3,707 had been brought and was pending in the district court, were consolidated with this case; the first of which being No. 3,707a and styled "W. P. H. McFaddin et al. v. Texas & New Orleans Ry. Co., Garnishee," and the second, No. 3,707b, styled "W. P. H. McFaddin et al. v. F. J. & R. C. Duff, Garnishees." The writ of garnishment in the first, No. 3,707a, was served on the garnishee on April 4, 1903, and the writ in No. 3,707b was served on the garnishees on April 16, 1903. The E. L. Wilson Hardware Company was interpleaded in each of the garnish-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



ment suits by the respective garnishees, and the Texas & New Orleans Railway Company intervened in cases No. 3,963 and No. 3,707b, and McFaddin et al. were interpleaded in cause No. 3,963. These interpleaders and interventions were prior to the consolidation. After the three cases were consolidated, the court entered an interlocutory decree adjudging that F. J. & R. C. Duff and D. W. Glasscock, composing the firm of F. J. & R. C. Duff, were, as to \$1,000 involved, mere stakeholders and had no interest in the fund except as stakeholders, and that as such they had the right to require the several parties claiming an interest in the fund to interplead with one another. It was further decreed that the firm of F. J. & R. C. Duff, who were originally in possession of \$1,100, had the right to subtract therefrom \$100 as attorney's fees, and that they pay into the registry of the court \$1,000, to abide the result of the consolidated suit, and that, upon complying with said order, they should be discharged from all liability to the plaintiff Wilson Hardware Company or to the garnishers, McFaddin, Wiess, and Kyle, and to the Texas & New Orleans Railway Company. It was further ordered that the costs incurred in the cause by F. J. & R. C. Duff be taxed against the fund in court to abide the final decision of the case. The final trial of the cause was by the court without a jury and resulted in a judgment that the E. L. Wilson Hardware Company take nothing by its suit, that W. H. P. McFaddin, V. Wiess, and W. W. Kyle be paid the \$1,000 in the registry of the court which had been deposited there by F. J. & R. C. Duff, and that the Texas & New Orleans Railway Company be discharged of any liability in so far as the \$1,000 is concerned. Other matters were also adjudicated; but as the E. L. Wilson Hardware Company has alone appealed, and as the right, as between it and McFaddin, Wiess, and Kyle, to the \$1,000 paid into the registry of the court on its interlocutory decree, is only involved in this appeal, we deem it unnecessary to state the other features of the judgment.

The facts are undisputed that upon April 2, 1903, and prior thereto, Duff & Duff, a law firm composed of F. J. and R. C. Duff and D. W. Glasscock, were the attorneys for D. R. Sims in a suit brought by him against the Texas & New Orleans Railway Company, which suit was, on April 2, 1903, settled by agreement, and the railroad company authorized Duff & Duff to draw upon it for the sum of \$1,100 in payment of the sum agreed upon in the settlement. The draft was drawn by Duff & Duff on that date, and paid by the company on April 13, 1903, to the collecting bank in Houston, Tex., and the proceeds were received by Duff & Duff on April 14, 1903. On April 4, 1903, W. P. H. McFaddin, V. Wiess, and W. W. Kyle sued D. R. Sims for an alleged indebtedness

of about \$3,000, and sued out a writ of garnishment against the Texas & New Orleans Railway Company, which was served upon the company through its local agent at Beaumont on the same day it was issued; but the agent on whom the writ was served failed to notify the company's officers or agents at Houston of the issuance and service of the writ until after the draft was paid. On April 10, 1903, D. R. Sims, being indebted to E. L. Wilson Hardware Company in the sum of \$541.45, drew on Duff & Duff an order to pay such indebtedness to the hardware company when they received the money from the Texas & New Orleans Railway Company. D. R. Sims, being also indebted to Wilson Bros. & Co. in the sum of \$484, on the same day drew his order in their favor on Duff & Duff for such amount, to be paid when they collected the money from said railway company. This order was by the payees transferred and assigned to E. L. Wilson Hardware Company, who, on April 10, 1903, presented the same, as well as the order drawn in its favor, to Duff & Duff for payment, and on the 16th of April it again presented both orders left with them. Upon April 16, 1903, McFaddin, Wiess, and Kyle procured the issuance of a writ of garnishment against Duff & Duff, which was served upon them on that day. These garnishment proceedings are the parents of cases Nos. 3,707a and 3,707b, which were consolidated with case No. 3,963. The draft, hereinbefore mentioned, drawn by the railway company in favor of Duff & Duff, was paid by B. C. Cushman, the treasurer of the company, without knowing that the writ of garnishment had been served on the railway company through its local agent at Beaumont; but, if Cushman had known of the writ of garnishment, he would not have paid the draft. The \$1,000 paid into the registry of the district court by Duff & Duff in obedience to the interlocutory order above mentioned are of the proceeds of said draft.

Under these undisputed facts, the money paid by the railroad company to Duff & Duff, as the attorneys of D. R. Sims, was the money of Sims, whose right to it was not affected by the writ of garnishment theretofore sued out by McFaddin, Wiess, and Kyle and served on the company. It having been paid by its treasurer, after the railroad company had been served with the writ in the manner prescribed by law, his ignorance of the issuance and service of the garnishment did not affect Sims' right to the money or his right to appropriate the same to the payment of his debts. In other words, no lien by reason of the garnishment extended to the money in the hands of Sims' attorneys after it had been paid, for garnishment proceedings are purely statutory and cannot be extended beyond reaching the effects of a defendant in the garnishees' hands. *Noyes v. Brown*, 75 Tex. 458. The writ of garnish-

ment gives the creditor a lien on the debt in so far as it restrains the garnishee from paying it over to the original debtor, but no further. *Shinn on Attach. & Garnishment*, §§ 467, 487, 613. As is said by Rood on *Garn.* § 192: "Service of the summons on the garnishee renders him liable to plaintiff, from the time of service, for \* \* \* all debts owing him by the defendant at the time of service; and he cannot escape liability to the plaintiff therefor by afterwards \* \* \* paying it to the defendant or any one else." See, also, *Jemison v. Scarborough*, 56 Tex. 358; *Arthur v. Batte*, 42 Tex. 159; *Burk v. Hance*, 76 Tex. 79, 13 S. W. 163, 18 Am. St. Rep. 28; *Planters' Bank v. Flocek* (Tex. Civ. App.) 43 S. W. 589. As article 225, *Sayles' Ann. Civ. St.* 1897, provides that it shall not be lawful for the garnishee to pay to the defendant any debt or deliver him any effects after the service of the writ of garnishment, we are unable to perceive how the railroad company can be heard to say that a lien attached to the money in the hands of Duff & Duff which it had unlawfully paid them as the attorneys for Sims. The money paid by the railway company to Duff & Duff, as the attorneys for Sims, not being affected by the garnishment against the railway company, and the execution and delivery of the two orders to plaintiff and Wilson Bros. & Co. by D. R. Sims on Duff & Duff on April 10, 1903, six days prior to the service of the garnishment upon Duff & Duff, being an absolute assignment and transfer of D. R. Sims' interest in the fund in Duff & Duff's hands (*Stillson v. Stevens* [Tex. Civ. App.] 23 S. W. 322; *Milmo Nat. Bank v. Convery*, 8 Tex. Civ. App. 181, 27 S. W. 828; *Beaumont Lumber Co. v. Moore* [Tex. Civ. App.] 41 S. W. 181), and the orders having been presented to Duff & Duff for payment prior to the service of the writ of garnishment on them, the plaintiff E. L. Wilson Hardware Company was entitled to the money so assigned it; and as the money was, under the interlocutory order, paid into the registry of the court, the plaintiff was entitled to a judgment, as against all the parties to the consolidated suits, ordering the fund paid to it out of the registry.

The part of the judgment against plaintiff and in favor of McFaddin, Wiess, and Kyle as to the \$1,000 paid into the treasury being the only part appealed from by either party (save the interlocutory order consolidating the suits and ordering the fund paid into the registry, which is objected to and assigned as error by appellant, which assignment we are not prepared to sustain), such part of the judgment is reversed, and judgment is here rendered in favor of appellant that it be paid said sum of money deposited into the registry under said interlocutory order.

Reversed and rendered for appellant.

# MARTIN et al. v. BUTNER et al.

(Court of Civil Appeals of Texas. Feb. 27, 1909. Rehearing Denied March 20, 1909.)

## 1. JUSTICES OF THE PEACE (§ 162\*)—APPEAL AND ERROR—EFFECT OF APPEAL.

The effect of an appeal from a justice's judgment is to annul the judgment, and the case stands in the county court for trial de novo, and the justice's judgment has no effect in any case subsequently brought between the same parties.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 603; Dec. Dig. § 162.\*]

## 2. MALICIOUS PROSECUTION (§ 71\*)—ACTIONS—QUESTIONS FOR JURY.

Evidence in an action for the malicious suing out of a writ of sequestration considered, and held, that the giving of a peremptory instruction to find for defendant was error.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Dec. Dig. § 71.\*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by O. W. and Ella Martin against J. C. Butner and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

R. S. Phillips, for appellants. J. M. Moore and Brown & Bledsoe, for appellees.

RAINEY, C. J. Appellants brought this suit to recover damages of appellees for the alleged willful, malicious, and wrongful suing out of a writ of sequestration, and ejecting them from certain premises held by them under a rental contract for a period of one year. A trial resulted in a judgment for appellees. The trial court gave the following instruction, which is assigned as error, viz.: "Gentlemen of the jury, you are instructed to find a verdict in this case in favor of the defendant J. C. Butner et al. The court gives you this instruction because from the judgments and orders of the justice court introduced in evidence the court holds that there is simply a question of law raised, and not a question of fact, and hence the instructed verdict." The evidence in regard to the orders of the justice court, referred to by the court in its charge, shows that J. C. Butner brought an action of forcible detainer in the justice court against the Martins to eject them from the premises here in question, and recovered a judgment. On the day following the rendition of said judgment the justice of the peace granted a new trial. The case was again heard and judgment rendered in favor of the Martins. From this last judgment Butner regularly perfected an appeal to the county court. The case was regularly docketed in the county court, and thereafter Butner appeared in the county court and asked a dismissal of the case, which was accordingly done. Butner also brought a sequestration suit. A writ of sequestration was issued and levied, and the premises were

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

replevied by Butner, and subsequently he dismissed the sequestration suit.

The effect of the appeal by Butner from the justice's judgment was to annul said judgment, and the case stood in the county court for trial de novo, as if originally brought in said court, and not having been dismissed for some illegality, or insufficiency in the manner of bringing it up, said justice's judgment had no legal force or effect, and this case stood alone upon its merits, irrespective of the action of the justice court. *Bender v. Lockett*, 64 Tex. 566; *Moore v. Jordan*, 65 Tex. 395; *Roberts v. McCamant*, 70 Tex. 743, 8 S. W. 543. We do not think the evidence on the merits of the case was such as warranted the court in giving a peremptory instruction to find for the defendant.

There was conflicting testimony on the question as to the duration of the rental contract; the Butners testifying that the Martins contracted for the premises by the month only, while Mrs. Martin testified, in effect, that the contract was for a year, for which she was to pay \$25 and board the Butners. This conflict raised an issue that required the submission of the case to the jury for their determination.

The judgment is reversed, and the cause remanded.

#### POITEVENT et al. v. SCARBOROUGH.

(Court of Civil Appeals of Texas. Jan. 23, 1909. Supplemental Opinion Jan. 29, 1909. Rehearing Denied Feb. 18, 1909.)

#### 1. DEEDS (§ 119\*)—PURPOSE OF EXECUTION—QUESTION FOR JURY.

Whether a second deed was executed by defendants and accepted by plaintiff as a substitute for the original deed, or solely to give a more specific description of the land conveyed to cure an objection of a lender on the land as security held for the jury.

[Ed. Note.—For other cases, see *Deeds*, Dec. Dig. § 119.\*]

#### 2. TRESPASS TO TRY TITLE (§ 25\*)—LIMITATIONS.

In an ordinary action of trespass to try title, only such defenses of limitation, not including the limitation of five years, as pertain to such action are applicable.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Dec. Dig. § 25.\*]

#### 3. EVIDENCE (§ 178\*)—BEST AND SECONDARY EVIDENCE—LOSS OF ORIGINAL DEED.

Where the loss of an original deed was shown, parol evidence as to its execution and contents was admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 580-594; Dec. Dig. § 178.\*]

#### 4. EVIDENCE (§ 158\*)—BEST AND SECONDARY EVIDENCE.

The answer of a witness as to statements in a letter was objectionable on the ground that the letter was the best evidence, but his further statement that he had lost sight of the land in question, and thought it had been included in a sale to A. was not subject to such objection.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 518; Dec. Dig. § 158.\*]

#### 5. JUDGMENT (§ 306\*)—MISTAKE—CORRECTION.

Certain land sued for was described in the petition as a part of the J. B. Win league situate in Polk county, Tex., beginning on the N. E. line of the Thompson survey where the N. W. line of the Win crosses the Thompson line. Thence N. 60 E. with the said Win line 2,094 varas to a stake on the N. W. line of the A. Viesca four league survey, pine 8 in. dia., pine 4 in. dia., and a post oak, all marked X. Thence "B. 49 W." with said Thompson line 616 varas to the place of beginning, containing 109 acres of land. The judgment followed the same description. Held, that the letter "B." in the call "Thence B. 49 W. with the Thompson line" was a clerical error, and the true course of the line being established as N. 49 W. by the call for the Thompson line, that being also the only direction which would satisfy the call for quantity, the judgment was not fatally defective, but the description would be so reformed.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 598; Dec. Dig. § 306.\*]

#### 6. BOUNDARIES (§ 8\*)—DESCRIPTION—CLOSING LINE.

Where two lines of a description have been ascertained, and the quantity can be obtained by connecting the termini thereof by a straight line, the description would be so closed instead of running several lines of different courses and length to include the area and arrive at the same result.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 68; Dec. Dig. § 8.\*]

#### 7. APPEAL AND ERROR (§ 561\*)—STATEMENT OF FACTS—FORM—STENOGRAPHER'S NOTES.

A statement of facts, consisting of the stenographer's notes, in question and answer form, in violation of Acts 30th Leg. 1907 (Called Session) p. 509, c. 24, § 5, was objectionable, and might be stricken out of the court's own motion.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 561.\*]

Appeal from District Court, Polk County; L. B. Hightower, Judge.

Trespass to try title by A. B. Scarborough against Mary E. Poitevent and husband. Judgment for plaintiff, and defendants appeal. Affirmed.

T. F. Meece and S. H. German, for appellants. F. Campbell, for appellee.

REESE, J. This is a suit of trespass to try title by A. B. Scarborough against Julius Poitevent and his wife, Mary E. Poitevent. Upon trial with a jury there was a verdict for plaintiff, and from the judgment the defendants appeal.

Plaintiff claimed title under an alleged deed from defendants executed in 1881, conveying to him all the land owned by defendants in the Wiesca and Win surveys in Polk county. The tract sued for, containing 109 acres, was a part of the Win survey, and belonged at the date of said deed to appellants. This deed was never recorded, and had been lost, and appellee undertook upon the trial to establish its contents by parol. The execution of the deed was not in fact disputed, but it was contended by appellants that it did not include the land sued for. In 1892 appellants executed to appellee a deed conveying to him, by exact and full descrip-

tion, two tracts of 333 and 851 acres, respectively, which had been conveyed by the former deed, but the description of which was not satisfactory. Appellants contended (1) that the tract of land in controversy was not included in the first deed; and (2) that the second deed was given and accepted in substitute of the first deed in its entirety. Appellee contended that the tract in controversy was included in the first conveyance, and that the sole purpose of the second deed was to correct the insufficient description given in the first deed of the two tracts of 333 and 851 acres, in accordance with the requirements of a loan company from which he desired to borrow money upon the security of these two tracts constituting his plantation tract, for the purpose of discharging his debt to appellants for the purchase money.

The court submitted to the jury, by an appropriate instruction, the issue as to whether the second deed was executed by appellants and accepted by appellee as a substitute for the first deed. This charge was assailed by the third, fourth, and seventh assignments of error on the ground that the second deed appeared on its face to be a substitute of the first deed, and the court should have so instructed the jury. The contention is based upon the following language in the deed following a specific description of the two tracts conveyed: "These lands being the same lands sold to said A. B. Scarborough on the 2d March, 1881, and described said deed dated March 2, 1881, and delivered to said Scarborough, conveying said lands to him. This deed being made to give a more full and complete description of said lands." There was also a recital that the consideration was the payment of the purchase-money notes mentioned in the first deed, "which were given for the purchase money of the lands hereinafter described." There was evidence sufficient to show that in fact the purpose of the second deed was, as alleged by appellee, solely to give a more full and specific description of the two tracts, on which he wished to procure a loan, the loan company objecting to the description given in the first deed of the said two tracts, and that it was not the intention that the title, already conveyed to the tract in controversy, should be affected by this second deed. We do not think it so clearly appears from the terms of the second deed that it was given and accepted as an entire substitution of the first deed as to require the court to so construe it. The court did not err in submitting the issue to the jury, and their verdict upon this issue was amply supported by the evidence.

There is no merit in the second, fifth, and sixth assignments of error. There was no issue of estoppel in the case, nor did the statute of limitation of five years apply. The suit was an ordinary action of trespass to try title, and only such defenses of limitation as pertain to such action were applicable.

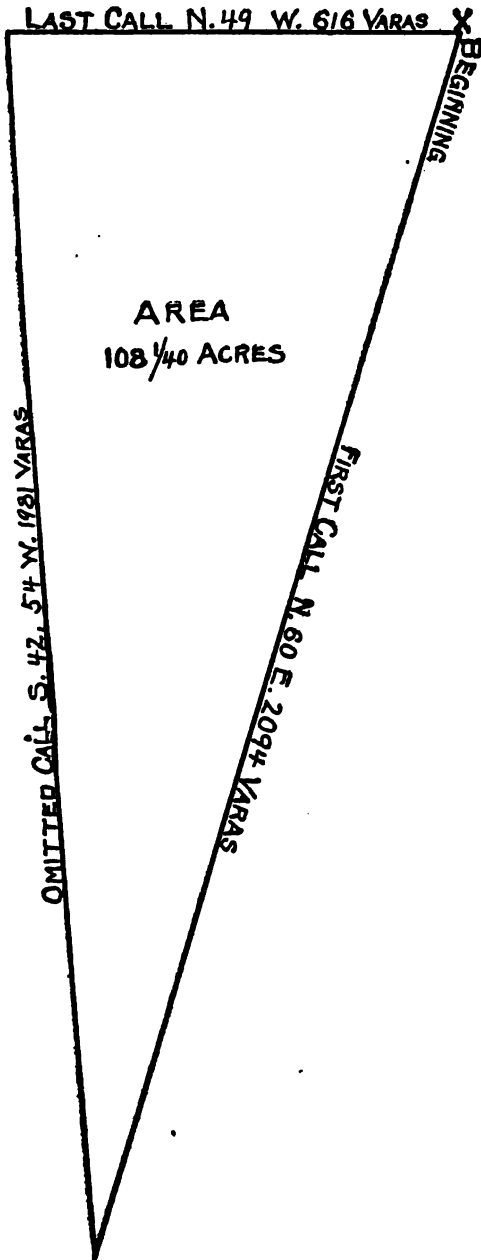
No error is presented by the tenth and eleventh assignments of error. The loss of the first deed was abundantly shown as a predicate for the introduction of parol evidence as to its execution and contents.

What we have said disposes of the twelfth assignment of error, which is without merit.

The thirteenth assignment of error assails the ruling of the court in sustaining the objections of plaintiff to certain statements of Junius Poltevent in reply to a cross-interrogatory propounded to him by appellee; the objection being that the letter referred to in the answer was the best evidence. In so far as this answer referred to statements in the letter this objection was properly sustained. The statement, however, "I had lost sight of this 109 acres, and thought it was included in the sale to Andress," was not subject to this objection, and was improperly excluded. This fact was shown by other testimony without objection, and this error appears to us to have been harmless.

The land sued for is thus described in the third amended original petition upon which the case was tried: "Being a part of the J. B. Win league situate in Polk county, Texas, and described thus: Beginning on the N. E. line of the Thompson survey where the N. W. line of the Win crosses the Thompson line. Thence N. 60 E. with the said Win line 2,094 varas to a stake on the N. W. line of the A. Viesca four league survey, pine 8 in. dia., pine 4 in. dia., and a post oak, all marked X. Thence B. 49 W. with said Thompson line 616 varas to the place of beginning. Containing 109 acres of land." In the judgment the land has the same description, omitting "Being a part of the J. B. Win league situated in Polk county, Texas," and giving only the boundaries as above set out, and the number of acres. There was a general demurrer to the petition, but it does not appear from the record that it was presented or acted upon. It was urged as a ground for a new trial that neither the petition nor the judgment described any land, and that the judgment was on this account void. To his answer to the motion for a new trial appellee attached the affidavit of A. C. Garvey, a surveyor, that he had surveyed the 109 acres in controversy; that he had examined the field notes given in the petition and judgment, and from them he could locate and identify the tract. It does not appear whether the court in refusing the new trial regarded this affidavit. Referring to the description, it will be seen that there is given the beginning point and the course and distance of the first line: N. 60 E. with the Win line 2,094 varas. The last line of the survey is "B. 49 W. with the Thompson line 616 varas to the beginning." Clearly the B. is a clerical error, and is intended either for N. or S. The true course of this line is further shown by the call for the Thompson line, whatever that may be. If we assume that it is N. 49 W., then it appears that a straight

line, run from the end of the first line to the end of the last line, called for in the description given, will include within the boundaries thus found 108 acres, substantially the number of acres called for in the survey, making a tract of land of the following boundaries:



Now, if we assume that the B. is intended, for S., making this last line S. 49 W. to the beginning, and there meeting the first line, whose direction to the beginning would be S. 60 W., the two lines would be so nearly parallel that a straight line connecting them would include a tract so very much smaller

than 109 acres that that theory must be discarded. In this way it is shown with reasonable certainty that the last line should read, instead of B. 49 W., N. 49 W. Whitaker v. Poston (Tenn.) 110 S. W. 1023; Combs v. Virginia Iron & C. Co., 106 S. W. 815, 32 Ky. Law Rep. 601.

Having disposed of this difficulty, it remains to determine whether, with the two lines thus run, and the quantity to be contained, the tract can be identified with such reasonable certainty as is required. We have seen that one single straight line connecting the two lines given, and forming a triangle, would include 108 acres, or substantially the quantity of land called for, leaving only one call to be supplied. Now the same result can be attained by connecting the two lines by three or more lines so run at different courses and of different lengths as to include the proper area, but this cannot be done by supplying just lines as missing, making a survey of four sides. A little examination will show that if a straight line connecting the two lines given will just include the proper area, two lines connecting the ends of the two lines as given cannot be so run as to include this area, but it may be done by running any number over two—zigzagging in and out. With reasonable certainty it may then be concluded that in the field notes as given in the petition and judgment, only one call is omitted, and not three or more, and having arrived at this conclusion, the supplying of the missing line is easy, and can be done with reasonable certainty, as shown by the sketch aforesaid.

We should have hesitated to arrive at this conclusion but for the authority of the opinion of the Supreme Court in Mansel v. Castles, 93 Tex. 414, 55 S. W. 559. In that case, according to the field notes of the land given in the judgment, the survey did not close, as in this. It could be made to close by several line of different lengths and courses so run as to include the necessary quantity of land. It could also be made to close by a straight line connecting the ends of two of the given lines, which would include the proper quantity. In these circumstances the court held that it was more reasonable to suppose that only one line was omitted than several, and adopted that conclusion, supplying the omitted call and so constructing the survey. The question arose in a proceeding to correct a mistake in a judgment, for all practical purposes, identical with the mistakes here. The Supreme Court went so far as to hold that no such proceeding was necessary, and, reversing the decision of the Court of Civil Appeals, dismissed the case. A careful examination of the opinion shows that the only difference between the facts of that case and this is that in that case one of four calls were omitted, and in this case one of three. The reasoning of the opinion is in our judgment exactly applicable to the present case, as the following quotation will show: "It is appar-

ent at a glance that there is a mistake in the field notes. There are but three lines called for, and the third line, while it calls to run to the beginning, simply runs back on the second. It thus becomes obvious that one or more calls have been inadvertently omitted. Running, then, the first two calls, we get two lines at right angles to each other. Recurring then to the beginning point, and establishing the last line by reversing the call for its course and by running the distance called for, we get another line at right angles to the first, and approximately of the same length as the second. By supplying another line running from the end of the second to the north end of that so established, we complete a parallelogram which contains a fraction of an acre over 87% acres—the number called for in the description. It is true that the requisite number of acres may be obtained by running three or more lines between the end of the second line and the beginning of the last; but if such had been the case, it is highly improbable that they would all have been omitted, while the omission by mistake of the calls for one line in a set of field notes is a matter of not infrequent occurrence. While, therefore, the proposition that the calls of the description in question correct themselves, and show the land intended to be described is not capable of mathematical demonstration, yet that it is true is reasonably certain. Upon such certainty we act in all the highest concerns of life, and it is sufficient for the purposes of the law." Upon the authority of that case we think the assignments of error presenting the objection of appellants to the petition and judgment should be overruled. See, also, *Sanger v. Roberts*, 92 Tex. 317, 48 S. W. 1; *Gallup v. Flood* (Tex. Civ. App.) 108 S. W. 426.

What we have heretofore said disposes of the fifteenth assignment of error. None of the assignments of error or the various propositions thereunder present any grounds for reversing the judgment.

Chief Justice PLEASANTS, while agreeing in the disposition of the case under the controlling authority of *Mansel v. Castles*, supra, is inclined to doubt the soundness of the doctrine therein announced, and discussed in this opinion.

The judgment is affirmed.

For statement of facts in this case there is sent up the stenographer's notes, in question and answer form, in total disregard of Acts 30th Leg. 1907, p. 509, c. 24, § 5. No objection having been made to the statement of facts, we have not stricken it out on our own motion, which might have been done. Experience soon disclosed that the practice of sending up the stenographer's notes in question and answer form was a very inefficient way of presenting the facts to the appellate court, and the passage of the act in question

was the result. The provisions of this statute must be observed.

Affirmed.

#### Supplemental Opinion.

Our first conclusion in the case was that the assignments of error presenting the objection to the petition and judgment for failure to describe the land should be sustained, and the judgment of the trial court reversed on this ground, and this decision was announced. A closer investigation of the authorities, however, particularly the case of *Mansel v. Castles*, 93 Tex. 414, 55 S. W. 539, cited in the opinion, has led us to conclude that our first conclusion and decision was erroneous. We, therefore, upon our own motion set aside our first decision, and affirm the judgment.

Affirmed.

#### TEXAS & N. O. R. CO. v. McCOY.†

(Court of Civil Appeals of Texas. March 3, 1909. Rehearing Denied March 24, 1909.)

#### 1. EVIDENCE (§ 539½\*)—EXPERT EVIDENCE—COMPETENCY OF WITNESS.

A locomotive engineer of 17 years' experience, who was familiar with the construction of engines and tenders and their coupling apparatus, was competent to testify as an expert as to the dangers of a peculiar coupling of an engine based on a full description of it.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2350-2352; Dec. Dig. § 539½.\*]

#### 2. APPEAL AND ERROR (§ 882\*)—OBJECTION TO EVIDENCE—REVIEW—ESTOPPEL TO COMPLAIN.

A party who, on the cross-examination of a witness, after the overruling of an objection to his testimony, brings out all the evidence objected to cannot complain of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3591; Dec. Dig. § 882.\*]

#### 3. DAMAGES (§ 158\*)—PERSONAL INJURIES—PETITION—EVIDENCE.

A petition, in an action for personal injuries, which alleges that plaintiff was permanently incapacitated to perform any mental or physical labor, is sufficient, in the absence of a special exception, to authorize the admission of evidence that plaintiff's mental condition was impaired in every way.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 441-446; Dec. Dig. § 158.\*]

#### 4. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, in an action for personal injuries, evidence that plaintiff could not co-ordinate his movements, that he did not have the ability to direct the movements of one hand, and that he did not have the mental condition to do so, and that his mental condition was impaired, was received without objection, defendant could not complain of the admission of evidence that plaintiff's mental condition was in every way impaired.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1050.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

**5. APPEAL AND ERROR (§ 882\*)—OBJECTION TO EVIDENCE—REVIEW—ESTOPPEL TO OBJECT.**

A party cannot object to evidence brought out in response to his questions on cross-examination.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3591; Dec. Dig. § 882.\*]

**6. MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTIONS FOR JURY.**

Whether an engine wiper in a roundhouse, injured in assisting in coupling a tender to an engine, as ordered by his foreman, was guilty of contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.\*]

**7. MASTER AND SERVANT (§ 153\*)—DANGERS OF EMPLOYMENT—OBLIGATION OF MASTER TO INFORM SERVANT.**

Where an engine wiper in a roundhouse was ignorant of the dangers of coupling a tender to an engine, and was inexperienced and the company knew it, the company was bound to inform him of the peculiar dangers attending the service, before directing him to assist therein.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.\*]

**8. TRIAL (§ 260\*) — INSTRUCTIONS — REFUSAL OF INSTRUCTIONS COVERED BY THOSE GIVEN.**

It is not error to refuse a charge covered by the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**9. MASTER AND SERVANT (§ 295\*)—INJURY TO SERVANT—ASSUMPTION OF RISK—EVIDENCE—INSTRUCTIONS.**

Where, in an action for injuries to an employé while assisting in coupling a tender to an engine, the evidence showed that the employé was an engine wiper in the roundhouse; that he was ignorant of the dangers attending the coupling; that he was inexperienced in such work; and that the foreman ordered him to assist in the coupling, without informing him of the dangers—an instruction that, if the danger of making the coupling in the position attempted by the employé was a risk that was known to him, or was so obvious that a person of ordinary intelligence, with such knowledge and experience as the employé had, would have learned of and avoided it, he assumed the risk, defeating a recovery sufficiently submitted the issue of assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.\*]

**10. MASTER AND SERVANT (§ 218\*)—ASSUMPTION OF RISK.**

An employé does not assume the risk which his ignorance and inexperience prevent him from knowing.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 601-609; Dec. Dig. § 218.\*]

**11. TRIAL (§ 252\*)—INSTRUCTIONS—ISSUES.**

A charge on an issue not made by the evidence, and withdrawn in the charge of the court, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

**12. TRIAL (§ 125\*)—ARGUMENT OF COUNSEL—APPEAL TO PREJUDICE.**

The argument of counsel for a negro, suing for a personal injury, made to a jury of white men that the negro was entitled to the same rights in court as a white man, and was

equal to the white man before the law, was merely an argument for justice, and was not objectionable as appealing to the prejudice of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 303-307; Dec. Dig. § 125.\*]

**13. TRIAL (§ 133\*)—ARGUMENT OF COUNSEL.**

Where the court, in an action by a negro for personal injuries, charged the jury of white men that plaintiff's race had nothing to do with the case, the error, if any, in the argument of plaintiff's counsel that the negro was equal to the white man before the law, etc., was harmless.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.\*]

**14. DAMAGES (§ 132\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.**

A strong, vigorous negro, 21 years old, earning \$1.50 a day, was injured by having his head crushed in such a manner as to cause blood to run out of one of his ears for 11 days, and to cause a fracture of the skull at the base. An operation was necessary, and a piece of the skull was removed. One side was partially paralyzed, and he did not have a free use of his hands, and his mind was impaired. His injuries were permanent. His eyesight was affected, so that he had double vision, and that condition was permanent. He would never be able to perform any work. *Held*, that a verdict for \$9,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 178, 872-885, 896; Dec. Dig. § 132.\*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by Leon McCoy against the Texas & New Orleans Railroad Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Baker, Botts, Parker & Garwood, and Lane, Jackson, Kelley & Wolters, for appellant. Ewing & Ring, for appellee.

**FLY, J.** This suit is based on a claim for damages arising from personal injuries sustained by appellee, an employé of appellant, while engaged in coupling a tender to a locomotive. It was alleged that appellee was employed as an engine wiper in the roundhouse of appellant, in the city of Houston, but that on April 22, 1907, he was directed by his foreman to assist in coupling a tender to a new engine, which had a coupling apparatus consisting of three separate bars which had to be manipulated at the same time in making a coupling, and which could not be accomplished with reasonable safety to the employés without three men being engaged in the coupling, one for each bar; that in endeavoring to hold up the middle and one of the side bars appellee got underneath them, and sought to guide them into the sockets of the engine, and his head was caught between the bars and crushed as they came together. He pleaded his youth and inexperience and ignorance of the danger. Appellant filed a general demurrer and general denial, and pleaded contributory negligence and assumed risk. A trial by jury resulted in a verdict

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and judgment for appellee in the sum of \$9,000.

The evidence shows that appellee, a negro about 21 years of age, was in the employ of appellant as an engine wiper, and was ordered by his foreman to assist in coupling a tender which had three bars, the largest in the middle, to a locomotive. To do this the three bars had to be raised and held so that each would enter a socket in the engine. The bars were rounded at the ends, so that they were smaller there than at other points, and would the more readily enter the sockets. Upon the rounded corners of the ends of the bars striking the sockets they would glide into them, and this would suddenly bring the bars closer together. Appellee, being ignorant and inexperienced in the work of coupling such a tender and locomotive, placed his back towards the tender with his arms under one of the side bars and the middle bars, which were very heavy, and with his head between the bars guided them to the sockets, and when they slipped in they were suddenly brought against appellee's head, inflicting serious and permanent injury on him. He was not warned by the foreman of the dangers incident to the work, although he knew of the inexperience of appellee, and knew of the dangers of the service.

The first and third assignments of error assail the action of the court in refusing to strike out the testimony of J. B. Hanks, who testified that he had been in the railroad business 23 years, during 17 years of which he was a locomotive engineer, and that he was familiar with the construction of engines, locomotive engines and tenders and their coupling appurtenances. He also testified: "I am familiar with the coupling apparatus of these three bar engines." He then explained that the bars were rounded at the ends so that they would enter the sockets, and that when they so entered they would move towards each other with great force, and that no inexperienced man should undertake the task of coupling the tender to such an engine, and that it would take three men to safely perform such a coupling. All of this was testified to without objection; but on the cross-examination it was elicited that the testimony of the witness as to the coupling of three bar engines was based on a coupling he saw made with such an engine after the institution of this suit. Appellant then moved the court to exclude all the testimony of the witness as an expert with reference to the proper method of coupling the three bar engines, on the ground that he was not an expert. The witness on further examination stated that he had seen engines coupled thousands of times, but had only once seen a three bar engine coupled. He further stated: "I would know just as well how to properly make a coupling on this kind of an engine as if I had done it a thousand times. \* \* \* From my experience as an engineer I am able to tell of the dangers and methods

of making a coupling on this particular engine; without my experience as an engineer, I could not tell of them. I would not know of them." The witness fully qualified himself as an expert in the coupling of trains. He was skilled in that particular trade, and he could have testified as to the dangers of the peculiar coupling of the engine in question, upon a full description of it, without ever having seen it; and, if it appeared that he was fully acquainted with the mechanism and operation of the peculiar coupling, it would not matter whether he gained his knowledge by having examined it, and having seen it in operation one time or a thousand times. It was a matter pertaining to his trade or calling. The fact that the witness had seen the coupling in operation only once might go to the weight of his testimony, but not to the competency of it. The court did not err in refusing to strike out the evidence. In this connection it may be noted that after appellant had objected to all the testimony of the witness Hanks, he was again cross-examined by appellant, and all of the evidence objected to again brought out, and it is in no position to object to the evidence.

Appellant objected to the statement of the witness Dr. Kyle, in connection with the condition of appellee, that "his mental condition is impaired in every way," the ground of objection being that there was no pleading to sustain it. It was alleged in the petition that appellee was "permanently incapacitated to perform any mental or physical labor." That is a general allegation, but sufficient, in the absence of a special exception to it, to authorize the admission of the evidence. Further, the evidence objected to was brought out on the cross-examination, and practically the same evidence had passed unchallenged in another part of the cross-examination. Appellant objected to the one statement alone, and before, in the cross-examination, the witness stated: "Cannot co-ordinate his movements; he has the power, but he hasn't the ability to direct the movements with that hand that he can with the right, nor has he the mental condition to do so. His mental condition is also impaired." That went in without objection. Appellant is in no position to complain. A party has no right to object to evidence brought out in response to his questions on cross-examination.

The charges complained of in the fourth and fifth assignments are not open to the criticisms directed against them. The charge, considered as a whole, presents the law of the case in a clear manner. The jury was instructed that appellee could not recover unless he had exercised ordinary care in his endeavor to couple the tender and locomotive. The charge presented every issue raised by the facts.

The sixth assignment of error is disposed of by our conclusions of fact. It cannot be said, as a matter of law, that appellee was guilty of contributory negligence in placing



his head between the bars. The question was one for the jury. He was young and inexperienced, and appellant knew it, and should have warned him of the dangers incident to the service required of him. Appellee was ordered to perform a service outside of the regular line of his employment, and it was the first time that he had ever performed such service; and, being ignorant and inexperienced, and these facts being known to appellant's foreman, appellee should have been informed of the peculiar dangers that attended the service. *Railway v. Hughes*, 22 Tex. Civ. App. 134, 54 S. W. 264.

So far as the special charge on assumed risk was correct and applicable to the facts, it was given in the charge of the court, and the court properly refused to give the charge requested by appellant. The charge ignores the facts that appellee was ignorant, and had never before undertaken to couple an engine with three bars, and could have known nothing of the dangers attendant upon such service. The court instructed the jury: "If you believe from the evidence that the danger of making the coupling in the position as attempted by plaintiff was a risk that was known to him, or that it was one that was so open or obvious that a person of ordinary intelligence, with such knowledge and experience as plaintiff had, if any, would have learned of and avoided by the use of ordinary care in the performance of his duties, then plaintiff is deemed in law to have assumed the risk, and if you so find, let the verdict be for the defendant." That charge was amply sufficient, and the requested charge was not the law of the case. Appellee could not have assumed risks which his ignorance and inexperience prevented him from knowing. *Railway v. Renz*, 24 Tex. Civ. App. 335, 59 S. W. 280; *Rice v. Dewberry* (Tex. Civ. App.) 93 S. W. 715.

The charge, the rejection of which is complained of in the eighth assignment of error, was properly refused, because it sought to inject an issue not made by the evidence, and which had been withdrawn in the charge of the court from the jury. The court instructed the jury that the only ground of negligence relied on by appellee was the failure to instruct him as to the dangers of the service, and the court very properly would not permit appellant to drag in something that could only tend to confuse the minds of the jury.

Counsel for appellee, in his closing address to the jury, reminded the jury, composed of white men, that his client was a negro, and that he felt sure that they would not permit racial prejudice to influence their verdict, and that he was entitled to the same rights in court as the white man, and stood on the same plane, and was the equal of the white man before the law. The appeal was not

to any race prejudice, but, on the other hand, was an appeal for justice, and a reminder that the laws of Texas know no color, and we do not feel inclined to hold that it was improper. But if it was not a legitimate appeal, it was rendered harmless by an instruction to the jury by the court that the race of appellant had nothing to do with the case. How prejudice and passion could be aroused in the minds of a Texas jury of white men in favor of a negro, by the information that the latter had the same rights before the law as a white man, is inconceivable to us, and no attempt is made to show how they could have been engendered, and yet it is urged that the speech caused the jury to render an excessive verdict. Appellee was, when hurt, a strong, vigorous negro, about 21 years of age, and earning \$1.50 a day. His head was crushed in such a manner that the blood ran out of one of his ears for 11 days. His skull was fractured at the base, and an operation became necessary to take out the clotted blood. One side is partially paralyzed. A piece of the skull was removed, and appellee has not a free use of his hands, and his mind was impaired. It was in evidence that he will never be able to perform any work. His injuries are permanent. His eyesight is affected, so that he has double vision, and that condition of the eyes is permanent. These injuries, considered with the suffering endured by appellee, completely answer the complaint as to excess in the verdict.

The judgment is affirmed.

#### HALL v. COOK et al.

(Court of Civil Appeals of Texas. March 3, 1909. Rehearing Denied March 24, 1909.)

#### 1. TRIAL (§ 139\*) — QUESTIONS FOR JURY — WEIGHT OF EVIDENCE.

Questions as to the weight of evidence are for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 332; Dec. Dig. § 139.\*]

#### 2. CONTRACTS (§ 350\*)—ACTION FOR PRICE—CONTRACT FOR BORING WELL—EVIDENCE.

In an action for the contract price of boring a well, evidence held to show that the well was cased as far as it was possible to do so on account of an obstruction caused by a broken drill rod.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1819; Dec. Dig. § 350.\*]

#### 3. CONTRACTS (§ 305\*)—ACTION FOR PRICE—WAIVER OF RIGHT TO COMPLETION.

Where, after a well had been bored 800 feet, but had not been cased to the bottom with 3-inch casing, as required by the contract, to the knowledge of the owner, though the contractor claimed that the contract had been completed, the owner contracted for further boring, and agreed that the casing of the well should be continued with 2-inch casing, he treated the contract for the 800 feet as completed, and waived the requirement of 3-inch casing.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1398; Dec. Dig. § 305.\*]

#### 4. FRAUDS, STATUTE OF (§ 44\*)—AGREEMENTS NOT TO BE PERFORMED WITHIN A YEAR.

A verbal contract with a firm that they should bore a well 500 feet, and, if a sufficient flow of water was not obtained at that depth, that they should continue to bore to 800 feet unless caused to stop by the other party before reaching that depth, was not within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 66; Dec. Dig. § 44.\*]

#### 5. TRIAL (§ 307\*)—DELIBERATION OF JURY—TAKING PAPERS TO JURY ROOM.

Where an original petition in an action was not used as evidence in the trial, it was not entitled to be taken by the jury upon retirement.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 733, 734; Dec. Dig. § 307.\*]

#### 6. TRIAL (§ 307\*)—DELIBERATION OF JURY—TAKING PAPERS TO JURY ROOM.

Where the opposite party agreed in writing that expected testimony of an absent witness was true and a paper containing a statement thereof was admitted in evidence, the paper also containing a statement of what another person would testify to, the other person having been a witness at the trial, the court did not err in refusing to permit the jury to take the paper with them in their retirement.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 732, 734, 735; Dec. Dig. § 307.\*]

Appeal from Atascosa County Court; W. M. Abernethy, Judge.

Action by Walter Cook and others against W. S. Hall. Judgment for plaintiffs, and defendant appeals. Affirmed.

Geo. M. Martin and W. W. Walling, for appellant. J. W. Preston and James Raley, for appellees.

JAMES, C. J. The amended petition of Walter Cook alleged a contract to bore a well for appellant Hall 500 feet deep for \$400, and to bore from 500 feet on to and not exceeding 800 feet for \$2 per foot, and that, after reaching a depth of 800 feet, defendant made a new contract with plaintiff to continue boring, which plaintiff did for a distance of 90 feet, at a price of \$2.25 per foot. The pleading alleged that the original contract was verbally made with plaintiff and M. Bowyer, of the firm of Cook & Bowyer, on or about February 5, 1906, that they were to bore 500 feet, and, if a sufficient flow of water was not obtained at that depth, they were to continue to bore to 800 feet, unless caused to stop by defendant before reaching said depth; that Cook & Bowyer commenced the work on or about February 18, 1906, and bored to 800 feet in compliance with the agreement, whereby defendant owed them \$1,000, and paid them \$800, leaving a balance of \$200 then due them; that about that time the firm of Cook & Bowyer dissolved, and the latter assigned to plaintiff the outfit and all claims due the firm, including said balance of \$200; that afterwards plaintiff and defendant entered into a further contract to continue boring the well, plaintiff agreeing to go as deep as he could, and defendant agreeing to pay at the rate of \$2.25 per foot; that according-

ly plaintiff went on boring, and bored 90 feet further, when an unavoidable accident occurred, the breaking of a drill rod, an accident liable to occur, and which does occur, with the most careful and experienced well borers, and one that cannot be anticipated and prevented, and when such accident occurs the work must stop unless the drill rod be removed; and that plaintiff spent 14 days, with experienced hands and approved machinery and appliances, endeavoring to remove the same, but wholly failed, without fault on his part, and then ceased work on or about January 15, 1907. The prayer was for the aforesaid balance of \$200 and for \$202.50 for said 90 feet. Plaintiff recovered the full amount.

The first assignment of error states that a new trial should have been granted because the evidence discloses that the well was to be cased to the bottom, and this was not done. Questions of evidence are for the jury, and we find evidence in the record that the well was cased as far as this was possible on account of the broken rod. The statement of Byron Mills is: "There was upon the ground about 50 feet of 2-inch casing, and only about 20 feet of this was placed in the well for the reason that the same could not be driven any deeper into the well because there was some obstruction in the well." This tends to show that the well was cased as far as the obstruction, and as far as it was possible to do so.

The second assignment is that a new trial should have been granted because plaintiffs agreed to case the well 800 feet deep with 3-inch casing, and failed to do so. The evidence shows that they had cased it with 3-inch casing for a depth of only 633 feet. By the contract defendant was to furnish all casing; and the original understanding, as testified to by Mr. Hall, was that, if they had to go deeper than 800 feet, the size of the casing was to be reduced to 2 inches. It appears that, when the second contract was entered into to go beyond the 800 feet, Mr. Hall knew that the well was not cased to its full depth. He testified: "After this delay, they got the pump, and plaintiff Cook came to the work to attempt to clean out the hole to the bottom of the well that Alanis had drilled, and in which he had failed to put down the casing according to contract. Cook said that he had cleaned out the well to the bottom, but that it had immediately caved in again and filled up, so that he could do nothing with it. Cook then told me that he could not put down the 3-inch casing, and that we would have to change the contract to 2-inch casing, and after I had talked with Mr. Allen I agreed to this change." From this it is plain that Mr. Hall waived the stipulation about 3-inch casing, and agreed to change to 2-inch casing, and the evidence shows that the latter was then put down inside the 3-inch casing from the top of the well to the obstruction at the bottom. It appears that

all this occurred when Cook was claiming that the contract as to the 800 feet had been completed; and if Hall then knew that it was not cased the full distance, and agreed as above stated, he treated it as completed, and waived the requirement. See *Land & Oil Co. v. Drilling Co.*, 34 Tex. Civ. App. 33, 77 S. W. 974.

The third, fourth, and fifth assignments present nothing that this court can reverse the judgment for.

The sixth and seventh assignments we must overrule for the reason that plaintiff alleged and proved an assignment from Bowyer to him. The one contract was a continuation of the other, and, according to Mr. Hall, the second contract was contemplated when the first one was entered into.

The eighth is overruled for the reason that the statute of frauds has no application to the facts of this case.

The ninth is overruled for the reason that the original petition was not used as evidence in the trial, and hence was not entitled to be taken by the jury in the retirement.

The tenth complains that the written statement of what an absent witness, Byron Mills, would testify to, which was a part of the evidence, was not allowed to be taken by the jury in their retirement. The paper appears in the statement of facts as follows: "The defendant then offered in evidence the testimony of the absent witness, Byron Mills, as contained in defendant's application for a continuance on account of the absence of said witness; the plaintiffs having agreed in writing filed herein that said expected testimony from said witness was true, as follows: That Byron Mills began work upon the well named in plaintiffs' petition, which was shortly after the witness Antonio Fuentes left the work, and that there was upon the ground about 50 feet of 2-inch casing, and that only about 20 feet of this was placed in the well, for the reason that the same could not be driven any deeper into the well because there was some obstruction in the well, and that Fuentes will testify that he was working on the well when all the 2-inch casing was put down by the plaintiffs up to the time when all but about 50 feet was placed in the well, and that, when he left the well, there was about 50 feet of 2-inch casing left on the outside, and that this was the casing found there by the witness Fuentes in the works upon the well." This paper, it will be seen, contains, not only a statement of what Mills would testify to, but what another witness, Fuentes, would testify to. Fuentes was a witness, and testified at the trial. It will also be observed that the agreement related only to the testimony of Mills, and the assignment of error is that the court erred in not permitting the jury to take with them the evidence or statement of Mills. If the statement of Mills had been separate or detached from the other, it

would still be a question whether or not it was "written evidence" as is intended by article 1303, Sayle's 'Ann. Civ. St. 1897; *Green v. Gresham*, 21 Tex. Civ. App. 603, 53 S. W. 382. But the paper contained other matter than the testimony of Mills, and, as a whole, it would not have been proper to allow it to go to the jury.

We are unable to sustain the eleventh assignment.

Not finding any error of law, and not being able to say that the jury erred in their solution of the facts, and having considered all the points raised, the judgment will have to be affirmed.

#### COMMERCE COTTON OIL CO. v. CAMP.

(Court of Civil Appeals of Texas. Feb. 20, 1909. Rehearing Denied March 20, 1909.)

##### 1. MASTER AND SERVANT (§ 291\*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action against a cotton oil company for the death of an employé by the falling of a mass of cotton seed hulls, it was improper to instruct that if decedent performed his work "in a way that was usual in the hullhouse—that is, to dig holes for the purpose of keeping the spouts cleared, if that was usual, and if any were dug"—where there was no evidence that digging holes was usual, though there was evidence that decedent, who had only worked five nights previously, had so performed the work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1136-1139; Dec. Dig. § 291.\*]

##### 2. MASTER AND SERVANT (§ 265\*)—DEATH OF SERVANT—NEGLIGENCE—PRESUMPTIONS.

The mere fact that decedent was killed while working in defendant's cotton oil company hullhouse by a falling of a mass of cotton seed hulls does not create a presumption of negligence of the company.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 881, 898, 955; Dec. Dig. § 265.\*]

##### 3. MASTER AND SERVANT (§ 85\*)—EMPLOYER'S DUTY TO SERVANT.

An employer does not insure the safety of his employé, being bound only to use ordinary care for his safety.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 136; Dec. Dig. § 85.\*]

##### 4. MASTER AND SERVANT (§ 291\*)—DEATH OF SERVANT—INSTRUCTIONS—NEGLIGENCE.

Where, in an action for the death of an employé, the court instructed that contributory negligence would not be presumed in the absence of evidence to the contrary, and that decedent was presumed to have used due care for his own safety, it was error to refuse to instruct that no presumption of negligence arose from the mere happening of the accident, and that an employer is only bound to use ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1140-1144; Dec. Dig. § 291.\*]

##### 5. MASTER AND SERVANT (§ 232\*)—DEATH OF SERVANT—INSTRUCTIONS.

In an action against a cotton oil company for the death of an employé caused by a caving of a mass of cotton seed hulls, it was error to refuse to instruct that if decedent went to sleep, and while asleep the hulls in flowing from a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

chute covered him, and he was thereby suffocated, there could be no recovery.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 232.\*]

Appeal from District Court, Hunt County; T. D. Montrose, Judge.

Action by Mrs. Cora Camp against the Commerce Cotton Oil Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Harry P. Lawther, Looney & Clark, and Mulkey & Hamilton, for appellant. John A. Stone, Jr., and Pierson & Staines, for appellee.

BOOKHOUT, J. This suit was instituted by appellee on February 27, 1907, as the sole surviving parent of Oscar Camp, against the appellant, Commerce Cotton Oil Company, to recover damages for the death of said Oscar Camp. Appellee's second amended original petition, upon which the case went to trial, alleged the employment by appellant of her said son without her consent to shovel hulls in its hullhouse. She alleged the youth and inexperience of her said son; that he was a boy but 15 years of age, and inexperienced in the operation of machinery and the danger attendant upon great banks of hulls being banked up and piled up in a building, and that he was too young to have judgment or discretion as to the danger attendant thereupon; and that he did not have judgment and discretion as to his own personal safety in the work that he was employed to do by appellant. She alleges that the work that her son, Oscar Camp, was employed to do and put to work at was very dangerous work; that the hulls were packed to a great height, and that steep embankments and precipices of compact hulls hung out over the space where her said son was put to work; that he was required to work up in and surrounded by the hulls; that it was dangerous and hazardous by reason of the fact that the hulls would pile up and accumulate and topple over and fall in large quantities, and that the work was even dangerous for a man of mature years to work at; that upon the day and date of the death of Oscar Camp the hullhouse was almost full of hulls, being filled within a few feet of the front, and that parties hauled hulls away from said hullhouse from the front end during the day prior to the death of Oscar Camp, and that the taking away of said hulls weakened the support of the great mass of hulls in the hullhouse, and caused them to fall down and slough off; that hulls were treacherous and dangerous to work in, because it was hard to extricate one when involved in them, and they would yield and give; that the company knew, or should have known, of the danger of such work; that this 15 year old child was put to work under these conditions, and that the said child did not know of the dangers; that he

had not been warned of the dangers by the managers of the appellant. She also alleges that appellant put her said son to work at night at this hazardous work, and that the hullhouse was provided with insufficient lights for the safe prosecution of said work. She alleges that, while pursuing the employment as set out, he was killed by suffocation by hulls caving in on him, and submerging him, and that he was buried in said hulls. She alleges that appellant was negligent in putting her minor child to do such hazardous work, and in allowing and permitting him to work in this hazardous position, and in assigning him also to this dangerous work at night. She alleges his earning capacity at \$600 per annum; that on account of the negligent, careless, and indifferent manner that appellant operated its business in its hullhouse and its negligence in employing such inexperienced youth for such work, and not warning him of the dangers, and without any negligence on her part, she had lost the value of his services during minority in the sum of \$4,000, and that, after minority, he would have continued to contribute to her support in the sum of \$8,000. Appellant answered by general and special demurrers, general denial, and by special answer that Oscar Camp was employed by appellee's consent, and denied that the work of shoveling hulls was dangerous, and that, if the work was dangerous, the same was open and apparent, and that he assumed the risk; that the death of Oscar Camp was caused by his own negligence; that appellee was fully cognizant of the work her son was employed to do; and that she, with such knowledge, consented to his employment and was guilty of contributory negligence. Appellant's demurrers were overruled, and the case was tried before a jury, and resulted in a verdict and judgment for appellee for \$2,500. Appellant's motion for a new trial was overruled, and an appeal was perfected to this court.

Appellant assigns as error the fifth paragraph of the court's charge as follows: "If you from believe from the evidence that at the time alleged in plaintiff's petition, that while deceased, Oscar Camp, was engaged in the performance of his duties as employé of the defendant, that he was performing them in a way that was usual in the hullhouse—that is, to dig holes for the purpose of keeping the spouts cleared, if that was usual, and if any were dug—and that defendant knew, or by the use of ordinary care could have had such knowledge, that said holes, if any, were dug and permitted and acquiesced in such way of keeping clear of said spouts, and did not forbid same, and if you further believe that, in digging said holes for said purpose, the said Oscar Camp exercised ordinary care for his own safety, and if you believe from the evidence that the failure, if any, on the part of the defendant to forbid

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the digging of said holes on the part of the defendant for the purpose of clearing said spouts was negligence as that term is defined in this charge, and that as a proximate cause of said negligence, if any, on the part of the defendant, said Oscar Camp was submerged and covered up in said holes and his life was crushed out and he was smothered to death, then you will find for the plaintiff." The proposition presented is that there is no evidence authorizing the submission of the issue embraced in this charge. We do not concur in this proposition. There was evidence tending to show, and which would have justified a finding, that Chess Crowson, the night foreman of the mill and a brother of the superintendent, or day foreman, saw Oscar Camp and George Taylor, a companion of Oscar Camp, on a previous night, digging a hold in the cotton hulls, and did not forbid them or warn them of the danger. However, we think this charge is subject to criticism in the use of the language that if they believed "while deceased, Oscar Camp, was engaged in the performance of his duties as employé of defendant, that he was performing them in a way that was usual in the hullhouse; that is, to dig holes for the purpose of keeping the spouts cleared, if that was usual, and if any were dug," etc. The evidence did not show that to dig holes in hulls to keep the spouts clear was usual in appellant's hullhouse. There was evidence that Oscar Camp dug holes in the hulls for the purpose of keeping the spouts cleared, but there was no evidence that other employés had done so, or that it was usual for any employé other than Oscar Camp to dig such holes. Oscar Camp worked at night and had only worked five nights prior to his death. We are not prepared to say, however, that the jury were misled by this language of the charge.

The court at the request of plaintiff gave a special charge, as follows: "You are charged that contributory negligence will not be presumed, and in the absence of evidence to the contrary, the deceased, Oscar Camp, is presumed to have used such due care for his own safety." Error is assigned to the giving of this special charge without at the same time giving two special charges requested by defendant as follows: "(1) You are instructed that from the mere happening of the accident to Oscar Camp in this case there arises no presumption of negligence. (2) A master is not an insurer of the safety of his servant, and the law imposes no greater obligation upon him than that he should use ordinary care for his servant's safety." This assignment must be sustained. The charges requested by defendant announce correct propositions of law. 2 Labatt on Master and Servant, § 833, and authorities cited in note 1; also volume 1, § 24, and authorities cited in note 2. The trial court, having instructed

the jury that contributory negligence will not be presumed in the absence of evidence to the contrary, and that the deceased, Oscar Camp, is presumed to have used due care for his own safety, should upon request have instructed them as to the legal presumptions in favor of defendant as set out in the requested charges.

Error is assigned to the action of the court in refusing a special charge requested by defendant as follows: "If you believe from the evidence that while Oscar Camp was in the defendant's hullhouse on the night of December 15, 1906, engaged in the work of shoveling hulls from under the chute, he laid down and went to sleep, and that while asleep the hulls in flowing from the chute or conveyor covered him up, and he was thereby suffocated, you will find for the defendant." This assignment must be sustained. While there was evidence tending to support the verdict, that the death of Oscar Camp resulted from a large quantity of hulls breaking off and falling upon him, causing his death, the jury under the evidence might have found that such was not the cause of his death, but that he laid down and went to sleep in the hulls, and that the hulls flowing from the chute covered him up and caused him to be suffocated. The requested charge presented this issue affirmatively, and should have been given.

For the errors pointed out, the judgment is reversed and the cause remanded.

#### LANTRY-SHARPE CONTRACTING CO. v. McCracken.

(Court of Civil Appeals of Texas. Feb. 11, 1909. Rehearing Denied March 18, 1909.)

##### 1. MASTER AND SERVANT (§ 189\*)—FELLOW SERVANTS—"VICE PRINCIPAL."

Authority to employ and discharge employes renders an employé a "vice principal," regardless of his grade of service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 443; Dec. Dig. § 189.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7313-7316, 7827.]

##### 2. MASTER AND SERVANT (§ 189\*)—FELLOW SERVANTS—VICE PRINCIPAL—SUPERINTENDING CONTROL.

Power to control the work may constitute a servant a vice principal of employes under him, though he has no power to employ and discharge them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 443; Dec. Dig. § 189.\*]

##### 3. MASTER AND SERVANT (§ 190\*)—VICE PRINCIPALS ENGAGING IN WORK.

A servant, while actually engaging in the work with other servants, is not a vice principal as to such servants, though he has power to direct and control them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 452; Dec. Dig. § 190.\*]

##### 4. MASTER AND SERVANT (§ 234\*)—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF SERVANT—BUILDINGS.

If the servant's injuries were caused by the insecurity of a temporary brace which he and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

other servants nailed to the structure, the servant must be held to have known it and to be at least jointly responsible for its insecurity.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 700; Dec. Dig. § 234.\*]

**5. MASTER AND SERVANT (§ 278\*)—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.**

In a servant's action for injuries caused by an upright timber falling upon him, while he and others were attempting to place in position a permanent brace, evidence held not to show negligence by the foreman in failing to warn plaintiff of the insecure bracing of the upright and the danger of being in the position in which he was when injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 972; Dec. Dig. § 278.\*]

**6. MASTER AND SERVANT (§ 279\*)—SUFFICIENCY OF EVIDENCE—NEGLIGENCE OF FELLOW SERVANTS.**

In a servant's action for injuries sustained while attempting to place in position a brace on a building which was held out from the building while being placed by lines at each end held by employes on the ground, evidence held to show that plaintiff's injuries were caused by the negligence of the workmen holding the lines, by permitting it to slack and let the brace strike a temporary brace supporting an upright timber, causing that timber to fall upon him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 979; Dec. Dig. § 279.\*]

**7. MASTER AND SERVANT (§ 177\*)—FELLOW SERVANTS—NEGLIGENCE—MASTER'S LIABILITY.**

The master is not liable for injuries caused by the negligence of fellow servants of the injured employe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 352; Dec. Dig. § 177.\*]

**8. NEGLIGENCE (§ 119\*)—PLEADING—ALLEGATIONS—PROOF.**

Where general allegations of negligence are followed by averments of particular negligent acts, plaintiff can only show the particular acts of negligence alleged, unless it appears from the pleading that the general averments and particular allegations refer to distinct acts of negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 206; Dec. Dig. § 119.\*]

**9. MASTER AND SERVANT (§ 278\*)—EVIDENCE—NEGLIGENCE.**

In a servant's action for injuries sustained while attempting to place in position a brace on a building, by one end of the brace swinging back and knocking out a temporary brace, which permitted an upright timber to fall upon plaintiff, evidence held to show that defendant's foreman exercised ordinary care to guard against the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 958; Dec. Dig. § 278.\*]

**10. MASTER AND SERVANT (§ 294\*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.**

Where there was no evidence to show that the negligence of defendant's foreman contributed to an accident in which plaintiff's fellow workmen were involved, it was error to refuse an instruction to find for defendant if the jury found that the injury was caused by the acts of certain workmen who were fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1162; Dec. Dig. § 294.\*]

**11. TRIAL (§ 202\*)—REQUEST FOR INSTRUCTIONS—RIGHT TO OBJECT TO REFUSAL.**

Though the evidence was such that it would have been proper to grant a peremptory instruction for defendant, defendant is entitled to al-

lege error on the part of the court in refusing to submit a proper issue to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 474; Dec. Dig. § 202.\*]

**12. MASTER AND SERVANT (§ 287\*)—ACTIONS—TRIAL—DIRECTION OF VERDICT.**

In a servant's action for injuries sustained while attempting to place a brace timber on a building, where the evidence showed that the accident was caused by negligence of fellow servants without any negligence by the employer, a verdict could be directed for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1060, 1061; Dec. Dig. § 287.\*]

**13. APPEAL AND ERROR (§ 1097\*)—REVIEW—QUESTIONS CONSIDERED—QUESTIONS UNNECESSARY TO DECISION.**

Assignments of error, which were passed upon by another Court of Civil Appeals on a former appeal in another district, will not be considered, where their consideration is not essential to the disposition of the case, in view of that fact and in deference to the authority of the Court of Civil Appeals of the other district over appeals originating in that district.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.\*]

Appeal from District Court, Bell County; John M. Furman, Judge.

Action by W. E. McCracken against the Lantry-Sharpe Contracting Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Harry P. Lawther and Arthur M. Monteith, for appellant. J. B. McMahon, for appellee.

**HODGES, J.** In June, 1905, the appellant was erecting what was termed a "rock-crusher plant" at its quarry in Bell county, in and about which the appellee was at the time employed as a laborer. During the progress of the work a heavy piece of timber which had been placed in an upright position was pulled over, fell upon the appellee's leg, and caused the injuries for which he instituted this suit and recovered a judgment.

The structure is thus described by one of the witnesses under whose direction it was being built: It consisted, when completed, of a square framework about 30 by 40 feet. The sides were built of what were called "bents" placed one upon the other. These bents were constructed as follows: Upon a concrete foundation was laid a heavy sill 30 feet in length, 12 by 12 inches, upon which were fastened three upright timbers 12 by 12, one at each end, 40 feet in length, and one in the center 13 feet 12 inches long. These were fastened to the sill by temporary angle braces 2 by 4 inches in dimension, nailed on with spikes. The central upright timber was let down in the sill 2 inches, and fastened at the base with a dowel pin. Permanent braces 6 by 10 inches were then put in on each side of the central upright timber, reaching from its

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



The testimony shows that Roettiger was the superintendent and general manager of this work, and was present on the ground; but there is some dispute as to whether he was at the time observing the work and the situation of the machinery when the accident occurred. John Bruce was an expert mechanic, and was employed as a foreman to look after the details of erecting this plant. The undisputed testimony shows that the accident occurred under the following circumstances: The last brace on what was called the "third bent" had been raised by the derrick to a position in which it was to be pulled in place by the men standing on top of the crosspiece forming the cap sill of the second bent. Standing upon that crosspiece were the appellee, John Bruce, the foreman, and John Fulwiler, a laborer. The appellee says that Bruce had told him to get up and assist them in putting the timber in place. At the time of the accident he was seated near the north end of the cap sill on the top bent, and was holding on to the brace at that end and also to the tag line, which was tied around the brace. The men holding to the tag lines, together with those upon the structure, had made an effort to pull the brace into position, but failed; and, while Bruce was hesitating about what to do next, McCracken suggested that they make another pull and possibly the timber might be "landed." Bruce immediately gave the order to "pull." The men on the north tag line pulled concertedly with Bruce, the appellee, and Fulwiler; but those who were holding the tag line on the west, and whose duty it was to keep their line taut so as to prevent a collision between the brace and the side of the structure, failed to pull on their line, and the sheave pin, which projected from a portion of the machinery fastened to the upper end of the brace, caught behind the upright timber, and, as the other men pulled, the temporary brace which supported it gave way, the upright timber was pulled over, fell on the appellee's foot and leg, and produced the injury. Bruce was standing between appellee and this upright at the time, and Fulwiler was on the opposite side. Bruce saw the timber start to fall, called to the men to look out, and escaped injury by getting around behind the upright on the north side. The appellee remained in his position, except that he put his head and part of his body behind the end timber, leaving his foot and leg exposed.

The specific charges of negligence alleged in the plaintiff's petition appear to be: (1) The insecure fastening and bracing of the timbers; (2) negligently bringing the brace which was being raised by the derrick into contact with the upright timber; (3) bringing up the brace on the outside of the structure instead of the inside; (4) failure to warn appellee of the defective bracing and danger of the work.

The court gave the following as a portion of its general charge: "You are charged that any agent or employé who is invested by his employer with authority over other employes and to superintend, control, or command other servants or employes and with the authority to direct any other employé in the performance of any duty of such employé is a vice principal of such employer and is not a fellow servant; and such employer would be responsible for any such damages accruing from the negligence of such vice principal." This charge is not a correct statement of the rule for determining when the relation of vice principal exists toward other employes.

Neither do we think the rule is properly stated in the special charges requested by the appellant and refused by the court. In the charge given the authority to manage and control the movements and conduct of other servants in the course of their employment is made the exclusive test by which to determine whether a mere foreman is a vice principal; while in the special charges requested by the appellant this test is made to depend upon the right to employ and discharge subordinate employes. While it is true the right to employ and discharge subordinate employes, when conferred by the master upon an agent, makes the latter in law a vice principal as to such employes, it does not follow that one cannot also be a vice principal without possessing that authority. One who is empowered by the master to direct and control the operations of other employes is unquestionably in some respects the representative of the master in the exercise of that authority, and when acting as such is in law a vice principal as to those over whom he is given such supervision. *Young v. Hahn*, 96 Tex. 99, 70 S. W. 950; *Bering Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36, 79 S. W. 869; *Suderman & Dolson v. Kriger* (Tex. Civ. App.) 109 S. W. 373; 28 Cyc. 1306-1313, and cases cited. The common law, which in this state is applicable to this class of services, seems to recognize the following rule: The superior servant, who is given the right to employ and discharge those over whom he exercises supervision, is, as to such employes, while engaged in the service of the master, a vice principal, regardless of the grade of service in which he may be engaged at the time; while one merely authorized to control or direct the operations of other employes is such vice principal only when exercising the delegated functions. If, for instance, an agent of the latter class should, while in the performance of some service of the same grade with those over whom he is placed, negligently cause an injury to another employé, it would be the act of a fellow servant, because the superior servant would not, in that instance, be acting at the time as the representative of the master; but if the injury should be caused by the negligence



of an agent endowed with the power to employ and discharge, it would be the act of the vice principal, and the master would be liable, for the reason that such agent is at all times as to his subordinates the representative of the master. A mere foreman, without power to employ and discharge, may therefore be a vice principal when directing the operations of other employes over whom he exercises supervision, and a fellow servant as to such employes when co-operating with them in the performance of their duties. While the charge of the court incorrectly stated the law in the particular indicated, it may not have been prejudicial when applied to this case, owing to the fact that Bruce, the foreman, was not charged with any character of negligence except that which must have arisen from his conduct in his representative capacity. In view of the fact, however, that the case will be reversed for other reasons, and that upon another trial a different state of facts may be relied upon and new issues presented, we have thought it proper to call attention to the error embodied in this charge.

The appellant requested, and the court refused, the following special charge: "An employer is not responsible in law to an employe for the negligence of a fellow servant; and in this case if you find from the evidence that the proximate cause of the falling of the central upright timber and the crushing of plaintiff's foot was the failure of the men who held the tag line across the railroad track, and whose duty it was to keep the brace timber which was being hoisted by the derrick from colliding with or striking against the structure, to pull on said tag line and thus keep said brace from striking said upright timber, or, stated another way, if you find from the evidence that the proximate cause of the injury was the act of said men holding this tag line in permitting the same to become slack, thus allowing said brace timber to strike against and become hung upon said upright timber, you will find for the defendant." The objection urged by appellee in his brief to the giving of this special charge is that it permits a verdict for appellant upon a finding that the negligence of those fellow servants caused the injury, regardless of whether there was any concurring negligence on the part of Bruce or Roettiger which contributed to any material extent to that result. If there was sufficient evidence to warrant a finding by the jury that either Bruce or Roettiger was guilty of any such concurring negligence in causing the fall of the timber and the resultant injury, then the charge was properly refused; but, if there was not sufficient evidence to support such a finding, then it was error to refuse it.

After stating that Bruce had given directions to the men on the ground to hoist the brace, the appellee in his petition thus proceeds to describe how the accident occur-

red: "That while the employes upon the ground, by the means of a rope and pulley, were raising said 5 by 8 timber (meaning the brace) as aforesaid, the said Bruce directed the plaintiff to go to the south side of said structure and to hold one end of the 5 by 8 timber in place while the other end of the same was being swung around against the top of the central upright post for the purpose of placing said timber in position, and to fasten the same so as to brace said upright timber and make the same secure, which orders and directions of the said Bruce plaintiff obeyed; and at the time hereinafter mentioned he was at his post of duty, holding said timber in place, and while so holding said timber in place the other end was brought in violent contact with said central upright timber, which caused the said upright timber to fall upon plaintiff's left leg, crushing and mangling the same in such a manner as to necessitate amputation," etc. A more satisfactory conclusion will be arrived at by considering the evidence adduced in support of the different charges of negligence contained in the petition.

As to the insecure fastening of the brace, by which is evidently meant the temporary brace which gave way when the accident occurred, the evidence shows that this was nailed in position by appellee and John Fulwiler, another employe; that appellee nailed the bottom end while Fulwiler nailed the other. If there was any insecurity appellee must be held to have known it, and as being at least jointly responsible for its existence. In addition to this an expert witness called by the appellee testified that a brace such as this was described to have been was sufficient for the purposes for which it was used. The same witness also exonerated Bruce and Roettiger from the charge of negligence in bringing the timbers up on the outside of the structure, instead of the inside. Upon neither of these issues was there any successful attempt made to show negligence from which the injury might have resulted. Regarding the charge of negligence arising from the failure to warn appellee of the insecure bracing of the timber and the danger to which he exposed himself in being in the situation he was when injured, there was little or no conflict in the testimony adduced upon the trial. Woodward, a witness for appellee, testified that McCracken represented himself to Bruce as being a "good topman," that he had some experience in that line, and expressed a desire to perform those duties. He also testified that Roettiger had ordered all of the men who did not feel safe in that position not to go on top of the building; that these orders were given a dozen times perhaps. Several other witnesses testified to practically the same facts, and in addition stated that just before the accident Bruce told McCracken that if he did not

feel safe on the building to go down. None of this evidence was disputed by McCracken or any of his witnesses. Besides this, the evidence fails to show that there was any particular danger to McCracken in being in the position he was which rested peculiarly within the knowledge of Roettiger or Bruce and which was not equally observable to him. The insecure fastening of the brace, if it existed, was certainly as well known to him as to others. The danger of being injured in the event the central upright piece should fall was no less patent to him that it was to Bruce or Roettiger. He was not injured as the result of an imprudent act ignorantly done by him, but from the source apparently wholly unexpected to all of them, and which was no more patent to others than to himself—the falling of the central upright timber.

There is nothing in the evidence upon which to base a finding of negligence "in bringing the brace being raised in violent contact with the upright timber," and thus causing the injury. The account given by the appellee in his testimony on the trial, as to how the accident occurred, is rather vague and indefinite. We think it may be assumed as having been conclusively shown: That the immediate cause of the fall of the central upright piece of timber was that some portion of the tackle used in hoisting the brace caught behind the upright about the time the north tag line was pulled the second time, and thus caused the upright timber to be pulled over in the direction of the appellee; that the tackle was thus caught on account of the failure of the men holding the west tag line to pull at the proper time and in permitting their line to become slack, their duty being to keep their line taut, so as to prevent the upper end of the brace then being elevated, or the tackle attached to it, from coming in contact with any portion of the structure. Whatever negligence there might have been in any of these acts was the negligence of the fellow servants, and for which appellant could not be held liable. The only thing done in that connection which could be made the basis of a charge of actionable negligence against the appellant company was the order given by Bruce for the men holding the tag lines to pull. Assuming that in giving this order Bruce was representing the master, the question then is: Was he guilty of negligence in giving the order?

We will here digress long enough to say that the state of the appellee's pleadings is such as to make the consideration of this issue as a basis of recovery a matter of doubtful propriety. Appellant insists that the pleadings are not sufficient to authorize such a consideration. In replying to this contention counsel for appellee claims protection under his general averments of negligence as set forth in his petition. The rule adopted in this state seems to be that

when the petition contains a general allegation of negligence, and this followed by special averments of particular acts, the special averments will be considered the grounds upon which the plaintiff relies, and recourse to them alone will be had as the statement of the cause of action, unless it also appears from the context of the pleadings that the pleader intended the general averments and the particular allegations to refer to different and distinct acts of negligence. *M., K. & T. Ry. Co. v. Vance* (Tex. Civ. App.) 41 S. W. 168; *G., C. & S. F. Ry. Co. v. Younger*, 10 Tex. Civ. App. 141, 29 S. W. 948; *H., E. & W. T. Ry. Co. v. Summers* (Tex. Civ. App.) 49 S. W. 106; *Railway Co. v. Hennessey*, 75 Tex. 155, 12 S. W. 608; *Johnson v. G., H. & N. Ry. Co.*, 27 Tex. Civ. App. 616, 66 S. W. 907. While we do not rest our disposition of this case upon the insufficiency of the pleadings to authorize the consideration of the issue here suggested—that is, whether it was negligence on the part of Bruce in giving the order for the men to "pull"—still we do not decide that it should not be done; and we suggest that the petition be amended if upon another trial the plaintiff expects to rely upon that ground for a recovery.

The testimony shows that Roettiger and Bruce had taken the proper precaution to avoid the collision between the brace as it was elevated, or the tackle holding it, and the other timbers, by attaching to the brace a tag line, and had placed this line in the hands of a group of men stationed on the west side of the building, upon whom rested the duty of keeping their line taut so as to prevent the very contact which did occur. Had this group of men done their duty, the tackle would have been held off from the upright timber and would not have caught as it did. From this we think it must be found that Roettiger and Bruce exercised ordinary care to guard against the accident which did occur. Having done this, it cannot be held negligence in Bruce in ordering the men to pull on the tag lines at the time he did, unless the tackle was at the time caught and he knew it, or the duty to know it rested upon him as a matter of common prudence. It seems that his direction to "pull" was addressed to the men holding both tag lines, and he had a right to expect the men holding the west tag line to pull at the same time the others did. Bruce swears that the brace was swinging loose and was not caught at the time he gave the order to pull. Mitchell, a witness for the appellee, and one of the men stationed at the west tag line and who failed to pull, stated, in response to questions upon his re-direct examination by counsel for plaintiff, that Bruce ordered them to pull before the brace was caught. There is nothing in the record to contradict this evidence. If, then, this be taken as true, there was nothing to show that Bruce or Roettiger was guilty of

any concurring negligence which the charge requested would have excluded from the consideration of the jury. In the absence of any, the appellant had the right to have the issue embodied in that charge submitted to the jury. The fact that the state of the evidence which made it improper for the court to refuse this charge would also authorize a peremptory instruction to the jury to find for the appellant does not affect the question.

We have simply passed upon the assignment as presented in the record. This case originated in the Third supreme judicial district and has once been before the appellate court. On the former appeal the honorable Court of Civil Appeals of that district passed upon the issues embodied in two of the assignments of error embraced in the present record. In view of the facts that the consideration of those assignments is not here essential to what we have decided to be a proper disposition of the case, and in defense to the authority of that honorable court over appeals originating in that district, we decline to pass upon those assignments.

The judgment of the district court is therefore reversed, and the cause remanded.

# GALVESTON, H. & S. A. RY. CO. v. POWERS et al.†

(Court of Civil Appeals of Texas. Feb. 24, 1909. Rehearing Denied March 24, 1909.)

## 1. CARRIERS (§ 227\*)—LIVE STOCK—ACTION FOR LOSS—PLEADING—SUFFICIENCY.

A petition against a carrier for loss of a mare, resulting from negligence in transit, alleged that at the destination at all times during the month of shipment there was a market for her, that she was then and there worth in the market \$1,500, but that, if there was no market there, she was standard bred, a speedy roadster, well developed and shapely, of kind and gentle disposition, healthy, and in the prime of life, and that on account of these and other good qualities and for the purposes for which she could be used she was worth \$1,500. *Held*, that the pleading was sufficiently explicit to apprise the carrier with reasonable certainty of the character of evidence to be tendered.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 953; Dec. Dig. § 227.\*]

## 2. CARRIERS (§ 215\*)—LIVE STOCK—LOSS OR INJURY—CARRIER'S LIABILITY.

Carriers are liable for loss or injury to live stock intrusted to them for transportation, unless caused by the act of God, or the public enemy, or the negligence of the shipper, or by the "proper vice" or natural propensities of the animals, but must use ordinary care to prevent loss or injury caused from such vice, and, to relieve it from liability, it must appear that the vice or natural propensity was the sole proximate cause of the loss or injury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 215.\*]

## 3. CARRIERS (§ 228\*)—LIVE STOCK—ACTION FOR LOSS—EVIDENCE.

Where, in an action against a carrier for loss of an animal, it was doubtful whether the

jury would find it had a market value at the destination, the shipper could prove its intrinsic or actual value.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 959; Dec. Dig. § 228.\*]

## 4. CARRIERS (§ 228\*)—LIVE STOCK—ACTION FOR LOSS—DAMAGES.

There is no inflexible rule for ascertaining damages recoverable from a carrier for loss of live stock shipped; it being merely required that reliable satisfactory evidence be produced from which the value of the property is ascertainable with a reasonable degree of certainty, and, in the absence of market value at the destination, actual or intrinsic value may be shown.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 959; Dec. Dig. § 228.\*]

## 5. APPEAL AND ERROR (§ 742\*)—REVIEW—ABSTRACT PROPOSITIONS.

The Court of Civil Appeals will not review a proposition unless a witness is legally qualified to testify as to the market value of a given article at a particular time and place, and it is reversible error to permit him to testify thereto, where the statement supporting the proposition does not show that witnesses named in it did testify to the market value.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

## 6. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL—MATTER COVERED.

It is not error to refuse instructions substantially covered by one given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

## 7. EVIDENCE (§ 553\*)—HYPOTHETICAL QUESTIONS—BASIS.

Where there is evidence upon which a jury may find facts upon which an expert may base a proper opinion, such facts may be assumed as a hypothesis for a question to elicit the opinion, and, where there is such evidence, the trial court cannot arbitrarily exclude a question upon the assumption that the facts on which it is based are not proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2371; Dec. Dig. § 553.\*]

## 8. APPEAL AND ERROR (§ 207\*)—REVIEW—CONDUCT OF COUNSEL.

When an exception has been reserved by proper bill to language used by counsel in addressing a jury, the Court of Civil Appeals can review the trial court's action respecting it, though the complaining party did not request an instruction to disregard the language; but objection will not be reviewed unless made at the time of argument.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1500; Dec. Dig. § 207.\*]

Appeal from District Court, Bee County; F. G. Chambliss, Special Judge.

Action by James F. Powers against the Galveston, Harrisburg & San Antonio Railway Company and another. From the judgment, the company appeals. Affirmed.

Proctor, Vandenberg & Crain, for appellant. Claude Pollard, Duvall West, R. J. McMillan, Fly & Daniels, and Beasley & Beasley, for appellees.

NEILL, J. James F. Powers sued the Galveston, Harrisburg & San Antonio Railway Company and the St. Louis, Brownsville & Mexico Railroad Company to recover \$1,523 damages alleged to have accrued by reason of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

the death of a certain mare of the plaintiff, which he claimed was caused by defendants' negligence while in their possession for transportation from Refugio to San Antonio, Tex. The negligence averred was, in substance, that the car in which the animal was shipped was jerked, roughly handled, and managed, delay in transportation, she was not properly watered and cared for in transportation, a delay in delivering her to the consignee after she arrived in San Antonio, and that she was not properly fed, watered, and cared for after her arrival at San Antonio before delivery to the consignee. The answer of the Galveston, Harrisburg & San Antonio Railway Company consisted of a general demurrer and special exceptions to plaintiff's petition, a general denial, and a special plea that the death of the animal was due to an inherent vice, and not to any negligence on its part. The other defendant pleaded a general denial and specially that it transported the animal with reasonable dispatch over its line of road, and delivered her, uninjured and in good condition, at the end of its line to appellant, its connecting carrier, to be thence carried to San Antonio, and that her death was attributable to an inherent vice which rendered her unfit for shipment. The court overruled appellant's exceptions to plaintiff's petition, and the trial resulted in a verdict and judgment in favor of plaintiff against appellant for \$750, and against plaintiff in favor of the other defendant.

#### Conclusions of Fact.

It is undisputed that on March 4, 1907, plaintiff delivered a mare and her six-days old colt to the St. Louis, Brownsville & Mexico Railway Company at Refugio, Tex., to be carried thence to the city of San Antonio; the animals being routed over its line of road to Placedo, and from thence over appellant's line to San Antonio. The mare was shipped and consigned to J. F. Conley at San Antonio for the purpose of having her bred to his stallion. The testimony was conflicting as to whether the mare, on account of having foaled so recently, was in a fit condition for shipment. As it was for the jury to determine this issue, we find, in accordance with the verdict, that her condition was such as to admit of her being safely transported by rail over defendants' roads to her destination, if ordinary care and prudence were used by defendants' servants to that end. While the evidence may be regarded as purely circumstantial, we believe that it reasonably tends to show that such care and prudence was not exercised by appellant after the mare was delivered to it by its codefendant at Placedo to be carried and delivered to the consignee at destination; such evidence tending to show that she was roughly handled, and not properly watered and cared for in transportation, and that there was a delay in delivering her to the consignee, and that she was given too much water after she arrived at San Antonio,

and that such acts of omission and commission on the part of appellant were negligence, and that such acts of negligence, or some of them, were the proximate cause of the mare's death, which occurred on March 14, 1907. The evidence is also sufficient to show that the market value of the mare, as well as her intrinsic value, in San Antonio, was, on the day she was delivered to the consignee, \$725, and that the expense incurred by appellee in keeping and caring for the animal while in the possession of the consignee was \$25, as found by the jury.

#### Conclusions of Law.

1. The first assignment complains of the court's overruling appellant's first special demurrer to plaintiff's original petition, which is as follows: "This defendant demurs specially to plaintiff's petition, on the ground that the allegations thereof are insufficient to apprise the defendant of facts, the knowledge of which is essential to defendant in order to enable it to intelligently prepare its defense as to the market value of said mare in San Antonio sued for herein, in this: That the only description given of said mare in said petition is that she was a certain bay mare, standard bred, and a speedy roadster, well developed and shapely, of kind and gentle disposition, healthy, and in the prime of life, and possessed of other good qualities; said petition failing to allege what such other good qualities consisted of, the particular breeding of said mare, her weight, her size and age, and her record for speed, or the speed which she was capable of making, or, in fact, any particular trait which would create a market value for the very large amount sued for, and said petition utterly failing to allege any facts which would constitute a market value for such animal so greatly in excess of the market value of an ordinary mare of the general description of plaintiff's mare, as stated in said petition."

The portion of the petition to which the demurrer was directed is as follows: "That at said San Antonio at all times during the month of March, 1907, there was a market for said mare and all such like animals, and that she was at said place at all times during said month of March, 1907, worth in said market the sum of \$1,500. That the market value of said mare at said San Antonio, at the time she arrived there, and at the time she would have arrived there had she been transported with reasonable dispatch, was, as stated, the sum of \$1,500. If, however, plaintiff is mistaken in this, and at said times and place there was no market for said mare, nor for such like animals, and in fact she had no market value in said San Antonio, at the time she arrived there, nor at the time she would have arrived there had she been transported with reasonable dispatch, then plaintiff says that the mare was standard bred, a speedy roadster, well developed, and shapely, of kind and gentle dis-

position, healthy, and in the prime of life, and was on account of these and her other good qualities, and for the purposes for which she could be used, of the fair and reasonable value of \$1,500 at said San Antonio, and at said Refugio, at the time she arrived in San Antonio as stated, and at the time she would have arrived there had she been transported with reasonable dispatch, and was so of the fair and reasonable value of \$1,500 at such and other places at all times during the month of March, 1907."

The proposition asserted under the assignment is: "A defendant is entitled to be apprised by plaintiff's pleadings of the facts relied upon by plaintiff with sufficient explicitness as to enable defendant to anticipate with reasonable certainty the character of evidence that will be tendered to establish such facts, in order that he may have the opportunity to make the investigation necessary to a proper preparation of its defense."

We think the pleading in question fully meets the proposition by conforming to every requisite of good pleading.

2. The second, third, fourth, eleventh, twelfth, seventeenth, and twenty-fourth assignments of error, which complain of the insufficiency of the evidence to support the verdict, are disposed of adversely to appellant by our conclusions of fact. In this connection we deem it proper to say that, in reaching the conclusion that the animal was injured by the negligence of appellant, we had in view, as applicable to the evidence, these principles of law: Carriers of live stock are liable absolutely for loss or injury to stock intrusted to them for transportation, like other common carriers, unless the loss or injuries were occasioned by the act of God, or the public enemy, or the negligence of the shipper, except that they are not liable for loss or injury caused by the "proper vice" or natural propensities of the animals themselves, and not by negligence on the part of the carriers; but the carrier is bound to exercise ordinary care to prevent loss or injury from being caused from the "proper vice" of the animals, and is not excusable for loss or injuries resulting therefrom which might have been prevented by the exercise of ordinary care. In order to relieve it from liability, it must appear that the vice or natural propensity of the animal was the sole proximate cause of the loss or injury (*Cragin v. N. Y. Cent. Ry. Co.*, 51 N. Y. 61, 10 Am. Rep. 559; *Penn v. Buffalo, etc., Ry. Co.*, 49 N. Y. 204, 10 Am. Rep. 355; *Illinois Cent. Ry. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85; *Evans v. Fitchburg Ry. Co.*, 111 Mass. 142, 15 Am. Rep. 19; and, unless it so appears, the carrier is liable as an insurer, even in cases where no negligence on its part is affirmatively shown (*Ft. W. & D. C. Ry. Co. v. Greathouse*, 82 Tex. 111, 17 S. W. 834; *Kinnick v. Railway*, 69 Iowa, 665, 29 N. W. 772; 4 *Elliott on Railroads* [2d Ed.] § 1548a; *L. & N. Ry. Co. v. Pedigo* [Ky.] 113 S. W. 116;

*Southern Ex. Co. v. Fox & Logan* [Ky.] 115 S. W. 184).

3. Under the fifth, sixth, and seventh assignments of error, which complain of the admission of evidence tending to show the intrinsic value of the mare, are asserted these propositions: "(1) Evidence of intrinsic value is admissible only where it is shown that the article possesses no market value. (2) Where, in a suit against a common carrier for the loss of a horse transported by it, it is shown that there is no market value for the horse at destination, then the measure of damages is the market value of the horse at the nearest market. (3) Unless a witness is shown to be legally qualified to testify as to whether or not there is a market value of a given article at a particular place and time, it is reversible error to permit him to testify in reference thereto."

As to the first proposition: The evidence as to whether the animal had a market value in San Antonio was such as might have authorized the jury to find either way, and, as it could not be told with reasonable certainty that it would not find in the negative upon the issue, the plaintiff could not be expected, in anticipation that the jury would not so find, to forego proving her actual value, and to rest his case alone upon the hypothesis that he had sufficiently shown her market value, so as to require the jury to so find; but, the issue being doubtful, he had the right to relieve himself of the consequence of the uncertainty by proving her intrinsic or actual value. *Pacific Express Co. v. Lothrop*, 20 Tex. Civ. App. 339, 49 S. W. 898; *G., C. & S. F. Ry. Co. v. Jackson*, 99 Tex. 343, 89 S. W. 968.

As to the second proposition: There is no hard and fast rule, that we know of, which requires the plaintiff, in an action against a common carrier for the loss or injury of an animal delivered it for transportation, where there is no market value for one of its kind at destination, to prove its market value at the next nearest place where there is a market for such an animal, to the exclusion of its actual value. As is said by the Supreme Court in *G., C. & S. F. Ry. Co. v. Jackson*, supra: "The rules of law for ascertaining damages are not inflexible, but the circumstances of each case must control. What is required is that reliable and satisfactory evidence shall be produced from which the value of the property in controversy may be ascertained with a reasonable degree of certainty." To this end it is held that, in the absence of market value at destination, the actual or intrinsic value of the animal may be shown. *G., C. & S. F. Ry. v. Anson* (Tex. Civ. App.) 82 S. W. 785; *T. & P. Ry. Co. v. Ellerd*, 38 Tex. Civ. App. 596, 87 S. W. 362; *A., T. & S. F. Ry. Co. v. Veale*, 39 Tex. Civ. App. 37, 87 S. W. 202; *T. & P. Ry. Co. v. Dishman*, 41 Tex. Civ. App. 250, 91 S. W. 828.

The third proposition is a mere abstraction, not shown by the statement under the first

proposition, which is referred to as the one to be considered in support of it, to have any relation to the proposition; it not appearing therefrom that the witnesses named in it did testify to the market value of the animal in San Antonio on the date she arrived there.

4. As before intimated in this opinion, we think the evidence was such that the jury might have found either way on the question as to whether the animal had a market value in San Antonio. Hence the court did not err in submitting the issue of her market value there, which is complained of in the eighth assignment, nor in submitting the question as to her intrinsic value, as is complained of in the ninth. The tenth assignment raises the same questions that are presented by the eighth and ninth, and are likewise disposed of.

5. This paragraph of the court's general charge: "If you do not believe from the evidence that the mare was injured while being shipped, or before her delivery by the railway company in San Antonio, or that if she was so injured that it was not caused by the negligence of either of the defendants, in the manner as substantially alleged in plaintiff's petition, or that if she was injured, and such was the result of the physical condition she was in by reason of her having recently given birth to her foal, or that, if she was so injured by the negligence of defendant, such injuries were not the proximate cause of her death, or that her death resulted from the negligence of plaintiff, or his agent or employé, in handling and caring for her after she had been so delivered in San Antonio, then in either such event your verdict must be for the defendants"—embodies the substance of special charges Nos. 2, 3, and 4, requested by appellant, the refusal of which is the basis of the thirteenth, fourteenth, and fifteenth assignments of error. For this reason said assignments are overruled. We also overrule the sixteenth assignment, because the issue of contributory negligence therein referred to was correctly submitted in the main charge to the jury.

6. Under the eighteenth and nineteenth assignments, it is asserted, as a proposition, that "it is error to permit a hypothetical question, based upon facts, to be propounded to a witness, when the facts which constitute the basis of such question have not been proven." It may be laid down as a rule that, whenever there is evidence upon which a jury may find the existence of a group of facts upon which an expert may base an opinion such as is legitimate for such a witness to give, such facts may be assumed as a hypothesis for a question to elicit from witness his opinion deducible from such facts. True, before such facts can serve as data for the hypothesis, it must reasonably appear to the court that the evidence is such as would warrant the jury in finding that they were proved; but, where there is

such evidence, the court cannot arbitrarily sustain an objection to a question, based upon the assumption of the existence of such facts, asked an expert as to a matter about which he can give an opinion, upon the assumption that such facts are not proved, for, if this could be done by the trial court, the basis upon which expert testimony rests would, in many instances, be destroyed. The witnesses to whom the hypothetical questions referred to in the assignments were asked were shown to be experts in regard to the matters under inquiry; and, we believe, the evidence as to the facts upon which the questions were predicated was sufficient to admit of the finding of such facts by the jury, as a basis for the questions upon which it was sought to elicit the witnesses' opinion as to what was the cause of the mare's death. We therefore overrule these, as well as the twentieth, twenty-first, and twenty-second assignments.

7. It appears from the explanation of the trial judge appended to the bill of exceptions taken to the remarks of one of counsel for plaintiffs, which are the subject of the twenty-third assignment of error, that "no objection was made at the time these remarks were made, and no request was made to instruct the jury to disregard same or have counsel withdraw them." When an exception has been reserved by proper bill to language used by counsel in addressing a jury, this court has authority to review the action of the trial court in reference thereto, although there may have been no request by the complaining party that a charge be given to the jury to disregard the language. *Western U. Tel. Co. v. Perry*, 95 Tex. 645, 69 S. W. 132. But the rule is that, unless objection is offered to the argument at the time it is made, notice of the objection will not be taken in an appellate court. *Moore v. Moore*, 73 Tex. 383, 11 S. W. 396; *Moore v. Rogers*, 84 Tex. 1, 19 S. W. 283; *G., C. & S. F. Ry. v. Hockaday*, 14 Tex. Civ. App. 613, 37 S. W. 475; *M., K. & T. Ry. v. Nesbit*, 43 Tex. Civ. App. 630, 97 S. W. 828; *Am. Freehold, etc., Co. v. Brown* (Tex. Civ. App.) 101 S. W. 862; *G., H. & S. A. Ry. Co. v. Worth* (Tex. Civ. App.) 107 S. W. 961. It is, however, held that the reason of this rule does not apply when the trial judge has established a rule that he will in no case sustain an objection to improper argument, and will never instruct a jury to disregard the argument, however improper it may be. See *G., H. & S. A. Ry. Co. v. Washington* (Tex. Civ. App.) 92 S. W. 1059; *H. & Tex. Cent. Ry. Co. v. Rehm*, 36 Tex. Civ. App. 553, 82 S. W. 527. It does not appear that the trial judge in this case had any such rule in his court. Therefore, we think the rule of law which requires objection to be offered to the argument at the time it is made should govern here, and, as no such objection was made, the assignment should be overruled.

8. The charge of the court is not obnoxious

to any of the objections urged against it under the twenty-fifth assignment of error. Nor did the court err in refusing special charge No. 10, requested by appellant, for if, while the mare was in the appellant's possession, she was without feed or water, the length of time she was in transit might have had considerable "bearing upon the case."

9. As there was not a particle of evidence tending to show that the mare suffered any injury while in the possession of appellant's codefendant, special charge No. 8, requested by appellant, was properly refused.

There is no error in the judgment, and it is affirmed.

### GOLD v. CAMPBELL et al.

(Court of Civil Appeals of Texas. March 3, 1909.)

#### 1. FALSE IMPRISONMENT (§ 7\*)—GROUNDS—DEPRIVATION OF LIBERTY.

Under the Bill of Rights, declaring that no citizen shall be deprived of life, liberty, or property except by due course of the law of the land, and that everything in the Bill of Rights is excepted out of the general powers of government and shall forever remain inviolate, and all laws contrary thereto shall be void, a police officer, who deprives a citizen of his liberty in any way except by due course of the law of the land, is amenable to the citizen deprived of his liberty in an action for false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 29-42; Dec. Dig. § 7.\*]

#### 2. FALSE IMPRISONMENT (§ 43\*)—NATURE OF OFFENSE.

Under Pen. Code 1895, art. 618, defining "false imprisonment," the offense consists of imposing by force or threats an unlawful restraint upon a man's freedom of locomotion, and the wrong may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, by personal violence, or by both.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 122, 123; Dec. Dig. § 43.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2657-2661; vol. 8, p. 7660.]

#### 3. FALSE IMPRISONMENT (§ 22\*)—EVIDENCE—BURDEN OF PROOF.

Under Pen. Code 1895, art. 593, relating to circumstances justifying the use of force for the detention of a person against his will, any restraint put by fear or force upon the actions of another is *prima facie* unlawful and constitutes a false imprisonment, and the burden is upon the person making the restraint to show a justification.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 98; Dec. Dig. § 22.\*]

#### 4. FALSE IMPRISONMENT (§ 31\*)—EVIDENCE—SUFFICIENCY.

In an action against the chief of police for false imprisonment, evidence *held* to show that, though he was not responsible for the original arrest, still he was responsible for plaintiff's being deprived of his liberty after he was taken to the police station.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 31.\*]

#### 5. FALSE IMPRISONMENT (§ 7\*)—ACTS CONSTITUTING—UNLAWFUL ARREST.

Code Cr. Proc. 1895, tit. 5, c. 1, prescribes in what cases arrests may be made without warrant, and, by article 252, provides that in all cases enumerated in the chapter the person making the arrest shall immediately take the person arrested before the magistrate who may order the arrest, or before the nearest magistrate where the arrest was made without an order. Article 249 provides that the municipal authorities of towns and cities may establish rules authorizing the arrest without warrant of persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten or are about to commit some offense. Ordinance No. 561 of the city of El Paso requires the police of the city to preserve order and to protect the inhabitants and property of the city, and commands them with or without warrant to arrest all persons found in the act of violating any law or ordinance, and all persons found under suspicious circumstances, and to take every person arrested by them, if in the daytime, before the proper judicial tribunal, and if at night to the city prison and confine the person so arrested until he can be brought before the proper tribunal for trial. *Held*, that the arrest of a merchant in his own store without a warrant, for refusing to return money paid him for goods sold and for exchanging American money into Mexican, on the verbal complaint of one who had repented of a trade he had made, the goods not being sold or the money exchanged, in the presence of an officer, was not authorized by the ordinance, since the merchant was not found in the act of violating any act or ordinance nor found in a suspicious place or under suspicious circumstances.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 29-42; Dec. Dig. § 7.\*]

#### 6. FALSE IMPRISONMENT (§ 8\*) — PERSONS LIABLE.

A chief of police, who, when informed of an illegal arrest by one of his police officers who brought the person arrested before him, sanctioned the arrest and himself ordered the person unlawfully arrested to be placed in jail, instead of arresting the policeman for false imprisonment committed in his presence, is himself liable in damages for the false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 8.\*]

#### 7. FALSE IMPRISONMENT (§ 34\*)—DAMAGES.

Where, in an action for false imprisonment, the evidence shows that defendant has unlawfully been deprived of his liberty, he is entitled to recover at least nominal damages for the violation of his constitutional right and the expenses reasonably incurred after procuring his discharge from the restraint, also for loss of time, interruption of his business, and suffering bodily and mentally occasioned by the wrongful imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 111; Dec. Dig. § 34.\*]

#### 8. FALSE IMPRISONMENT (§ 22\*)—MALICE—NECESSITY OF SHOWING.

It is not necessary to prove malice, in an action for false imprisonment, where it is shown that the imprisonment is unlawful, since malice will be conclusively imputed from the unlawful act.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 99; Dec. Dig. § 22.\*]

#### 9. FALSE IMPRISONMENT (§ 33\*)—MEASURE OF DAMAGES—DISCRETION OF JURY.

An action for false imprisonment being one in which the general damages cannot be meas-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ured with any certainty, the sound discretion of the jury, under all the circumstances, is the only practicable measure.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 33.\*]

#### 10. FALSE IMPRISONMENT (§ 35\*)—EXEMPLARY DAMAGES—MALICE.

Where a police officer in making an arrest without authority acted recklessly or willfully and maliciously with a design to oppress and injure the person arrested, the jury, in addition to compensatory damages, as a punishment to defendant and as a protection against the violation of personal rights and social order, may award such exemplary damages as they may deem proper.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 112; Dec. Dig. § 35.\*]

#### 11. FALSE IMPRISONMENT (§ 34\*)—DAMAGES—INJURY TO BUSINESS.

In an action for false imprisonment, damages to plaintiff's business, not being such as would naturally and proximately arise from the wrong done his person, are too remote for recovery.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 111; Dec. Dig. § 34.\*]

#### 12. FALSE IMPRISONMENT (§ 26\*)—EVIDENCE.

Where, in an action for false imprisonment, it was shown that plaintiff's arrest was without warrant or complaint and unjustifiable, the complaint, information, and warrant of arrest, filed and issued after his false imprisonment, were not admissible as tending to justify or mitigate the unlawful act.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 103; Dec. Dig. § 26.\*]

#### 13. FALSE IMPRISONMENT (§ 7\*)—DEFENSES—WAIVER OF RIGHT OF ACTION—PLEA OF GUILTY.

The liability of an officer for an illegal arrest is not waived by the plaintiff's pleading guilty of the offense for which the arrest was made.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 7.\*]

#### 14. OFFICERS (§ 129\*)—BONDS—LIABILITIES OF SURETIES.

The sureties on the bond of a public officer are liable for all defaults of the officer within the limit of what the law authorizes or enjoins upon him as such officer, but they are not liable for acts not done in his official capacity.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 129.\*]

#### 15. OFFICERS (§ 129\*)—BONDS—LIABILITIES OF SURETIES—NATURE OF DEFAULT—"VIRTUTE OFFICII"—"COLORE OFFICII."

Acts done by an officer "virtute officii," for which the sureties on his official bond are liable, are such as are done within the authority of the officer, but in the doing of which the authority is improperly exercised or the confidence reposed in him by the law is abused; while acts done "colore officii," for which the sureties are not liable, are such as the nature of the office gives him no authority to do.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 129.\*]

For other definitions, see Words and Phrases, vol. 1, p. 936; vol. 2, pp. 1263-1264.]

#### 16. MUNICIPAL CORPORATIONS (§ 173\*)—CHIEF OF POLICE—BONDS—LIABILITIES OF SURETIES.

To charge sureties on the bond of a chief of police, the act complained of must not only be such as might be rightfully done by him as such officer, but it must have been actually done by

him as such officer under a claim of right to do it in his official capacity.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 173.\*]

Appeal from El Paso County Court; Albert S. Eylar, Judge.

Action by Samuel Gold against George C. Campbell and others for false imprisonment. From a judgment for defendants, plaintiff appeals. Affirmed in part, and reversed in part.

Atlas Jones, for appellant. Jackson, Lea & Ware, for appellees.

NEILL, J. Samuel Gold sued George C. Campbell, and the sureties on his official bond, as chief of police of the city of El Paso, to recover \$495 actual, and \$100 exemplary, damages for false imprisonment alleged to have been effected by plaintiff having been unlawfully arrested and imprisoned by one George Miller without a warrant, while acting under the direction and command of the defendant Campbell. The defendants answered by general and special exceptions to plaintiff's petition, a general denial, and pleaded specially, in justification of the imprisonment, a certain ordinance of the city, under which it was averred the arrest was made by Miller as a policeman. After the court sustained the special exception embodied in the fifth paragraph of defendants' answer to plaintiff's petition, the case was tried before a jury, and the trial resulted in a verdict and judgment in favor of the defendants.

The first assignment which attracts our attention is that which complains of the refusal of the court to set aside the verdict because it is unsupported by the evidence. As a decision of the question involved requires a consideration of the law pertaining to a case of this character, as well as a review of the evidence adduced in this particular case, we will first expose the principles of law pertaining to the case, and then, in the light of such principles, review the evidence for the purpose of determining whether it tends to support the verdict. If the probative force of the testimony should prove such that no reasonable man can deduce the conclusion from it that the defendant Campbell wrongfully imprisoned the plaintiff, if there was no error in the charge submitting the issue to the jury, then the verdict must stand; but, on the other hand, if, under the law pertinent to the evidence, no mind capable of receiving and weighing evidence directed to the proof of a specific fact could, in the light of the law, come to any other conclusion than that Campbell wrongfully and without authority of law restrained the plaintiff of his liberty, it must be set aside.

There are certain God-given rights, which government is instituted and maintained to secure and protect all men in the equal enjoyment of—the proud, the humble, the poor, the rich, the citizen, the stranger, and the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



sojourner. It matters not what adversities may have befallen him, or what complexion an Indian or an Afric sun may have burnt upon him, whoever and wherever he is, so long as he conforms his conduct to the law, and does not exercise such rights to the injury or detriment of another or in disturbance of the peace and good order of society, neither government nor its officers, though they may wield a policeman's baton, handle a "big stick," and be epauletted, chevroned, and arrayed like the Sons of Veterans at a Confederate reunion, can rightfully deprive him of such rights, and even when his conduct is such as to authorize the government, through its officers, to deprive or restrain him in the exercise of such right, such authority must be exercised according to law. Among these natural rights are the enjoyment of life, liberty, and property. The Bill of Rights, which is incorporated in our Constitution, declares that no citizen shall be deprived of life, liberty, property, etc., except by due course of the law of the land. It then declares that "Everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate and all laws contrary thereto \* \* \* shall be void." If, then, the plaintiff was deprived of his liberty by the defendant Campbell in any way, except by due course of the law of the land, the latter was unquestionably amenable to him in this action.

"False imprisonment" consists of imposing by force, or threats, an unlawful restraint upon a man's freedom of locomotion. *Prima facie* any restraint put by fear or force upon the actions of another is unlawful and constitutes a false imprisonment, unless a showing of justification makes it a true or legal imprisonment. The wrong may be committed by words alone or by acts alone, or by both, and by merely operating on the will of the individual, by personal violence, or by both. All that is necessary to constitute false imprisonment is that the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he fears to disregard. Any arrest or detention of a person is presumed to be unlawful, and the burden is upon the defendant to show that it was lawful. *Cooley on Torts* (3d Ed.) 296-298. False imprisonment is an offense under the laws of Texas, punishable by a fine not exceeding \$500, and may be by confinement in the county jail not exceeding one year, and is thus defined: "False imprisonment is the willful detention of another against his consent, and where it is not expressly authorized by law, whether such detention be effected by an assault, by actual violence to the person, by threats or by any other means which restrains the party so detained from removing from one place to another as he may see proper." *Pen. Code* 1895, art. 618. However, article 622 provides that: "It is not an offense to detain a person in the cases and for the objects mentioned in

article 593 as justifying the use of force, but whenever it is assumed as a justification that such circumstances existed, it must be shown also that the detention was necessary to effect any of the objects set forth in said article." After we have stated from the record the evidence upon the question of plaintiff's imprisonment, which will show beyond a peradventure of a doubt that he was imprisoned, we will then determine whether any one can come to any other conclusion than that the defendant Campbell was a party to such imprisonment; and, if no other conclusion can be deduced, we will then inquire whether under the law the evidence tends to justify him in making such imprisonment.

James Miller testified, in substance: That on February 4, 1908, he was a policeman of the city of El Paso, when a Mexican came to him and told him that plaintiff, Gold, had agreed with him to sell him a dozen silk handkerchiefs, and to change \$280 United States money into Mexican money for him at the rate of \$1 of United States money for \$2 of Mexican, that he was to pay \$24 for the handkerchiefs, and plaintiff was to keep \$24 of his (the Mexican's) money for changing it, and that the Mexican asked him to get his money and make plaintiff take back the handkerchiefs. That he (Miller) then went with the Mexican to plaintiff's store on El Paso street and demanded of plaintiff to return the Mexican his money and take back the handkerchiefs, but that plaintiff said that the Mexican agreed to pay him for changing the money, and refused to do so unless his attorney so advised him. That plaintiff asked time to go and consult his attorney, which he (Miller) granted him. That when plaintiff returned from his attorney, he refused to take the handkerchiefs or give back the money, whereupon Miller told plaintiff that he would have to take him to the chief of police, and thereupon plaintiff, without resistance, accompanied him to the chief of police at the police station of the city. That when he took plaintiff to the chief of police, he had no warrant, and did so without direction or request of the chief. That when they got to the police station they found defendant Campbell, the chief of police, and both plaintiff and the Mexican told him their stories about their transaction. That, after talking with them for some time, and consulting with the captain of the police force, and planning to find out what charge to make against plaintiff, the chief, Campbell, told the captain he had better lock plaintiff up and investigate the matter. That they then locked plaintiff up under orders from the chief of police. That he was locked up at about 12:30 p. m., under orders from the chief of police, Campbell, who was the authority at the time.

The defendant George C. Campbell testified as follows: "I was chief of police of the city of El Paso, Tex., on February 4, 1908, when plaintiff was brought to the police station by James Miller. A Mexican, who

was a stranger to me, and who was on his way from Arizona to Mexico, came with them. The Mexican complained to me that plaintiff had swindled him out of his money and showed me two dozen handkerchiefs, and said plaintiff had charged him \$2 apiece for them. He also said plaintiff had charged him \$24 for changing \$280 United States money into Mexican money. I questioned plaintiff and talked with him three-quarters of an hour, or an hour, and I examined the handkerchiefs and told plaintiff I had been a merchant, and that the handkerchiefs were not all silk, all of them; some were raw silk and not worth more than 25 cents, which he admitted to me. He also admitted to me that some one or two were worth about 75 cents. I told him he had charged an exorbitant price for the handkerchiefs, and he said he was not in business for his health, that he had a big expense, and had a right to make whatever he could on his goods. At my direction Capt. Edwards called up the banks and Judge Lea and asked them if a man was required to take out a license to discount money. Capt. Edwards told Judge Lea the case in my presence over the phone, and Judge Lea told me to charge plaintiff with swindling, which I did. In phoning I was trying to get right before I did anything. Plaintiff was not put in jail until I learned from Judge Lea what charge to make against him. I detained plaintiff until the proper complaint could be made, and instructed the Mexican to go to the proper authority and make the complaint. I sent the Mexican to make the complaint, when plaintiff was turned over to the county authorities; but I do not know who made the complaint. When plaintiff's attorney, Mr. Goldstein, came to me and asked me to let plaintiff out on bond or without bond, I told him I had no authority to release plaintiff. I had been advised by the judge of the police court, the city attorney, and the mayor that I had no authority to release plaintiff, and I held plaintiff because I did not think I had authority to release him. In putting plaintiff in jail and handling him on the occasion, I was acting as chief of police of the city of El Paso, Tex., and by authority of my office. I did not know anything about the matter until plaintiff was brought to the station under arrest and charged with an offense, and then I did not think I had a right to release him, and that is why I held him. No written complaint or warrant were made before plaintiff was delivered to the county authorities, which was about 3 o'clock p. m. I was not present at plaintiff's store when he sold the Mexican the handkerchiefs and changed the money, and did not hear the trade. I did not abuse or mistreat plaintiff in any way whatever, and I had no malice whatever toward him. I did not take plaintiff before a magistrate. The office of the judge of the corporation court was in the police station, and the office of Justice Marshall was four

blocks from the station, and the office of Justice Mitchell was six blocks from the station. At the time plaintiff was brought to the police station, the officers there were under me and under my direction. I was chief over all of them."

The plaintiff testified as follows: "I am the plaintiff in this cause, and George C. Campbell is one of the defendants, and W. H. Burgess and J. H. Pollard are the other defendants. I am, and was at the time of my arrest by James Miller, a dry goods merchant on South El Paso street, city and county of El Paso, Tex.; my store being in the main business part of the city and being surrounded by business houses. At the time of my arrest I had five clerks in my store, and I managed the business and sold my goods, and my time was of the value of \$10 per day to me. On February 4, 1908, the day of my arrest, James Miller came to my store with a Mexican about 11 o'clock a. m. and demanded that I take back 12 handkerchiefs which I had sold the Mexican, and give him \$24 which the Mexican claimed I had kept for changing his money. I told Mr. Miller that the Mexican had agreed to pay me \$24 for the handkerchiefs, and to pay me \$20 for changing \$280 United States money into Mexican money, \$2 Mexican money for \$1 United States money, that I had kept only \$20 for changing the money, and refused to take the handkerchiefs and return the \$24 paid me for them, and also refused to return the \$20 which I charged for making change, unless my attorney so advised, and asked time to go and consult my attorney, which said Miller gave me. When I came from my attorney, I still refused the demands of the Mexican and said Miller, whereupon said Miller said he would have to take me to the chief of police. I went with said Miller without protest because I knew he was a police officer, and I did not want to resist an officer, but I went with him against my will. When we got to the police station in the city of El Paso, Tex., we found defendant George C. Campbell, who was then chief of police of said city. I told Mr. Campbell that the Mexican had agreed to pay me \$24 for the handkerchiefs, and to pay me \$20 for changing his money. I told Mr. Campbell that I did not know whether or not I had a right to charge for changing money, but that I knew all the other merchants did so, and I supposed I had, and that I had a heavy expense, and had to make money, and had a right to get all I could for my goods. I told Mr. Campbell that the handkerchiefs cost from \$12 to \$18 per dozen. I did not tell him that I had charged too much for the handkerchiefs, or that some of the handkerchiefs were worth only 25 cents apiece. When Mr. Campbell had talked over the matter with me and the Mexican, he demanded of me to take the handkerchiefs and return the money, which I refused to do. He then said he would put me in the penitentiary and ordered me locked

up. I was locked up by order of Mr. Campbell about 12:30 o'clock p. m. I asked the party who locked me up to allow me to phone my attorney and get bond for me, and he refused to do so. I was allowed to phone my attorney, Abe Goldstein, about 1 o'clock p. m. Mr. Goldstein came to me at the station, and Mr. Campbell was not there, and demanded of the clerk to release me, which he refused to do. Mr. Goldstein then left and returned to the station about 2:30 o'clock p. m. and asked Mr. Campbell to release me without bond, or on bond, which he refused to do. About 3 o'clock p. m. I was delivered to Deputy Sheriff Greet, to be transferred to the county jail, and he took me to the sheriff's office, where Mr. Goldstein made bond for me and obtained my release. Mr. Campbell did not strike; or curse, or abuse me, or handle me roughly. I suffered great humiliation from being put in jail. I did not have anything to eat while in jail, and I became sick. It hurt me to have my friends ask me why I was put in jail, as they did, and to have the local agent of R. G. Dun & Co. ask me why I was put in jail. I paid Mr. Goldstein \$25 for obtaining my release, and I think it was a reasonable fee for his services. When I changed the money for the Mexican, he was in a hurry to go into Mexico, and the banks were closed. I got the Mexican money from other merchants and had to pay them 2 per cent. for it. The Mexican left my store perfectly satisfied. My Mexican clerk made the trade with him."

Mr. Goldstein, the attorney of plaintiff to secure his release, testified: That he was called to the police station at 1 p. m. on February 4, 1908, to see plaintiff, and asked the clerk to release him, which he refused to do. That he returned to the station about 2:30 p. m., and found Campbell there, and told him that he had no right to hold plaintiff, asked him if he had a complaint, and he said, "No." That he then asked Campbell if any offense had been committed in the presence of an officer entitling him to hold plaintiff, and he replied not that he knew of; but that he would hold him anyway, that he had committed an offense, and he would hold him. And that he (Goldstein) demanded plaintiff's release with or without bond, and he (Campbell) refused to do either.

While Campbell may not be responsible for the original arrest of plaintiff by the policeman, Miller, no one can entertain the slightest doubt about the fact that plaintiff was deprived of his liberty by him after Miller took him from his store to Campbell at the police station. The defendant's own testimony, coming from his own lips, shows this. Was this imprisonment sanctioned or justified by the law? If not, then Campbell was guilty of false imprisonment, and the verdict in his favor is manifestly wrong, for, if he was not authorized by the law to imprison Gold, the plaintiff was entitled as a matter of law to damages in some amount.

Title 5, c. 1, of the Code of Criminal Procedure of 1895 prescribes in what cases arrests may be made without warrant, and then, by article 252, provides that in all cases enumerated in the chapter the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate where the arrest was made, without an order. It is not pleaded, nor is it contended, that the arrest and imprisonment of plaintiff was made or justified under any article of this chapter, unless it is article 249, which is as follows: "The municipal authorities of towns and cities may establish rules authorizing the arrest without warrant of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws." The ordinance, establishing a rule authorizing an arrest without a warrant by the municipal authorities of the city of El Paso, which is pleaded by defendants in justification of the arrest, is No. 561, which is as follows: "General Duties and Powers of Police Officers. The chief of police and the policemen of this city, shall at all times preserve order, peace and quiet throughout the city, and shall vigilantly guard and protect the inhabitants and property of the city. They shall, with or without warrant, arrest all persons found in the act of violating any law or ordinance; they shall arrest all persons found under suspicious circumstances, and shall take every person arrested by them, if in the day time, before the proper judicial tribunal, and if in the night time to the city prison, or other place of security within the city, and there confine the party so arrested until they can be brought before the proper tribunal for trial. The policemen of this city shall have authority to break open and enter any house, tenement, enclosure, or other place where any person may take refuge or be, to arrest such person who has in their presence or hearing been guilty of any crime or breach of the peace, or when a breach of the peace or crime has been, is being or is about to be committed, or any law, or ordinance has been, is being or is about to be violated, and arrest the offenders."

In view of the undisputed facts, it is apparent that the arrest and detention of the plaintiff was not authorized by this ordinance and cannot be justified by it. The plaintiff was not found in the act of violating any act or ordinance, nor was plaintiff found in suspicious places or "under suspicious circumstances," but at his own store, in pursuit of his legitimate business. It is equally apparent that plaintiff was not detained in any of the cases or for any of the purposes mentioned in article 593 of the Penal Code of 1895. The long and short of the whole mat-

ter is that plaintiff was arrested by Miller upon the verbal statement of a Mexican, which simply showed that he rued a trade he had made with plaintiff and wanted back the purchase money he had paid for a dozen handkerchiefs he had bought from the plaintiff, because he would not, on the demand of the officer, take back the handkerchiefs and return the Mexican the money he paid for them. No fraud on the part of plaintiff was charged, nor does the evidence indicate any, in the transaction. It was simply a matter of bargain and sale, in which plaintiff had the right to ask what he pleased for his goods and receive as much for them as a purchaser was willing to pay. Things have come to a pretty pass in this country, when a policeman can constitute himself a judge of the fairness of a business transaction and deprive a citizen of his liberty because a sale is not canceled at his bidding. What are our constitutional guaranties of the right of enjoyment of liberty and property worth, if an outrage of this character is to receive the sanction of our courts? The question answers itself. Having been informed of this illegal arrest when plaintiff was brought before him, instead of arresting Miller for the offense of false imprisonment, which was committed in his presence, the defendant Campbell sanctioned the commission of the offense by undertaking, himself, to force plaintiff to take back the handkerchiefs and return to the Mexican the purchase money he had received for them; and, because he would not, placed him in jail and locked him up there. The law does not, cannot, and never will, unless the natural rights of man are lost and become but a theory or a dream, justify such conduct in one of its officers, or any one else. The verdict as to Campbell is not only contrary to the overwhelming weight of the testimony, but without a particle of evidence to support it. Indeed, the imprisonment being shown by the undisputed evidence, and there being nothing proved that tended in the least to justify it, there was no issue as to the fact of false imprisonment to be submitted as to such defendant, and the court should have peremptorily instructed the jury to find against such defendant as to such matter, and have submitted to the jury only the question of how much damages were sustained by plaintiff by reason of such false imprisonment; and, should the evidence upon another trial be in effect such as that now before us, the court below is directed to so instruct the jury.

Now, as to the question of the measure of damages: This will embrace the consideration of a number of the assignments. Some damages are always presumed to follow from the violation of any right or duty implied by law, and therefore the law will, in such cases, award nominal damages, if none greater are proved. Hence, in this case, the plaintiff's right to the enjoyment of his liberty having been violated by the defendant Camp-

bell, he is entitled to recover from him at least nominal damages. He is also entitled to recover the expenses reasonably incurred to procure his discharge from the restraint, for loss of time, interruption of his business, and suffering, bodily and mental, such as the wrongful imprisonment may have occasioned him. The imprisonment being unlawful, it is not necessary to prove malice; it being conclusively imputed from the unlawful act of the defendant. And in cases of this character, where there is no possible way of measuring the general damages with any certainty, the sound discretion of the jury, under all the circumstances, is the only measure practicable (3 Sutherland on Dam. § 1257); and if the defendant, in committing the wrong complained of, acted recklessly, or willfully and maliciously, with a design to oppress and injure the plaintiff (which are matters for the jury to determine), the jury in fixing the damages may disregard the rule of compensation, and beyond that may, as a punishment of the defendant, and as a protection to society against the violation of personal rights and social order, award such additional exemplary damages as they may deem proper. Sedg. on Dam. § 352. Wherefore the court erred in instructing the jury that they could not find exemplary damages against the defendant Campbell. We think, however, damages to plaintiff's business, not being such as would naturally and proximately arise from the wrong done his person, are too remote for recovery, and that therefore the court did not err in sustaining the exception of defendants to that part of plaintiff's petition which alleges such damages.

As the arrest of the plaintiff was without complaint or warrant and unjustifiable under the undisputed facts, the complaint, information, and warrant of arrest, filed and issued after his false imprisonment, it being indisputably shown that he was not held in custody after the warrant was issued, were not evidence tending to justify or mitigate such unlawful act, and should not have been admitted in evidence over plaintiff's objections thereto. Even the liability of an officer for an illegal arrest is not waived by the plaintiff's pleading guilty of the offense for which the arrest was made. McCullough v. Greenfield, 133 Mich. 463, 95 N. W. 532, 62 L. R. A. 906.

Now, as to the liability of Campbell's sureties on his official bond for the false imprisonment of plaintiff: For all defaults of a public officer within the limit of what the law authorizes or enjoins upon him, as such officer, the sureties on his official bond are liable; but they are not bound for acts which are not done in his official capacity. As is said: "The authorities recognize a principle or rule by which the acts of the sheriff, for which his sureties may be held liable, can be distinguished from those acts for which they will not be held liable. The former are

termed acts done 'virtute officii,' and the latter 'colore officii.' The distinction is this: Acts done 'virtute officii' are when they are within the authority of the officer, but when doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done 'colore officii' are where they are of such nature the office gives him no authority to do them." *Leger v. Warren*, 62 Ohio St. 500, 57 N. E. 506, 51 L. R. A. 222, 78 Am. St. Rep. 738. Under this principle, it is held in this state that, to charge the sureties on a sheriff's bond, the act complained of must not only be such as might be rightfully done by the sheriff as such, but was actually done by him as sheriff under a claim of right to do it in his official capacity. *Heidenheimer v. Brent*, 59 Tex. 533; *Maddox v. Hudgeons*, 31 Tex. Civ. App. 291, 72 S. W. 415. In view of what we have said in regard to the wrongful imprisonment, it is apparent from the authorities cited that the sureties on his official bond are not liable. For a case where sureties were held liable because the acts were done virtute officii, see *King v. Brown*, 100 Tex. 109, 94 S. W. 328.

The judgment in favor of the sureties on defendant Campbell's bond is affirmed, and the judgment in favor of Campbell is reversed, and the cause as to him remanded to be tried in accordance with this opinion.

Affirmed in part, and reversed and remanded in part.

#### HUDSON et al. v. SLATE.†

(Court of Civil Appeals of Texas. Jan. 28, 1909. Rehearing Denied March 4, 1909.)

#### 1. VENDOR AND PURCHASER (§ 123\*)—RESCISSI- ON BY PURCHASER—RECOVERY OF CONSIDERATION—EVIDENCE—ADMISSIBILITY.

In an action by a purchaser to recover the property consideration given for land which was not conveyed to him free of incumbrance as agreed, his evidence that he was uneducated and unable to read or write was properly admitted, in support of the allegation of his petition to the same effect, as explaining why he had not discovered the liens on the land when he made the deal.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 123.\*]

#### 2. EVIDENCE (§ 121\*)—RES GESTÆ.

In an action by a purchaser to recover the consideration given for land conveyed subject to a lien, contrary to agreement, involving the terms of a verbal contract, testimony was introduced that, the deed having been delivered late in the evening to the purchaser's son, early the next morning it was read to the purchaser over the telephone, and that he had told his son that he had made no such trade with vendors as that stated in the deed, and directed the son to take it back to them and get his property. Objection was made thereto on the ground that it was hearsay and was permitting him to support his testimony on the stand by hearsay statements to third parties. *Held*, that the son having been entrusted with the delivery of the property to vendors and the reception of the deed, but without instructions as to the con-

tingency which arose between the parties, the purchaser's declarations and instructions to his son as his agent, concerning the property involved, and his repudiation of the deed and directions for its return, were admissible as verbal acts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338; Dec. Dig. § 121.\*]

#### 3. TRIAL (§ 85\*)—RECEPTION OF EVIDENCE— OBJECTIONS TO EVIDENCE ADMISSIBLE IN PART.

Where objections were made to the whole of declarations, a portion of which were properly admissible, there was no error in overruling them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 223-225; Dec. Dig. § 85.\*]

#### 4. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in the admission of testimony is cured by the same evidence being permitted to go to the jury unobjected to at a different time.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.\*]

#### 5. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

No error can be predicated on the admission of evidence to prove a fact which was not disputed directly or indirectly by any witness testifying in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1163; Dec. Dig. § 1051.\*]

#### 6. WITNESSES (§ 330\*)—CROSS-EXAMINATION.

In a suit between a purchaser and vendors involving the terms of a verbal contract, there was no error in permitting vendors to be cross-examined as to whether, in an answer to interrogatories in ex parte depositions taken by the purchaser before trial, they had omitted to mention a note which they claimed on the trial the purchaser was to pay.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1106; Dec. Dig. § 330.\*]

#### 7. EVIDENCE (§ 271\*)—SELF-SERVING DECLARATIONS.

In an action between a purchaser and vendors involving the terms of a verbal contract, there was no error in excluding the declarations of vendors, on the morning after the deed was delivered, that the purchaser was to assume and pay off a certain note, which he denied.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1075; Dec. Dig. § 271.\*]

#### 8. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action by a purchaser of land to recover the property consideration, on the ground that the contract called for a title free of liens, while the deed provided for plaintiff's assumption of purchase-money notes outstanding against the land to the amount of several thousand dollars, evidence that, the morning after the transfer, defendants had stated to a witness that plaintiff's assumption of a \$360 note not mentioned in the deed was part of the consideration therefor, and had consistently maintained that position, would not have shown a defense, so that its exclusion, if error, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.\*]

#### 9. EVIDENCE (§ 143\*)—MATERIALITY—ABANDONED PLEADINGS.

Generally abandoned pleadings may be offered and used in evidence when relevant and material to the issue involved, but their relevancy and materiality are to be determined by the same rules governing the admissibility of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

other testimony, and hence there was no error in sustaining an objection to an original petition which had been amended and did not appear to contain anything material to any issue in the case.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 143.\*]

Appeal from District Court, Coleman County; John W. Goodwin, Judge.

Action by J. W. Slate against M. A. Hudson and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Snodgrass & Dibrell and Woodward & Baker, for appellants. J. C. Randolph, for appellee.

HODGES, J. In January, 1907, the appellants were the owners of 389 acres of land situated in Coleman county and near the farm owned and occupied by the appellee, Slate. Some time during that month, negotiations were entered into between the parties for the purchase of this tract of land by Slate. These resulted in what each of the parties thought was an agreement on the part of Slate to purchase. The record shows that, at the time these negotiations were pending, there were then outstanding against the land several thousand dollars of purchase-money notes held by other parties. It is also shown that Slate was the owner of two valuable animals, which were to be taken as the consideration he was to pay for the land. A dispute arose between the appellee and appellants as to what consideration Slate had agreed to pay. Slate contended that he was to have the land free from any incumbrance for his two animals, which he valued at \$3,100; and the appellants contended that, in addition to the two animals, Slate was to assume the outstanding indebtedness against the land, and the further sum of \$360, for which their personal notes had been given as a cash payment on the land. A few days after the preliminary negotiations took place between Slate and Hudson, one of the appellants, Slate sent the stock by his two sons to Coleman City, with instructions to deliver them to the appellants and get a deed to the land. The property was delivered, in accordance with these instructions, to the parties, and was put in a wagon yard. Slate's sons, together with one of the appellants, went to the office of a notary to have the deed prepared. The testimony is conflicting as to what occurred during the preparation of the deed, and as to whether or not the deed, after being written was explained to the sons of the appellee. The notary testified: That he prepared the deed in accordance with the instructions given him by one of the appellants, expressing a consideration of \$2,000 paid, and the assumption by Slate of the outstanding indebtedness against the land, which amounted to over \$5,000; that upon the completion of the deed it was discovered that no

mention was made of a \$360 personal note held by Henderson & Beakly against the appellants; that it was finally agreed that Slate should give his personal note for that amount, and no mention should be made of it in the deed. He further testified that the deed was read over and fully explained to the sons of the appellee, John Slate and B. C. Slate, that one of them proposed to sign his father's name to the \$360 note, but upon the objection being made that it would be better for the father himself to sign it this was not done. John Slate and his brother testified: That the deed was not read over to them; that they knew nothing of its contents until after it was completed and delivered to them late in the evening; that after it was delivered to them they retired from the notary's office and read it over; that the next morning early they called their father over the telephone, and John Slate read to him the deed; that Slate stated, in response to that message, that that was not the trade he made, and for them to return the deed and bring the stock back home. It appears to be uncontradicted that, after this conversation over the telephone with J. W. Slate, his sons immediately sought the appellants, and found one of them, Knox, to whom they communicated their father's dissatisfaction with the deed and his demand for a return of the stock. Knox referred them to Hudson, and upon going to Hudson's house they found him too sick to talk about the transaction; but later in the day they returned and stated to Hudson their father's dissatisfaction and his statements that the deed did not recite the trade that they had entered into, and demanded the return of the stock. This was refused. Other conversations took place between the parties; Slate insisting that the trade was not as understood, and that he was to have the land free from any incumbrance for the stock, and demanding a return of his property, and the appellants insisting that the deed correctly recited the agreement and the consideration to be paid for the land, and refusing to return the stock. Subsequently suit was instituted by Slate for the recovery of the stock or their value, and from a verdict rendered in his favor this appeal is prosecuted.

The first assignment of error complains of the testimony of J. W. Slate to the effect that he was an uneducated man and not able to read and write. Slate had alleged these facts in his petition as a reason why he had not been on the alert sufficiently to ascertain for himself that there were no liens upon the land at the time he entered into the trade. The assignment is overruled.

Assignments Nos. 2, 3, and 4 are based upon objections to testimony giving the answer made by J. W. Slate to his son over the telephone when informed of the contents of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

deed. J. W. Slate testified that, when the deed was read to him over the telephone, he "told his son that he had made no such trade with the defendants as that stated in the deed, and directed him to take the deed back to the defendants and get his property." The same facts were testified to by John Slate. The objections made were that this was hearsay and "was permitting the plaintiff to support his testimony on the stand by hearsay statements to third parties." In his amended original petition, the appellee had alleged the very facts here testified to. The appellants had also put in issue the fact that the appellee had returned, or offered to return, to them the deed in question within a reasonable time after its contents were known to Slate. Slate was unable, so he says, to make the trip to Coleman City, and had intrusted the delivery of the stock and the reception of the deed to the land to his two sons. These were acting as his representatives, but without any instructions as to the contingency which had arisen. What Slate did when first informed of the contents of the deed was a material question in the case in view of the pleadings of the parties. Under the circumstances surrounding him at the time, his declarations and instructions to his agent concerning the property involved, his repudiation of the deed, and directions for its return to the appellants, were verbal acts, and as such were admissible in evidence. 1 Greenleaf, § 108; 3 Wigmore on Evid. § 1770; 11 Ency. of Evid. 378. His directions to his agent at the time were not upon a parity with similar statements which he might have made to a third party having no necessary connection with the transaction. He intended for his statements to be communicated to the appellants, and the record shows that this was promptly done. Whatever may be said with reference to the admissibility of that portion of his statements to this son over the telephone, in which he said that he "had made no such trade with the defendants as that stated in the deed," there can be hardly any question that his directions for his son to return the deed to appellants and get his property were admissible. The objections of the appellants being to the whole of the declarations, if any portion was properly admitted, there was no error in overruling the objections as made. However, we think that, whatever of error there might be in the admission of this testimony, it was cured by the same evidence being permitted to go to the jury unobjected to at a different time. While Hudson, one of the appellants, was on the stand, he testified that B. C. Slate, a son of the appellee, came to him and said: "Mr. Hudson, there is a misunderstanding." I said, "I guess not." He (B. C. Slate) says, "We called the old man up over the phone this morning and read the deed to him, and the old man says that was not the trade." This evidently put before the jury substantially

the same facts, and without objection. For still another reason we do not see how the admission of this evidence could have possibly operated prejudicially to the appellants in the trial of this case: The fact that Slate repudiated the trade and refused to accept the deed tendered him because it rectified the assumption by him of the payment of the outstanding debts against the land, and on the same day demanded a return of his stock, is put beyond controversy by other testimony. This is not disputed directly or indirectly by any witness who testified in the case. We do not think there was any error in admitting the testimony.

It appears from the record that on a date prior to this trial the plaintiff below had taken the ex parte depositions of the appellants Hudson and Knox, but had never filed them among the papers of the case. During the cross-examination of Hudson, he was asked by counsel for plaintiff if, in answer to interrogatories propounded to him on that occasion, in stating the consideration Slate was to pay for the land, he had omitted any mention of the \$360 note which he now claimed Slate was also to pay. Hudson admitted that he had not in terms mentioned that note. Similar questions were asked Knox upon his cross-examination, and a similar reply given. Counsel for appellants objected to these questions and answers, for reasons which we think were wholly untenable. Subsequently appellants offered to prove, by the witness Henderson, that on the morning after the deed was prepared both Hudson and Knox told him (Henderson) that, as a part of the consideration for the sale of the land, Slate was to assume and pay off the \$360 note. This proffered evidence, we think, was properly excluded by the court. Hudson and Knox were parties in interest and were the defendants in this suit. Their declarations which were offered were made in their own interest and on the very day the controversy arose, and may have been after they had notice of the refusal of Slate to accept the deed as made. The only legitimate purpose which this testimony could have subserved was to show that the testimony of the appellants, to the effect that Slate was to also assume the payment of the note for \$360, was not a recent fabrication. 1 Greenleaf (16th Ed.) § 469b; *Lewy v. Fischl*, 65 Tex. 318; 2 Wigmore on Evid. § 1129. Neither of the appellants had been impeached in any manner. The effect of their answers, concerning the failure to speak of the note as being a part of the consideration for the sale of the land at the time their depositions were taken, tended merely to show that they had omitted to mention this fact at a time when it may have been their duty to do so. The inference of recent contrivance as to this particular fact is the only one that could have been drawn from this silence, if it be construed as silence, and was the only harmful result that

could have followed. Hence the situation which ordinarily permits a witness to be sustained by showing statements made out of court consistent with those made on the stand is not presented. The rule applicable to the situation here presented is thus stated by Mr. Greenleaf in a part of the section above cited: "(5) Similarly, where it has been shown that the witness failed to speak of the matter at a time when he might have done so, and the inference is suggested that his present story is therefore a matter of recent contrivance, it is useful to show that the witness, on the contrary, has already made the same statement, and thus is not now for the first time making it; the inference of recent contrivance being thus rebutted."

At most, the testimony of Henderson was admissible only for the purpose of showing that the statements of the appellants as to the assumption by Slate of the payment of the note for \$360 was not a "recent contrivance," as stated above. If the issue as to whether Slate had in the trade assumed the payment of this particular note was of such materiality as to constitute an essential part of the defense to this suit, and Henderson's testimony was not otherwise objectionable, then we think the court erred in refusing to admit it; but the record in this case shows that proof of that fact was not material to the defense of the appellants. The undisputed testimony is to the effect that there were over \$5,000 in purchase-money notes outstanding against the land, that in writing the deed the notary recited the assumption of these notes alone, and no mention was made in the deed of the note for \$360, that when the deed was read to Slate over the telephone he claimed that he was to pay no part of this indebtedness, and that the live stock which he delivered was the sole consideration agreed to be paid by him. It is further shown that this was his contention for refusing the deed at all times thereafter. If it be admitted as a fact that appellants had told Henderson what the latter would have testified to, and also that they had consistently maintained that the assumption of this particular note was a part of the consideration to be paid by Slate, still it would not be any defense to this suit. The issue made is: Did Slate agree to assume any part of the indebtedness against the land? Not whether he agreed to assume the payment of this particular note. There is nothing in the rejection of this proffered testimony which would require a reversal of the case.

The eleventh assignment complains of the refusal of the court to permit appellants to read in evidence the original petition of the appellee; there having been an amended original petition filed and upon which the case was being tried. This was excluded upon the objection that it was immaterial and irrelevant. The entire petition was offered,

and no particular purpose for which it was intended to be used was indicated by counsel offering it. Generally, abandoned pleadings may be offered and used in evidence when relevant and material to the issue involved in the trial, but their relevancy and materiality are to be determined by the same rules which govern the admissibility of other testimony.

Upon an examination of this pleading, we find nothing in it which is material to prove any issue in this case. We think the court properly sustained the objection.

The judgment of the district court is affirmed.

#### ROGERS v. STEVENSON et al.

(Court of Civil Appeals of Texas. Feb. 9, 1909.  
Rehearing Denied March 11, 1909.)

#### LANDLORD AND TENANT (§ 61\*)—ESTOPPEL OF TENANT—APPLICATION OF DOCTRINE.

A lessor of the northeast quarter of a league bounded on the north by designated surveys did not point out to the lessee a certain tract as a part of the league, nor authorize him to take possession of it as a part of the land leased. The lessee took possession of the tract, though it was not a part of the league. The tract was either a part of the designated surveys then controlled by the lessee, or it was outside of the surveys and constructively in the possession of a third person as owner. *Held*, that the lessee was not estopped from disputing the lessor's title to the tract, since the relation of landlord and tenant did not exist as to it.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 151; Dec. Dig. § 61.\*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by Anna L. Stevenson and others against J. T. Rogers. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

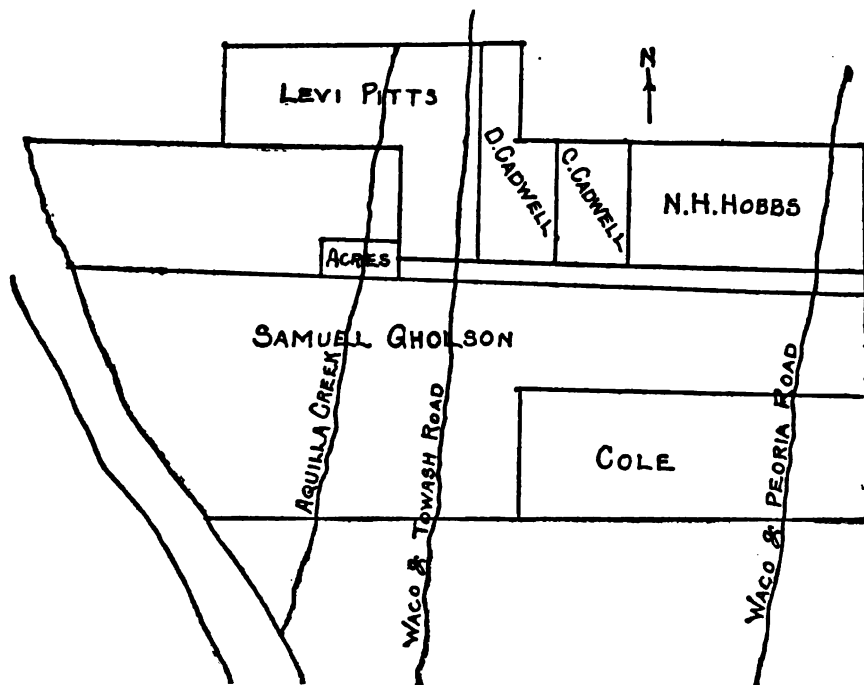
The action was by appellees against appellant to try the title to a tract of land in McLennan county, described in the petition as the northeast quarter of the Samuel Gholson league, and further described in said petition by metes and bounds, and as the land "for more than twelve years last past continuously in the actual possession of said plaintiffs by and through their tenants and lessees, and embraces what is called the John W. Clark 207-acre survey." As further identifying the land sued for, the petition alleged that its north boundary line was identical with the south boundary line of the N. H. Hobbs, C. Cadwell, and Levi Pitts surveys, and that said common line of said surveys was the line upon which appellant, Rogers, and said Rogers and one Bird, had many years before placed a fence. In other counts in their petition appellees alleged that on May 12, 1893, they had leased said land to said Rogers, and to him and said Bird, and placed them in the actual possession thereof, and that under said lease said Rogers and Bird continued in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



actual possession of the land until May 12, 1905. They further alleged that at the expiration of the lease appellant, Rogers, refused to deliver the possession of the land to them, etc. In his answer appellant disclaimed any claim of title to any part of the land described in the petition, except the part thereof lying north of the north boundary line of said Gholson survey and north of his (appellant's) fence along and upon or near said north line of said Gholson survey, included a plea of "Not guilty," and specially denied that he was in possession of any of the land leased to him by appellees, as alleged in their petition, asserting that he had delivered back to them the land so leased by them to him. There were other allegations in the pleadings, which we think need not here be set out.

From the evidence it appeared that the position of the Gholson, Pitts, Cadwell, and Hobbs surveys relative to each other and to certain public roads, etc., mentioned by witnesses, was about as is shown by the plat following:



It further appeared that appellant, Rogers, claimed to be the owner of the C. Cadwell survey, under a deed dated August 8, 1882; of a portion of the Pitts survey east of Aquilla creek, under a deed dated October 4, 1871; of the south one-half of the west half of the Hobbs survey, under a deed dated August 20, 1887; and that he claimed to have leased the D. Cadwell survey. The field notes of the C. Cadwell and D. Cadwell surveys as patented called for, and for the south lines of said surveys to run with, the north line of the Gholson survey, as did also

the field notes of the Pitts survey. The Gholson survey appeared to have been made in 1834, the Pitts in 1883, and the Cadwell surveys to have been patented in 1858. In 1873, on the supposition, it seems, that there was a vacancy between the Gholson survey and the Pitts, Cadwell, and Hobbs survey on the north, a survey of 207 acres made for John W. Clark, and covering the vacancy supposed to exist, was patented. The field notes of the Clark survey as patented called for it to run from the south corner of the Pitts 162½ varas southward to the east corner of the Acres survey on the Gholson north line, thence eastwardly with the Gholson north line 6,108 varas, thence northwardly 221½ varas to the corner in Hobbs' south line, and thence westwardly 6,109 varas to the beginning. Under a deed to him dated August 29, 1901, recorded in McLennan county September 10, 1901, appellant Rogers claimed to have acquired an interest in the claim on the land last described above, asserted by reason of the patent to Clark's assignee.

It further appeared from the evidence that by an instrument in writing dated May 12, 1893, appellees leased to appellant, Rogers, and one Bird, for a term of five years, land therein not further described than as the "northeast quarter of the Samuel Gholson league in McLennan county"; that by the terms of the lease appellant and Bird undertook to "watch and protect said land against trespassers and to fence so much of said land as lies" between the Waco and Peoria and Waco and Towash roads, and "between the north and south lines of said land"; that ap-

pellant and Bird, after the lease had been made to them, took possession of the land it described, fenced it, and in fencing it included within the inclosure of the fence a part of the 207 acres patented to Clark, as aforesaid; that the lease to Rogers and Bird, after the expiration of its terms, was extended from year to year until about May 12, 1905; and that at about the time the lease terminated Rogers moved the part of the fence inclosing the leased land on the north south to a point claimed by him to be the north boundary line of the Gholson league, and so retained possession of the land, or a part of it at least, covered by the patent to Clark. The controversy on the trial in the court below seems to have been confined to a question as to the ownership of the strip included in the field notes of the Clark survey and inclosed by the fence constructed by Rogers and Bird in fencing the land leased to them by appellees. Appellant's contention seems to have been that said strip of land was a part of the Pitts, Cadwell, and Hobbs surveys, and not a part of the Gholson survey. Appellees' contention seems to have been that, without reference to whether the strip was or was not a part of the Gholson survey, they were entitled to recover it as against appellant, because he, having taken possession of it under the lease from them, and never having delivered back to them the possession thereof, was estopped to deny that they owed it.

The court instructed the jury as follows:

"(1) The plaintiffs have sued to recover the land described in their petition, and by the pleadings of the defendant the contention between the parties is now limited to the right of the plaintiffs' recovery of a strip of land along or across the north side of the land described in plaintiffs' petition, embraced between the place where defendant's old fence across the south end of the C. Cadwell was located, and extending east and west therefrom across the northeast quarter of the Gholson league as described in plaintiffs' petition, and the place about 200 varas southeast thereof, where the defendant, J. T. Rogers, built his said fence as now maintained, during the year 1905, as shown by the evidence, said strip extending from the east to the west line of the land described in plaintiffs' petition, and as to this strip both parties claim to own the same.

"(2) If you believe from the evidence that J. T. Rogers and George P. Bird took charge of this land, and fenced the same as a part of the Samuel Gholson survey, under the lease which they obtained from the plaintiffs on the 12th day of May, 1893, wherein plaintiffs leased to said Rogers and Bird the northeast quarter of the Samuel Gholson league in McLennan county, then in that event you will find for the plaintiffs for all of that portion of said land that was included within the said inclosure of said Rogers and Bird, regardless of where you may find

the original north line of the Samuel Gholson league to have been located.

"(3) On the contrary, if you find that said Rogers and Bird, or said Rogers alone, if you should find that he alone actually directed the building of said fence, did not take charge of and fence said land as a part of the Gholson league, but that J. T. Rogers, at the time said land was fenced, claimed the same as his individual property, and that it was inclosed by the fence which was at that time erected by said Rogers and Bird around that portion of the land which they were required by said lease to fence simply as a convenience in fencing the same, and not with an intent to inclose the same as a part of said Gholson land, then, if you so find, you cannot find for the plaintiffs under the foregoing instruction.

"(4) If you believe from the evidence that the original north line of the Samuel Gholson league was located by the surveyors who made the original survey upon which said grant was made along the north line of said strip of land, then and in that event, if you so find, you will find for the plaintiffs for all the land sued for.

"(5) On the contrary, if you should find that said original surveyors located said line along the south line of said strip, then you will find as follows: If you find for the plaintiffs under the second paragraph of this charge above, then you will find for the defendant for that portion of said strip not included within the fence built by Rogers and Bird under said lease, viz., lying west of the Waco and Towash road. If you should not find for the plaintiffs under the second paragraph of this charge, and find that the original north line of the Gholson league runs south of said strip, then you will return your verdict for the defendant for said entire strip of land."

The verdict of the jury was as follows: "We, the jury, find for the plaintiffs for all that portion of the land in dispute that was included in the inclosure of Rogers and Bird, under the second paragraph of the charge, and we find for the defendant for that portion of said strip of land lying west of said inclosure and the Towash road." The appeal is prosecuted from a judgment, based on the verdict in favor of appellees against appellant for a part of the land, described in the judgment as follows: "A portion of what is known and claimed as the S. Gholson league in McLennan county, Tex., beginning at a point on the division line run through said league from the Brazos river east; the beginning point being N. 60 E. 4,126 vrs. from the Brazos river on said division line; thence N. 60 E. 5,576 vrs. to the east line of said league; thence N. 30 W. 1,050 vrs. more or less to the east line of said league to the south line of the Shepherd tract; thence S. 60 W. with the line fence of Shepherd's S. line to his S. W. corner west of the Peoria and Waco public road;

thence N. 30 W. about 200 vrs. to a continuation N. 60 E. of what is known as the old fence line of the defendant, J. T. Rogers, on or near the south line of the C. Cadwell survey, to said Shepherd's N. W. corner; thence S. 60 W. with the south line of the Hobbs survey to the S. E. cor. of C. Cadwell and S. W. cor. of said Hobbs survey and continuing in about a S. 60 W. course with the south and west of lines of said fence of the said defendant Rogers, and of said Bird and Rogers built by them in inclosing said land under said lease, to the N. W. corner of the said fence so placed by the said Bird and Rogers in inclosing the said land leased from plaintiffs, just east of the Towash and Waco public road; thence in a S. 30 E. direction with the line of said Bird and Rogers fence about 180 vrs. with said Towash & Waco public road to the fence, or what would be a continuation thereof, built in the year 1905, by the said defendant, J. T. Rogers, and now maintained and claimed by him to be on the north line of the said Gholson league; thence S. 60 W. continuing in the same course as the said last-named fence of the defendant, Rogers, to the west line of the said N. E. quarter of said Gholson survey; thence S. 30 E. to the place of beginning. The said land so described above embraces and includes all that portion of the land in dispute between the plaintiffs and defendant that was included in the inclosure of Rogers and Bird under the lease contract made by them with plaintiffs' agent, John C. West, dated May 12, 1893, being a strip of land about 200 vrs. wide, and bounded on the south by the line of fence built by the defendant, J. T. Rogers, in 1905, and now maintained and claimed by him to be on the north line of the said Gholson league, and bounded on the east by the said Shepherd tract just west of the Peoria and Waco public road, and on the west by the said Towash and Waco public road, and on the north by the old line of fence of the defendant J. T. Rogers, which was built across the south end of the C. Cadwell survey, and extending east and west therefrom to the said public roads."

Taylor & Gallagher and D. A. Kelley, for appellant. Prendergast & Williams, for appellees.

WILLSON, C. J. (after stating the facts as above). It is evident from their verdict that the jury found for appellees in accordance with the instruction contained in the second paragraph and the second clause in the fifth paragraph of the court's charge. In other words, it is evident that the jury found that the north boundary line of the Gholson survey was located, as contended for by appellant, along the south line of the strip of land in controversy, and that appellees were entitled to recover, as specified in their verdict, not because the land they so specified was believed by them to be a part of the Gholson survey, but because they believed

that appellant and Bird had taken charge of and fenced it under their lease from appellees. The correctness of the portion first mentioned of the charge is brought in question by appellant's tenth assignment of error, and by his fifth assignment of error, complaining of the refusal of the court to instruct the jury as requested by him as follows: "The plaintiffs' title papers call to run to and with the north or northwest boundary line of the Samuel Gholson survey; and the defendant J. T. Rogers' title papers call to run to and with the north or northwest boundary line of the Samuel Gholson survey on the opposite side from plaintiffs' land. Now you are instructed that if you believe from the testimony that the lands which the defendant, J. T. Rogers, has inclosed under fence built by him are located on the north or northwest side of the said line of the said Gholson survey, then you are instructed to find a verdict for the defendant, J. T. Rogers."

On the facts of the case as shown by the record, we think the charge refused should have been given, and that the second paragraph of the charge given, in so far as it authorized the jury to find for appellees if they believed from the evidence that the land in controversy was not within the boundaries of the Gholson survey, was erroneous. It was not pretended that before the lease from appellees to appellant and Bird was made appellees were in the possession, actual or constructive, of any of the land lying north of, and contiguous to, the north boundary line of the Gholson survey. It was not pretended that the land in controversy was pointed out to Rogers and Bird by appellees as land claimed by them as a part of the Gholson league, or otherwise. But the contention, it seems, was that Rogers and Bird, by virtue of the lease, actually took possession of the land, and that because they did so, Rogers, without delivering the possession thereof to appellees at the expiration of the lease, should not be heard to say that the land did not belong to them. If it had been made to appear that the land was embraced within the description, as given by its field notes, of the northeast quarter of the league, or had it been made to appear that the land had been pointed out to Rogers and Bird by appellees as a part of the land covered by the lease and possession thereof so delivered to them, appellees' contention, we think, would be tenable. But not only does it not appear that appellees pointed out to Rogers and Bird the land in controversy, and authorized them to take possession of it as a part of the land leased to them, but it affirmatively appears that, by whatever right Rogers and Bird took possession of the land, they did not take possession of it by authority of the lease, if, as found by the jury, it was not a part of the Gholson survey. The lease was of the northeast quarter of the Gholson survey, and of nothing else. By

force of its provisions Rogers and Bird were authorized to take possession of the northeast quarter of said league, and nothing else. Therefore, if the land was not a part of the Gholson survey, Rogers and Bird did not acquire possession of it by authority of the lease. If, as contended by Rogers, the land was a part of the Pitts, Cadwell, and Hobbs surveys, then either owned or controlled by him, and of which, or portion of which, he testified he at the time had actual possession, then he was in the constructive, if not in the actual, possession thereof at the time he and Bird took the lease from appellees of himself and Bird thereof. If the land was not a part of the Pitts, Cadwell, and Hobbs surveys, and Rogers was not lawfully already in possession of it at the time he and Bird took the lease, then constructively at least it was in the possession of its owner, and not of appellees, and in taking possession of it under the lease Rogers and Bird would have been trespassers, and as such liable to the owner. And they could not have referred to their lease as authorizing such trespass. It authorized them to take possession of land on the Gholson survey belonging to appellees, and did not authorize them to take possession of land on some other survey, which did not belong to appellees. For such trespass the latter would in no wise be responsible. Without incurring responsibility for the act they ought not to be heard to claim that they had acquired rights as against Rogers, or as against any one else, on account of it. The rule that denies to a tenant the right to dispute his landlord's title did not apply, for the simple reason that, as to the land in controversy, if it was not a part of the northeast quarter of the Gholson league, the relation of the landlord and tenant did not exist between appellees and appellant. Therefore it was error, we think, to submit the case to the jury upon the assumption that the existence of such a relationship between the parties, as to land not forming a part of the northeast quarter of the league, was an issue raised by the evidence.

In the attitude of the case as presented by the record it is unnecessary to consider other assignments of error urged by appellant in his brief.

The judgment of the trial court is reversed and the cause is remanded for a new trial.

**YOUNG v. STATE BANK OF MARSHALL.**  
(Court of Civil Appeals of Texas. Feb. 25, 1909.)

**1. APPEAL AND ERROR (§ 719\*)—ASSIGNMENTS OF ERROR—REVIEW.**

Appellate courts confine their attention to the particular errors assigned, and to the reasons urged in the accompanying propositions and argument.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2968; Dec. Dig. § 719.\*]

**2. COURTS (§ 89\*)—DECISIONS AS PRECEDENTS.**

The value of former adjudications as precedents is usually confined to the issue directly involved, and the mere failure of the court to point out objections to a ruling other than those assigned must not be construed as approving the ruling in such other respects.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 311; Dec. Dig. § 89.\*]

**3. BILLS AND NOTES (§ 471\*)—STIPULATION FOR ATTORNEY'S FEES—RECOVERY.**

A stipulation in a note for recovery of 10 per cent. attorney's fees if the note is placed in the hands of an attorney for collection, or suit is brought thereon, amounts to a contract of indemnity; and the holder of the note, to recover attorney's fees, must allege and prove the contract price of the attorney's services, or, in the absence of a contract, the reasonable value thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1467; Dec. Dig. § 471.\*]

**4. APPEAL AND ERROR (§ 292\*)—PRESENTATION OF QUESTIONS IN LOWER COURT—MOTION FOR NEW TRIAL.**

That the error in the charge, in an action on a note stipulating for attorney's fees, that plaintiff was entitled to recover the principal and interest of the note, and 10 per cent. attorney's fees thereon, was not called to the attention of the trial court in the motion for new trial did not defeat the right of defendant, appealing from the judgment for attorney's fees, to have it reviewed; for it is only those matters on which the court has not passed during the progress of the trial which must be presented in the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1697; Dec. Dig. § 292.\*]

**5. INDEMNITY (§ 15\*)—ACTIONS—PARTIES—PETITION.**

A petition, in an action by the transferee of a note for the premium on an insurance policy, which was never delivered, alleging that the insurance company had agreed to indemnify the maker against any liability on the note, is insufficient to justify the making of the insurance company a party defendant.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 371; Dec. Dig. § 15.\*]

**6. APPEAL AND ERROR (§ 1040\*)—HARMLESS ERROR—ERRONEOUS RULING ON DEMURRER.**

The error in not sustaining a demurrer of a defendant to the petition is rendered harmless by an instruction directing a verdict for him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4105; Dec. Dig. § 1040.\*]

**7. APPEAL AND ERROR (§ 1053\*)—HARMLESS ERROR—EVIDENCE.**

In an action by a transferee of a note, given by the maker to an insurance company for a policy which was never delivered, the error in admitting evidence of an agreement, whereby the insurance company agreed to indemnify the maker against any judgment that might be rendered against him on the note, was not cured by an instruction that the matter for adjustment between the maker and the insurance company was not before the jury, but that their verdict should be made under the evidence and the law set forth in the instructions, since the jury were permitted to base their verdict against the maker, on the consideration that the insurance company had agreed to indemnify him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4180-4182; Dec. Dig. § 1053.\*]

Appeal from District Court, Harrison County; W. C. Buford, Judge.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by the State Bank of Marshall against T. P. Young, executor of Mrs. E. S. Sloan, deceased. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Cary Abney and Locke & Locke, for appellant. F. H. Prendergast, for appellee.

HODGES, J. During her lifetime Mrs. E. S. Sloan, appellant's testator, executed and delivered her promissory note in writing payable to the order of H. C. Cates, for \$593.46, due eight months after date, with interest and attorney's fees. Before maturity the note was, for a valuable consideration, transferred by Cates to the appellee bank. Cates was, at the time of taking the note, the agent of the Mutual Life Insurance Company of New York, and the note was given as part of a premium to be paid in consideration of the issuance of a certain policy of insurance by the insurance company upon the life of Mrs. Sloan. Mrs. Sloan was at the time a woman of advanced age, and the policy for which her application had been taken provided for annuities to be paid to each of her three children during their lives. The remainder of the premium, of which this note was a part, had been paid by Mrs. Sloan to Cates in cash, and amounted to something over \$1,800. The policy was never delivered to Mrs. Sloan because of the rejection of her application by the insurance company. When the note was presented, payment was refused, and upon such refusal suit was instituted by the appellee against both Mrs. Sloan and the insurance company. The latter was made a party, upon the allegation that it had entered into a contract with Mrs. Sloan by which it agreed to indemnify her against any liability by reason of the execution of the note, or any judgment that might be rendered against her in any suit thereon. Before a final judgment was reached Mrs. Sloan died, and T. P. Young, the executor of her will, was made a party defendant. Thereafter, upon a trial before a jury, a verdict and judgment for the full amount of the note, together with interest and 10 per cent. attorney's fees, were rendered against appellant Young; a verdict in favor of the insurance company having been directed by the court. From that judgment the executor prosecutes this appeal.

One of the defenses urged in this suit was that the note was without consideration, and that the bank, through its officials, had notice of that defect. Inasmuch as this question involves an issue of fact which may again arise in another trial, and in view of the fact that the judgment must be reversed upon other grounds, we do not pass upon the assignment raising that question, preferring to rest our decision of the case upon other errors presented.

Special objection is urged by the appellant to so much of the judgment as warrants a recovery for 10 per cent. attorney's fees in favor of the appellee. It is contended that

neither the pleadings nor the evidence justified such a recovery, and that the court committed error in instructing the jury that, in the event they found for the plaintiff on the note, to also find for 10 per cent. attorney's fees. That portion of the note providing for attorney's fees, or collection fees, as there stated, is as follows: "In the event default is made in the payment of this note at maturity, and it is placed in the hands of an attorney for collection, or suit is brought on the same, then ——— agree that an additional amount of ten per cent. on the principal and interest of this note shall be added to the same as collection fees." The allegation of the petition pertinent to this part of the note is as follows: "The full amount of said note of \$593.46 with 6 per cent. interest from November 3, 1906, together with 10 per cent. attorney's fees on the amount so obtained, is now due and is unpaid. Plaintiffs have been compelled to place said note in the hands of F. H. Prendergast, an attorney, for collection, and he has been compelled to bring suit to collect the same. Therefore the said 10 per cent. as collection fees has accrued, and is now due. Wherefore plaintiffs bring this suit, and pray for judgment for \$593.46, with 6 per cent. from November, 3, 1906, and 10 per cent. on the whole amount as collection fees, against the defendant Elizabeth S. Sloan." The record does not disclose any evidence tending to show that the appellee had paid, or had contracted to pay, any sum as fees or expenses for collecting the note, or any fee for the employment of an attorney to prosecute this suit. The court charged the jury: "If you find for the plaintiff, the amount of your verdict will be the principal and interest of said note to date, and 10 per cent. attorney's fees on same." The principles of law applicable to the issues here presented were fully discussed by this court in the case of *Elmore v. Rugely*, 107 S. W. 152, and in the cases there referred to. Under the rule there announced the assignments before us must be sustained. The appellee insists that our holding in that case is not in accord with the previous decisions of the Supreme Court on that question, and has called our attention to a number of cases upon which it relies. We have examined the authorities cited, but have failed to find any adjudications opposed to the conclusions reached in the case of *Elmore v. Rugely*. It is true there are some expressions in the earlier cases which would seem to be in harmony with the policy of treating the promise to pay attorney's fees, usually embodied in commercial paper, as liquidated damages inuring to the benefit of the holder of the note, upon default of payment and the happening of the contingency upon which it is made to depend—that is, the filing of a suit, or the placing of the note in the hands of an attorney for collection—but this is nowhere, so far as we have been able to find after a careful search, expressly held.

In *Simmons v. Terrell*, 75 Tex. 277, 12 S. W. 854, the question was as to whether or not attorney's fees could be collected upon a note against the estate of a decedent, when presented after maturity to his executor. It was contended by the appellant in that case that the proceeding required of a creditor by our probate laws in having his claim against an estate allowed by the administrator and approved by the probate court did not come within the most comprehensive definition of a suit, and that a civil suit in the district or county courts must be commenced by a petition, etc. In disposing of the issue the court said that the language used in the note, and which provided for the payment of 10 per cent. attorney's fees additional in case of suit after maturity to enforce collection, should not be restricted to a suit in equity or an action at law. In that case it appeared from the record that an attorney was employed for the purpose of presenting the claim for collection. The only question before the court was whether or not the record disclosed the institution of a suit within the meaning of the language used in the note providing for the payment of attorney's fees.

*Morrill v. Hoyt*, 83 Tex. 59, 18 S. W. 424, 29 Am. St. Rep. 630, presented a situation similar to the above. There the note had been executed by a person who afterwards became insane, and suit was brought against his guardian. In his answer the defendant admitted the facts stated, but denied any obligation for attorney's fees, on the ground that legal proceedings had not been instituted for the collection of the claim. In disposing of the case the court said: "The sole question for our consideration is, Did the steps taken by the plaintiff, viz., the putting of the claim past due against the estate of the lunatic into the hands of an attorney, who properly proved it up and presented it for allowance to the guardian of the estate, constitute the institution of legal proceedings for the collection of the amount due on the claim?" This question was decided in accordance with the case just previously cited.

*Kendall v. Page*, 83 Tex. 132, 18 S. W. 335, was a suit upon a promissory note containing the usual stipulation to pay attorney's fees. In that case the court states the error assigned as follows: "At the date of rendition of judgment herein the total sum due plaintiff—principal, interest, and attorney's fees—was \$120.34, as shown by the plaintiff's petition and the record in said cause; whereas judgment is rendered in plaintiff's favor for \$319.45, which is \$199.11 more than was due. The petition sets out the note sued upon, and the credit and the balance, as above stated, are shown by calculation." It is evident that the sole question before the court in that case was whether or not the attorney's fees had been computed upon too large an amount; the appellant contending

that it had, and the appellee to the contrary. That was the only question decided.

*Brown Co. v. Perrill*, 77 Tex. 206, 13 S. W. 975, was a contest between the wife and the creditors of the husband; she claiming her debt was entitled to priority over the indebtedness claimed by the appellant in the suit. The note by which the debt to the wife was evidenced provided for the payment of attorney's fees in the usual form. Upon appeal the appellant complained that the court erred in instructing the jury, in the event they found for plaintiff, to find for her attorney's fees, together with the principal and interest on the note. The court said: "The note stipulated that the makers should pay attorney's fees in the event suit should be brought for the recovery of the debt. Upon the institution of suit they became a part of the indebtedness. They were set up in the petition, and included in the amount for which the writ of attachment issued. Why the plaintiff was not entitled to recover them, if she recovered at all, we do not see." The record does not disclose upon what ground the collection of the attorney's fees by the wife was resisted; neither does it show the nature of the pleadings nor the character of the testimony upon which the ruling of the court was made to depend.

*Johnson v. Blanks*, 68 Tex. 495, 4 S. W. 557, was a garnishment proceeding. The only question there adjudicated which could have any remote bearing upon the issues in this case was the determination by the court that the trial court might, without the aid of extraneous evidence, determine for itself what was a reasonable attorney's fee to be allowed the garnishee for the preparation of his answer. We do not think that is decisive of any issue here under consideration.

*Stansell v. Cleveland*, 64 Tex. 660, was an attachment suit. The note sued on provided for 10 per cent. attorney's fees if it should be collected by law. The court held in that case that none of the objections based upon the allowance of attorney's fees were well taken, and said: "These fees were to become a part of the debt in case of suit, and are expressly claimed in the petition. The answer admitted all of the indebtedness alleged in the petition, which included these fees. It matters not that the suit was instituted before the debt was due. The debt was not paid at maturity, and this authorized the plaintiffs to proceed to judgment upon the note, and that authorized the collection of the attorney's fees. The language of the note is that these fees are to be paid if the note is collected by law, and this note was so collected." This is by far the strongest expression tending to sustain the position taken by counsel for appellee which we have found emanating from our Supreme Court; but, as will be seen later, the language here used has since been criticised, and the principle announced questioned.

In none of these cases do we find the di-

rect question involved which is here under consideration, unless it may have been in the case last mentioned. It is the general practice of appellate courts to confine their attention, not only to the particular errors assigned, but to the reasons urged in the accompanying propositions and argument; and, if these are considered untenable, and no fundamental error is apparent, the assignment will be overruled. In view of that practice the mere failure of the court to discover and point out other objections to the ruling brought under consideration should not be construed as approving it in all other respects. The real value of former adjudications as precedents is usually confined to the issue directly involved, and the enunciation of the legal principles by which it is determined. If the doctrine that stipulations usually inserted in commercial obligations and other contracts are to be construed as liquidated damages, inuring to the benefit of the holder upon the happening of the contingency mentioned, finds any support in the cases heretofore decided by the Supreme Court of this state, it must rest upon an inference drawn from the failure to hold otherwise. That court, so far as we have been able to ascertain, has never expressly so held. It is only its failure to hold to the contrary which can furnish any foundation for the contention that it recognizes the doctrine in this state. But, as we shall see later, there are some significant expressions which indicate an opposite view. However valuable may be precedents in the determination of issues, conclusions are always more satisfactory when they can be based upon principle as well. The classification of the usual stipulations to pay attorney's fees as contracts of indemnity is, we think, decisive of the question here involved. This construction is not only supported by a sound legal principle, but is in accord with a large number of authorities. *Laning v. Iron City Nat. Bank*, 89 Tex. 601, 35 S. W. 1049; *Elmore v. Rugely*, supra, and cases cited; *Goss v. Bowen*, 104 Ind. 207, 2 N. E. 704; *Harvey v. Baldwin*, 124 Ind. 59, 24 N. E. 347, 26 N. E. 222; *Kennedy v. Richardson*, 70 Ind. 524; *Exchange Bank v. Land & Lumber Co.*, 128 N. C. 193, 38 S. E. 813; *Tinsley v. Hoskins*, 111 N. C. 340, 16 S. E. 325; *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356; *Dow v. Updike*, 11 Neb. 95, 7 N. W. 857; *Campbell v. Worman*, 58 Minn. 561, 60 N. W. 668; *Harvester Co. v. Clark*, 30 Minn. 308, 15 N. W. 252; *Kittermaster v. Brossard*, 105 Mich. 219, 63 N. W. 75, 55 Am. St. Rep. 438, and cases cited in the notes.

In the case first above cited the Supreme Court, in replying to the question, Did the trial court err in directing the jury to allow the plaintiff 10 per cent. additional on the principal and interest due on the note as attorney's fees? uses this language: "Attorney's fees, whether expressed as such, or as costs of collection, are regarded as costs of

the suit, and agreements to pay them are sustained by the courts upon that ground. The legitimate purpose of such a promise is to indemnify the payee or holder of the note for expenses which he may incur by default of the maker which would not be allowed to him by law. Under the terms of the note in this case the maker agreed to pay attorney's fees in case it should be placed in the hands of an attorney for collection. Under that agreement he would become liable to pay such costs if his default in making payment, or some other act of his, made it necessary for the holder to place it in the hands of an attorney for collection." In this case the court also referred to the case of *Stansell v. Cleveland*, supra, in which it said the plaintiff was entitled to recover attorney's fees under circumstances somewhat similar to the case then pending, and said: "We doubt the correctness of the decision in that case, unless it be put upon the ground that the pleadings of the defendants amounted to a confession of their indebtedness, not only for the principal and interest of the debt sued for, but for the attorney's fees also."

In *Maddox v. Craig*, 80 Tex. 600, 16 S. W. 328, the court held that a petition, which failed to allege that the note containing the usual stipulation for the payment of attorney's fees was placed in the hands of an attorney for collection, would not support a judgment by default for such attorney's fees. If such stipulations are contracts of indemnity, then actual damages alone can be recovered, and suits for that purpose should be prosecuted in accordance with the rules of pleading and practice applicable to that class of actions. In such cases it is required that the damages sought should be both alleged and proven. *Johnson v. Cook*, 24 Wash. 474, 64 Pac. 729; *O'Keefe v. Dyer*, 20 Mont. 477, 52 Pac. 196; 2 Page on Contracts, § 1170; 3 Ency. of Plead. & Prac. 648; *Elder v. Kutner*, 97 Cal. 490, 32 Pac. 563. To hold that the plaintiff, in an action to recover on a note providing for attorney's fees in the usual form, should be permitted to do less would open a wide avenue for the entrance of numerous and varied devices for oppressive exactions by creditors, which our laws against usury are intended to prevent. In the present case the petition alleges the default in the payment of the note, and that it was placed in the hands of an attorney for collection, and not only fails to allege any damages in general terms, but also fails to state the existence of any conditions, specific or otherwise, from which the law would presume more than nominal damages. These allegations alone might be sufficient if the stipulation for the payment of attorney's fees is to be construed as a contract for liquidated damages, but not when it is to be treated as one for indemnity. The mere placing of the note or obligation does not of itself damnify the holder, and the allegation and proof of that fact alone fail to furnish the court with

either a basis or evidence upon which to found a judgment for actual damages sustained. The holder cannot say that he has sustained any damages which he may recover in such a suit till he alleges and proves that he has paid, or contracted to pay, the attorney's or collection fees; and the amount he has paid, or agreed to pay, measures the damages for which he may demand reimbursement, provided it does not exceed the terms of the contract, or is not an unreasonable sum.

In the case at bar no effort seems to have been made to prove the amount of fees paid, or agreed to be paid, the attorney for his services in bringing this suit further than the introduction in evidence of the note sued on. Counsel for appellee contends that this is sufficient to authorize a finding of a fixed sum as attorney's fees; that the court should infer from the introduction of the note that the full amount of the fees expressed therein had been agreed upon between the holder and the attorney. We do not think so. The custom of contracting for the full amount of the attorney's fees stipulated is not so uniformly established in this country that courts may, under all circumstances, judicially assume that to have been done. The note was evidence of its making and of the terms of the contract therein expressed, but not of the damages resulting from its being sued on or placed for collection. While the court may, in some instances, judicially know what is a reasonable attorney's fee for the performance of a given service, it cannot judicially know what the contract between the plaintiff and his attorney in any particular case may be. The issue of a reasonable fee is not involved, but the question is, What was the fee which the appellee paid, or agreed to pay, its attorney in this case? There are probably many instances in which attorneys are retained by banking institutions, and others engaged in an extensive commercial business, as salaried employes, who receive their compensation by the month or year, regardless of the amount of work performed. There are perhaps other instances where suits are brought upon a contract providing for a contingent fee, in which the plaintiff assumes no personal obligation, under any circumstances, to pay the costs of an attorney. There are still others where the attorney's or collection fees may, for special reasons, be fixed at a sum less than the amount stipulated as attorney's fees in the note, possibly in consideration of the attorney's receiving all of the business of the holder. In view of these varied conditions the court could not undertake to say, as a matter of law, that the parties in this suit had agreed upon the 10 per cent. expressed in the note as the compensation to be received by the attorney for his services. We, therefore, think there was error in the charge of the court complained of. The fact that the error was not called to the attention

of the trial court in the motion for a new trial does not defeat the right of the appellant to have it reviewed on appeal. It is only those matters upon which the court has not passed during the progress of the proceedings in the trial which the law requires to be presented in motions for new trials, in order to be made available upon appeal. *W. U. Tel. Co. v. Mitchell*, 89 Tex. 441, 35 S. W. 4.

However, we should not feel inclined to reverse and remand this case for this error alone, inasmuch as it might be cured by the appellee's filing a remittitur of the attorney's fees should it feel inclined to do so. But there is another error which we think equally serious, and which will require that the case be remanded. The appellee was permitted, over the objection of the appellant, to show by the witness Cary Abney that there was an agreement between Mrs. Sloan and the insurance company, by which she was to be protected, and the company was to pay any judgment that might be rendered against her in this suit, that the agreement was made with an agent of the company, at the time he had paid her \$1,838 in cash for money that she had formerly paid to Cates in connection with her application for insurance, and in addition to the note here sued on, and that the company was to defend the suit for her, as it did not think the bank was an innocent purchaser. The pleading relied upon to support the relevancy of this testimony was that portion of the appellee's petition alleging such an agreement. Such pleading was the allegation of immaterial facts, and could form no basis for the admission of testimony wholly irrelevant to any issue in the case. The allegations did not show that the insurance company was a proper or a necessary party to this suit. *Holloway v. Blum*, 60 Tex. 626; *U. S. Fidelity & Guaranty Co. v. Fossati*, 97 Tex. 497, 80 S. W. 74. In the case last cited the court said: "Indeed, the existence of the right of a defendant in all cases to implead other parties who might become liable to him as the result of a judgment against him, regardless of other considerations, has been expressly negatived." That was a suit in which an effort was made to bring in the indemnitors of the defendant in the suit and make them parties to the proceedings. This right to make them such parties was denied.

While the demurrers interposed in this case by the insurance company to the pleadings of the plaintiff should have been sustained, the error arising from the failure to do so was, as to the insurance company, rendered harmless by the instructed verdict in its favor; but the erroneous retention of irrelevant matter in the petition could not justify the admission of the irrelevant testimony to support it. This testimony, we think, was calculated to, and probably did, operate prejudicially to the appellant. It, in effect, informed the jury that there was behind the



defendant in the suit a large foreign corporation whose agent had perpetrated the fraud which brought about the litigation, and that the corporation would protect Mrs. Sloan's estate against whatever judgment might be rendered against her in this suit. That the jury was influenced by that consideration is rendered exceedingly probable by the question which they asked the court after their retirement, and before reaching a verdict. That question was, "If we find a verdict in favor of the plaintiff, does that prevent the Sloan estate from proceeding against the insurance company?" In replying to this the court instructed the jury "that the matters for adjustment, if any, between Mrs. Sloan's estate and the insurance company, are not before you, but your verdict will be made under the evidence and the law as set forth in the charge heretofore given you." It is true that this instruction on the part of the court in one sense informed the jury that this issue was not involved in the considerations which should engage their attention, but they were left to surmise why they could not rest their verdict upon an issue to support which the court had admitted the testimony of Abney, and which testimony could have no other relevancy. They had a right to assume, even after the last instruction of the court, that they could consider testimony which the court had admitted in determining the only issue it would tend to prove that the defendant in the suit was indemnified by the insurance company against any verdict which they might find against him. If their verdict was based, in whole or in part, upon such considerations, then it was improperly influenced.

The judgment is reversed, and the cause remanded.

#### DE STEAGUER v. PITTMAN et al.

(Court of Civil Appeals of Texas. March 4, 1909.)

#### 1. VENDOR AND PURCHASER (§ 310\*)—ACTION FOR PRICE—SET-OFF.

The defect in title for the curing of which an expenditure may be made by the purchaser, and reimbursement claimed as an offset to the purchase price, must amount to a breach of the covenant of warranty on which the sale was made; and a mere cloud on the title, or a colorable claim, unaccompanied by a substantial legal or equitable right capable of enforcement against the purchaser, is insufficient.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 903; Dec. Dig. § 810.\*]

#### 2. VENDOR AND PURCHASER (§ 315\*)—ACTION FOR PRICE—SET-OFF—BURDEN OF PROOF.

A purchaser, who pleads in a suit for the price an offset based on a payment to cure a defect in the title, has the burden of proving an outstanding title, which he was compelled to purchase to protect himself.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 928; Dec. Dig. § 815.\*]

#### 3. VENDOR AND PURCHASER (§ 237\*)—DEED RESERVING VENDOR'S LIEN—RIGHTS OF PURCHASER.

A deed of land reserving a vendor's lien to secure deferred payments vests in the purchaser only an equity in the land, and the superior legal title remains in the vendor, and the purchaser, failing to pay the price, does not acquire the title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 654; Dec. Dig. § 257.\*]

#### 4. VENDOR AND PURCHASER (§ 310\*)—ACTION FOR PRICE—SET-OFF.

A purchaser making a partial payment, and executing notes for the balance, died without paying the notes, leaving a widow surviving. A third person purchased the land with the consent of the widow, and pursuant to an agreement with her, and gave notes for the price to the vendor. The vendor and the widow destroyed the unrecorded deed to the purchaser and the notes executed by him, with a view of extinguishing the widow's rights. Held, that the widow was estopped from asserting any claim against the title of the third person, especially where she had accepted a lease from the purchaser, and occupied the land thereunder during the term of the lease, and the amount paid by the purchaser in satisfaction of her claim was not available as an offset against the price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 903; Dec. Dig. § 310.\*]

#### 5. VENDOR AND PURCHASER (§ 310\*)—ACTIONS FOR PRICE—SET-OFF.

A purchaser cannot offset against the price the cost of extinguishing an outstanding title of which he knew at the time of the purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 903; Dec. Dig. § 310.\*]

#### 6. BILLS AND NOTES (§ 487\*)—ACTION ON NOTE—PETITION—AMENDMENTS.

A defect in the petition on a note, and for attorney's fees stipulated therein, arising from the failure to sufficiently plead the right to recover attorney's fees, may be cured by an amendment, and proof may then be made justifying recovery thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1575, 1578; Dec. Dig. § 487;\* Pleading, Cent. Dig. § 703.]

Appeal from District Court, Panola County; W. C. Buford, Judge.

Action by Mrs. Julia De Steaguer against A. B. Pittman and others. From a judgment granting insufficient relief, plaintiff appeals. Reversed and remanded.

W. R. Anderson, for appellant. H. N. Nelson, for appellees.

HODGES, J. Appellant owned a tract of land in Panola county which was sold to Pittman, the appellee, in March, 1902, the consideration being \$100 cash, and five notes for \$89.50 each, due annually thereafter, the last of which matured November 1, 1905. Upon a failure to pay the last-mentioned note this suit was instituted, asking for judgment for principal and interest, and a foreclosure of the vendor's lien, which had been retained to secure payment. Pittman admitted the execution of the note and the existence of the lien, but pleaded an offset amounting to \$80, which he claims to have paid to cure a defect in his title, and in or-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

der to obtain possession of the tract of land purchased. Judgment was rendered against him for the amount of the note, and interest less the offset claimed, and the appellant has appealed.

The defense relies upon that principle of law which permits the vendee to offset against the purchase money whatever sum he pays for the perfection or protection of the title he obtained from the vendor, as enunciated in the cases of *Denson v. Love*, 58 Tex. 468, and *Oury v. Saunders*, 77 Tex. 281, 13 S. W. 1032. The defect in the title, for the curing of which the expenditure is made and reimbursement claimed, must be such as would amount to a breach of the covenant of warranty upon which the sale of the land was made. A mere cloud upon the title, or a colorable claim, when not accompanied by a substantial legal or equitable right to the land, capable of enforcement against the vendee, would not furnish such a defect in the title conveyed as to authorize the vendee to offset against the demand for the purchase money any sum he may have paid in quieting his title, or preserving his peace.

The record shows that some years prior to the time Pittman bought the land it had been sold by the appellant's husband to one Walter Rodgers, who made a cash payment of about \$50, and gave notes for the remainder of the purchase money. Rodgers died without having paid more on the land, leaving a widow surviving him. The circumstances under which Pittman bought the land appear to be somewhat as follows: Bryan, an agent of the appellant, made a visit to see Mrs. Rodgers about the place after the death of her husband. Pittman had a mill on the land. He saw the agent upon this occasion, and proposed to "take up the Walter Rodgers trade as it stood, pay the land out, and get possession of it by agreeing with the widow, and without any further process." This was agreed to by the agent. Pittman testifies: "I told Katy [meaning Mrs. Rodgers] I would stand in Walter's stead, if she would not object, and she agreed for me to do so. I do not know of my own knowledge what amount Walter Rodgers paid on the place, and only know from hearsay what amount he was to pay for the place, and I know he lived on the place about five years. \* \* \* I did tell Mr. Bryan that I had talked the matter over with Katy Rodgers, and had come to an understanding, and that we understood each other. She agreed with me to let me take up the trade that Walter Rodgers had, without any new terms and price with Mr. Bryan, and back interest on the Walter Rodgers purchase; also back taxes, which I paid. When I executed my notes for this land, I did not know at that time what rights Katy Rodgers claimed to the land. I did know at that time that her husband had bought the land, and I did know

when I bought the land that Katy Rodgers was in possession of the land, because she was living on the land. I did rent land to her [second] husband, Mr. Gary, while she was living on the land with him."

The record also shows that some time after the death of Rodgers, and probably after the land was sold to Pittman (although it is not clear as to that), Judge Boren, as the agent of the appellant, called on Mrs. Rodgers for the purpose of settling whatever claim she had to the land. The deed from De Steaguer to Rodgers never having been put on record, both it and the note which had been given by Rodgers were destroyed, the parties thinking this would have the effect of extinguishing whatever right Mrs. Rodgers might have to the land as against the appellant. As to his purpose in paying the \$60 claimed as an offset, and the conditions under which it was done, Pittman thus testifies: "About the time the last note became due, or just before it became due, Mr. Gary, who had married Rodgers' widow, came to me in August, I believe, to get some lumber to build a mill, or to repair a mill, and I told him I would want the place in the fall to go to work on, and asked him if he intended to move, and he said he did not aim to move off. \* \* \* He said he would not move because I had no title to the place." Then follow statements concerning a visit to an attorney for consultation, and a request to Mr. Bryan to have the matter adjusted before he (Pittman) paid the last note, after which the witness continues: "The claim that Mrs. Rodgers had to the land was that Walter Rodgers had paid the \$50, and I don't know whether Walter Rodgers had any deed or not. \* \* \* They did move from there [the place] in February after the note that fell due in November, and I gave them 1½ bales of lint cotton, and the cotton was worth \$40 per bale, so I gave them \$60 to get them to move off, and they gave me a quitclaim deed. Mrs. Rodgers was living on the place at the time I got it, and stayed there all the time till I bought them off. Mr. Bryan did not offer to adjust the title for me. Judge Boren, after he got the notes for collection, did agree to adjust the title, but failed to do so, and I had to do it myself. I never did see the deed from Mrs. De Steaguer to Walter Rodgers, nor the note."

The question is, Did the claim of Mrs. Rodgers, here mentioned by Pittman, amount to an outstanding title which he was compelled to purchase in order to protect himself? The burden of proving that such a title existed rested on Pittman; and, unless the evidence upon which he relies is sufficient, *prima facie* at least, to show that fact, he was not entitled to the offset. What character of deed was given to Walter Rodgers by De Steaguer is not shown. It may have been, and probably was, a deed reserving a vendor's lien to secure the deferred

payments. If so, it vested in Rodgers only an equity in the land, the superior legal title remaining in the vendor. Not having paid the purchase money, Rodgers never acquired more. Without undertaking to say whether the destruction of the Rodgers deed and notes by agreement of the parties had the legal effect of rescinding the contract by which the land was sold to Rodgers, and of extinguishing whatever equity had been acquired by him in the land, it certainly would operate to estop Mrs. Rodgers from thereafter asserting any claim to the land against Pittman, he having purchased with her consent and express agreement. Mrs. Rodgers and her second husband, Gary, were also estopped from asserting any claim against the title of Pittman, because they rented the land from him, thereby becoming his tenants, and thus acknowledging his superior title. They could not, at the expiration of their tenancy, set up against their landlord the claim to ownership resting upon the former deed to Rodgers. *Casey v. Hanrick*, 69 Tex. 48, 6 S. W. 405; *Juneman v. Franklin*, 67 Tex. 411, 3 S. W. 562; *Cobb v. Robertson*, 99 Tex. 138, 86 S. W. 748, 87 S. W. 1148, 122 Am. St. Rep. 609. The possession of Gary and wife as tenants of Pittman was the possession of Pittman, and he cannot now claim that possession was not delivered to him by De Steaguer. The sum which he may have paid his tenants to get them off the land would not be a valid claim against the demand for the purchase money which he contracted to pay.

There is another fact which we think is apparent from the record, and which is sufficient to defeat the offset interposed by Pittman. The evidence is sufficient to show, as a matter of law, that he had knowledge of the facts upon which Mrs. Rodgers, or her second husband, based the hostile claim to the land. It is a well-settled principle of law that the vendee cannot offset against the purchase money the cost of extinguishing an outstanding title of which he knew at the time of the purchase. *May v. Ivie*, 68 Tex. 379, 4 S. W. 641; *Fagan v. McWhirter*, 71 Tex. 569, 9 S. W. 677; *Brock v. Sothwick*, 10 Tex. 65; *Harralson v. Langford*, 66 Tex. 113, 18 S. W. 339. Pittman knew that the first husband of Mrs. Rodgers had bought the land and paid some money on it. He evidently knew the terms of the trade between Rodgers and De Steaguer, because he says he proposed to "take up Rodgers' trade, and pay the land out without any further process." He purchased the land with Mrs. Rodgers on it, and permitted her and her second husband to remain there for five years.

We think the record shows a state of facts wholly insufficient to defeat the right of appellant to collect the full sum sued for. However, we do not feel disposed to reverse

this case and render judgment, for the reason that the record shows that the pleadings of the appellant as to attorney's fees are not sufficient to authorize a judgment for that sum. *Elmore v. Rugely* (Tex. Civ. App.) 107 S. W. 152; *Young v. State Bank* (recently decided by this court) 117 S. W. 476. This defect might be cured by an amendment, and proof be made which would justify such a recovery. To remand the case will also give to the appellees an opportunity, upon another trial, to meet the objections here sustained to the proof offered in support of their offset.

The judgment of the district court will therefore be reversed, and the cause remanded.

### MAXFIELD v. TEXAS & P. RY. CO.

(Court of Civil Appeals of Texas. March 20, 1909.)

#### 1. RAILROADS (§ 390\*)—INJURIES TO PERSON ON TRACK—NEGLIGENCE.

Trainmen, knowing of the peril of a person on the track in time to avoid injuring him, must use every reasonable means within their power, consistent with the safety of the train, to avoid running him down; and a failure so to do is actionable negligence, notwithstanding such person negligently exposed himself to the peril.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1324, 1325; Dec. Dig. § 390.\*]

#### 2. RAILROADS (§ 401\*)—INJURIES TO PERSON ON TRACK—NEGLIGENCE—INSTRUCTIONS.

An instruction, submitting the issue of discovered peril in an action for injuries to a person struck by a train, that if the trainmen saw him at a sufficient distance to stop the train, and if an ordinarily prudent person would under similar circumstances have used the means at hand to stop the train, and if the trainmen failed so to do the railroad was liable, was erroneous for submitting the issue whether or not an ordinarily prudent person would have used the means at hand to stop the train, since it was the absolute duty of the trainmen, when discovering the peril, to make use of all the means at their command, consistent with the safety of the train, to stop it.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1390; Dec. Dig. § 401.\*]

Appeal from District Court, Van Zandt County; R. W. Simpson, Judge.

Action by J. S. Maxfield against the Texas & Pacific Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Davidson & Davidson, for appellant. J. A. Germany, for appellee.

#### Reasons for Reversal.

RAINEY, C. J. The evidence in this case raised the issue of discovered peril. On this issue the court charge the jury: "If defendant's servants saw plaintiff a sufficient distance from him to have stopped the train or lessened its speed in time to avoid striking him, then if you find an ordinarily pru-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dent and cautious person would, under the same or similar circumstances to those surrounding the parties, have used the means at hand to stop or check the speed of the train, then if you find they failed to use ordinary care to so use the means to stop or check the train," to find for plaintiff.

This charge, in defining the duty imposed by law on defendant upon the issue of "discovered peril," falls short of that duty as announced in the case of *Railway Co. v. Breadow*, 90 Tex. 26, 36 S. W. 410, and followed by the case of *Railway Co. v. Staggs*, 90 Tex. 458, 39 S. W. 295, to wit: "If defendant, through the parties in charge of the engine, knew of Breadow's peril in time to have avoided same, such knowledge imposed upon it the new duty of using every means then within its power, consistent with the safety of the engine, to avoid running him down; and a failure so to do would render it liable, notwithstanding he may have been guilty of contributory negligence in being exposed to the peril." This imposes the duty of using the means then in its power consistent with the safety of the engine, and the measure of the duty, imposed by the charge, of using "such care as an ordinarily prudent and cautious person would use under similar circumstances," does not fully meet the requirements of the new duty that arises under the circumstances. The new duty that arises under such conditions seems, from the wording of the decision cited, to be one that is imperative, and is not measured by the term "ordinary care."

Again, we think the charge is erroneous, in that it submits for the determination of the jury whether or not an ordinarily prudent and cautious person would, under the same or similar circumstances to those surrounding the parties, have used the means at hand to stop or check the speed of the train. It was the absolute duty of the engineer in charge of appellee's train, when he discovered appellant's peril, to make use of all the means at his command consistent with the safety of the engine to stop or check the train and avoid striking appellant. Such duty did not depend upon whether or not a person of ordinary care and caution would have made use of such means, but under such circumstances was imperative. Therefore the court erred in its charge in not charging the jury in accord with said decisions.

The third assignment of error complains of the giving of the special charge, asked by defendant, as follows:

"The court erred in giving to the jury defendant's requested instruction No. 1, as follows: 'You are instructed that if you find that the plaintiff could have walked between said tracks in a place of safety, and that an ordinarily prudent person would have remained between said tracks, and would not

have gotten upon the tracks, so as to be struck by the engine in question, then, if you so find, plaintiff is guilty of contributory negligence, and cannot recover. J. A. Germany, Attorney for Defendant.

"Given, with the qualification that, under circumstances mentioned in this charge, plaintiff cannot recover unless defendant's engineer saw him, and saw he was in position of peril, in time to have stopped the train by the use of ordinary care, to use the means and appliances at hand. R. M. Simpson, Judge."

This charge assumes that plaintiff got on the track so as to be struck, and in another portion of the charge it was left to the jury to determine whether or not he got upon the track so as to be struck. While the evidence, we think, might warrant such an assumption, there being a conflict in the charge, the jury may have been confused thereby, and attention is called to it that it may not be repeated on another trial.

For the error in the charge on discovered peril, the judgment is reversed, and cause remanded.

#### PRICE v. WHITE.

(Court of Civil Appeals of Texas. March 14, 1908.)

#### BILLS AND NOTES (§ 92\*)—LIABILITY OF MAKER.

Liability of defendant on a note given for inducing a third person to contract cannot be defeated on the theory that the contract did not bind such person to do anything, where he executed notes called for contemporaneously with the contract, since there remained nothing for him to do, except to comply with his agreement, which defendant could insist on.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 166; Dec. Dig. § 92.\*]

#### Appeal from Hale County Court.

Action by N. A. Price against L. B. White. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

B. Graham and H. C. Randolph, for appellant. Mathes & Williams and Wm. J. Berne, for appellee.

#### Conclusions.

SPEER, J. We have carefully read the contract entered into between appellee and H. C. Chapman, as well as all the oral evidence contained in the record, and have concluded that the court ought to have given appellant's requested charge instructing a verdict in his favor. The evidence indicates that appellant fully performed his contract when he secured the purchaser, Chapman, to sign the contract introduced in evidence; and, if appellee chose not to enforce the contract thus entered into, it was no fault of appellant's. It is no argument against this conclusion to insist that the contract bound Chapman to do nothing, since Chapman had already executed the notes called for contemporaneously.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

poraneously with the execution of the contract, and there remained, therefore, nothing for him to do, except to comply with the terms of his agreement, which appellee certainly had a legal right to insist on.

The judgment of the county court is therefore reversed, and judgment here rendered for appellant for the amount of the note sued on, to wit, \$400, together with 10 per cent. attorney's fees.

Reversed and rendered.

## BARTLETT OIL MILL CO. v. CAPPES.

(Court of Civil Appeals of Texas. March 10, 1909.)

### 1. COMPROMISE AND SETTLEMENT (§ 6\*).

The compromise of a cause of action, real or supposed, made in good faith, is binding.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 35-40; Dec. Dig. § 6\*]

### 2. COMPROMISE AND SETTLEMENT (§ 6\*)—CONSIDERATION—SUFFICIENCY OF EVIDENCE.

In an action on a contract of settlement of a servant's claim for injuries, evidence that plaintiff was injured while at work for defendant, that defendant's manager proposed the settlement, and that plaintiff, believing that he had a cause of action, in good faith accepted the proposition, was sufficient to show a consideration, though there was no evidence that the injuries were due to defendant's negligence.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 35-40; Dec. Dig. § 6\*]

### 3. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—FAILURE TO BRIEF ACCORDING TO RULES.

The appellate court need not consider assignments of error not briefed in accordance with the rules and decisions of the courts.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3000; Dec. Dig. § 742\*]

Appeal from Williamson County Court; T. J. Lawhon, Judge.

Action by Tom Cappel for the Bartlett Oil Mill Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Richard Critz, for appellant. Stanton Allen and Wilcox & Graves, for appellee.

RICE, J. Appellee, while at work as linterman for appellant, on the 5th day of January, 1907, had his right hand so mangled and injured by the saws of one of its gins as made it necessary to have two of his fingers amputated, whereby he was disabled for work. He claims that thereafter, on the 9th of January, he made a contract and agreement with the mill, through its general manager and agent, Ogden, whereby appellant bound itself to pay plaintiff his regular wages so long as he might be disabled from said injury, together with his doctor's bill. Appellant having failed and refused to comply with this contract, as contended by appellee, the latter brought this suit against appellant in the justice's court upon said contract, al-

leging that he was disabled for the performance of the work from the time of said injury until the 6th of April, a period of 13 weeks; that he was receiving \$12 per week for his services, wherefore he was entitled to recover from appellant the sum of \$156, on account of said contract, nothing being claimed for doctor's bill; the same having been paid by appellant. Appellee further alleged that at the time of entering into said contract he in good faith believed he had a good cause of action against appellant, on account of said injuries, and that he accepted said settlement in compromise for all damages that he might have received by reason thereof. Appellant answered by general and special exceptions, general denial, and specially denied that it made any contract of settlement, and further pleaded that there was no consideration for said contract, if any was so made as contended by appellee. Appellee recovered in the justice's court, from which appellant appealed to the county court, where judgment was again rendered against it in favor of appellee for the full amount of his claim, from which this appeal is prosecuted.

Appellant, by its first assignment of error, insists that the court erred in rendering judgment against it, because the evidence shows no legal, valuable, or good consideration as a basis for the contract sued upon, and by its proposition thereunder insists, in effect, that if appellee had and asserted no cause of action on account of said injury, he was therefore not entitled to recover. By his counter proposition appellee insists that the compromise of a cause of action, real or supposed, made in good faith, is binding. This we believe to be the law. It is not essential, in our judgment, that there should have been in fact a good cause of action before appellee would have had the right to recover upon the contract. It is only necessary to show that he was injured, as claimed, and that he in good faith believed that he had a cause of action arising therefrom, at the time he entered into the compromise, in order to maintain his suit thereon. The evidence, briefly summarized, shows that appellee suffered the injury while at work for appellant, from the effects of which he was disabled, as claimed by him. It likewise shows that appellant made the contract asserted by appellee, and that at the time of entering into the contract appellee in good faith believed he had a cause of action. The evidence further tends to show that at the time appellant made the contract of settlement its manager must have entertained the belief that appellee had a good cause of action, for it appears that he proposed the settlement himself, which appellee accepted. While the evidence, it may be conceded, failed to disclose that the injuries received by appellee were due to any fault or negligence upon the part of appellant, still

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

we think this is immaterial under the authorities.

In *Camoron v. Thurmond*, 56 Tex. 3, it is said, quoting from leading cases in equity: "An agreement, entered into upon the supposition of right, or of a doubtful right, though it often comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties, for the right must always be on one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation of an agreement." In *Pegues v. Hayden*, 76 Tex. 99, 13 S. W. 172, it is said: "When a right which is doubtful is controverted, or where the object is to avoid or settle litigation, a compromise, duly executed, will not be set aside by the courts, if the parties act in good faith, and there is no fraud or misrepresentation." In 6 Am. & Eng. Ency. Law (2d Ed.) p. 711, it is said: "As it is the policy of the law to discourage litigation, and to enforce voluntary settlements effected without the interposition of the law, it has uniformly been held that the compromise of doubtful claims is valid; the mutual release of their respective rights by the parties to the controversy, and the avoidance of the expense and annoyance of a suit at law, being a sufficient consideration for the composition"—citing various cases in support of the text. In *Honeyman v. Jarvis*, 79 Ill. 318, it is said: "The compromise of a doubtful right, though it afterwards turns out the right is on the other side, when there is neither actual nor constructive fraud and the parties act in good faith, with full knowledge of the facts, is sufficient consideration to support a compromise; the real consideration which each party receives under the compromise being, not the sacrifice of the right, but the settlement of the dispute and the abandonment of the claim. It is no objection to the validity of the transaction that the right was really in one of the parties only, and that the other had no right whatever. The fact that the one may have had no claim is immaterial if he was honestly mistaken in that regard." There is no contention in this case that there was any fraud or imposition by appellee upon appellant. It was shown that, while appellee had not consulted any attorney about the matter, and was not advised of his legal rights before making the contract, nevertheless he believed that he had a good cause of action; and, according to his evidence, the proposition of settlement was suggested by appellant's agent, and it appears that the agreement of compromise was entered into by both parties with full knowledge of all the facts relative to the injury. And it may be that the inducing cause on the part of appellant to make said compromise was to avoid litigation, which would have been sufficient consideration, under the authorities, to sustain the agreement. Believ-

ing the law under the facts is with the appellee, this assignment is overruled.

The remaining assignments of error are not briefed in accordance with the rules and decisions of the courts, and it is not therefore incumbent upon us to consider them. They are therefore overruled.

Finding no reversible error in the record, the judgment of the court below is affirmed. Affirmed.

# **RAPID TRANSIT RY. CO. v. ALLEN.** (Court of Civil Appeals of Texas. Feb. 27, 1909.)

## **1. DAMAGES (§ 158\*)—PERSONAL INJURY—PLEADING—SUFFICIENCY.**

Allegations that plaintiff was seriously and permanently injured internally and externally in and on her back, spine, head, etc., and that her nervous system was seriously impaired, warranted proof that she was a mental wreck and her mind was seriously affected 18 months after the accident, and that, if her condition was not cured, she might become insane.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 441-446; Dec. Dig. § 158.\*]

## **2. DAMAGES (§ 158\*)—PERSONAL INJURY—PLEADING.**

A general allegation of damage from personal injury admits proof of such damages only as naturally and necessarily result from the injury charged, but it is not essential, to warrant proof thereof, that all the results of the act or injury complained of be pleaded in detail, if such results are necessarily or legally implied from the injuries alleged.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 441-446; Dec. Dig. § 158.\*]

## **3. DAMAGES (§ 158\*)—PERSONAL INJURY—PLEADING.**

Proof of impairment of the mental faculties will be received usually under allegations of grievous or permanent bodily injury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 441-446; Dec. Dig. § 158.\*]

## **4. DAMAGES (§ 26\*)—PERSONAL INJURY—FUTURE CONSEQUENCES.**

Recovery can only be had for such future apprehended consequences of an injury or existing condition as will reasonably or probably result therefrom, and the jury in assessing damages therefor should be confined by the charge to such probable results.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 69, 236; Dec. Dig. § 26.\*]

## **5. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In a personal injury action, the admission of testimony that plaintiff's nervous condition, if not cured, "might" result in insanity, was not prejudicial error, especially in view of proof that she was a mental wreck.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.\*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by Mary S. Allen against the Rapid Transit Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter H. Walne and Finley, Knight & Harris, for appellant. A. W. Nowlin, J. E.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Forrest, N. G. Turney, and T. F. Lewis, for appellee.

**TALBOT, J.** This is an action for damages on account of personal injuries sustained by appellee through the negligence of appellant's servants. The petition alleged that appellee was a passenger on one of appellant's street cars; that when said car arrived at the intersection of First avenue and Ash Lane, public streets in the city of Dallas, it was stopped, among other things, for the purpose of allowing appellee to alight therefrom, but that appellant's servants in charge of said car failed to stop it a reasonably sufficient length of time to enable her to alight in safety; that, while she was in the act of alighting from said car, it was negligently started and moved forward with a sudden lurch and jerk which caused appellee to be thrown with great force and violence down upon the platform or steps of said car and upon the cross walk of said streets in such manner as to catch her foot and drag her some distance, by reason of which she sustained serious and permanent injuries. Defendant answered by general demurrer, special exceptions, and general denial. The case was tried before a jury and resulted in a verdict and judgment in favor of appellee for the sum of \$3,000, and the appellant appealed.

It is assigned that the trial court erred in permitting Dr. S. Egan to testify that, when he was called to treat appellee some 18 months after the accident, he found her to be a mental wreck; that her mind was seriously affected. This testimony was objected to on the ground that there was no sufficient basis in the pleading for such proof. We are of the opinion the court did not err in the admission of the testimony. It was alleged that appellee was seriously and permanently wounded, bruised, and injured, both internally and externally in and on her back, spine, legs, hips, head, and shoulders, arms, and body; that by being dragged, and by reason of the bruises, wounds, and injuries received as aforesaid, her uterus, ovaries, kidneys, and bladder, together with the nerves and muscles by which the same are controlled, were seriously and permanently displaced, injured, and affected, and her lungs and abdomen seriously impaired and injured, and her nervous system seriously impaired and shattered. Dr. Egan testified, in substance, that the injury to appellee's nervous system is very great; that from his last examination of her the gravest condition he found is one that relates to the nervous system; that there are two nervous systems in the body—one controls the voluntary acts of the body, the brain and spinal cord and their nerves, and the organic nervous system, which presides over all the organic functions of the body, the circulation, the nutrition, and assimilation, and the very life of the individual—that he found in appellee's case very seri-

ous injury to both of these nervous systems; and that her mind has been seriously affected. He further testified that he found appellee in very broken health; that she was a physical and mental wreck, in a state of extreme prostration and depression, great emaciation, and not only imperfect nutrition, but imperfect in all the organic processes of the body—that is, in the circulation of the blood, in the digestion, and in the assimilation. The rule that a general allegation of damages for personal injury will admit evidence of such damages only as naturally and necessarily result from the injury charged seems to be well established. *Railway v. Curry*, 64 Tex. 85; *Campbell v. Cook*, 86 Tex. 630, 26 S. W. 486, 40 Am. St. Rep. 878. In *Railway v. Curry*, supra, the Supreme Court, after laying down the general rule, substantially as above stated, said: "The rule, however, is satisfied when from the facts stated the law infers other fact or facts; for, whatsoever the law infers from a given state of facts, the adverse party is presumed to know and must take notice of, whether it is specially pleaded or not." So that it is not essential, in order to let in proof thereof, that all the results of the act or injury complained of should be set forth in detail, if such results are necessarily or legally implied from the injuries alleged. *Railway v. McMannewitz*, 70 Tex. 73, 8 S. W. 66; *Railway v. Mitchell*, 72 Tex. 171, 10 S. W. 411; *Railway v. Edling*, 18 Tex. Civ. App. 171, 45 S. W. 406; *Railway v. Pina*, 33 Tex. Civ. App. 690, 77 S. W. 979; 13 Cyc. pp. 184-185; *Tyson v. Booth*, 100 Mass. 258. It is well understood, we think, that the mind, nervous system, and body are so intimately connected that the mind is likely to become affected by a severe nervous shock or physical injury, and hence proof of impairments of these faculties will be received usually under allegations of grievous or permanent bodily injury. 13 Cyc. p. 189; *City of Chicago v. McLean*, 133 Ill. 148, 24 N. E. 527, 8 L. R. A. 765. In the present case, in addition to the allegation that appellee's "nervous system was seriously impaired and shattered," it was specifically alleged that she received injury to her head and spine and other parts of the body. In *Railway v. McMannewitz*, cited above, the petition alleged that the plaintiff "was injured in her spine, chest, head, and limbs," and the allegation was held "sufficiently comprehensive to embrace a heart disease or aneurism of the blood vessels situated in the chest." In *Railway v. Mitchell*, supra, under allegations that the plaintiff's wife had received heavy and serious blows and bruises on both her shoulders, that "her lower limbs were bruised and wrenched, and her nervous system shocked and permanently impaired," etc., testimony to the effect that she had been threatened with miscarriage was admitted over the objection that there was no pleading to authorize its admission, and the court said: "We do not see that the evidence was

not properly admitted." These and other decisions cited fully justify and sustain, we think, the conclusion of this court that the allegations in this case were sufficiently broad and comprehensive to authorize the admission of the evidence of which appellant complains. Among the cases of the Supreme Court of this state *Railway v. McMannewitz*, supra, especially seems to be in point; for, if a heart disease can be necessarily or legally implied from the injuries to the spine, chest, head, and limbs, we see no reason why the mental condition in which the physician says he found the appellee may not likewise be inferred or implied from her shattered nervous system, and the injuries alleged to her head and spine. Such being the natural and necessary result of those injuries, the appellant was bound to take notice of them, and the overruling of its special exception to the effect that the allegations of the nature and character of the injuries charged were too general does not materially affect the question.

Appellant's third assignment complains of the court's action in permitting Dr. R. W. Allen to testify that, if the hysterical and neurotic condition with which plaintiff was suffering was not cured, "it might result in insanity." The objections urged to the admission of this testimony were (1) that there was no sufficient basis in the pleading to authorize it; (2) that what is liable to result from an injury is not a proper criterion of damage. In disposing of the first and second assignments of error we decided the first question here raised adversely to appellant's contention, and as to the second objection we think it is not well taken. It is unquestionably well settled in this state that a recovery can only be had for such future apprehended consequences of an injury or existing condition as will reasonably and probably result therefrom, and the jury in assessing damages therefor should be confined by the charge of the court to such probable results. In the introduction of testimony, however, it would be extremely difficult, we apprehend, to confine the witness to the use of the language usually employed by the courts to express the rule upon the subject. In the case of *Railway Company v. Garber* (Tex. Civ. App.) 108 S. W. 742, one of the grounds of objection to the trial court's charge on the measure of damages was that it instructed the jury to take into consideration, in estimating the plaintiff's damages, "such physical pain and mental anguish as he may reasonably and probably suffer in the future as a result of his injuries," instead of telling them to take into consideration such physical pain and mental anguish as he would suffer; the contention being that what may reasonably and probably happen in the future is purely speculation, and admits of the widest conjecture, that what he may suffer in the future

includes, not only what he will suffer, but much more that is contingent and uncertain. In holding that this charge was not materially erroneous this court said: "It is difficult to perceive any real or substantial difference between the expression 'may' reasonably and probably suffer and 'will' reasonably and probably suffer," and that we did not believe the jury was misled by the charge as given to the injury of appellant. So, too, in the admission of the testimony of which complaint is here made, we do not believe appellant has sustained any substantial injury. This is especially true in view of the testimony of Dr. Egan, which we have held was properly admitted, to the effect that as a result of her injuries appellee was a mental wreck.

It is not contended that the verdict is without evidence to support it, or that it is excessive in amount. If, however, such contention had been made, it could not be sustained. The evidence was abundantly sufficient to establish the material allegations of the petition, and the issues seem to have been fairly submitted.

The judgment is affirmed.

#### CALDWELL et al. v. HOUSTON & T. C. RY. CO.

(Court of Civil Appeals of Texas. Feb. 4, 1909.  
On Rehearing, March 11, 1909.)

##### 1. RAILROADS (§ 376\*)—KILLING PERSONS ON TRACK—NEGLIGENCE.

Trainmen, discovering an object on the track in front of the train, must at least exercise ordinary care to ascertain what it is, and where, by failure to do so, a person lying on the track is killed, the company is liable.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 376.\*]

##### 2. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where the proper verdict was returned, and a correct judgment entered thereon, the case will not be reversed merely because of an erroneous instruction, which could not have affected the proper disposition of the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.\*]

##### 3. RAILROADS (§ 396\*)—KILLING PERSON ON TRACK—BURDEN OF PROOF.

One suing for the death of a person struck by a train because of the failure of the trainmen to exercise ordinary care, after discovering decedent's peril, has the burden of proving that the discovery of the peril of decedent was made in time to enable the trainmen by the exercise of proper care to avoid the collision.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1841-1843; Dec. Dig. § 396.\*]

##### 4. RAILROADS (§ 381\*)—USE OF TRACK—LICENSEES.

A license to use a railroad track for a foot-path does not include the right to use it as a place whereon to lie or sit.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 381.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.



## On Rehearing.

**5. RAILROADS (§ 358\*)—PERSONS ON TRACK—INJURIES—OPERATION OF TRAINS—CARE REQUIRED.**

Trainmen may assume that the track used for a footpath is clear of pedestrians shortly after midnight.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 358.\*]

**6. RAILROADS (§ 398\*)—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.**

A person on a railroad track used as a footpath was struck by a train and killed. He was lying down across the rails, in a situation calculated to conceal his presence from the trainmen. The accident happened shortly after midnight. *Held*, that decedent was prima facie guilty of contributory negligence, and plaintiff, basing a recovery on negligence in failing to discover decedent sooner, must furnish evidence to rebut the prima facie case.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 398.\*]

**7. RAILROADS (§ 398\*)—KILLING PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.**

In an action against a railroad company for killing a person lying on the track, evidence *held* to show that decedent was guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 398.\*]

**8. RAILROADS (§ 357\*)—INJURIES TO PERSON ON TRACK—CARE REQUIRED OF TRAINMEN.**

Trainmen owe no duty to one guilty of contributory negligence in lying on the track until after his peril is actually discovered.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 357.\*]

**9. RAILROADS (§ 376\*)—KILLING PERSON ON TRACK—NEGLECT.**

A person lying on a railroad track was struck by a train, which, after striking him, ran 435 feet before it stopped. The body was first discovered as an undistinguishable object on the track when the train was 300 feet from it. The trainmen did not discover that the object was that of a person until the train was within 75 or 80 feet from him. The train was a mixed one, running 18 or 20 miles an hour. The evidence showed that the train could not have been stopped within less than 510 feet. *Held*, that the railroad company was as a matter of law free from negligence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 376.\*]

Appeal from District Court, Lee County; Ed. R. Sulks, Judge.

Action by Mrs. Tommie Caldwell and others against the Houston & Texas Central Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Watson & Symmang and J. N. Story, for appellants. Baker, Botts, Parker & Garwood, W. B. Garrett, and W. O. Bowens, for appellee.

**HODGES, J.** Mrs. Tommie Caldwell, as the surviving widow of George Caldwell and the next friend of her minor children, instituted this suit against the appellee to recover damages for the alleged negligent killing of her husband. It is alleged that Caldwell was at the time lying upon the track of the defendant company, that his perilous situa-

tion was discovered by the engineer and brakeman in charge of the train that ran over and killed him in sufficient time to enable them by the exercise of proper care to avoid the collision, but that they negligently failed to exercise this care. It is also alleged: That Caldwell was one of the appellee's section foremen, and that on this occasion he was on his way home, traveling along the appellee's track, where he had the right to walk; that the track at this point was habitually and customarily used by the public as a footpath, with the knowledge and consent of the railway company; that in thus using the path Caldwell was a licensee; that the trainmen were charged with the duty of keeping a lookout at that place for the presence of persons who might be so using the track; that while Caldwell was walking along said path he was stricken with a "providential illness and fell thereon from a providential cause; \* \* \* that while he lay upon the track in that condition, unable to move, the defendant's train ran over and killed" him. Negligence is alleged as consisting of a failure on the part of the trainmen to keep a proper lookout to discover the presence of Caldwell upon the track, he being as to that place a licensee, and in failing to use ordinary care to discover the deceased upon the track after he had fallen thereon from "providential causes." From a verdict in favor of the defendant below, this appeal is prosecuted.

Caldwell was one of the appellee's section foremen and lived in or near the town of Giddings, up the track from the depot. On the night of the 22d day of July, 1907, after having spent some time in town, he started for his home. He was accompanied as far as the depot by a witness who testified in the case. The witness states that at that time deceased was considerably under the influence of whisky, so much so that he staggered as he walked. They separated about 11:30 o'clock. As Caldwell started up the track toward his home, witness asked him if he "could make it home," to which he says deceased answered that he thought he could. There is some conflict, however, as to whether Caldwell was in fact drunk on that occasion. At 12:50 o'clock on the same night, one of appellee's trains was due from the west, and it came in on time. It was this train which ran over and killed Caldwell. In order to show the circumstances under which the killing occurred, the appellants placed the engineer and brakeman in charge of that train on the stand, from whom the following details were obtained: There was a mixed train, consisting of five freight cars, three passenger coaches, and one sleeper. They were due at Giddings at 12:50 that night and were coming in on time. When within a short distance of the station, and after having passed the whistling post,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

they discovered an object about 250 or 300 feet in front of them on the track. Neither of them could tell what it was, but thought it was probably a bank of clinders, a calf, or a dog. They say they could not see plainly ahead by reason of the fact that the train was at that point passing around a curve, and the headlight shone to the left of the track. When within 75 or 80 feet of the object, the brakeman, who was at the time in the place usually occupied by the fireman, discovered that the object was a man, and immediately so informed the engineer. The latter says he applied his brakes and partially applied the reverse lever, but was unable to stop the train in time to prevent running over the man. The man proved to be Caldwell, who was at the time lying upon his back, across the track, with his feet over the south rail. After being struck, his body was dragged by the train 435 feet from where he was lying.

The court refused to charge upon any issue except that of discovered peril. In addition to the general charge on that subject, the following special charge was given at the instance of the appellee: "In this case the jury are instructed that in considering this case you are not authorized to consider whether or not the employes in charge of said train in the exercise of ordinary care could have discovered, or might have discovered, the deceased as a man lying upon the track; but the question submitted to you, and the only question for you to determine, is whether or not said employes in charge of said train in the exercise of such care actually discovered the deceased as a man lying on the track in time to stop the same to prevent striking him." We do not subscribe to the legal doctrine embodied in that charge. Neither do we think it is supported by the case of *S. A. & A. P. Ry. Co. v. McMillan*, 100 Tex. 562, 102 S. W. 103, decided by the Supreme Court of this state. The doctrine announced in that case falls little short of permitting a railway company to escape civil liability for killing a human being upon evidence sufficient to convict the employes in charge of the train in a criminal prosecution for negligent homicide. The charge given in this case would permit the employes in charge of the train, after having observed an object on the track in front of the engine, which might upon closer inspection prove to be a human being in a helpless condition, to deliberately turn their eyes away and carelessly destroy his life. We think it is exacting little enough of such employes to require that, under such circumstances, they exercise at least ordinary care to ascertain what the object is; and if by reason of a failure to exercise such a precaution human life is sacrificed, the company should be held liable for damages.

However, we do not think the case should be reversed because of the error discussed.

If the proper verdict has been returned, and a correct judgment entered, the case will not be reversed merely because of an error which could not have affected the disposition which should have been made of it. *G. & W. Ry. Co. v. City of Galveston*, 91 Tex. 17, 39 S. W. 920, 36 L. R. A. 44; *T. & P. Ry. Co. v. Purcell*, 91 Tex. 585, 44 S. W. 1058. Under the evidence introduced by the appellants, no other verdict could have been rendered, for the reason that this evidence shows that, even if the engineer had used his best efforts from the time he discovered the object on the track, he could not have avoided the collision. He was plaintiffs' witness, and testified that his train was a mixed train and about 540 feet in length, and that such a train could not be stopped within less than its length. He further testified that he made every possible effort to stop the train after being notified that he was about to run over a man, and the evidence shows that the train ran about 550 feet before it came to a stop. From this we think the conclusion is irresistible that the train could not have been stopped within 300 feet, the distance which the body of Caldwell was when first discovered as an indistinct object on the track. The burden rested on the appellants to prove the negligence charged, that the discovery of the peril of the deceased was made within such time as might have enabled the employes in charge of the train, by the exercise of the proper care, to avoid the collision. *Luna v. M., K. & T. Ry. Co.* (Tex. Civ. App.) 73 S. W. 1061; *St. L. & S. F. Ry. Co. v. Townsend*, 69 Ark. 380, 63 S. W. 994; 8 Ency. of Evidence, 854, and cases there cited.

There was no error in refusing the special charges submitting the issue as to whether the trainmen exercised ordinary care in keeping a lookout for a person on the track at that place. We may concede that the track was commonly used by persons as a path, and that as to persons using it in that manner there was a duty to keep a lookout; but it does not follow that the company would be liable for the failure of its servants to maintain a lookout for a person lying down upon the track. A license to use the track, or right of way, for a footpath, does not include the right to also use it as a place whereon to lie or sit. In any view that can be taken of the case, the deceased was, *prima facie*, guilty of contributory negligence, as a matter of law, in being upon the track in the manner he was, and there was absolutely no evidence sufficient to rebut that presumption.

We think the testimony was such that the court should have directed a verdict in favor of the appellee.

The judgment is, accordingly, affirmed.

#### On Rehearing.

In disposing of this case in the original opinion, we assumed that the deceased was guilty of contributory negligence as a matter of law in being upon the track of the rail-

road at the time and place he was when killed. The facts relied upon to refute this assumption are: That there was evidence sufficient to justify a finding by the jury that Caldwell was a licensee and had a right to use the track of the railroad; and, further, that after he went on the track on this occasion, he was stricken with a sudden illness, which rendered him unable to get out of the way of moving trains.

There was testimony tending to show to some extent a use of the track at that place as a footpath, without any known objection from the railway company, although the trainmen testified that they had never known of its being so used. The deceased was not killed while using the railroad track in the manner usual with pedestrians, but was lying down across the rails, in a situation calculated to conceal his presence from those operating the train, and far more dangerous than standing or walking on the track. He was also there at an unusual hour of the night, a time when the employes in charge of trains had a right to assume that the track was clear of pedestrians. *M., K. & T. Ry. Co. of Texas v. Malone*, 115 S. W. 1153. These facts placed Caldwell in the attitude of being prima facie guilty of such contributory negligence as would relieve the railway company of any liability for any negligence except that which may have accrued after his peril was discovered. The burden then rested upon the appellants, if they wished to base a recovery upon negligence in failing to discover him sooner, to furnish evidence sufficient to authorize the jury to acquit him of contributory negligence. The only effort to do that is in the attempt to show that Caldwell was at times subject to sudden attacks of illness which would render him helpless. Testimony was introduced to the effect that several years previous to this occasion Caldwell had become overheated, and thereafter became subject to what the witness called "spells" of some sort, and while these attacks lasted he would be helpless, would fall down, groan, and apparently suffer much pain; that they generally came on in the nighttime and would last about half an hour—sometimes not so long. His wife, who was the principal witness as to this ailment, testified that the spells seemed to follow more frequently after an over-indulgence in eating. How often these spells came the testimony does not show, neither does it inform us whether or not they came periodically or at irregular intervals. Some of the sectionmen with whom Caldwell had worked for quite a while stated that they had never known him to have such an attack. Had this been the only evidence by which Caldwell's presence upon the track, apparently asleep, or in an unconscious condition, was accounted for, there might be some reason for saying that it supplied facts from which the jury could find that he was not negligently there; but there is other testimony

which, if true, amply accounts for his situation. Several witnesses, who saw him on the fatal night, testify that he visited more than one saloon in the town of Giddings before starting for his home, and that he was considerably under the influence of liquor. Others who saw him testify that he was not drunk when they observed him, but admitted that he had been drinking some. As he started home, at about 11 o'clock at night, two of his companions accompanied him as far as the railroad depot. They both say that he was then so much under the influence of drink that he staggered as he walked. This was the last seen of him till he was discovered two hours later lying across the track in an apparently unconscious condition at the place where he was struck and killed. Under this state of the evidence, we can conceive of but one reasonable conclusion that might have been reached. The jury was not left to conjecture that Caldwell might have fallen as the result of a sudden attack from one of the spells mentioned, but were confronted with a condition from which his subsequent situation was but the logical and usual sequence. The court did not err in telling the jury not to consider the fact that Caldwell might have fallen as the result of a sudden illness, and in refusing to give the special charges presenting the same issue requested by the appellants.

We have again gone carefully over the record with the view of seeing whether we were in error in concluding, as we did, that the evidence did not show negligence in the trainmen in failing to sooner stop the train and prevent the accident, and have found no reason for changing our former decision. If Caldwell was guilty of contributory negligence in being down upon the track, under the well-established rule in such cases, the employes owed him no duty till after his peril was actually discovered. Without undertaking to decide when that event happened, whether it was when the indistinguishable object was discovered on the track, 300 feet in front of the engine, or when his body was recognized as that of a man only 75 or 80 feet distant, we think the inevitable consequences would have been the same. Appellants insist that there is evidence in the record which tends to raise an issue as to this fact, which should have been submitted to the jury. This evidence consists substantially of the following testimony: On the night prior to the trial, four parties, Simmang, Folkes, Ebling, and Krieger, repaired to that portion of the track where the accident occurred, for the purpose of ascertaining by a test the distance at which a body could be discovered and distinguished upon the track of the railway. In carrying out the test, Simmang lay down upon the track at the spot where Caldwell was killed; Folkes took a position 300 feet west of Simmang on the side of the track; Krieger stationed himself at the cattle guard, which

was between 700 and 800 feet west of Simmamang; and Ebling was between Folkes and Krieger. They awaited the approach of the train, due at 12:50 that night, from the west—the one whose schedule corresponded to that which killed Caldwell. Krieger stated that when the train passed him, and the engine got about 40 feet distant, he could see easily, by means of the headlight, about 100 yards down the track in front of the engine. Folkes stated that as the engine passed him he could plainly discern Simmamang lying on the track 300 feet distant. He did not know how much farther he could have seen, for the reason that he did not undertake to look beyond the point where Simmamang was. Simmamang testified that when the engine got about 100 or 150 feet east of the cattle guard the first rays from the headlight fell upon him, and the engine gave several sharp whistles, which he took to be a danger signal, indicating that his presence had been discovered. Ebling did not testify as to the results of his observation. It is further shown that the curve at that place is what is called a curve of one degree, and that is explained to be a deviation of 18 inches from a straight line every 100 feet. Doyle, who testified as an expert engineer, stated that the lights on that railroad were generally so adjusted that the focus fell upon the track 300 or 400 feet in front of the engine, and at that point it shone from 30 to 60 feet on each side of the center of the track; that while the space between the focus and the engine was illuminated, and also a distance beyond, the focus was the place of best illumination.

It will be remembered that the head brakeman testified that as soon as the headlight shone upon the body he recognized it as a human being, and not before. The question now is: Does this testimony show that the employés in charge of the train discovered the body, even as an indistinguishable object, soon enough to enable them by the exercise of ordinary care in the use of appliances at their command to avert the accident? Considered in its most favorable light, it shows only the possibility of an earlier discovery of the body of the deceased. Both the brakeman and the engineer testified that when they first saw the object they were not over 300 feet distant, and their train was moving at the rate of 18 or 20 miles per hour. The engineer says they were then between the 56 milepost and the body, and by other testimony it is shown that this milepost was about 350 feet distant from where Caldwell was struck. This would seem to corroborate the engineer's estimate of the distance. He also testified that, upon being informed that he was about to run over a man, he did everything in his power to stop the train and avert the accident. The testimony shows that after striking the body the train ran 435 feet before it did

stop. If we add this distance to that estimated by the engineer and brakeman as to how far they were from the body when an effort was first made to stop the train, it shows that the train could not have been stopped within less than 510 feet, or more than 200 feet in excess of the distance it was from the body when the latter was first discovered as an indistinguishable object on the track. It must also be borne in mind that this evidence was adduced by the plaintiffs, and obtained from the engineer and brakeman during their examination in chief, and that it is not contradicted except inferentially by circumstances. It is true that the plaintiffs were not legally bound by the testimony given by these witnesses, and might have produced other evidence inconsistent with the facts detailed by them; but, having failed to do this, they cannot complain that the version given by the engineer and brakeman was believed. The brakeman also testified that after discovering the object on the track he kept his eye upon it, and as soon as it could be recognized as the body of a man he gave the warning, and all efforts possible were then made to stop the train. After giving to every testimonial fact in the record its full probative force, we have failed to find any showing of negligence upon which a recovery could be sustained in this case.

The motion is overruled.

#### BEALL v. CHATHAM.

(Court of Civil Appeals of Texas. Jan. 25, 1909.  
On Rehearing, Feb. 26, 1909.)

#### 1. TRESPASS TO TRY TITLE (§ 39\*)—ADMISSIBILITY OF EVIDENCE—PAYMENT OF TAXES.

In trespass to try title, where neither the issue of limitations nor that of a bona fide purchase is raised, evidence as to the payment of taxes on the land by one of the parties is immaterial.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Dec. Dig. § 39.\*]

#### 2. TRESPASS TO TRY TITLE (§ 39\*)—ADMISSIBILITY OF EVIDENCE.

In trespass to try title conveyed by an assignee in bankruptcy of the owner to a firm of lawyers and on the same day conveyed to another person by the assignee, evidence that the firm represented one to whom the land had been conveyed by the other claimant in a matter not connected with the land is inadmissible.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Dec. Dig. § 39.\*]

#### 3. APPEAL AND ERROR (§ 1050\*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In trespass to try title to property conveyed by the assignee in bankruptcy of the owner at a sale of the property in the bankruptcy proceedings to two persons on the same day, evidence that one of the parties purchased certain personal property at the bankrupt sale at which the land was sold is harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1050.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**4. DEEDS (§ 194\*)—PRESUMPTION AS TO DATE OF DELIVERY.**

Where there is no evidence of the date of the delivery of a deed, it will be presumed to have been delivered on the date of execution.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 578; Dec. Dig. § 194.\*]

**On Rehearing.****5. DEEDS (§ 208\*) — DELIVERY — EVIDENCE — SUFFICIENCY.**

Evidence, in trespass to try title as to the date of the delivery of a deed, held not to sustain a finding that as matter of law a certain deed was delivered prior to the delivery of another deed of the same premises of the same date, but to another grantee.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 208.\*]

Appeal from District Court, Anderson County; N. B. Morris, Special Judge.

Action by Fannie Chatham against Thomas J. Beall. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

P. N. Springer, for appellant. Campbell & Sewell and Thos. B. Greenwood, for appellee.

PLEASANTS, O. J. This is an action of trespass to try title, brought by the appellee against appellant and others to recover a tract of 476 acres of land on the William Meredith survey in Anderson county. The appellant answered in the court below by general demurrer and plea of not guilty. The pleadings of the other defendants are omitted from the record by agreement of the parties to this appeal; none of said defendants having appealed from the judgment of the trial court. The cause was tried without a jury, and judgment was rendered in favor of plaintiff for all of the land in controversy.

The facts disclosed by the record are as follows: Both parties claim under Champ. E. Carter, Jr., assignee in bankruptcy of the estate of E. J. and J. H. Iglehart, as common source of title. Carter was the duly appointed and qualified assignee of said bankrupt estate, and as such conveyed the land in controversy to J. H. Iglehart on the 22d day of January, 1870, and on the same day conveyed the same land for the same consideration to Bennett H. Davis and Thomas J. Beall. These deeds, which are in exactly the same words, except as to names of grantees, were both acknowledged by the grantor before O. D. Thatcher, a notary public of Robertson county, on the 27th day of January, 1870. The sale of the land by the assignee was made under an order of the court in which the bankrupt estate was being administered, directing him to sell all of the property of the estate, and each of the deeds above mentioned is sufficient as a conveyance of the property. The deed to Iglehart was filed for record in Anderson county on June 24, 1870, and the deed to Davis and Beall was filed for record in said county on February 7, 1871.

The grantor, the grantees in both deeds, and the notary who took the acknowledgment of the grantor to both deeds are dead. The sale of the property under the order above mentioned was made at Bryan, Brazos county, Tex., on January 22, 1870. The Igleharts, Davis, and Beall all lived at Bryan when the bankruptcy proceedings were begun, and Davis and Beall lived there at the time the sale was made. Beall testified that soon after they went into bankruptcy the Igleharts left Bryan and went further west. The petition in bankruptcy was filed in April, 1869, and Carter was appointed assignee in June of that year. There is no other testimony as to when J. H. Iglehart left Bryan, or where he was on date of the sale. The assignee Carter, at the time of the sale, lived at Calvert in Robertson county. Appellant holds whatever title was conveyed to Davis and Beall by the deed to them before mentioned, and appellee holds the title conveyed to Iglehart. At the time of this sale, Davis and Beall were partners in the practice of law, and, as before stated, lived at Bryan. Mr. Davis has been dead for a number of years. Mr. Beall was a witness on the trial below, and testified that he did not know of the purchase of the land until the deed was received through the mail by his firm about a week after the sale. He did not attend the sale, but his partner did. After the deed was received through the mail, it was placed with other deeds to property belonging to the firm, and the property thereby conveyed was regarded as an asset of the firm until the dissolution of the partnership in 1880, at which time, in the settlement of their partnership affairs, Davis conveyed his interest in the property to Beall. The taxes on the land were paid by Davis & Beall from 1877 to 1880, and by appellant Beall from 1880 to 1884, inclusive. Beall testified that he had not paid the taxes on the land for the past four or five years because of the question as to the title raised by the claim of appellee. He knew nothing of the sale to Iglehart and did not know of the adverse claim of appellee until shortly before this suit was brought. The only evidence of the payment of the purchase money by Davis & Beall or by J. H. Iglehart is the recitals in the deeds from Carter to said parties. The land has never been in the possession of either of the claimants. J. H. Iglehart, by his attorney in fact, D. T. Iglehart, conveyed the land to Jas. A. Blackerby in 1872. R. K. Chatham, under whom appellee claims, became the owner of the Blackerby title in 1876. No taxes are shown to have been paid upon the property by appellee or those under whom she claims until 1880, from which time and up to 1883 taxes were paid by R. K. Chatham. It does not appear that taxes were thereafter paid by him until 1891, after which time they were continuously paid by

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

him until his death, and have since been paid by appellee. After his acquisition of the Blackerby title, R. K. Chatham continuously asserted ownership of the land, by conveyance thereof and repurchase from his vendee, and by suit for possession against trespassers. There is evidence to sustain the finding that the firm of Davis & Beall represented the bankrupts, E. J. and J. H. Iglehart, in the bankruptcy proceedings at least to the extent of preparing the petition in bankruptcy. Mr. Beall testified that he was positive his firm did not represent the bankrupts any further than to prepare their petition, and his recollection and belief is that they did not prepare the petition, though they did advise the bankrupts in the matter before the petition was filed. Over the objection of appellant, N. C. Campbell testified that on a former trial of this case Mr. Gooch, who was then the attorney for appellant, and who is now dead, testified that he had examined the records in the bankruptcy proceedings, and that said records show that the bankrupts were represented in said proceedings by Davis & Beall. There is no direct evidence as to when the deed from Carter, assignee, to J. H. Iglehart, was delivered. The trial court concluded that the facts above stated were not sufficient to sustain any finding as to which of the two deeds from the assignee Carter was delivered first, but that said facts are sufficient to sustain the finding that "it was the intention of all the parties, at the time said two deeds were executed and delivered by said Champ E. Carter, Jr., as such assignee, that the title to said land should pass to said J. H. Iglehart alone."

In the view we take as to the proper disposition of this appeal, it would serve no purpose to discuss the various assignments of error in detail, and in this opinion they will not be so considered. We think the evidence of the payment of taxes on the land in controversy by R. K. Chatham and appellee was immaterial to any issue in the case, and therefore was inadmissible. Neither the issue of limitation nor that of innocent purchaser was raised by the evidence, and there is no evidence that either of the parties to this suit or those under whom they claim knew that there were two deeds from Carter conveying the land to different parties. If there had been failure on the part of either Davis & Beall or J. H. Iglehart to assert claim to the land, the party so failing to assert his claim, knowing that the other was claiming it under a deed from the assignee executed on the same day as the deed under which there was no assertion of ownership, such fact might be admissible in evidence as tending to show that the party failing to assert claim recognized the title held by the other as superior to that conveyed by his deed; but, as before stated, the evidence in this case shows an assertion of ownership by both grantees of the assignee, and there is no evidence that either

knew of the existence of the deed to the other. The evidence of the payment of taxes by Chatham and appellee was irrelevant and immaterial to any issue in the case. The evidence to the effect that the firm of Davis & Beall at one time represented R. K. Chatham in a matter in no way connected with the land in controversy was also immaterial, as was the evidence that Davis & Beall represented the Igleharts in the bankruptcy proceedings. *Beall v. Chatham*, 100 Tex. 371, 99 S. W. 1116. If there was any error in the admission of the testimony of Beall in regard to the purchase of certain personal property by his firm at the bankrupt sale at which the land in controversy was sold, it was harmless.

We cannot agree with the learned trial judge in holding that, without regard to the question of the priority of the execution of the two deeds by Carter conveying the land in controversy, the evidence sustains the conclusion that "it was the intention of all the parties to both deeds that the superior title to the land should vest in J. H. Iglehart." There is no such trust relation shown to have existed between the firm of Davis & Beall and Iglehart as to invoke the doctrine of constructive trusts in favor of Iglehart, and no evidence to authorize the finding of an express trust. There is nothing in the evidence tending to show that Davis & Beall purchased the land for Iglehart, or that either of them had any notice of Iglehart's purchase. We are of opinion, however, that the facts before found sustain the holding that the superior title vested in Iglehart on the ground that the deed from the assignee to him was delivered before the delivery of the deed to Davis & Beall. In the absence of any evidence to the contrary, it must be presumed that the deed to Iglehart was delivered on the day of its date. Mr. Beall testified that the deed to Davis & Beall was received by that firm about a week after the sale, and as both deeds were dated January 22d, which was the date of the sale, the deed to Iglehart must be presumed to have been delivered first. *Kirby v. Cartwright* (Tex. Civ. App.) 106 S. W. 742. In the case cited this court dissents from the views of the Court of Appeals of the Fourth District, as expressed in the case of *Kent v. Cecil* (Tex. Civ. App.) 25 S. W. 715, in which it is held that, in the absence of evidence to the contrary, when the date of a deed and the date of its acknowledgment are different, the date of acknowledgment will be presumed to be the date of delivery.

In deciding the question presented in this case, it is immaterial which of the rules above stated is the correct one, because, if the deed to Iglehart is presumed to have been delivered on the date of its acknowledgment, its delivery was prior to that of the deed to Davis & Beall, which came to them through the mail about a week after the sale. The ac-

knowledge of the two deeds was made five days after the sale, and, the deed to Davis & Beall having been sent to them through the mail after its acknowledgment, the Iglehart deed, under the presumption that it was delivered on the date of its acknowledgment, must have been delivered before the deed to Davis & Beall. Such being our conclusion as to the legal effect of the undisputed material evidence, the errors before indicated in the admission of immaterial evidence were harmless, and the judgment of the court below is therefore affirmed.

**Affirmed.**

#### On Rehearing.

Upon consideration of appellant's motion for rehearing, we have reached the conclusion that we erred in holding in our former opinion in this case that the testimony of appellant, Beall, that the first time he saw the deed from the trustee to the firm of Davis & Beall was when it came to the office of said firm through the mail about a week after the date of its execution, would require or authorize this court to hold, as a matter of law, that said deed was not delivered to Davis prior to the time it was received by the firm through the mail, as testified by appellant. The trial court having found that the evidence was not sufficient to warrant a finding as to which of the two deeds from the trustee, Carter, was delivered first, we are not authorized to render a judgment upon a contrary finding, unless the evidence is such that we can conclude as a matter of law that the deed under which appellee claims was first delivered, and, as before said, we do not think the evidence warrants such conclusion.

In our former opinion we held, for reasons therein stated, that the judgment of the court below could not be sustained upon the grounds upon which it was based by the trial judge, and, having now reached the conclusion that it cannot be affirmed upon the grounds stated in our previous opinion, it follows that the motion for rehearing should be granted, and said judgment reversed, and the cause remanded, and it has been so ordered.

#### PARLIN & ORENDORFF IMPLEMENT CO. v. CLEMENTS.

(Court of Civil Appeals of Texas. March 10, 1909.)

#### COURTS (§ 170\*)—COUNTY COURT—JURISDICTION.

Under Const. art. 5, § 16, and Sayles' Ann. Civ. St. 1897, arts. 1154, 1155, giving the county court concurrent jurisdiction with the district court when the matter in controversy exceeds \$500, but does not exceed \$1,000 the county court has no jurisdiction of a cause of action asserted by a petition alleging that a constable at the request of defendant converted two horses, worth \$150 each, under the pretense of a judgment and execution against plaintiff; that plaintiff's credit was affected thereby in the sum of

\$950; that for the unlawful deprivation of the use of the horses and the expenses he lost \$45, and praying for exemplary and actual damages, since the petition demands judgment for the value of the horses and injury to plaintiff's credit, etc., in all over \$1,200.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 170.\*]

Appeal from McLennan County Court; El. C. Street, Special Judge.

Action by T. E. Clements against the Parlin & Orendorff Implement Company. From a judgment for plaintiff, defendant appeals. Reversed, with instructions.

John B. McNamara and U. F. Short, for appellant. Jas. L. Garrett and Baker & Thomas, for appellee.

RICE, J. Appellee brought this suit in the county court of McLennan county against appellant, a private corporation, and Guy McNamara, who was constable of precinct No. 1 of said county, for the recovery of damages alleged to have been sustained by him on account of the wrongful levy of a pretended execution upon certain property of appellee by said McNamara at the instance of appellant. At the ensuing term of the county court, McNamara having answered, and appellant having failed to do so, judgment by default, with a writ of inquiry, was rendered against it. It thereafter filed an answer setting up its defenses thereto, which appellee moved to strike out. Subsequent to these proceedings, the case by agreement of parties, together with the writ of inquiry, was continued to the next term of said court without prejudice to either party. At the ensuing term of the county court, plaintiff dismissed his cause of action as against McNamara, and, both parties having announced ready for trial on the writ of inquiry theretofore awarded, judgment was rendered against appellant in favor of appellee for the sum of \$900. Appellant filed its motion for new trial and in arrest of judgment, asserting, among other things, that the court had no jurisdiction of plaintiff's cause of action, because the same was in excess of \$1,000, exclusive of interest, which motion was overruled, from which judgment this appeal is prosecuted.

Appellant by its second assignment of error assails the judgment on the ground that the court had no jurisdiction of plaintiff's cause of action for the reason assigned in its motion in arrest of judgment. By the averments of plaintiff's petition it is shown that on the 15th day of July, 1907, he was engaged in the livery business at Waco, at which time defendant McNamara, who was constable of said precinct, at the instance and request of appellant, seized and converted to the use of the defendant two horses each of the value of \$150; that said property was unlawfully seized and converted under the pretense of having some kind of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

judgment against the plaintiff on which they caused an execution to be issued and said property seized; that prior thereto plaintiff was a man of good reputation and character, standing well among his neighbors, and possessing good credit; that, by reason of the seizure of his said property under said pretended execution, his fair name, reputation, and credit were injured, and that, by reason of the unlawful seizure of said property without probable cause, he was greatly humiliated and his standing and credit affected; that, in addition to the unlawful seizure, defendant through said McNamara as constable of said precinct posted notices in said county, one at the courthouse door and at other places, advertising said property of plaintiff for sale under said pretended judgment and execution, further affecting his credit, fair name, and reputation, causing him humiliation, to his damage, including reasonable attorney's fees, in the sum of \$950, and for the unlawful detention and deprivation of the use of said property, and the expenses incident to said seizure, the further sum of \$45. Said petition concluding with a prayer for the recovery of exemplary and actual damages, interest, and costs, etc.

We think it clearly appears, therefore, from the recitations of said petition that the cause of action as therein asserted embraces as well the value of the horses as it does deprivation of their use and injury to his credit, etc., and therefore is for the sum of \$1,295, which is in excess of the jurisdiction of said court. The county court has exclusive jurisdiction in all civil cases where the matter in controversy shall exceed in value \$200 and does not exceed \$500, exclusive of interest, and concurrent jurisdiction with the district court when the matter in controversy shall exceed \$500 and not exceed \$1,000, exclusive of interest. Article 5, § 16, Const. Tex. See, also, articles 1154, 1155, Sayles' Ann. Civ. St. 1897.

We therefore conclude that the county court had no jurisdiction of the cause of action asserted against appellant, and that the judgment of the court below should be reversed with instructions to that court to dismiss said cause, and that the costs of this appeal be taxed against appellee, and it is so ordered.

Reversed, with instructions.

# ATLANTIC COAST LINE R. CO. et al. v. RICHARDSON.

(Supreme Court of Tennessee. August 6, 1908.)

## 1. PARTNERSHIP (§ 32\*)—EXISTENCE OF RELATION—AS TO THIRD PERSONS.

A voluntary association of independent, but connecting, railroads, for the more expeditious handling of freight passing over their several

lines to points beyond, does not constitute a partnership.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 32.\*]

## 2. CORPORATIONS (§ 642\*)—RAILROADS—FOREIGN COMPANIES—ACTIONS—PROCESS—"DOING BUSINESS IN THE STATE."

Acts 1887, p. 386, c. 228, § 1 (Shannon's Code, § 4543), provides that a foreign corporation doing business in the state shall be subject to suit to the same extent as a domestic corporation as to "any transaction had in whole or in part within this state, or any cause of action arising here." Section 2 of said act (Shannon's Code, § 4544) defines the term "doing business in this state" as follows: "Any corporation having any transaction with persons, or having any transaction concerning any properties situate in this state through any agency whatever, acting for it within the state, shall be held to be doing business here." Section 3 (Shannon's Code, § 4545) authorizes process to be served on an agent, whatever his character may be. *Held*, that a foreign railroad corporation, operating a line of road wholly outside of the state and having only a soliciting agent in the state, which commits a wrong by the negligent handling of a nonresident's freight passing over its line as intermediate carrier, is not "doing business in the state," within sections 1 and 2, because the shipper's "cause of action" for the wrong does not arise from "any transaction with persons" or "concerning any property situated in this state through any agency whatever acting" for the corporation "within the state," although the wrong is not discovered until the freight reaches its destination here; and hence the service of process upon the traveling agent, where he has had no connection with the shipment, does not bring the corporation within the jurisdiction of the court.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2155-2160; vol. 8, pp. 7640, 7641.]

### On Rehearing.

## 3. STATUTES (§ 188\*)—CONSTRUCTION.

Where the language of an act is free from ambiguity, and expresses an intelligent and definite meaning, the courts are bound to assume that this meaning is that which the Legislature had in mind.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 266; Dec. Dig. § 188.\*]

## 4. CARRIERS (§ 180\*)—CARRIAGE OF GOODS.

Where the bill of lading limits the liability of connecting carriers to the road inflicting the injury, the initial carrier is liable to the shipper for damages caused by its violation of its express directions given at the time of delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 815-828; Dec. Dig. § 180.\*]

### Certiorari to Court of Civil Appeals.

Action by Charles E. Richardson against the Atlantic Coast Line Railroad Company and another. Petition for certiorari to review a judgment of the Court of Civil Appeals, affirming a judgment of the circuit court of Davidson county, for plaintiffs. Petition granted, and judgments reversed.

Sloss Baxter, for plaintiffs in error. Robert L. Morris, for defendant in error.

BEARD, O. J. The defendant in error, at Wyoming, in the state of New York, deliver-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



ed to the Buffalo, Rochester & Pittsburg Railway a car loaded with pears, and received a few days thereafter a bill of lading, in which it undertook to convey the same, over its own line and connecting lines of the Atlantic Coast Dispatch Company, to Nashville, in this state.

This company, as the record indicates, was a voluntary association of certain railroads for the more expeditious handling and transport of freight passing over their several lines to points beyond. The plaintiffs in error, the Atlantic Coast Line Railroad Company and the Georgia Railroad & Banking Company, were, as we infer, two of the constituent members of this association.

The car in question passed over the lines of several railroads, including those of the plaintiffs in error. On reaching Nashville, the pears were found to be in a decayed and worthless condition, whereupon the present suit was instituted to recover the value of the shipment. As a ground for recovery it was alleged that the defendant carriers were guilty of negligence in failing properly to ice the car containing the pears, and also of unreasonable delay in transportation, resulting in the decay and loss of the fruit. The action was begun by the issuance of an ordinary summons, upon which a return by the officer making this service was indorsed as follows: "Came to hand and executed by reading the process to S. M. Wene, agent of the Atlantic Coast Line Company, and to M. H. Lillard, agent of the Georgia Railroad & Banking Company. \* \* \* Upon the coming in of the declaration the plaintiffs in error filed pleas to the jurisdiction of the court. In its plea the Atlantic Coast Line Railroad Company averred that it was a foreign corporation, "created under the laws of the state of Virginia, operating its lines of railroad in the states of Virginia, North Carolina, etc., and wholly outside of Tennessee; that its principal offices were located outside of this state; that S. M. Wene, upon whom service of the summons was made, was its traveling soliciting agent, and was never appointed agent for the company in Davidson county, in this state; that the company had no office or agency in Davidson county, at the time of the transaction out of which the plaintiff's cause of action arose or since; and that this cause of action did not arise within the state of Tennessee, nor out of any transaction had, in whole or in part, within the state of Tennessee."

The plea of the Georgia Railroad & Banking Company was in like form and substance, save that it averred that it was a corporation created and existing under and by virtue of the laws of Georgia; that its lines of railway were altogether outside of Tennessee; that its principal offices were located in Augusta, Ga., and that M. H. Lillard, upon whom service was made, was a traveling soliciting agent of the company,

and was never appointed the agent for the company in Davidson county. In all other essential respects the plea of this latter company was similar to the one set out above.

Instead of demurring to these pleas, if bad in law, the plaintiffs joined issue, and the case was heard on evidence pertinent thereto, resulting in a judgment overruling them and putting plaintiffs in error to trial on defenses involving the merits of the case, which resulted in a verdict and judgment adverse to them.

If the trial judge was in error in his ruling on these pleas on abatement, this is determinative of the case, and there will be no necessity of considering the numerous other errors assigned upon his action in the conduct of the cause.

Before coming to the question of law raised by these pleas, it is proper to say that the averments of fact contained in them are, without any contradiction, supported by the evidence in the case. It is only necessary to add that the car containing the pears in question was received from a connecting carrier by the Atlantic Coast Line Railroad Company, at Richmond, Va., and by that company was taken over its own lines to Augusta, Ga., where it was delivered into the possession of the Georgia Railroad & Banking Company, and by it was transported over its lines to Atlanta, Ga., where it was turned over to the custody of the Southern Railway Company, and by it was carried over its several lines to Nashville, the point of destination. Upon these facts the question is: Did the service of process upon these traveling agents bring the plaintiffs in error within the jurisdiction of the circuit court of Davidson county, and authorize a judgment in personam?

The answer to this question depends alone upon the proper construction of sections 1, 2, c. 226, p. 386, of the Session Acts of 1837 (sections 4543, 4544, of Shannon's Code). Section 1 of this act provides that any foreign corporation "found doing business in this state shall be subject to suit here to the same extent that corporations of this state are by the laws thereof liable to be sued, so far as it relates to any transaction had in whole or in part within this state, or any cause of action arising here, but not otherwise." The second section defines what is meant by being "found doing business in this state" in these terms, to wit: "Any corporation having any transaction with persons, or having any transaction concerning any property, situated in this state, through any agency, whatever, acting for it within the state, shall be held to be doing business here, within the meaning of section 1."

We are at a loss to see how, by the most liberal interpretation, this controversy can be brought within the jurisdictional limits of this statute. These two foreign corporations had no transaction with any person or

concerning any property situated in this state, through any agency acting for them, or either of them, within the state. Their transactions were with persons, or corporations, outside the state, and with regard to property, at the time of these transactions, far beyond the borders of the state. The Atlantic Coast Line Railroad Company had its transaction with reference to this property with the common carriers, from whom it received and to whom it delivered this car load of freight. This was equally true with the Georgia Railroad & Banking Company.

This act of 1887 was passed for the purpose (*Telephone Company v. Turner*, 88 Tenn. 265, 12 S. W. 544) of remedying a defect in our corporation acts, pointed out in *Chicago & Alton Railroad v. Walker*, 9 Lea, 475. In that case it was held that the Code provisions, which regulate the mode in which corporations may be sued, did not apply to the case of a foreign corporation having no resident agent, or local office, but which was alone represented by a traveling agent, not localized in this state. To meet this apparent hardship, by section 3 of that act it is provided that "process may be served upon any agent" of a corporation found within the county where the suit is brought, "no matter what character of agent such person may be"; but the effect of this section is necessarily limited to suits against foreign corporations falling within the letter and spirit of sections 1 and 2 of the act. So it is, while authorizing process to be served on an agent, whatever his character may be, yet the right of bringing foreign corporations into the courts of this state is circumscribed by the terms of sections 1 and 2 of the act.

It is true that it was held in *State v. Insurance Company*, 106 Tenn. 294, 61 S. W. 75, that "the term, or phrase, 'doing business' does not and cannot have a uniform and unvarying meaning, but is governed largely by the connection and in view of the object of the statute." And so it was ruled that the Connecticut Mutual Insurance Company, which in the year 1894 recalled its agents and agencies from the state, and from that time ceased to solicit and write new policies, was not doing business in Tennessee, so as to be subject to a privilege tax on its premium receipts from policies theretofore issued, which were sent by mail, or otherwise, to the agents of the company outside the state.

But we see no room for speculation as to the sense in which the terms "doing business in this state" are used in the act of 1887, as the second section, as has already been said, defines those terms, and thus places them beyond the realm of debate.

That this was understood by the court in its disposition of that case is apparent, from the clear line of distinction which the opinion points out between it and that of *Insurance Company v. Spratley*, 99 Tenn. 322, 42 S. W.

145, 44 L. R. A. 442. In this latter case it appeared that the insurance company had issued its policies on the life of Spratley before its withdrawal from the state, had received premiums on these policies to the date of his death, and thereafter sent a special agent into the state to examine into the conditions under which the policies were issued, and, upon such examination having been made and reported, gave authority to this agent to propose a compromise to the beneficiary. Upon these facts it was held that, clearly within the act of 1887, the insurance company was "doing business in this state," and that service of process on this special agent gave our courts jurisdiction over the controversy between it and the beneficiary as to its liability on the policies. This case was subsequently taken by writ of error to the Supreme Court of the United States, and was there affirmed by an opinion reported in 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569.

The contention of counsel of defendant in error that this suit was maintainable seems to be based on two propositions: First, that the plaintiffs in error were associated with other railroads, including the Southern Railway Company, in something like a partnership agreement, under the name and style of the "Atlantic Coast Line Dispatch," so that, as the latter, the delivering carrier, had lines within this state, the case fell within the act of 1887; and, second, that plaintiffs in error, having agents in Tennessee, with offices at Nashville, soliciting freight for their several lines, were doing business in this state within the meaning of that act, so as to make them amenable to our courts by the service of process on these agents.

As to the first proposition, it need only be said that there is nothing in the record to show that there were any of the features of a partnership in this association, or anything upon which the doctrine of representation, or of principal and agent, as between these railroads, can be invoked. *Post v. Railroad*, 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481; *United States v. American Bell Telephone Co.* (C. C.) 29 Fed. 17.

Nor do we think the second proposition, when applied to the facts of the case, sound. That these foreign corporations were, in a sense, "doing business" in this state through their traveling soliciting agents, is true; and service upon the latter in all cases falling within sections 1 and 2 of the act of 1887, which we are considering, would probably bring them into our courts. But the vice in the proposition is found in that the facts alleged in the pleas, and shown in the evidence, put the case outside the provisions of the statute, as we have already undertaken to establish. Hence it is that, as "the cause of action" did not arise from "any transaction with persons" or "concerning any property situated in this state through any agency whatever acting" for this corporation "with-

in the state," service on these agents did not give the circuit court jurisdiction of the cause.

It would have been otherwise if, as in the case of *St. Louis, Iron Mountain, etc., Railway Company v. Bean*, at September term, 1908 (no opinion filed), these agents had been connected in Davidson county with the transaction out of which the cause of action grew.

It results that the petition for certiorari must be granted, the judgments of the Court of Civil Appeals and of the circuit court be reversed, and the case dismissed.

#### On Rehearing.

This suit is before us on a petition for a rehearing, in which it is urged that the construction we have given to chapter 226, p. 386, of the Session Acts of 1887, is so narrow that it, in effect, defeats the purpose of this legislation. It is insisted that, realizing the necessity of making all foreign corporations, which had agencies of any character in this state, subject to the jurisdiction of our courts, this act was passed. The argument of petitioner is that the trend of modern legislation and judicial opinion has been to open wide the doors of domestic courts for the purpose of giving suitors redress on all claims which they may have as against a foreign corporation, and that it was in view of this the statute was drafted, and its purpose can only be effected by giving it a liberal interpretation. There is no doubt, in construing statutes, that it is the duty of the courts to give effect to the intent of the lawmaking power, and to seek for that intent in every legitimate way; but it is well settled that this intention must be sought primarily in the language of the act itself, as the presumption is that the Legislature has selected apt words for the expression of its will. The necessary effect of this is, where it is found upon examination that the language of the act is free from doubt or ambiguity, and expresses an intelligent and definite meaning, the courts are bound to assume that this meaning is that which the Legislature had in mind. To such an extent has this rule been recognized that, though the court is satisfied some other or different meaning was behind the legislation, and though a literal interpretation might defeat what was well understood to be the purpose of its enactment, "still the explicit declaration of the Legislature is the law, and the courts are not at liberty to depart from it." It is only where the statute is ambiguous, or lacks precision, or is fairly susceptible to two or more interpretations, the intended meaning of the act "must be sought by the aid of all pertinent and admissible considerations. But here, as before, the object of the search is the meaning or the intention of the legislation, and the court is not at liberty, merely because it has a choice

between two constructions, to substitute for the will of the Legislature its own ideas as to the justice, expediency, or policy of the law." *Black on Interpretation of Laws*, 36; *United States v. Fisher*, 2 Cranch, 358, 2 L. Ed. 304; *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869; *Woodbury v. Berry*, 18 Ohio St. 456; *Newell Universal Mill Co. v. Muxlow*, 115 N. Y. 170, 21 N. E. 1048; *Bradbury v. Wagenhorst*, 54 Pa. 180.

So it is, however tempting the field, with a view of ascertaining the trend of legislation in other states upon this particular subject, into which we are invited by the counsel of petitioner, and uninteresting as it may be to confine our investigation to the examination of the statute in question, for the purpose of ascertaining the intent of the Legislature in its enactment, we are satisfied, under the rules above indicated, it is our duty, first of all, to look to the language of the act in order to ascertain its meaning, and it is only when left in doubt, after having done this, we would be permitted to go afield in search of aid in its interpretation.

The insistence in the present case, notwithstanding disclaimer to the contrary, we think, comes to this, that a nonresident suitor has the right to come into one of our courts and seek redress from a foreign corporation, against which he happens to have a claim, and subject that corporation to a judgment in personam by a service of process upon an agent found in this state, whatever may be the character of that agent's representation, either with regard to his principal or the transaction out of which the controversy arose. There is no doubt that the plaintiff in this case, nonresident though he was, had he found property of either, or both, of these foreign corporations within the jurisdiction of the lower court, by the process of attachment issuing under other and distinct statutory provisions, could have proceeded in that court, and to the extent of the property so levied upon have obtained relief as against one or both as the case might be. But this record is one in which a personal judgment is sought, and, if maintainable, is so alone by virtue of the act of 1887, and it was in construing it we held that the pleas to the jurisdiction, interposed by these plaintiffs in error, should have been sustained. It was said, to avail himself of the benefit of this act, the question of jurisdiction having been properly raised, that the plaintiff below must have shown that his controversy with these corporations grew out of a "transaction had in whole or in part within this state," or "a cause of action arising here," and we held, upon the facts incontrovertibly established, that the plaintiff below had no transaction, either directly or otherwise, with either of these corporations "concerning any properties situate in this state through any agency whatever acting for it

within the state," and that "the cause of action" sued upon did not arise here.

We repeat, as was said in the original opinion, we are at a loss to understand how any other view can be entertained of this controversy. The plaintiffs in error were foreign corporations, in law and in fact. Neither one had any transaction with the defendants in error within this state, or concerning any property situate in the state, through any agency whatever acting for it within the state; nor did plaintiff's cause of action arise here. Whatever injury either of them inflicted upon the plaintiff occurred outside of this state. If by failure to re-ice the car in which defendant's pears were being transported, or if in negligent delay in forwarding it, the fruit was either deteriorated or destroyed, these acts of wrong were committed far beyond the borders of Tennessee. While it is true that it was not ascertained that the pears were in a worthless condition until the car reached its destination in Nashville and were there inspected, yet nevertheless, whatever grievance the plaintiff below may have suffered at the hands of these plaintiffs in error, it occurred outside of this state. It was this grievance that constituted the cause of action of the plaintiff in error.

In view of the statute, it matters not that agents of these corporations were found within the state upon whom process could be served. Their presence here and service of process upon them were not sufficient to give the domestic court jurisdiction. The conditions precedent to the maintenance of a suit, as against their principals, were those prescribed in the first section of the act, the meaning of which is clearly expressed in the second section. Failing in meeting these essential conditions, we are satisfied that this failure was necessarily fatal to the action.

It is insisted, however, that the construction which we give to this statute works great inconvenience to the owner of the property injured while being transported over a number of independent, but connecting, lines of railway, as in such a case it is particularly impossible for him, in the beginning, to fasten the responsibility for such injury upon any one of these railroads. In every case where the bill of lading stipulates that each one of the carrying roads should be responsible alone for the injury which it inflicted in transportation, this difficulty will be generally experienced. This argument, however, ab inconvenienti, cannot be relied upon to aid in the construction of this statute. Particularly, however, the defendant in error is in no attitude to complain in this case, because upon his own showing he had a right of action against the initial carrier, which might have been sued upon in his home court. By his testimony it appears

that this carrier, in violation of an express direction given at the time of the delivery of the goods, routed them over lines other than those selected by the consignor, and provided in his waybill that the car was to be iced, or re-iced, only at one point, while the agreement was that re-icing was to be done by the successive carriers whenever necessity for this occurred. For these violations of instruction, we have no doubt that an action might have been maintained. *Railroad Co. v. Cabinet Co.*, 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729, 78 Am. St. Rep. 933.

### KITTEL v. STEGER.

(Supreme Court of Tennessee. March 6, 1909.)

#### 1. PUBLIC LANDS (§ 170\*)—STATE LANDS—CONFLICTING GRANTS—TITLE.

The oldest of several conflicting grants carries the title.

[Ed. Note.—For other cases, see *Public Lands*, Dec. Dig. § 170.\*]

#### 2. ADVERSE POSSESSION (§ 100\*)—COLOR OF TITLE—TITLE ACQUIRED.

Where actual possession is taken of a tract of land under a deed conveying land by a definite boundary, the possession of one claiming under the deed is extended by construction of law to the limits of the boundary described, whether the claim or defense, as the case may be, is made either under the first or the second section of the act of 1819 (2 Laws 1715-1820, p. 483, c. 28).

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 547; Dec. Dig. § 100.\*]

#### 3. ADVERSE POSSESSION (§ 100\*)—COLOR OF TITLE—TITLE ACQUIRED.

Where a party claiming under a deed conveying land by definite boundaries entered into possession of land within the boundaries, and inclosed a few acres, and maintained such inclosure adversely and openly for more than seven years, his adverse possession extended to the limits of the boundaries.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 547; Dec. Dig. § 100.\*]

#### 4. LIMITATION OF ACTIONS (§ 5\*)—LIMITATIONS APPLICABLE—ACTION TO RECOVER REAL PROPERTY.

Section 2 of the act of 1819 (2 Laws 1715-1820, p. 483, c. 28), embodied in Code 1853, § 2765, limiting the time of actions for land to seven years after the accrual of the cause of action, when considered in connection with section 1 of the act, embodied in Code 1853, §§ 2763, 2764, providing that seven years' adverse possession of land vests title, etc., only bars the remedy, without barring the right; and an unregistered deed is good, as supporting a defensive right under the section, notwithstanding Acts 1895, p. 54, c. 38, amending Code 1853, §§ 2763, 2764, providing for the recording of conveyances under which land is claimed under adverse possession.

[Ed. Note.—For other cases, see *Limitation of Actions*, Dec. Dig. § 5.\*]

Error to Circuit Court, Van Buren County; Joseph C. Higgins, Judge.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

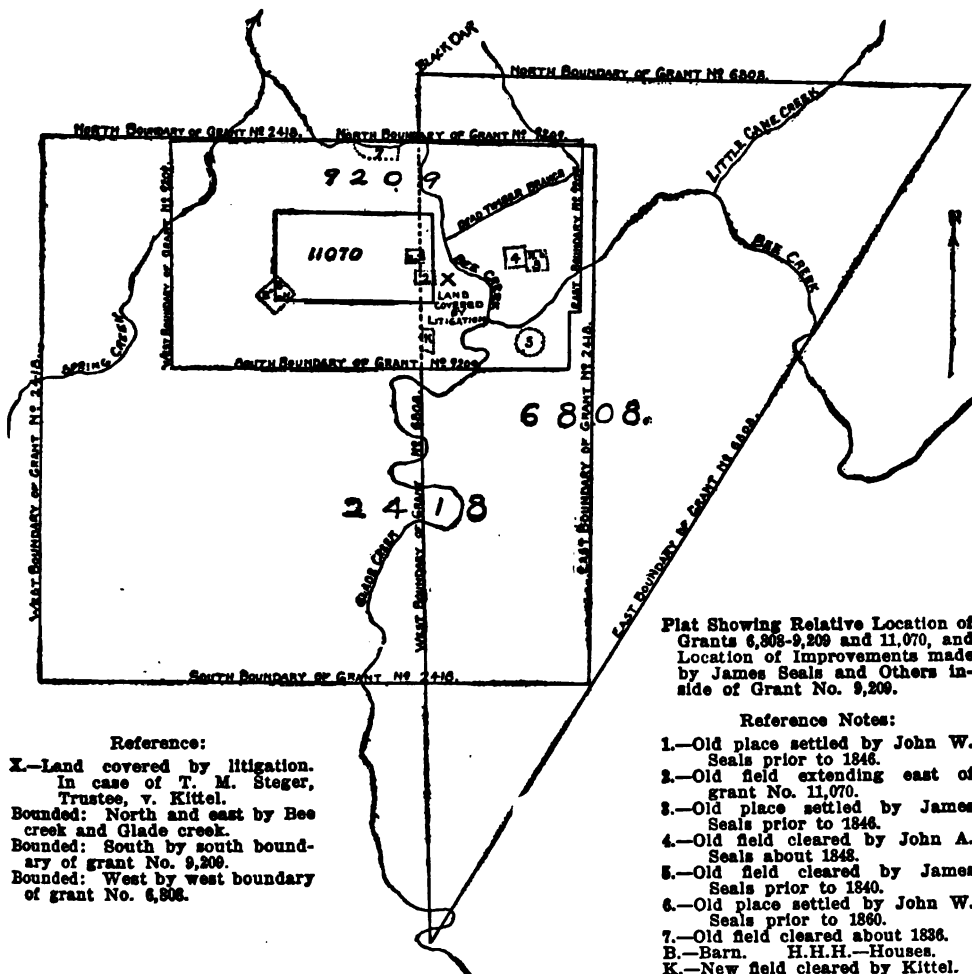
Action by T. M. Steger, trustee, against Matilda G. Kittel. There was a judgment for plaintiff, and defendant brings error. Reversed and rendered.

The following is the map referred to in the opinion:

south with said line 150 poles to the beginning.

The general issue was interposed by the defendant below, who is the plaintiff in error here.

The case was tried before Hon. Joseph C.



Henry H. Ingersoll, for plaintiff in error.  
 James M. Brady and W. T. Smith, for defendant in error.

NEIL, J. This is an action of ejectment, brought in the circuit court of Van Buren county, to recover about 200 acres of land described as follows: Beginning at a stake painted white, where the west boundary line of grant No. 6,808 to J. A. Lane for 1,000 acres crosses the south boundary line of grant No. 9,209, granted to James and O. H. P. Seals for 1,000 acres, and running thence east to the said Seals line 22 poles to the center of Glade creek; thence down said creek as it meanders to its mouth; thence down Bee creek as it meanders to the west boundary line of grant No. 6,808; thence

Higgins, circuit judge, who, at the request of the parties, reduced his findings of fact and law to writing, and the case comes before us on these findings; there being no bill of exceptions.

It is unnecessary to set out these findings in full. We shall give only the substance of them, so far as they affect the questions now before the court for disposition.

His honor rendered judgment on these findings in favor of the plaintiff below.

From this judgment the defendant below brought the case to this court by writ of error, and has here assigned errors. In what we shall hereafter say we shall dispose of these various errors assigned as far as may be necessary.

In order that the findings referred to may

be more easily and fully understood, we attach to this opinion a map, which we find with the brief of the counsel for defendant in error. Its accuracy is not questioned by counsel for plaintiff in error, and it presents the controversy more plainly and simply than does the blue print found in the record.

From section 1 of the findings it appears that the Groves grant was the oldest of the three grants mentioned, and hence carried the better title, or, as we should more properly say, the title. It also appears from this finding that the grantees under the Seals grant, No. 9,209, tolled the title, or drew to themselves the title, carried by the Groves grant, to the extent of the boundaries of said grant No. 9,209; that grant lying wholly within the Groves grant. It is also apparent from this finding that the land in controversy in the present case lies wholly within both the Groves grant and the said Seals grant No. 9,209, and therefore that the grantees under No. 9,209 became the owners of the title to the land here in controversy.

From sections 2, 3, 10, and 11 of the findings it is apparent that the defendant in error and those under whom he claims tolled the Seals title to the land in controversy in the present case, since it is found as a fact that his predecessors in title held adverse possession for more than seven years under deeds purporting to convey a fee of a large body of lands, including the small boundary in controversy. It is immaterial that the actual possession (house, or fenced field, as the case may be) was not on what is now the disputed land, inasmuch as the rule is undoubted that, where an actual possession is placed upon a tract of land covered by a deed or other instrument purporting to convey land by a definite boundary, the possession of one claiming under such instrument is extended by construction of law to the limits of the boundaries described in the instrument. This is true, whether the claim, or defense, as the case may be, is made either under the first section or the second section of the act of 1819 (2 Laws 1715-1820, pp. 482, 483, c. 28). *Lieberman v. Clark*, 114 Tenn. 117, and authorities cited and discussed on pages 132 to 141, inclusive, 85 S. W. 258, 69 L. R. A. 732. And among these particularly see *Green v. Cumberland Coal & Coke Co.*, 110 Tenn. 35, 72 S. W. 459; *Mansfield v. Northcut*, 112 Tenn. 536, 80 S. W. 437. See, also, *Jones v. Perry*, 10 Yerg. 59, 30 Am. Dec. 430; *Rutherford v. Franklin*, 1 Swan, 321; *Brown v. Johnson*, 1 Humph. 261; *Pickens v. Delozier*, 2 Humph. 400; *Ramsey v. Monroe*, 3 Sneed, 329; *Bon Air Coal Co. v. Parkes*, 94 Tenn. 263, 29 S. W. 130; *Turnage v. Kenton*, 102 Tenn. 328, 52 S. W. 174.

It is clear, from the fourth, fifth, sixth, and eighth findings, that although the title papers, under which plaintiff in error and her predecessors in title claim, in fact covered the land in controversy, yet that the possession taken and dominion really exercised

thereunder only extended to the creek as the western limit thereof, and did not cover the land in controversy.

From what has already been said, it follows that defendant in error and his predecessors in title had by operation of the statute of limitations acquired the title to the land in controversy, and that this was the status in 1890, when the plaintiff in error established an adverse possession upon said land at the point marked K on the map. Defendant in error and his predecessors in title had not only tolled the Groves title as to this land, but had as to it nullified the intervening Lane grant, No. 6,808, under which plaintiff in error claims.

With the title in this situation, it appears from the seventh and ninth sections of the findings that the plaintiff in error established a possession at K within the land now in controversy, by inclosing four acres, and maintained that inclosure adversely and openly for more than seven years, before action brought.

The first question that arises at this point is whether the adverse possession extended beyond the limits of the inclosure to the boundaries set out in the deed claimed under, or whether it was confined to the inclosure.

It appears from the fifth, seventh and ninth findings that the plaintiff in error claimed adverse possession under the Carpenter deed, made in March, 1887. That deed covered the lands in controversy. The inclosure at K lay within this deed, and we are of the opinion that adverse possession extended to the limits of the deed, and so covered all of the land sued for in the present case.

The Carpenter deed, however, was not registered. This brings us to the next inquiry; that is, whether the fact of nonregistration prevented plaintiff in error, defendant below, from relying upon the deed under the second section of chapter 28 of the Acts of 1819 (2 Laws 1715-1820, p. 483), in full defense of the action brought by defendant in error for the recovery of the land.

We are of the opinion that it did not. The contrary view is based on chapter 38, p. 54, of the Acts of 1895. This act declared that section 2763 of the Code of 1858 (Shannon's Code, § 4456) should be amended by adding, at the end of the section, the following language: "But no title shall be vested by virtue of such adverse possession, unless such conveyance, devise, grant, or other assurance of title, shall have been recorded in the register's office for the county or counties in which the land lies during the full term of said seven years' adverse possession."

The second section of the act declared that section 2764 of the Code of 1858 (Shannon's Code, § 4457) should be amended by inserting in that section, after the words "in possession," the following words: "Under recorded assurance of title."

The two sections of the Code above referred to are as follows:

Section 2763 reads:

"Any person having had, by himself or those through whom he claims, seven years' adverse possession of any lands, tenements, or hereditaments, granted by this state, or the state of North Carolina, holding by conveyance, devise, grant, or other assurance of title, purporting to convey an estate in fee, without any claim by action at law or in equity, commenced within that time and effectually prosecuted against him, is vested with a good and indefeasible title in fee to the land described in his assurance of title."

Section 2764 reads:

"And on the other hand any person, and those claiming under him, neglecting for the said term of seven years to avail themselves of the benefit of any title, legal or equitable, by action at law or in equity, effectually prosecuted against the person in possession, as in the foregoing section, are forever barred."

The next section (2765) reads:

"No person, or any one claiming under him, shall have any action, either at law or in equity, for any lands, tenements, or hereditaments, but within seven years after the right of action has accrued."

Owing to the great similarity between sections 2764 and 2765—indeed, their apparent identity in substance and legal effect—both have been supposed to refer to and cover the defense allowed under the second section of chapter 28 of the Acts of 1819. This view has been current to a considerable extent among the members of the bar of the state, and has appeared in several of our cases. This is, however, a mistaken view. A resort to the original act shows that section 2764 was taken from the first section of the act, while section 2765 was taken from the second section of the act. Sections 2763 and 2764 are to be construed together; the first of these barring the right, and the second barring the remedy. Section 2765, taken from the second section of the act of 1819, simply bars the remedy. It does not bar the right. The second section of the act of 1819 seems to have been construed in our earlier cases as having a broader scope than the first section; that is, as applying to a larger class of cases. *Wallace v. Hannum*, 1 Humph. 443, 450, 451, 452, 34 Am. Dec. 659. And see *Brown v. Johnson*, 1 Humph. 261. In *Wallace v. Hannum* the great similarity between the provisions of the two sections is referred to and commented on; but it is held that, notwithstanding their great similarity, they are in fact different. As illustrating the broad scope of the second section of the act of 1819, see the following, which we add, not as a full, but only a partial, list of the cases bearing on the point, viz.: *Dunlap v. Gibbs*, 4 Yerg. 94; *Neal v. East Tenn. College*, 6 Yerg. 190; *Jones v. Perry*, supra; *Brown v. Johnson*, supra; *Wallace v. Hannum*, supra;

*James v. Patterson*, 1 Swan, 311, 55 Am. Dec. 737; *Rutherford v. Franklin*, supra; *Ramsey v. Monroe*, 3 Sneed, 329; *Meriwether v. Vaulx*, 5 Sneed, 307; *Haynes v. Jones*, 2 Head, 372; *Sims v. Eastland*, 3 Head, 368; *Sharp v. Van Winkle*, infra; *Bon Air Coal Company v. Parkes*, 94 Tenn. 263, 29 S. W. 130; *Sanders v. Everett*, 3 Tenn. Ch. 520, 524. And compare *Chilton v. Wilson*, 9 Humph. 399 et seq.

We have made a very extensive examination of our authorities for the purpose of discovering how section 2765 has been referred to. In most of the cases the court speaks generally, even since the enactment of the Code of 1858, simply of the second section of the act of 1819, without referring to the section of the Code supposed to embody it; but we find that Mr. Justice Cooper, who was one of the compilers of the Code, in his edition of the Tennessee Reports, uniformly refers in his headnotes to section 2765 as embracing the second section of the act of 1819. See the syllabus in *Dyche v. Gass*, 3 Yerg. 397; *Dunlap v. Gibbs*, supra; *Neal v. East Tennessee College*, supra; *Ramsey v. Monroe*, 3 Sneed, 329; *Lincoln v. Purcell*, 2 Head, 142, 73 Am. Dec. 196. He indicates the same view in the text, in a general way, in the case of *Sharp v. Van Winkle*, 12 Lea, at pages 18 and 19. See, also, remarks in *Sanders v. Everett*, 3 Tenn. Ch. 524. In *Mulloy v. Paul*, 2 Tenn. Ch. 156, 158, he refers, on the latter page, to sections 2763 and 2764 as covering the first section of the act of 1819, and to section 2765 as covering the second section of that act. See, also, *Erck v. Church*, 87 Tenn. 575, 579, 11 S. W. 794, 4 L. R. A. 641, to same effect. Our conclusion, therefore, is, as above indicated, that the act of 1895 did not have any effect upon section 2765. It did not purport in terms to amend that section, and no effect was produced upon it by the amendment of section 2764.

It may seem anomalous that an unregistered deed could not be used under section 2763, and yet might be good as supporting a defensive right under section 2765. However, this precise state of the matter was contemplated in *Jones v. Perry*, supra. At the same time that case was decided the court had not yet determined, as it subsequently did in the case of *Stewart v. Harris*, 2 Swan, 656, that an unregistered deed would be operative under the first section of the act of 1819, but held that question in reserve. Considering such matter, the court said in that case:

"The possession having been proved, the next question is, how and against whom does it operate? The deed executed by the Joneses to the Steels was dated on the 23d of May, 1826, and registered the 25th of February, 1829. This suit was commenced the 24th day of February, 1835. Seven years did not elapse from the time the deed was registered up to the time of the commencement of the suit. Whether, therefore, the first section of the act of limitation of 1819 (chapter 28) will

operate to bar the complainant's claim is a question of some doubt, and which it is not necessary to decide. We shall therefore consider the case in reference to the second section of said act."

The court thereupon proceeded to hold that the defense was good under the second section. 10 Yerg. 81, 82.

What was said by the court upon this subject in *Byrd v. Phillips*, 120 Tenn. 14, 29, 30, 111 S. W. 1109, 1113, was merely inadvertent, and is not to be held as in conflict with the present opinion.

It results that the judgment of the court below must be reversed, and judgment entered here in favor of the plaintiff in error on the merits of the cause, and for the costs.

#### P. & M. J. BANNON v. JACKSON et al.

(Supreme Court of Tennessee. Dec. 4, 1908.)

#### 1. CONTRACTS (§ 284\*)—BUILDING CONTRACTS—CONSTRUCTION.

A stipulation in a building contract that no work shall be considered extra unless a written order for the same shall have been given to the contractor by the architect, defeats a recovery for extra work unless the contractor first received the architect's written order therefor, unless the owner or his authorized agent waived written orders.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1315; Dec. Dig. § 284.\*]

#### 2. CONTRACTS (§ 243\*)—BUILDING CONTRACTS—CONSTRUCTION.

A stipulation in a building contract that no work shall be considered extra unless a written order for the same shall have been given to the contractor by the architect is not so modified by a provision making the architect the supervisor of the building, with authority to order and direct in its construction, that the owner is bound by an oral order of the architect for extra work; the architect being the agent of the owner for the purposes of the contract as limited by its provisions.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 243.\*]

#### 3. CONTRACTS (§ 284\*)—BUILDING CONTRACTS—CERTIFICATE OF ARCHITECT—NECESSITY.

A stipulation in a building contract that in case of payment a certificate shall be obtained from the architect, reciting that the work has been done in accordance with the specifications and that the payment is due, makes the certificate of the architect a condition precedent to the maintenance of a suit for compensation, in the absence of a showing of a fraudulent, malicious, or unreasonable refusal to issue the certificate, or a waiver of the condition, or inability of the contractor to obtain the certificate by some cause over which he has no control.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1308-1315; Dec. Dig. § 284.\*]

#### 4. EQUITY (§ 296\*)—RIGHTS OF PARTIES—SITUATION AT COMMENCEMENT OF SUIT.

The rights of the parties to a chancery suit are determined by the facts existing at the commencement of the suit, unless something has since occurred affecting the matter in issue, which the court may consider, if presented by a supplemental pleading.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 586; Dec. Dig. § 296.\*]

#### 5. EQUITY (§ 296\*)—BUILDING CONTRACTS—ACTIONS.

Where the bill, by a contractor in a building contract requiring presentation of the certificate of the architect as a condition precedent to the maintenance of a suit for compensation, made no reference to the certificate and offered no excuse for failing to obtain it, and the answer offered as a ground for resisting recovery the failure to obtain the certificate, the contractor could not rely on a certificate subsequently obtained, unless brought forward by a supplemental bill.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 586; Dec. Dig. § 296.\*]

#### 6. CONTRACTS (§ 198\*)—BUILDING CONTRACTS—LIABILITY OF OWNER.

A stipulation in a building contract that the owner will not be responsible for any damage which the contractor may sustain in material or work at the hands of any other contractor relieves the owner from liability for damages sustained by the contractor through the negligence of other independent contractors of the owner.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 198.\*]

#### 7. PAYMENT (§ 48\*)—IMPLIED CONTRACTS—PARTIAL PAYMENT.

A mere payment of a part of a claim, for which the party making the payment is not liable, is not an implied promise to discharge the remainder of the claim.

[Ed. Note.—For other cases, see *Payment*, Dec. Dig. § 48.\*]

#### 8. CONTRACTS (§ 305\*)—BUILDING CONTRACTS—WAIVER OF PROVISIONS.

Where a building contract stipulated that the owner should not be responsible for any damage which the contractor might sustain at the hand of any other contractor, a payment by the owner of a part of a claim of the contractor for damages through the negligence of another contractor was not a waiver of the contract provision.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1467-1475; Dec. Dig. § 305.\*]

Appeal from Chancery Court, Davidson County; John Allison, Chancellor.

Suit by P. & M. J. Bannon against W. H. Jackson and others. From a decree dismissing the bill, complainants appeal. Affirmed.

E. A. Price and Ryan & Cain, for appellants. Hill McAllister, for appellees.

BEARD, C. J. The late W. H. Jackson and Howell E. Jackson, the owners of a life estate in a lot in Nashville, contracted with various parties for the erection on it of a large business house. The complainants, P. & M. J. Bannon, under the name and style of the Louisville Fireproof Construction Company, on the 22d of September, 1893, entered into articles of agreement with the owner to furnish and place in the building the fireproofing required.

By the first article of this agreement, the complainants undertook that they would "well and satisfactorily erect, finish, and deliver in a true and workmanlike manner the fireproofing materials required in the erection and completion of the new stores, offices, and apartments, \* \* \* agreeably to the plans, detailed drawings, and specifications,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



prepared for the said work, \* \* \* to the satisfaction and under the direction and personal supervision of the architects. \* \* \*

The second article stipulated for the payment of the sum of \$13,850 for this work by the owners, but with the proviso "that in each case of said payment a certificate shall be obtained from and signed by H. J. Dudley & Son, architects, to the effect the work is done in strict accordance with the drawings and specifications and that they consider the payment properly due."

The third article provided that the owners at any time during the progress of the work might require alterations, deviations, additions to, or omissions from "the said contract, \* \* \* and the same shall in no way injuriously affect or make void the contract; but the difference for the work omitted shall be deducted from the amount of the contract by fair and reasonable valuation, and for additional work required in alterations, as provided and hereafter set forth in article 6."

Article 6 is in these words:

"No new work of any description done on the premises, or any work of any kind whatsoever, shall be considered extra, unless a written order for the same shall have been given to the contractors by the architects, and their signatures obtained thereto."

The seventh article in substance and effect provided that the owner should not in any manner be held responsible for any loss or damage which the complainants might sustain in material or in work at the hand of any other contractor upon this building.

The work covered by this contract was begun by the complainants soon after the date, and was finished by them in June or July, 1895, and immediately thereafter they presented an account of the amount that they claimed to be due them to W. H. Jackson, who, by the death of H. E. Jackson, which occurred during the progress of the work; was the surviving owner. This account was not accompanied with a certificate from the architects, as required by the second article of the contract. It embraced items of extra work aggregating \$5,819. Payment being refused, the present bill was filed, seeking a recovery for those amounts, as well as for \$808, which they claimed to be due them for damages they had sustained in their work and materials at the hands of other contractors on this building, which it was insisted by them the owners were obligated to pay.

In their bill the complainants admit that the extra work embraced in their account was done without written orders from the architects of the owners; but they allege that they did it by their direction, and that they, and their representative, who was looking after the filling of their contract on this building, were assured by H. J. Dudley, the senior of this firm of architects, that written orders in strict compliance with the requirement of article 6 of the contract had

been or would be prepared by him and delivered to the complainants, but that the demands for these written orders were constantly evaded by him and his firm. While it is alleged in the bill that during the progress of the work H. J. Dudley uniformly recognized the obligation of the owners to pay for this work as outside the contract, and by his promise to give them orders in writing covering this extra work lulled complainants into security, yet after the completion of all the work the architects and the defendants denied the liability of the latter for the same.

To this bill an answer was filed by W. H. Jackson, as well as the other defendants, in which it was denied that the several items claimed as extra work by the complainants were in fact such; but, on the contrary, it was averred that each one of these items was included in the original contract with complainants. It was further denied that the architect, H. J. Dudley, made any oral promise to pay any one of said items, and in addition it was averred that, even if it were true he had made such oral promise, the defendants were not bound thereby, by reason of the provision of the sixth article of the contract, set out above. The owner also denied the liability of the defendants for the damage that complainants alleged they had sustained at the hands of others, or that there was any sum whatever due complainants on the original contract, because, as averred by the defendant, W. H. Jackson had been compelled to pay other parties sums of money which were properly the debts of complainants, and the sums so paid were relied upon by way of set-off and counterclaim against any demand which complainants may have had against them. It was further averred that complainants were not entitled to a recovery for any balance upon the original contract for the additional reason that the second article thereof made it a condition precedent to the right of complainants to demand payment of defendants for work done that the written certificate of the architect, certifying the money so demanded, was to be obtained, and that complainants had not produced such a certificate.

Much evidence was introduced in the cause, and finally the record assumed very large proportions. It is unnecessary, in the view we take of this case, to analyze the testimony. It is sufficient to say that certain matters were developed in the preparation of the cause for trial which throw serious discredit upon the claim of complainants, if in fact they do not impeach its integrity. Only two or three of these will be mentioned. As has already been stated, the work of complainants was finished in June or July, 1895. They were at once notified that their claim would not be recognized by the owners. The present bill was filed on the 17th of January, 1896. The depositions of the com-

plainants to establish their claim were taken from time to time, so that all were finished by the 1st of September, 1897. This was the last step taken in the cause by them until the 18th day of March, 1905, when they took certain depositions in Louisville, Ky., with regard to the character and handwriting of M. J. Bannon.

As a reason for this long lull in the litigation, involving as it did the large amount of money claimed by these complainants to be due them, it is suggested by defendants that it is to be found in the fact that upon the cross-examination of M. J. Bannon in 1897 there was produced and submitted to him by their counsel a paper writing, which is in words and figures as follows:

"Nashville, Tennessee, September 9, 1896.

"For services rendered we hereby acknowledge indebtedness to H. J. Dudley in the sum of \$500, to be paid upon the settlement of the suit now pending, between ourselves and General Jackson and others, for fireproof construction in building corner Church and Sumner streets, Nashville, Tennessee.

"[Signed] Louisville Fireproof Construction Company,

"M. J. Bannon, General Manager."

When interrogated with regard to it, the witness denied that the instrument had been written by him. Some eight years thereafter the testimony of experts was taken as to the genuineness of this writing. One of these experts, comparing it with writings admitted to be those of M. J. Bannon, testified that it was written and signed by him. Another expert, having like advantage, after a painstaking examination, testified that the writing and signature were not those of the complainant M. J. Bannon. A number of persons who have been familiar with the handwriting of this party for many years were examined as witnesses, and with one accord they testified that they were satisfied that this instrument and the signature thereto were not written by M. J. Bannon.

It is unnecessary for us to determine whether this paper is genuine or not; but it is urged by the defendants, as strongly corroborating their insistence that it is genuine, and strongly points to the fact of corrupt dealing between complainants and H. J. Dudley, one of the architects of the defendants, that the latter, in his firm name, on the 16th day of July, 1896, gave to the complainants a certificate, in which it was stated that they were entitled to \$8,537.34 "for fireproof tiling, including all extra work and connections by them in the building" in question, directing the same to W. H. Jackson for payment. With this certificate there is filed in the record a letter from H. J. Dudley to M. J. Bannon, in which he states he never had refused to give an order for extra work on that building, nor had he ever doubted the liability of the owners for this extra work, and yet, in the original bill in the cause, it was distinctly alleged that

both the architects and the defendants denied their liability for such extra and additional work and material. There is no question but that this allegation was true as to the defendants, and as little that it was equally true as to the architects. For a witness for the complainants, who, as an expert, made an examination for them of their work on this building in the spring of 1896, testifies that at the time of this examination he understood that the architects had declined to allow complainants anything for the work which they claimed as extra their contract, and as this party was making this examination at the instance of, and, as we are satisfied, under the eye of, M. J. Bannon, we think it not only reasonably, but necessarily, to be inferred that he derived that information from him.

Conceding, however, that the claim for extra work is honest, and that it was done upon the verbal orders of the architect, given from time to time; can a recovery for it be had, in view of article 6 of the contract, hereinbefore set out? That article was evidently introduced with the purpose of avoiding just such a controversy as we have presented in this record. It is apparent that, if the complainants had taken the precaution to obtain orders signed by the architect before undertaking this work, then there could have been no question as to the liability of the owners for it. But they saw proper to disregard it, and the result is that they were met with the defense that the work, if done, was within the terms of the contract, or, if this be not so, then it was done in the teeth of the contract and in utter disregard of the rights of the owners of the building. As is said in *Langley v. Rouss*, 185 N. Y. 201, 77 N. E. 1168, 7 Am. & Eng. Ann. Cas. 210: "Where contracts, including plans and specifications, involve a great amount of detail, and the merits of claims or alterations and extra work are difficult to determine and adjust after the work is completed, a provision requiring the contractor to submit itemized estimates of the expense of proposed alterations or extra work, and that the order of the architect therefor shall be in writing, is reasonable, and tends to a more definite understanding, and avoids controversies. The contractor is not required to make changes, or perform extra work, unless he first receives written authority therefor, and the contract is, therefore, neither unreasonable nor severe, and it should be enforced."

Many authorities may be found where it is held that, notwithstanding such a limitation in a contract, yet the contractor has been permitted to recover for extra work done by agreement with the owner or upon the order of the architect with his knowledge and consent. This, however, is upon the principle that the parties to the contract may, if they see proper, waive any provision made in the interest of either. Such

cases, however, cannot be invoked where the record presents such facts as we have in this. In the absence of a waiver by the owner, as above indicated (and there is no pretense of either an actual or constructive waiver by the owner, or owners, of this contract provision), we understand it to be settled, by the overwhelming weight of authority, that a recovery cannot be had for extra work in the face of a requirement such as we find in the article in question.

In 30 Am. & Eng. Ency. of Law, 1285, the rule with regard to such a provision is thus stated: "Contracts conferring upon the architect, or the engineer, power to order extra work, frequently provide that the power shall be exercised only in a certain manner, and in such case a compliance with the particular provision is necessary in order to bind the builder." In 6 Cyc. 16, it is said that "a provision that the builder is not to execute any extra work, or make any modifications or alterations in the work mentioned in the specifications and plans, unless ordered in writing by the engineer in charge, or claim payment for same, unless such written order be produced, is valid and should be enforced."

In 2 Page on Contracts, § 785, it is said: "If the contract requires a written order from the architect for extra work, no recovery can be had for extra work without such order, if the owner, or his authorized agent, have neither of them waived such a provision."

The rule thus announced is recognized, among others, in *Langley v. Rouss*, supra; *White v. San Rafael, etc., Railroad*, 50 Cal. 417; *O'Keefe v. Corporation, etc.*, 59 Conn. 557, 22 Atl. 325; *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620; *Cooper v. Hawley*, 60 N. J. Law, 560, 38 Atl. 964; *Stuart v. Cambridge*, 125 Mass. 102; *Condon v. Jersey City*, 43 N. J. Law, 452; *Sheyer et al. v. Pinkerton Construction Co.* (N. J. 1904) 59 Atl. 462.

It is insisted, however, inasmuch as by another article in the contract it was provided that the architects were made the supervisors of this building, with authority to order and direct in its construction, that the sixth article is so modified by this other provision as that the owners were bound by an oral order, given by these architects, for this extra work. This insistence, however, is obviously unsound. The architects, by the provision thus invoked, were the agents and representatives of the owners in superintending the work within the terms of the contract. They had the authority to enforce a literal compliance upon the part of persons engaged in doing work with the contract which they entered into. It was their duty, as well as their right, standing in the shoes of the owners, to see that proper materials were used and skillful workmanship was employed in the construction of the building. In other words, the architects were expressly made

the agents of the owners for the purposes of the contract; but such agency, "so far as it related to making alterations, or directing that extra work should be done, was limited, as in the contract stated, to such orders as should be given in writing." *Langley v. Rouss*, supra.

We are unable to discover any ambiguity in this sixth article. It contains a clear restriction upon the authority of the architects, made for the protection of the owner. If it be, as insisted by the counsel of complainants, that the writing required could be as well given after the work as prior thereto, within the terms of the article, then there would be no occasion for it, as the extra work might as well be included in the final certificate, signed by the architect, as provided for in another part of the contract.

Without an analysis of the various cases referred to by the respective counsel in this case, we are satisfied, from an examination, that the rule, which, in the absence of a waiver upon the part of the owner or his authorized agent, requires a strict compliance with, and enforcement of, the provision found in the sixth article of this contract, is justified by sound reason and is abundantly supported by authority.

This leaves open for determination only the claim made for the balance alleged to be due on the original contract, and that for damages sustained in their materials and work at the hands of other contractors upon the building. As to the first of these, it is conceded that the defendants are entitled to large credits upon it; the amount of these, however, not being definitely shown in the record. Waiving this, however, we are satisfied that this claim must also be rejected. By one of the articles in the contract, between complainants and the owners of the building, as has been seen, it was provided "that in each case of payment a certificate shall be obtained from and signed by Henry J. Dudley & Son, architects, to the effect the work is done with strict accordance with the drawings and specifications, and that they consider the payment properly due. \* \* \*"

The authorities hold, save in certain exceptional cases, that where a provision of this sort exists the obtaining of a certificate is a condition precedent to the maintenance of a suit by the builder against the owner for compensation. 30 Am. & Eng. Ency. of Law, p. 1239.

As is said in 6 Cyc. p. 88: "Where the contract, either expressly or impliedly, makes a reference to arbitration, or a certificate, decision, or estimate of an architect, a condition precedent to the right of the builder to sue on his contract, the builder must comply with the condition before suing for compensation on the contract, his employer being under no liability to pay unless this is done, if there is not sufficient excuse for the builder's

failure to refer or obtain such certificates, decisions, or estimates, such as a fraudulent, malicious, capricious, or unreasonable refusal to determine the facts or issue the certificate, or a waiver of the condition, or the builder is prevented from obtaining such certificate, decision, or estimate, by some cause over which the builder himself has no control whatever." The text of these two works is supported by many cases; in fact, by an unbroken line of authorities.

In the present bill no reference is made to this provision, and no excuse is offered for a failure to obtain a certificate from the architect as to the balance alleged to be due on the original contract. The answer, with other grounds for resisting recovery, distinctly avers the failure of complainants to obtain this certificate. To meet this, in the progress of the cause, and in the taking of the testimony, the complainants disclosed the paper signed by the architects, executed, not only long after the completion of the building, but some six months after the institution of this suit; and this is done by them without bringing the instrument forward, by supplemental bill or otherwise. Thus it is complainants sought in their bill a recovery for this balance upon the averments, independent of and without regard to this provision of the contract, and then, practically abandoning this theory, at last in their argument placed their right to a decree upon this subsequently acquired paper. Granting, notwithstanding a record which contains much to throw grave suspicion on the manner of obtaining this instrument, it was honestly given, and as honestly received, yet we think the well-established rule of chancery practice precludes relief as to this item. This rule is thus stated in 21 *Encyclopædia of Pleading & Practice*, p. 9: "The rights of parties are to be determined as they were at the commencement of the action, unless some event happens subsequent which affects the matters in issue; and the court cannot consider such subsequent matter unless it is presented by a supplemental pleading. One of the reasons for requiring a party to file a supplemental pleading, to enable him to rely upon matters that have occurred since the filing of his previous pleadings, is that he should enable his adversary to take issue as to such new matter." This rule is again announced on page 28 of the same work. On this last page the author cites many authorities in support of the text, and among them *Payne v. Beech*, 2 Tenn. Ch. 708, and *Riddle v. Motley*, 1 Lea, 468.

To like effect will be found *Gibson's Suits in Chancery*, §§ 431, 782, and 683, and 4 *Elliott on Evidence*, § 213.

This leaves open for consideration only that part of complainants' claim for compensation for damage alleged to have been sus-

tained by them for the negligence, or otherwise, of other contractors engaged in and about this building. A conclusive answer to this is found in the seventh article of the contract, which is as follows:

"The owners will not in any manner be responsible, or accountable, for any loss or damage that shall or may happen to the said works, or part or parts thereof, respectively, or for any of the materials, or other things used and employed in the finishing and completing said works. \* \* \* Where there are different contractors employed on the works, each shall be responsible to the other for damage to work and person, or for loss caused by neglect, by failure to finish work at proper times. \* \* \*"

But it is said that, on an order of the architect, W. H. Jackson paid a part of this claim, and that in doing so he waived the benefit of this provision. As these damages were inflicted by independent contractors, and, so far as this record shows, without any concert of action on the part of either of the owners, it is difficult to see upon what ground the doctrine of waiver can be invoked. The owners were not liable in view of this provision, and a promise by them to compensate the complainants for such loss after its infliction, without more, would have been nudum pactum and unenforceable; and a fortiori a mere payment of a part of such claim cannot be regarded either as an implied promise to discharge the remainder or as a waiver of the protection of the contract provision.

The views expressed above relieve us of the necessity of considering a number of questions argued upon the briefs, and among them that made upon the admissibility of testimony tending to show that M. J. Bannon, one of the complainants, was the maker of the paper of September 9, 1896, which contained a promise to pay H. J. Dudley, one of the architects, \$500, upon the settlement of the present suit.

It follows that the decree of the chancellor, in dismissing the bill of complainants, is affirmed.

The costs of the court below, and those incident to this appeal, will be paid by the complainants and their sureties.

#### RHINEHART v. STATE.

(Supreme Court of Tennessee. Jan. 20, 1908.)†

##### 1. STATUTES (§ 110½\*)—SUBJECT AND TITLE.

The fire marshal law (Acts 1907, p. 1538, c. 460), entitled "An act to reduce the fire waste" in the state "by providing for the investigation of fires and to provide for the expense of such investigation," contains but one subject, as required by Const. art. 2, § 17; the provisions for the investigation of fires and for payment of the expenses of such investigations being only the means by which the subject of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

†Received for publication March 25, 1909.

the act, expressed in the title, is to be accomplished.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 110½.\*]

## 2. STATUTES (§ 64\*)—EFFECT OF PARTIAL INVALIDITY.

Even if Fire Marshal Law (Acts 1907, p. 1540, c. 460) § 4, authorizing the Insurance Commissioner, in his investigation of the origin of fires, to enter on and examine any building or premises where a fire had occurred, or any building or premises adjoining the same, should be held invalid, as in conflict with Const. art. 1, § 7, forbidding unreasonable searches and seizures (which is not decided), the other provisions of the act for the investigation and prevention of fires are valid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.\*]

## 3. TAXATION (§ 40\*)—STATUTORY PROVISIONS—UNIFORMITY OF OPERATION.

Fire Marshal Law (Acts 1907, p. 1540, c. 460) § 6, providing that a tax of one-fifth of 1 per cent. on the gross insurance business done in the state shall be levied for the purpose of providing a fund for expenses in conducting investigations by the Insurance Commissioner as to the origin of fires, and if any surplus of such fund remains at the end of any year it shall be paid into the state treasury, is not in conflict with Const. art. 2, § 28, requiring all property to be taxed equally and uniformly according to its value.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 68-89; Dec. Dig. § 40.\*]

## 4. FIRES (§ 9\*)—POLICE POWER—PROTECTION FROM FIRE.

Fire Marshal Law (Acts 1907, p. 1540, c. 460) § 6, providing for a tax on the business of insurance companies in the state for the purpose of raising a fund for expenses in investigating the source of and preventing fires, is a valid exercise of the police power of the state.

[Ed. Note.—For other cases, see Fires, Dec. Dig. § 9.\*]

## 5. FIRES (§ 9\*)—INVESTIGATION OF FIRES—PLACE FOR INVESTIGATION.

Under the fire marshal law (Acts 1907, p. 1538, c. 460), authorizing the Insurance Commissioner to investigate the origin of fires throughout the state, such investigation may take place at the commissioner's office in the State Capitol, though the fire under investigation occurred in another county; there being no provision in the act as to where the investigation should be held.

[Ed. Note.—For other cases, see Fires, Dec. Dig. § 9.\*]

## 6. FIRES (§ 2\*)—STATUTES—REMEDIAL PROVISIONS—LIBERAL CONSTRUCTION.

The fire marshal law (Acts 1907, p. 1538, c. 460), authorizing the Insurance Commissioner to investigate the origin of fires and to subpoena witnesses for that purpose, is remedial in its nature and should receive a liberal construction.

[Ed. Note.—For other cases, see Fires, Dec. Dig. § 2.\*]

## 7. FIRES (§ 9\*)—INVESTIGATION OF ORIGIN—WITNESSES—AUTHORITY TO SUBPOENA.

Fire Marshal Law (Acts 1907, p. 1540, c. 460) § 3, vesting in the Insurance Commissioner or his deputy all the powers of a trial justice in the state for the purpose of summoning and compelling attendance of witnesses to testify in investigations of the origin of fire, and Shannon's Code, § 7358, providing that "the magistrate before whom an information is made may issue subpoenas to any part of the state for witnesses," authorizes the Insurance Commissioner, in the investigation of any fire, to issue

subpoenas for bringing before him witnesses from any part of the state.

[Ed. Note.—For other cases, see Fires, Dec. Dig. § 9.\*]

## 8. WITNESSES (§ 21\*)—PENALTY FOR NONATTENDANCE—JURISDICTION TO ENFORCE.

Shannon's Code, §§ 5608, 5609, 5610, providing a penalty for failure of a witness to attend a trial pursuant to subpoena, and section 5613, providing that, "if a witness fails to appear when summoned before a justice of the peace or commissioner, the subpoena is returned to the circuit court of the county with the indorsement of such failure made thereon by the justice or commissioner," apply to proceedings under Fire Marshal Law (Acts 1907, p. 1540, c. 460) § 3, authorizing the Insurance Commissioner to subpoena witnesses throughout the state to appear at his office in the investigation of the cause of any fire; and the circuit court of the county in which the commissioner has his office has jurisdiction to enforce against a witness the penalty for disobedience to a subpoena.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 37-41; Dec. Dig. § 21.\*]

## 9. WITNESSES (§ 21\*)—DISOBEDIENCE TO SUBPOENA—RECOVERY OF PENALTY—STYLE OF MOTION.

The motion for the recovery of a penalty against a witness for failure to appear in answer to a subpoena at an investigation by the Insurance Commissioner of the origin of a fire, pursuant to the fire marshal law (Acts 1907, p. 1538, c. 460), should be made in the name of the state, rather than that of the Insurance Commissioner.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 37-41; Dec. Dig. § 21.\*]

## 10. WITNESSES (§ 21\*)—DISOBEDIENCE TO SUBPOENA—EXCUSE.

Even if the Insurance Commissioner should exceed his authority under the fire marshal law (Acts 1907, p. 1538, c. 460) in investigating matters not pertinent to the origin of the fire in question, that would be no excuse for a witness to disobey the subpoena issued by the commissioner.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 37-41; Dec. Dig. § 21.\*]

Appeal from Circuit Court, Davidson County; Lytton Taylor, Special Judge.

Action by the State against Marcellus Rhinehart to recover a penalty for refusal of defendant to appear as a witness. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Dancey Fort and H. N. Leech, for appellant. Charles T. Cates, Jr., Atty. Gen., Jon J. Vertrees, W. O. Vertrees, Thos. H. Malone, Jr., and Austin Peay, for the State.

**SHIELDS, J.** This is an action, begun by motion in the circuit court of Davidson county, to recover of the plaintiff in error, a citizen of Montgomery county, a penalty of \$250 for willfully refusing and failing to appear before the Insurance Commissioner of Tennessee at his office in the Capitol at Nashville, in Davidson county, to testify and give evidence in an investigation then being conducted by the commissioner concerning the cause, origin, and circumstances of the burning of the storehouse of W. E. Wall & Son,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in Montgomery county, under what is known as the "Fire Marshal Law," being chapter 460, p. 1538, of the Acts of 1907, in obedience to a subpoena issued by T. Leigh Thompson, Deputy Insurance Commissioner, to the sheriff of Montgomery county, for the plaintiff in error, and there served upon him.

The defenses of the plaintiff in error involve the constitutionality and the construction of the statute under which the commissioner was proceeding, and we here state it in full:

"An act to reduce the fire waste in Tennessee by providing for the investigation of fires, and to provide for the expense of such investigations.

"Section 1. Be it enacted by the General Assembly of the state of Tennessee, that the Insurance Commissioner and the sheriff are hereby authorized to investigate the cause, origin and circumstance of every fire occurring in the state by which property has been destroyed or damaged, and shall specially make investigation as to whether such fire was the result of carelessness or design. Whenever such fires occur it shall be the duty of the sheriff to notify the Insurance Commissioner as early as practicable thereafter of the occurrence of such fire. It shall be a sufficient compliance with the requirement to send said notice as aforesaid by registered mail, addressed to the Insurance Commissioner at Nashville.

"A preliminary investigation of all fires shall be made by the sheriff, and shall be begun within three days thereafter, and, if not, then as soon as practicable after he has such information and the Insurance Commissioner shall have the right to supervise and direct such investigation whenever he deems it necessary or expedient. The officer making such investigation of fires shall, within one week of the occurrence of the fire (if the preliminary investigation can be concluded in that time, if not, then as soon thereafter as such investigation is concluded), furnish to the said Insurance Commissioner a written statement of all of the facts relating to the cause and origin of the fire, the kind and ownership of the property destroyed and such other information as may be called for by the blanks provided by the Insurance Commissioner. The Insurance Commissioner shall keep in his office a record of all fires occurring in the state, together with all facts, statistics and circumstances, including the origin of the fires, which may be developed by the investigations provided for by this act.

"Sec. 2. Be it further enacted, that the Insurance Commissioner shall have power, and it shall be his duty, either in person or by deputy or by the officers provided in section 1 of this act, to examine or cause examination to be made, into the cause, circumstances and origin of all fires occurring within the state to which his attention has been called in accordance with the provisions of section 1, or otherwise, by which property is acci-

dently or unlawfully destroyed or damaged by fire, and to especially examine and decide whether said fire was the result of carelessness or was the act of an incendiary. The Insurance Commissioner shall, in person, by deputy or by an officer named for the purpose in section 1 herein, fully investigate all the circumstances surrounding such fire, and when, in the opinion of the officers making the investigation, such proceedings are necessary, take, or cause to be taken, the testimony on oath of all persons supposed to be cognizant of any of the facts or to have means of knowledge in relation to the matters as to which an examination is hereby required to be made, and shall cause same to be reduced to writing. If the Insurance Commissioner shall be of the opinion that there is evidence sufficient to charge any person with the crime of arson or other willful burning, he shall cause such person to be arrested and charged with such offense prosecuted and bound over to the circuit or criminal court of the county where such fire occurred, and shall furnish to the Attorney General of the district all such evidence, together with the names of the witnesses, and all information obtained by him, including a copy of all pertinent and material testimony taken in the case.

"Sec. 3. Be it further enacted, that when conducting an examination or investigation provided for in this act, the Insurance Commissioner, or his deputy, or any other officer authorized by this act to conduct such investigation, shall have all the power of a trial justice in this state for the purpose of summoning and compelling attendance of witnesses to testify in relation to any matter which is by the provisions of this act a subject of inquiry and investigation, and may administer oaths and affirmations to persons appearing as witnesses before them; and false swearing by any witness in any manner or proceeding aforesaid shall be deemed perjury and punished as such.

"Sec. 4. Be it further enacted, that the Insurance Commissioner, or his deputy, or any of the officers authorized by this act, to investigate fires, shall have the right and authority, at all times of the day and night, in performance of the duties imposed by the provisions of this act, to enter upon and examine any building or premises when a fire has occurred, and any other building or premises adjoining the same. Any investigations held under the provisions of this act, may, in the discretion of the officers holding same, be private; and persons other than those required to be present may be excluded from the place where such investigation is held, and witnesses may be kept separate and apart from each other, and not allowed to communicate with each other until they have been examined.

"Sec. 5. Be it further enacted, that any officers referred to in this act who neglects or refuses to comply with the requirements

of this act shall be guilty of a misdemeanor, and, upon a conviction shall be punished by a fine of not less than fifty nor more than two hundred and fifty dollars.

"Sec. 6. Be it further enacted, that a tax of one-fifth of one per centum on the gross receipts of the fire insurance companies doing business in this state, shall be, and it is hereby levied for the purpose of providing a fund for the defraying the cost of the enforcement of this act, to be collected by the Insurance Commissioner as other taxes on fire insurance companies are now collected in this state, and the Insurance Commissioner shall keep a separate account of all money received and disbursed under this act, and shall include same in his annual report. The Insurance Commissioner shall pay all necessary expenses, including counsel, expense of deputy, detectives and officers, incurred in the performance of the duties imposed by this act, out of said fund hereinbefore provided, and any surplus of said fund remaining at the end of any year shall be taken into the state treasury.

"Sec. 7. Be it further enacted, that this act shall take effect from and after its passage, the public welfare requiring it."

This record discloses that the storehouse of W. E. Wall & Son was destroyed by fire in August, 1907, and upon being notified of such fire by the sheriff of Montgomery county the Insurance Commissioner, under authority given him by paragraph 2 of the first section of the statute, directed the sheriff to investigate the fire and report to him. The sheriff made such investigation and report, and soon thereafter Hon. Austin Peay, an attorney at law, residing in Montgomery county, was employed by the Insurance Commissioner to aid in further investigation of the cause, origin, and circumstances of the fire.

On October 11, 1907, G. W. Sanders was indicted in the criminal court of Montgomery county, charged with arson in burning the property, and the case was set for trial on October 29, 1907. It also appears that said Sanders and certain other parties were also indicted in that court upon the charge of destroying plant beds and tobacco crops and that the cases against them were then pending for trial.

Afterwards Mr. T. Leigh Thompson, Deputy Insurance Commissioner, went to Clarksville for the purpose of conducting an investigation of the cause of the fires in question. While so engaged he caused a number of citizens of the county to be subpoenaed as witnesses to appear before him and testify in relation to the subject of the inquiry, who failed and refused to appear upon advice of counsel for Sanders and the defendants in the other criminal cases mentioned, because it was believed that the investigation was being made to develop the facts in their cases to the prejudice of the defendants. This advice was given upon application of witnesses to counsel.

There was also then existing much lawlessness in Montgomery county, believed to be the work of a secret organized body of men, some of the members of which were suspected of being implicated in the fire in question. The commissioner, finding that by these matters witnesses subpoenaed by him were intimidated and prevented from obeying subpoenas and testifying, and that the investigation could not there be proceeded with, adjourned it to his office in Nashville. On November 26, 1907, he issued a subpoena to the sheriff of Montgomery county for the plaintiff in error, Rhinehart, and a number of other citizens and residents of that county, to appear before him at his office in that city and testify in relation to the cause, origin, and circumstances of the said fire. Service was made on November 27, 1907, and under advice of the same counsel the parties summoned again refused and failed to obey the process. Thereupon the subpoena, with the sheriff's return showing service, and a certificate of the Insurance Commissioner indorsed thereon in these words:

"I return this subpoena to the circuit court of Davidson county, and certify that Marcellus Rhinehart, though duly served with this subpoena, as shown by the officer's return hereon, failed and willfully refused to attend and testify in obedience to this subpoena, and this return is made that *scire facias* may issue as the law provides against said witnesses. This November 27, 1907. T. Leigh Thompson, Deputy Insurance Commissioner"—was returned to the circuit court of Davidson county.

T. Leigh Thompson, Deputy Insurance Commissioner, also filed his affidavit, stating all the facts. Upon these papers a motion was there made in the name of the state, upon relation of T. Leigh Thompson, against the plaintiff in error, for a judgment for the penalty of \$250 denounced by the statute. Shannon's Code, §§ 5609, 5610. Judgment nisi was entered, and *scire facias* awarded to the sheriff of Montgomery county against the plaintiff in error, requiring him to appear on December 23, 1907, and show cause, if any he had, why the judgment should not be made final. He appeared and made defense, first by motion to quash the proceedings for causes, which will be hereafter stated, and then by answer. Similar proceedings were had and begun against other witnesses in default. The motion against the plaintiff in error, Rhinehart, was selected as a test case, and was tried before the judge of that court; and, the issues being found in favor of the state, judgment final for the penalty of \$250 sued for was entered. From that judgment the plaintiff in error, having filed his bill of exceptions to the action of the court in the premises, prosecuted an appeal in the nature of a writ of error to this court, and has assigned a number of errors, of which we will now dispose.

First. The first contention of the plaintiff

in error is that the statute under which the commissioner was acting is unconstitutional, and, therefore, the commissioner had no authority to issue a subpoena which he was bound to obey. The statute is attacked upon these grounds:

(1) That it violates article 2, § 17, of the Constitution, providing that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title.

We understand the insistence of the counsel to be that the act contains two distinct subjects, namely, the detection of incendiary fires and the imposition of a tax upon insurance companies, and that neither of these subjects is stated in the caption.

We think that the statute embraces but one subject—the reduction of fire waste in Tennessee—and that this is distinctly expressed in the title. The provisions for the investigation of fires and the payment of expenses of such investigations are but the means by which that subject is to be accomplished. They are, therefore, not foreign to the reduction of fire waste, the subject and purpose of the act, but are germane and necessary to make it effective.

This all so clearly appears from the numerous opinions of this court construing the section of the Constitution invoked that we do not deem it necessary to discuss it further. Cases directly in point are *State v. Yardley*, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656; *Railroads v. Crider*, 91 Tenn. 489-493, 19 S. W. 618; *Peterson v. State*, 104 Tenn. 127, 56 S. W. 834; *Memphis St. Ry. v. Byrne*, 119 Tenn. 278, 104 S. W. 460.

(2) It is said that the provision in section 4 of the act, authorizing the Insurance Commissioner or his deputy at all times, in performance of the duties imposed by the act, to enter upon and examine any building or premises where a fire has occurred, or any other building or premises adjoining the same, is in conflict with section 7, art. 1, of the Constitution, ordaining "that the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures; and that general warrants, whereby any officer may be commanded to search suspected places without evidence of the fact committed, or to seize any person or persons not named, whose offense is not particularly described and supported by facts, are dangerous to liberty and should not be granted."

This provision is not involved in this case. No search of the premises of the plaintiff in error was or is sought to be made. Furthermore, if this provision were void, it would not affect the validity of the statute. It is only one of the means to be used in making an investigation. The statute is effective, and it is clear that the General Assembly would have enacted it without this provision. The invalidity of one provision of a statute under these circumstances does not invalidate

the entire statute, but it may be treated as a nullity and elided. *State v. Cummins*, 99 Tenn. 667, 42 S. W. 880; *Fite v. State*, 114 Tenn. 659, 88 S. W. 941, 1 L. R. A. (N. S.) 520; *Cummings v. Trewitt*, 113 Tenn. 561, 82 S. W. 480; *State v. Willett*, 117 Tenn. 334, 97 S. W. 299; *Malone v. Williams*, 118 Tenn. 390, 103 S. W. 798, 121 Am. St. Rep. 1002. It being, therefore, immaterial to the constitutionality of the entire act whether this provision be valid or invalid, the plaintiff in error not being affected by it, it is not necessary and not proper now to pass upon it, and it is not done.

Cases bearing upon the provision of the federal Constitution upon this subject, in which similar legislation has been sustained, are *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652. *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, seems to be adverse to such legislation.

(3) Again, it is said that the provision contained in section 6 of the act, "that a tax of one-fifth of one per centum on the gross premium receipts of the fire insurance companies doing business in the state shall be, and is hereby levied for the purpose of providing a fund for defraying the cost of the enforcement of this act, to be collected by the Insurance Commissioner as other taxes on fire insurance companies are now collected in this state," is a tax levied upon a single class of taxpayers, is unequal taxation, and in conflict with section 28, art. 2, of the Constitution, requiring "that all property be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that the taxes shall be equal and uniform throughout the state, and that no one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value," and that, this provision for the expenses being one without which the General Assembly would not have enacted the law, and being void, the entire statute is invalid.

This clause of the Constitution has no application to the charge here made upon fire insurance companies doing business in Tennessee. It has reference solely to assessments and taxes for revenue, made and levied upon property according to its value—*ad valorem* taxes. The burden imposed by section 6 of the statute, if it be a tax, is a privilege tax, and by the same section of the Constitution here invoked the General Assembly is authorized to tax privileges in such manner as that body may from time to time direct. What are privileges, and the taxes that shall be imposed upon those exercising them, is a matter of which the Legislature has a very wide discretion. *Kurth v. State*, 86 Tenn. 136, 5 S. W. 593. But it is not a tax in the sense of revenue. The statute is a police measure enacted by the General Assembly, in the exercise of the police power of



the state, and is well within that power. The protection of property from loss by fire, whether accidental or incendiary, by precautionary measures and detection and punishment of incendiaries, is one of the most frequent subjects of the exercise of the power. *Knoxville v. Bird*, 80 Tenn. 123, 49 Am. Rep. 326; *New York Board of Underwriters v. Whipple*, 2 App. Div. 361, 87 N. Y. Supp. 712; *Webster v. State*, 110 Tenn. 504, 82 S. W. 179; *Morrison v. State*, 116 Tenn. 544, 95 S. W. 494; *Freund on Police Power*, §§ 33, 118, 141.

And reasonable charges, in the exercise of this power, may be imposed upon the class of citizens and taxpayers chiefly affected and benefited by the measure, to bear the expenses of its enforcement, without being subject to the objection that it is either unequal taxation or vicious class legislation. Clearly a vigorous administration of this statute will afford fire insurance companies doing business in this state great protection, and be of more benefit to them than any other class of persons or corporations. The rule above announced, although not there applied, was recognized by this court in the case of *Reelfoot Lake Levee District v. Dawson*, 97 Tenn. 171, 36 S. W. 1046, 34 L. R. A. 725, where Judge Caldwell, in speaking for the court, says:

"Complainants contend, in next place, that if the act be not sustainable under the taxing power, it can be and should be sustained under the police power of the state. The latter power, like the former one, is an attribute of sovereignty, and it may rightfully have expression in the form of legislation, whenever needful for the promotion of public health, or the preservation of public safety, order, or well-being. Rules and regulations established in the proper exercise of this power often require the payment of money for certain specified objects, and thereby in some measure partake of the nature of tax laws, though in primary purpose entirely distinct from them.

"The distinction between a demand of money under the public power and one made under the power of tax is not so much one of form as of substance. The proceedings may be the same in two cases, though the purpose is essentially different. The one is made for regulation, and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case and referring it to the proper power. \* \* \* Only those cases where regulation is the primary purpose can be specially referred to the police power." *Cooley on Tax'n*, 586, 587."

Judge Burrows, in his work on *Taxation* (section 77), says:

"When the amount of the fee is only such as would probably cover expenses of enforcing the regulations of the state as to the particular, it is under the police power; but where the fee is larger than is necessary for such purposes, and is executed with refer-

ence to revenue, the license is issued under the taxing power of the states, where it is contrasted with the property tax in those provisions which limit the power of the state to tax property otherwise than by a uniform system and according to values. But, whether mentioned in the Constitution or not, the provisions as to equality and uniformity do not apply to taxes on license."

The case of *New York Board of Underwriters v. Whipple*, supra, is in point. There a statute providing for a fire patrol and imposing the expense of same upon insurance companies in proportion to the premiums received by them was held to be valid exercise of the police power.

The provision requiring the burdens to be paid by fire insurance companies is somewhat analogous to statutes sustaining local assessments for the improvement of property, upon the ground that the adjoining property owners are benefited by the improvement to be made. The principle involved is very much the same. *Arnold v. Knoxville*, 115 Tenn. 204, 90 S. W. 469, 3 L. R. A. (N. S.) 837.

The provision that if any surplus of the charge to be collected by the Insurance Commissioner remains, after defraying all expenses incurred by him in making investigations as required by the act, shall be paid into the state treasury, does not make that charge a tax for revenue. It is impossible in advance to estimate what the expenses of such investigations will be, and the mere fact that a surplus may remain will not affect the validity of the statute. It is common, in statutes providing for inspection fees and special taxes, to provide that any surplus that may remain be paid into the public treasury, and such provisions have always been sustained. It is the only disposition that can be made of such unforeseen excess. *Postal Tel. & Cable Co. v. Taylor*, 192 U. S. 64-70, 24 Sup. Ct. 208, 48 L. Ed. 342; *Atl. & Pac. Telegraph Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995; *Terre Haute v. Kersey*, 159 Ind. 300, 64 N. E. 469, 95 Am. St. Rep. 298; *Kennedy v. Montgomery County*, 98 Tenn. 180, 38 S. W. 1075.

It results, therefore, that the statute is constitutional and valid, and the assignment of error assailing it upon the grounds disposed of must be overruled.

Second. The plaintiff in error insists that the Insurance Commissioner has no right to conduct an investigation of a fire occurring in Montgomery county at his office in Davidson county, and therefore a subpoena issued by him requiring a witness to appear before him in the latter county was issued without authority, and void, and he was not bound to obey it.

We have read the statute in vain to find anything in it which tends to confirm this view. It contains no provision which expressly or by implication requires the Insurance Commissioner to conduct the investiga-

tion in the county where the property was destroyed. He is given broad authority to make the investigation, without any direction as to where it shall be conducted. When the law was enacted, under other statutes he was required to have an office in the Capitol and to discharge certain duties there. In the absence of a provision in this statute conferring other and new duties upon him, the presumption is that he was authorized to discharge them at his established office and where then existing laws required him to be.

While the conduct of an investigation in Davidson county may result in great inconvenience, amounting almost to oppression, in some cases, yet the Legislature had the power to authorize it to be conducted there, and having done so, the power exists, and courts cannot interfere with it. No elaboration of this point is necessary.

Third. It is further insisted, granting that the commissioner had a right to conduct an investigation in Davidson county, that he had no power to issue a subpoena to Montgomery county for witnesses. It is said that the statute confines his powers to those of a trial justice—a justice of the peace—and that a justice of the peace can only issue subpoenas for witnesses to his own or an adjoining county.

This contention is also unsound. The statute (section 3) vests in the Insurance Commissioner or his deputy "all the power of a 'trial justice' in this state for the purpose of summoning and compelling attendance of witnesses to testify in relation to any matter which is by the provisions of the act the subject of inquiry and investigation." There is no such officer in Tennessee as a "trial justice," but it is apparent a justice of the peace was meant. The authority given a justice of the peace in issuing subpoenas for witnesses by our statutes is to be found in three sections of the Code. These are as follows:

"Justices of peace may issue subpoenas for witnesses in an adjoining county, and such witnesses thus summoned are required to attend under the usual penalties." Shannon's Code, § 5615.

"Justices of the peace are vested with power to issue subpoenas for witnesses in any matter to be tried before him to his own or an adjoining county." Shannon's Code, § 5937, subsec. 4.

"The magistrate before whom an information is made may issue subpoenas to any part of the state for witnesses on behalf either of the defendant or the state." Shannon's Code, § 7358.

The first section is to be found in the chapter upon the general subject of procuring the attendance and testimony of witnesses; the second, in the chapter relating to the powers of justices of the peace; and the third, in the chapter relating to witnesses and the mode of securing their testimony in criminal proceedings. This statute (chapter 460, p. 1538, Acts of 1907), being a police

measure, passed for the protection of life and property, and to facilitate the detection of those guilty of fraudulent and incendiary fires, and to aid in bringing them to punishment, the investigation provided for is more a criminal proceeding than a civil one, and it was clearly the intention of the General Assembly to confer upon the commissioner all the power vested by law in the justices of the peace to require witnesses to appear before them and testify in relation to crimes committed. This is the only reasonable construction that can be placed upon the statute. Without such authority, the commissioner would in many instances be wholly unable to make an investigation. The act must be given a broad and liberal construction, as remedial statutes always are, to effect the purpose of its enactment.

Fourth. It is next insisted that the statutes denouncing a penalty against witnesses for failure to appear in obedience to the service of a subpoena do not apply to this case, and the circuit court of Davidson county had no jurisdiction to render judgment against plaintiff in error.

We think otherwise. The statutes upon the subject are as follows:

"Every witness legally bound to appear as herein directed shall appear accordingly and continue to attend from day to day and from term to term until discharged by the court or the party at whose instance he was summoned.

"In default thereof he forfeits to the party at whose instance the subpoena issues the sum of \$125.00, to be recovered by scire facias; and he is further liable to the action of the party for damage sustained for want of his testimony.

"The attendance of witnesses in criminal cases is enforced in the same way, subject to the same rules, except that the penalty for failing to attend is \$250.00."

Shannon's Code, §§ 5608, 5609, 5610.

"If a witness fails to appear when summoned before a justice of the peace or commissioner, the subpoena is returned to the circuit court of the county with indorsement of such failure made thereon by the justice or commissioner, and scire facias issues as in other cases."

Shannon's Code, § 5613.

The statute under which the commissioner was proceeding vested in him all the powers of a justice of the peace to issue subpoenas for witnesses and compel their attendance before him to testify in the investigation which he was authorized to make. It follows that all statutes providing for the enforcement of this authority are applicable to proceedings before him. It could not have been intended by the General Assembly to vest him with the authority of a justice of the peace to issue subpoenas, and yet withhold the means of enforcing the attendance of the witnesses. Such a construction would be absurd and unreasonable.

It may be, as said for the plaintiff in error, that the appearance of witnesses could be enforced by attachment; but this is immaterial. The law also provides that their appearance may be compelled by enforcing the penalties denounced against defaulting witnesses. The state of Tennessee, through its officer, the Insurance Commissioner, upon whom the duty of enforcing this police measure was imposed, had the right to compel the appearance of the plaintiff in error as a witness to testify in relation to the fire under investigation. The failure of the witness to appear was prejudicial to the state in the enforcement of laws made for the protection of property and the punishment of crime, and the motion was properly made in its name to recover the penalty, and, when collected, it will be covered into the public treasury. The motion could have been made, and properly should have been made, in the name of the state, without the intervention of the commissioner as relator, because the latter had no interest in the matter, and no relator was necessary; but his name, being mere surplusage, will not affect the action, the state being the real party in interest.

Fifth. The plaintiff in error offers in excuse for his failure to obey the subpoena that the commissioner was exceeding his authority in investigating matters not pertinent to the fire in question.

We find upon this record that the Insurance Commissioner was conducting the investigation of a fire in good faith and in strict discharge of the duties imposed upon him by the statute. It was immaterial that one Sanders had been indicted upon the charge of burning property. The commissioner had nothing to do with that. The indictment did not conclude the question as to the cause, origin, and circumstances of the fire, nor who, if any one, was guilty of fraud or arson in the matter. The investigation might have developed that Sanders had no connection with it, and that other parties, then unsuspected, were guilty. It was the duty of the commissioner to discharge the duties imposed upon him, and it appears that he was doing so with reasonable diligence under the circumstances attending the case.

But, whether the commissioner was acting in good faith or not, the plaintiff in error had no discretion in the matter. It was his duty to obey the subpoena. It would be impossible to conduct a legal proceeding if every witness summoned could determine for himself whether or not his evidence was material or whether he should attend. Advice of counsel in such cases is no defense—certainly not in this case, because it appears that the witness sought the advice of the counsel for Sanders, and clearly disobeyed the subpoena in his interest.

We think, upon the whole record, that the Insurance Commissioner had the power to

issue subpoena which was served upon the plaintiff in error, requiring him to appear before him in his office at Nashville; that the plaintiff in error willfully disobeyed this process; that the circuit court of Davidson county had jurisdiction of a motion to collect the penalty of \$250 denounced against defaulting witnesses summoned in behalf of the state; and, the plaintiff in error having wholly failed to show any good excuse or cause why the penalty should not be enforced, the judgment of the trial court to that effect should be affirmed, with costs.

ST. LOUIS & S. F. RY. CO. v. SHORE et al.  
(Supreme Court of Arkansas. March 1, 1909.)

1. RAILROADS (§ 249\*)—OPERATION—FIRES—STATUTES—CONSTITUTIONALITY.

Act April 18, 1907 (Acts 1907, p. 336), making railroad companies liable for damages caused by fire from a locomotive in the operation of its road, is constitutional and valid.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 249.\*]

2. STATUTES (§ 64\*)—EFFECT OF PARTIAL INVALIDITY.

If a statute imposing a liability for damages caused by fire in the operation of a railroad be void as to persons operating railroads other than railroad companies, or as to fire communicated by other methods than by a locomotive, those provisions may be eliminated, and leave the statute valid, as applied to fires caused by a locomotive operated by a railroad company.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.\*]

3. EVIDENCE (§ 488\*)—OPINION EVIDENCE—DAMAGES BY FIRE—MARKET VALUE.

In an action for injuries to an orchard by fire, it was proper to permit witnesses to state their opinions as to the market value of the orchard before and after the fire, and to give their reasons therefor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2283-2289; Dec. Dig. § 488.\*]

Appeal from Circuit Court, Washington County; J. S. Maples, Judge.

Action by Thomas Shore and others against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. F. Evans and B. R. Davidson, for appellant. Walker & Walker, for appellees.

McCULLOCH, C. J. Plaintiffs instituted this action to recover damages to their land and growing fruit orchard, caused by fire alleged to have been communicated from a locomotive operated by the defendant on its railroad. They recovered the sum of \$2,500 in the trial below, and defendant appealed to this court.

It is neither alleged nor proved that the defendant was guilty of any negligence in allowing the fire to escape, and the principal question involved in this case is as to the constitutionality of the act approved April 2,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1907 (Acts 1907, p. 336), making railroad companies responsible for damage caused by fire. The statute is as follows: "Hereafter all corporations, companies or persons, engaged in operating any railroad wholly or partly in this state, shall be liable for the destruction of, or injury to, any property, real or personal, which may be caused by fire, or result from any locomotive, engine, machinery, train, car or other thing used upon said railroad, or in the operation thereof, or which may result from, or be caused by any employé, agent or servant of such corporation, company or person upon or in the operation of such railroad, and the owner of any such property, real or personal, which may be destroyed or injured, may recover all such damage to said property by suit in any court, in the county where the damage occurred, having jurisdiction of the amount of such damage, and upon the trial of any such action or suit for such damage it shall not be lawful for the defendant in such suit or action to plead or prove as a defense thereto, that the fire which caused such injury was not the result of negligence or carelessness upon the part of such defendant, its employés, agents or servants; but in all such actions, it shall only be necessary for the owner of such property so injured to prove that the fire which caused or resulted in the injury originated or was caused by the operation of such railroad, or resulted from the acts of the employés, agents or servants of such defendant, and if the plaintiff recover in such suit or action, he shall also recover a reasonable attorney's fee to be ascertained from the evidence in the case by the court or jury trying the same. Provided, that the penalty prescribed by section 1 of this act shall apply only when such employé, agent or servant is in the discharge of his duty as such."

All of the objections made to the statute in question are fully answered by the Supreme Court of the United States in the case of *St. L. & S. F. Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611, upholding a similar statute in Missouri, and we need go no further than to cite that case as an expression of our views on the subject. Mr. Justice Gray, in delivering the opinion of the court in that case, after reviewing the authorities on the subject, said: "This review of the authorities leads us to the following conclusions: First. The law of England, from the earliest times, held any one lighting a fire upon his own premises to the strictest accountability for damages caused by its spreading to the property of others. Second. The earliest statute which declared railroad corporations to be absolutely responsible, independently of negligence, for damages by fire communicated from their locomotive engines to property of others was passed in Massachusetts in 1840, soon after such engines had become common. Third. In England, at the time of the passage of that

statute, it was undetermined whether a railroad corporation, without negligence, was liable to a civil action, as at common law, for damages to property of others by fire from its locomotive engines; and the result that it was not so liable was subsequently reached after some conflict of judicial opinion, and only when the acts of Parliament had expressly authorized the corporation to use locomotive engines upon its railroad, and had not declared it to be responsible for such damages. Fourth. From the time of the passage of the Massachusetts statute of 1840 to the present time, a period of more than half a century, the validity of that and similar statutes has been constantly upheld in the courts of every state of the Union in which the question has arisen." The learned justice concludes the opinion with the following statement of the law: "The motives which have induced, and the reasons which justify, the legislation now in question may be summed up thus: Fire, while necessary for many uses of civilized man, is a dangerous, volatile, and destructive element, which often escapes in the form of sparks, capable of being wafted afar through the air, and of destroying any combustible property on which they fall, and which, when it has once gained headway, can hardly be arrested or controlled. Railroad corporations, in order the better to carry out the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to use locomotive engines propelled by steam generated by fires lighted upon those engines. It is within the authority of the Legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the Legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over, or interest in, those instruments."

The authorities on this subject are collated in 3 Elliott on Railroads, § 1223, where the rule is stated as follows: "Statutes imposing liability for damages, on account of fires set out by railway locomotives, have been attacked in many of the states where they are in force, on the ground that they are unconstitutional, but in all the decisions, where

the question has directly arisen, so far as we have been able to discover, they have been held constitutional." None of the decisions of this court conflict with this rule. The case of *L. R. & Ft. S. Ry. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55, which is cited by the appellant in support of its contention, clearly recognizes the validity of such a statute, for the opinion contains the following: "In Massachusetts, by statute, railroad companies are made absolutely liable for injuries by fire communicated from their engines; but in compensation are given an insurable interest in any buildings along the route. The courts have sustained this law, but the nature of it is peculiar and exceptional, and the language too clear to admit of doubt." We are of the opinion that the clause in some of the statutes giving the railroad company an insurable interest is not essential to the validity of the statute.

It is contended that the act is void for the reason that it is not confined simply to cases of fire communicated from locomotives operated by railroad companies, but applies to persons operating railroads, and also to fire communicated by other methods in the operation of railroads. It is sufficient to say that we have no question presented in this case except that of the validity of the statute as applied to the damage done by fire communicated from a locomotive operated by the railroad corporation. If the statute is void as to persons operating railroads, or as to fire communicated in other methods, that part could be eliminated, and still the statute be valid so as to apply to cases such as this. *Leep v. Ry. Co.*, 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109.

The only other question raised by this appeal is that of the admissibility of the testimony of certain witnesses introduced by the plaintiff. It is contended that the court erred in this respect, because witnesses were allowed to testify as to damages, basing their estimates upon the product of the land, and not upon its market value; also that some of the witnesses did not show sufficient knowledge and experience to testify as to the amount of the damage. The court in its instruction limited the amount of recovery to the difference between the market value of the land before it was damaged and afterwards. We are of the opinion that all of the witnesses showed sufficient knowledge of land similarly situated in that locality to enable them to testify. While it is true that some of them based their opinions upon the estimated yield of fruit of the orchards on the land, the questions propounded were as to the market value, and the jury must have understood from the opinions expressed by the witnesses that they were giving the market value based upon the estimated yield of crop. It was proper to permit the witnesses to state their opinions as to the market

value, and to give their reasons therefor, so that the jury might determine what force to give to the testimony. It was, after all, a question for the jury to determine under the instructions of the court, and upon all the evidence adduced, as to what the difference in the market value was before and after the damage. *L. R. Jct. Ry. Co. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; *K. C. S. Ry. Co. v. Boles*, 115 S. W. 375, 15 Ark. Law Rep. 614.

We find nothing in the record which violates this rule. Therefore no error of the court was committed.

Judgment affirmed.

# ST. LOUIS, I. M. & S. RY. CO. v. FURLOW et al.

(Supreme Court of Arkansas. March 1, 1909.)

## 1. EVIDENCE (§ 417\*)—PAROL EVIDENCE—VARYING WRITING.

A shipping contract with an unfilled blank for freight rate, said rate, however, being expressly recited to be less than the rate for carriage at carrier's risk, is not varied by parol evidence of the rate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 417.\*]

## 2. TRIAL (§ 252\*)—ABSTRACT INSTRUCTIONS.

Giving an instruction authorizing recovery if it be found the shipment was injured by delay in transportation is error; there being no evidence of damage from delay, but merely of damage from rough handling in switching.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

## 3. CARRIERS (§ 180\*)—CONTRACTS—NOTICE OF CLAIM OF DAMAGES—INTERSTATE SHIPMENT.

Stipulation, in a contract for carriage of freight, that as a condition to recovery the shipper shall give notice within a certain time of claim therefor, does not exempt from liability and does not in case of an interstate shipment and by connecting carriers, contravene the Hepburn act (Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 909]), declaring that the contract for such a shipment may not exempt the initial carrier from liability for such injury caused by it or the connecting carrier.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 180.\*]

## 4. CARRIERS (§ 166\*)—CONTRACT—NOTICE OF CLAIM OF DAMAGES—REASONABLENESS OF STIPULATION.

Stipulation, in a contract for carriage of freight, that as a condition to recovery for injury to the property the carrier shall be given notice within a certain time of claim for damages, must be reasonable, and whether it is reasonable, where the notice is required to be given within a day after delivery at destination, is a question for the jury; the stock shipped having arrived at 2 p. m., there having been no agent at such station, and the nearest agent to whom notice might have been given having been 35 miles away.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 649, 672; Dec. Dig. § 166.\*]

## 5. CARRIERS (§ 154\*)—CONTRACT—NOTICE OF CLAIM OF DAMAGES—CONSIDERATION FOR STIPULATION.

A reduction of freight rate is a sufficient consideration for the stipulation in the contract

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of carriage that, as a condition to recovery for injury to the property shipped, notice of claim of damages shall be given the carrier within a certain time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 641-645; Dec. Dig. § 154.\*]

**6. CARRIERS (§ 159\*)—CONTRACT—NOTICE OF CLAIM OF DAMAGES—NOTICE BY MAIL.**

The stipulation, in a contract of carriage, that as a condition to recovery for injury to the property shipped the shipper will give notice of claims therefor in writing to an agent of the carrier within one day after delivery at destination, so that the claim may be investigated, requires actual notice, so that notice by mail is not sufficient, unless received within the one day.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 159.\*]

**7. CARRIERS (§ 159\*)—CONTRACT—NOTICE OF CLAIM OF DAMAGES—REASONABLENESS.**

Where a contract of carriage stipulated that, as a condition to recovery for injury to the property shipped, notice of claim therefor should be given the carrier within one day after delivery at destination, and notice was given in six days, the question is not whether the notice was given in a reasonable time, but whether one day was a reasonable time for giving notice, as if it was then the notice given was insufficient, and if it was not then the entire stipulation was invalid.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 159.\*]

**8. CARRIERS (§ 177\*)—INTERSTATE TRANSPORTATION—CONNECTING CARRIERS—LIABILITY FOR INJURY.**

By express provision of the Hepburn act (Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 909]), a carrier receiving property in one state for transportation to another state is liable for injury to the property, as well when caused by a connecting carrier as when caused by it.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 177.\*]

Appeal from Circuit Court, Ouachita County; Geo. W. Hays, Judge.

Action by W. H. Furlow and others against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiffs. Defendant appeals. Reversed and remanded for new trial.

E. B. Kinsworthy and Lewis Rhoton, for appellant. J. S. McKnight and Thornton & Thornton, for appellees.

**BATTLE, J.** Plaintiffs' (W. H. Furlow's and B. M. Biggers') complaint against the defendant, St. Louis, Iron Mountain & Southern Railway Company, embraces two claims for damages, one for delay in transportation of plaintiffs as passengers and loss of baggage, and the other for injuries to horses sustained while in course of shipment from Coffeyville, Kan., to Harrell, Ark. There is no controversy in this court about the first.

They allege: That, on or about the 15th day of September, 1907, plaintiffs loaded in a stock car of the defendant at Coffeyville, Kan., 25 or 26 horses in good condition, and it agreed to deliver them in like condition

at Harrell, Ark., but "on the 17th day of September, 1907, while at Little Rock, Ark., defendant permitted said car loaded with plaintiffs' horses to be continually run back and forth on the switchyard of defendant for a period of 7½ hours, bumping the car violently against other cars, knocking plaintiffs' horses down, causing them to tramp upon each other, knocking them against each other and against the wall of the car, till they were badly bruised and damaged, thereby diminishing the value of said car load of horses to plaintiffs at least \$300; that when said car was transferred to Chicago, Rock Island & Pacific Railway Company to be carried to Harrell it was then in a broken down condition, insomuch that said car loaded with said horses was kept on the said track of the Chicago, Rock Island & Pacific Railway Company for a period of three hours; and that all of the negligence of the defendant aforesaid contributed to the injury and damage of plaintiffs, and they prayed judgment for \$331."

The defendant answered and specifically denied each allegation of the complaint, and alleged that the contract of shipment into which plaintiffs and defendant entered was a special contract, by which the shipper assumed certain risks, and that the damages complained of were risks assumed by plaintiffs, and that plaintiffs had failed to comply with the contract and were not entitled to recover.

The contract of shipment referred to in the pleadings was a printed form with all the blanks filled, except the rate of freight to be paid, and contained the following statements and stipulations:

"—— at the rate —— per —— subject to minimum weights and length of cars provided for in tariff, said rate being less than the rate charged for shipments transported at carrier's risk, for which reduced rate and other considerations it is mutually agreed between the parties hereto as follows:

\* \* \* \* \*

"Fifth. That, as a condition precedent to the recovery of any damages for any loss or injury to live stock covered by this contract for any cause, including delays, the second party will give notice in writing of the claim therefor to some general officer or to the nearest station agent of the first party, or to the agent at destination or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of the stock at destination, to the end that such claim may be fully and fairly investigated; and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of any and all such claims, and to any suit or action brought thereon.

\* \* \* \* \*

"Twelfth. That in making this contract, the undersigned owner, or other agent of the owner, of the stock named herein, expressly acknowledges that he has had the option of making this shipment under the tariff rates, either at carrier's risk or upon a limited liability, and that he has selected the rate and the liability named herein and expressly accepts and agrees to all the stipulations and conditions herein named."

Evidence was adduced in the trial of the issues tending to prove the following facts: The foregoing contract was made by plaintiffs and defendant on the 15th day of September, 1907, at Coffeyville, Kan. Twenty-five or 26 horses were delivered at that time and place, in good condition, by plaintiffs to defendant for shipment to Harrell, Ark. Defendant had two rates of freight for shipment of live stock, one where the stock was shipped at the carrier's risk, and the other where the liability was limited. The contract shows that the latter was agreed upon, and the defendant offered to prove what that was, and the court would not permit it to do so. The horses were shipped according to the contract, but were delivered in bad condition at Harrell. "They were stamped on and bruised and cut when delivered." One of them had a gash on her shoulder, and another was stamped up badly and scratched." All of this damage was done while in the yards at Little Rock "on account, as they state, of rough handling while being switched about the yards."

The horses arrived at Harrell on the 18th of September, 1907, at about 2 o'clock p. m. There was no station agent at Harrell. The defendant's nearest station agent was at Camden, about 35 miles from Harrell. Four or five days after the delivery of the horses at Harrell, plaintiffs, by their attorney, gave notice of claim for damages to agent of the defendant at Coffeyville, Kan., by mail.

The court, over the objections of the defendant, instructed the jury, at the instance of the plaintiffs, in part, as follows:

"(1) It is the duty of common carriers to furnish sufficient facilities for the reasonably prompt transportation of goods or stock tendered for carriage, and they are liable for any negligent delay in furnishing such facilities, and if you believe from the evidence in this case that the St. Louis, Iron Mountain & Southern Railroad Company delivered the car of horses in controversy to the Chicago, Rock Island & Pacific Railway Company, a connecting carrier, in a broken or damaged car, and that on this account plaintiff's horses were held in transit for an unnecessary length of time, you will consider this in arriving at the amount of damage plaintiffs are entitled to provided that you find that they are entitled to any damage."

"(6) The jury are instructed that, if they

find from the evidence that the plaintiff gave notice to the defendant of the damage to the stock within six days after the arrival of the stock at the destination, then the same was a reasonable and sufficient compliance with the terms of said contract."

And the court instructed the jury, at the request of the defendant, in part, as follows:

"(4) If the jury believes from the evidence that the defendant received the stock mentioned in the complaint, and which was destined to pass over defendant's road and a connecting line, and contracted only to carry it over its own line, and then to deliver it to the connecting line, then they will find for the defendant, unless they find that the damage to the stock mentioned occurred while said stock was in this defendant's possession."

"(5) The court instructs the jury that in this case there is a written contract expressing the terms and condition upon which the stock in question were to be shipped from Coffeyville to Harrell, and that all parties are bound by the terms of that contract, and the jury will not consider any evidence that varies from the terms of the same."

And refused to instruct as follows:

"(8) If the jury find that, by the terms of the bill of lading or shipper's contract, notice in writing should have been given to the defendant or delivery line of any loss or damage to the stock within 24 hours after the delivery of the stock, and that no such notice was given, they will find for defendant."

"(9) If the jury believe from the terms of the bill of lading or shipper's contract it was agreed that the defendant should not be responsible for loss or damage to stock shipped unless written notice of said loss or damage was given to the defendant before the stock were removed from the point of shipment or destination before the stock were mingled with other stock, and within one day after the delivery of the stock at place of destination, and that no such notice was given to defendant on delivery, you will find for the defendant."

The jury returned a verdict in favor of plaintiff for \$290, and the defendant appealed.

The contract of shipment shows that the owner of the stock had the option of shipping, under the tariff rates of the defendant, either at carrier's risk or upon a limited liability, and that they selected the latter. The contract expressly provides: "Said rate (the rate agreed upon) being less than the rate charged for shipments transported at carrier's risk, for which reduced rate and other considerations, it is mutually agreed between the parties hereto as follows." Appellant should have been permitted to show what this rate was. Such evidence would not have varied the contract. *Busch v. Hart*, 62 Ark. 330, 35 S. W. 534; *St. L., I. M. & S. Ry. Co. v. Wynne Hoop & Cooperage Co.*, 81

Ark. 373, 99 S. W. 375; Soudan Planting Co. v. Stevenson, 83 Ark. 163, 102 S. W. 1114.

Instruction numbered 1 and given at the request of the plaintiffs should not have been given. There was no evidence upon which to base it. There was no evidence that the stock was damaged on account of delay in shipment. Plaintiffs testified that the stock was damaged while in the yards of the defendant at Little Rock on account of rough handling while being switched about the yard, and on account of being thrown against each other and knocked down, and that their damage on this account was \$290; but it does not appear that the instruction was prejudicial, as the verdict of the jury was for \$290.

The fifth paragraph of contract of shipment in reference to notice of claim for damages is the basis of the principal controversies in this case. Similar stipulations have been sustained by this court. *Kansas & Arkansas Valley Railroad Co. v. Ayers*, 63 Ark. 331, 38 S. W. 515; *St. Louis & San Francisco Railway Co. v. Hurst*, 67 Ark. 407, 55 S. W. 215; *St. Louis & San Francisco Railway Co. v. Pearce*, 82 Ark. 353, 101 S. W. 760, 118 Am. St. Rep. 75.

The act of Congress, known as the "Hepburn Act," approved June 29, 1906 (chapter 3591, § 7, 34 Stat. 598 [U. S. Comp. St. Supp. 1907, p. 909]), does not affect the validity of such stipulations when reasonable and based upon a valuable consideration. That act provides: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

The stipulation in question does not exempt the defendant from liability imposed by that act, which extended the liability of the initial carrier for loss, damage, or injury to property while in course of transportation over the line of a connecting carrier. Before it was enacted an initial carrier could not exempt itself from such liability for loss, damage, or injury incurred on its own line, yet it was lawful for it to enter into stipulations like the one in question when the shipment of the property was confined to its own line. For the same reason it can enter into such stipulations under the Hepburn act as to loss, damage, or injury suffered on the line of the connecting carrier.

Such stipulations, however, must be reasonable and based on a consideration. *St. Louis & San Francisco Railway Co. v.*

*Pearce*, 82 Ark. 353, 358, 101 S. W. 760, 118 Am. St. Rep. 75. The stipulation in this case was based upon a sufficient consideration, a reduced rate of freight. The reasonableness depends upon the sufficiency of the time allowed for giving the notice. In *St. Louis & San Francisco Railway Co. v. Hurst*, 67 Ark. 407, 410, 55 S. W. 215, it was held that such a contract is reasonable "if it allowed the shipper sufficient time, with the use of reasonable diligence, to discover the damage and give the notice; otherwise it was unreasonable."

In the stipulation in the case before us the notice in writing was required to be served within one day after the delivery of the stock at destination. The object of the notice was to give the carrier an opportunity to fully and fairly investigate the claim for damages before the horses should be placed beyond the power of the carrier to examine and inspect by reasonable exertion. It is obvious that this could have been done only by actual notice. The contract says that the notice must be served within the one day, and this means actual notice. Notice by mail, then, would not be sufficient unless it was received within the one day.

Was the stipulation as to notice reasonable? It might have been given under the contract to any one of the following parties, to wit, some general officer, or to the nearest station agent, of the defendant, or to the agent at destination, or some general officer, of the delivering carrier. There was no agent at Harrell, the destination. Camden was the nearest station of the defendant, where there was a station agent, and it was 35 miles from Harrell. The stock arrived at Harrell on the 18th of September, 1907, at about 2 o'clock p. m. Under these circumstances was one day a sufficient time in which to give the notice? It does not clearly appear to us that it was or was not, and we think that this is a question which should have been submitted to the jury under proper instructions of the court.

Instruction numbered 6 and given at the request of plaintiffs should not have been given. The question is not whether six days were a reasonable time in which to give the notice, but whether one day after the arrival of the stock at its destination was sufficient time. If it was not, the entire stipulation requiring it was invalid and not enforceable. *St. Louis, Iron Mountain & Southern Railway Co. v. Coolidge*, 73 Ark. 112, 117, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. Rep. 21; *St. Louis & San Francisco Railway Co. v. Pearce*, 82 Ark. 353, 358, 101 S. W. 760, 118 Am. St. Rep. 75.

We have not failed to notice section 2 of the act entitled "An act to prohibit common carriers from abridging and limiting their statutory and common-law liabilities by contracts, rules and regulations," approved April 30, 1907 (Acts 1907, p. 558), cited by



appellees. It is unnecessary to consider it in this case.

Instruction No. 4, and given at the defendant's request, and limiting its liability to damage to stock which occurred while the stock was in its possession, is contrary to the act of Congress known as the "Hepburn act," and should not have been given.

Reverse and remand for a new trial.

### KING v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Arkansas. March 1, 1909.)

#### TELEGRAPHS AND TELEPHONES (§ 37\*)—FAILURE TO DELIVER MESSAGE—NEGLIGENCE.

A message to be telegraphed plaintiff at L. was given the operator, who was told of its importance, and that plaintiff lived in the country, 4 miles from L., and was asked his charges for sending and delivering. Twenty-five cents, the amount he stated, was paid; but this was the regular charge for sending to and delivering at L., and nothing was said by either about extra charges for messenger services. The message was promptly received at L., the delivery limit for which was half a mile from the office, and it was found that plaintiff was not in town, that she lived 6 or 8 miles in the country, and that there was no telephone within 1½ miles of her, whereupon the message was mailed to her at L. *Held*, that there was no negligence in failure to deliver.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 29; Dec. Dig. § 87.\*]

Appeal from Circuit Court, Mississippi County; Frank Smith, Judge.

Action by Dora King against the Western Union Telegraph Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. T. Caston, for appellant. Geo. H. Fearona, Rose, Hemingway, Cantrell & Loughborough, and Murphy, Coleman & Lewis, for appellee.

**BATTLE, J.** This action was commenced on the 3d day of September, 1907, by Dora King against the Western Union Telegraph Company to recover damages on account of the failure to deliver a message sent to her announcing the death of her father in time for her to view his remains before he was buried. At the conclusion of the evidence, the court instructed the jury to return a verdict in favor of the defendant, which they did. Was there any evidence adduced upon which the jury could have returned a verdict in favor of the plaintiff?

Plaintiff was the wife of C. R. King and resided about four miles from Luxora, Ark. Her father, J. B. Barham, who lived at Idalia, Mo., died in the morning of the 24th of July, 1907. Lee Barham, her brother, testified in her behalf that he in the same morning, between 9 and 10 o'clock, delivered to the defendant's agent at Idalia a message announcing the death of her father, which

was directed to her at Luxora, Ark., that he explained to the agent the importance of the message, telling him that plaintiff resided about four miles from Luxora, out in the country, and witness wanted to know his charge for sending and delivering the telegram, and he said his charges were 25 cents, and he (Barham) paid that amount, and that he saw the message sent. The undisputed evidence shows that was the regular charge for sending and delivering the message at Luxora, and that there was nothing said about extra charges for messenger services—no offer to pay anything, except the regular fee of 25 cents, and nothing said about guaranteeing expenses of delivery. The message was promptly delivered to defendant's operator at Luxora at 10:53 a. m. on the day it was sent. The operator immediately sent a boy to look for Mrs. King, and he returned in a short time and reported he could not locate her. The operator then went out in town and inquired for her, and found that she lived six or eight miles in the country. He then inquired about a telephone and found that she had none. He then mailed a copy of the telegram to Mrs. King at the post office in Luxora. This was about 12 o'clock noon. The evidence shows that the delivery limit at Luxora for telegrams was embraced within a radius of half a mile from the telegraph office, and that the nearest telephone to Mrs. King which connects at Luxora is a mile and a half. She was not in Luxora at the time the telegram was received at that place.

Under the foregoing facts and circumstances, the defendant was guilty of no negligence in the failure to deliver the message sent to Mrs. King and is not liable for damages, and the court committed no error in instructing the jury to return a verdict in favor of the defendant. *Arkansas & Louisiana Railroad Co. v. Stroud*, 82 Ark. 117, 100 S. W. 760; *Western Union Telegraph Co. v. Taylor*, 3 Tex. Civ. App. 310, 22 S. W. 532; *Whittemore v. Western Union Telegraph Co.* (C. C.) 71 Fed. 651.

Judgment affirmed.

### CURTIS v. STATE.

(Supreme Court of Arkansas. March 1, 1909.)

#### 1. INDICTMENT AND INFORMATION (§ 132\*) — ELECTION BETWEEN OFFENSES — "CARNAL KNOWLEDGE"—"CARNAL ABUSE."

The prosecution will not be required to elect between offenses charged in an indictment alleging that defendant did "carnally know and abuse" prosecutrix, as "carnal knowledge" and "carnal abuse" thus used are synonymous terms.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 433, 434, 437; Dec. Dig. § 132.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 975, 976.]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**2. RAPE (§ 23\*)—INDICTMENT—AGE OF PROSECUTRIX.**

The allegation that the assault was on "a female child under the age of consent, to wit, of the age of 15 years," is a sufficient allegation that prosecutrix was a female under the age of 16 years.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 27; Dec. Dig. § 23.\*]

**3. RAPE (§ 22\*)—INDICTMENT—NECESSITY FOR NEGATIVING MARRIAGE.**

An indictment, alleging the "unlawful and felonious carnal knowledge and abuse" of a female under 16 years of age, need not allege that defendant and prosecutrix were not married.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 26; Dec. Dig. § 22.\*]

**4. RAPE (§ 27\*)—INDICTMENT—SUFFICIENCY.**

An indictment, alleging that at a certain time and place defendant "unlawfully and feloniously did make an assault in and upon [the prosecutrix], a female child under the age of consent, to wit, of the age of 15 years, and her the said [prosecutrix] unlawfully and feloniously did carnally know and abuse," is sufficient under Kirby's Dig. § 2006, providing the punishment for "carnally knowing, or abusing unlawfully, any female person under the age of 16 years."

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 31; Dec. Dig. § 27.\*]

**5. CRIMINAL LAW (§ 713\*)—TRIAL—REMARKS OF COUNSEL.**

A conviction will not be disturbed because of remarks of counsel for the prosecution concerning a further continuance, which were not made in the presence of the jury impaneled to try the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1663; Dec. Dig. § 713.\*]

**6. CRIMINAL LAW (§ 613\*)—CONTINUANCE—DISCRETION OF COURT.**

Defendant asked a continuance on the ground that he learned of the absence of his counsel and employed new counsel only the day before. The court continued the trial until the afternoon the following day. *Held*, that the ruling was a proper exercise of the court's discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1373; Dec. Dig. § 613.\*]

**7. WITNESSES (§ 255\*)—REFRESHING MEMORY.**

In a prosecution for statutory rape, it was not error to permit the mother of prosecutrix to refresh her memory as to the age of the prosecutrix by leaves which she identified as having been taken from the family Bible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 874; Dec. Dig. § 255.\*]

**8. CRIMINAL LAW (§ 721\*) — REMARKS OF COUNSEL—FAILURE OF DEFENDANT TO TESTIFY.**

Under the statute providing that defendant "shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create a presumption against him," in a prosecution for statutory rape, defendant having failed to testify, it was reversible error for the prosecuting attorney to remark in his argument that "defendant does not deny that he had sexual intercourse with the prosecutrix."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. § 721.\*]

Appeal from Circuit Court, Garland County; W. H. Evans, Judge.

Jesse Curtis, having been convicted of statutory rape, appeals. Reversed.

The defendant was convicted in the Garland circuit court of the crime of carnal abuse. The indictment (omitting formal parts) charged that: "The said Jesse Curtis in the county and state aforesaid, on the 15th day of December, A. D. 1906, unlawfully and feloniously did make an assault in and upon one Bertha Williams, a female child under the age of consent, to wit, of the age of fifteen (15) years, and her the said Bertha Williams unlawfully and feloniously did carnally know and abuse." Defendant demurred to the indictment, which demurrer was overruled. Defendant saved his exceptions. Defendant then moved to require the state to elect as to whether it would stand on the charge of carnal knowledge or carnal abuse, which motion was overruled, and defendant excepted. Defendant moved for time in which to prepare his case, stating for his ground that his attorney had been gone for seven months, and that he did not know of his absence, and only employed new counsel the day before. The court gave him until 2 o'clock the next day. Defendant excepted to the ruling of the court, and asked that his exceptions be noted, which was done.

Bertha Williams testified as follows: "I was born in December, 1891. I know Jesse Curtis. He had sexual intercourse with me three or four times in 1906. I don't remember the dates. The first time was near home on the side of the mountain. I gave birth to a baby on the 18th of February, 1907. I never had sexual intercourse with any person except defendant before I gave birth to the child. The defendant is the father of the child."

Sarah Williams testified: "I am the mother of the prosecuting witness Bertha Williams. (When testifying to Bertha's age, she consulted a written memorandum, supposed to be leaves torn from a Bible. Defendant objected and had his exception noted.) Bertha was born on the 16th day of December, 1891. The leaves are the family record torn from a Bible which belonged to my husband. When we separated several years ago, I tore the record from the Bible."

B. F. Jenkins testified for appellant that he had known Bertha Williams for years, and that she was 19 years old at the time he was testifying October 9, 1908.

The court, at the request of the state, gave the following instruction: "(1) The court instructs the jury that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant had sexual intercourse with the prosecuting witness; and, at the time he had such intercourse, Bertha Williams was under the age of 16 years, the defendant would be guilty, and you should so

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

find." Appellant excepted to the giving of the above instruction.

At the request of appellant, the court gave the following: "(3) The court instructs the jury that you are the sole and exclusive judges of the weight of the testimony and of the credibility of the witnesses; and if you believe that any witness has willfully sworn falsely as to any part of his testimony, you are at liberty to disregard the whole testimony of such witness, or you may consider such parts of his testimony as you believe to be true, and disregard such parts of it as you do not believe to be true. And in considering the weight that should be given to the testimony of any witness, you may take into consideration the manner of said witness upon the stand, his seeming willingness to testify on one side and not to testify on the other, or the partiality that such witness may seem to have for the defendant or the prejudice that he may seem to have against him. (4) The court instructs the jury that the defendant is presumed to be innocent of the crime charged against him until the contrary is proven, and that it devolves upon the state to show by competent proof that the defendant had sexual intercourse with the said Bertha Williams, and that the said Bertha Williams was at that time under the age of 16 years; and if upon the whole case you entertain a reasonable doubt that the defendant had sexual intercourse with the said Bertha Williams, or that the said Bertha Williams was under the age of 16 years at the time of said act of sexual intercourse is proven to have been committed, then you should find the defendant not guilty."

The court refused the following prayers of appellant, to which ruling he duly excepted: "(1) The court instructs the jury to find the defendant not guilty. (2) The court instructs the jury that the sheets of paper alleged to be a family record and taken from the Bible and introduced by the state in the testimony of the mother of Bertha Williams are incompetent, and should not be considered by you in your efforts to arrive at a verdict in this case; and unless you can find from other evidence that the defendant had sexual intercourse with Bertha Williams, and that the said Bertha Williams was at the time under the age of 16 years, your verdict should be for the defendant. (3) The court instructs the jury that it devolves upon the state to prove beyond a reasonable doubt that the defendant had sexual intercourse with Bertha Williams, and that such intercourse was unlawful. You are further instructed that sexual intercourse between a man and a woman is not unlawful if they are married to each other at the time, and unless it is shown by the proof that the defendant and said Bertha Williams were not married to each other at the time said acts of sexual intercourse are alleged to have been committed, you should find the defendant not guilty."

The bill of exceptions recites the follow-

ing: "In the closing argument the prosecuting attorney made use of the following language: 'The defendant does not deny that he had sexual intercourse with the plaintiff, and the proof is conclusive that she was under the age of 16 years.' The defendant objected to the prosecuting attorney being permitted to use said language, but the court refused to stop or reprimand said attorney or to admonish the jury to disregard that part of his argument. To which ruling of the court the defendant at the time objected, and asked that his exception be noted of record, which was accordingly done."

The jury returned a verdict of guilty and fixed the punishment at one year in the penitentiary.

The defendant moved for new trial on the following grounds: (1) The court erred in overruling defendant's demurrer. (2) The court erred in refusing to require prosecuting attorney to elect as to whether he would try defendant for carnal knowledge or carnal abuse. (3) The court erred in forcing defendant to trial without giving him more time. (4) The court erred in permitting the prosecuting attorney to state in the presence of the jury: "This case was put off at the last term of court on account of sickness of the defendant's attorney, and I want to try it. This case has already cost the county several times more than it ought to cost, and I am getting tired of waiting on these people." (5, 6, 7) The court erred in refusing instructions Nos. 1, 2, and 5, asked by defendant. (8) The court erred in giving the written instruction asked by the state. (9) The court erred in instructing the jury orally that the only question for them was, "Did the defendant have sexual intercourse with Bertha Williams," and "Was she 16 years of age?" (10, 11, 12) The verdict is contrary to the law and the evidence. (13) The jury misunderstood the evidence. (14) The court erred in permitting the prosecuting attorney to refer to defendant's not taking the stand and denying having sexual intercourse with Bertha Williams. (15) The jury presumed the defendant's guilt from his not taking the stand, and discussed the matter in the jury room. (16) The court erred in permitting Bertha Williams' mother to testify as to her age from the memoranda torn from the Bible.

The court overruled the motion, and defendant saved his exceptions and prayed an appeal, which was granted.

Jas. E. Hague, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

WOOD, J. (after stating the facts as above). First. The ruling of the court in overruling the demurrer and in refusing to require the prosecuting attorney to elect was correct. The indictment charged but a single offense. "Carnal abuse" and "carnal knowledge," as used in the statute, are syn-

onymous terms. The allegation that the assault was upon "a female child under the age of consent, to wit, of the age of 15 years," was a sufficient allegation that the party assaulted was a female person under the age of 16 years. It was not necessary for the indictment to charge in express terms that the party assaulting and the person assaulted were not married. The indictment charged that the assault was unlawful and felonious, and that the carnal knowledge was also unlawful and felonious. It also charged Jesse Curtis with assaulting Bertha Williams. These allegations were sufficient to charge that the accused and the prosecuting witness were not married, and that the assault and carnal abuse were therefore unlawful and felonious, under the statute, being, as alleged, upon a female person under the age of 16 years. See *Plunkett v. State*, 72 Ark. 409, 82 S. W. 845. The indictment contained all that was essential to charge the offense interdicted by section 2008, Kirby's Dig.

Second. The court did not err in its ruling upon the prayers for instructions. The instructions given correctly presented the issue to the jury. It was not necessary, as we have said, for the indictment to negative, in express words, that the accused and the prosecutrix were married. As was said by Judge Riddick in *Caldwell v. State*, 73 Ark. 139, 83 S. W. 929, 108 Am. St. Rep. 28: "It is never necessary that an indictment should set out or negative mere matters of defense, for it would be impracticable to cover all such matters." But if it were necessary for the indictment to show that the accused and the prosecutrix were not married, as we have said, this indictment was sufficient for that purpose, and likewise the evidence sufficiently proved that fact in the way we have indicated.

Third. We find no prejudicial error in the remarks of the prosecuting attorney concerning a further continuance of the cause. The remarks, as the record shows, were made before the jury was impaneled and sworn to try the case. While such remarks are improper when made in the presence and hearing of a jury selected, or to be selected, to try a cause, we do not see that any prejudice to appellant could have resulted, under the circumstances. Assuming that the jurors who heard the remarks before they were selected to try the case were sensible men, they were not likely to be prejudiced by them against the defendant, for the remarks had no reference whatever to his guilt.

Fourth. There was no error in the refusal of the court to continue the cause on account of the absence of counsel. This was a matter within the court's discretion, and it was properly exercised.

Fifth. It was not error for the court to permit the mother of the prosecutrix to refresh her memory by leaves which she identified

as taken from the family bible. The court accepted her testimonial guaranty of their accuracy, and, having done so, did not err in permitting her to use them to refresh her memory in testifying as to the age of her daughter. *Wigmore on Ev.* § 746.

Sixth. The language used by the prosecuting attorney in his closing argument, that "the defendant does not deny that he had sexual intercourse with the plaintiff," was prejudicial error. It is obvious that by the word "plaintiff" the prosecuting attorney meant the "prosecutrix." Our statute provides that the defendant charged with crime "shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create a presumption against him." By his plea of not guilty the defendant did deny that he had sexual intercourse with the prosecutrix. His plea of not guilty put in issue every material allegation of the indictment, and sexual intercourse was material. The court by permitting the prosecuting attorney to make the statement made the defendant's failure to testify a presumption against him in the most hurtful manner. The statement put the defendant in the attitude of not denying the charge, when under the law he was not called upon to deny it further than by his plea of not guilty. In no other way could he deny it except by going upon the witness stand. If he does not choose to become a witness, no comment can be made upon the fact of his failure to do so adversely to him, without plainly violating the provisions of the statute and depriving the defendant of the very rights which it was intended to vouchsafe.

For the error indicated, the judgment is reversed, and the cause is remanded for new trial.

#### STATE v. DE LONG.

(Supreme Court of Arkansas. March 1, 1909.)

HOMICIDE (§ 135\*)—ASSAULT WITH INTENT TO MURDER—INDICTMENT—REQUISITES.

The gist of the offense of assault with intent to murder, under Kirby's Dig. § 1588, is an assault with a felonious intent, the kind of weapon used or the manner of its use being material only to show the intent; and an indictment need not allege the manner of using a knife in making an assault.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 221; Dec. Dig. § 135.\*]

Appeal from Circuit Court, Conway County; Hugh Barham, Judge.

Arthur De Long was indicted for assault with intent to murder, and the State appeals from a judgment sustaining a demurrer to the indictment. Reversed and remanded.

The grand jury, at the October term, 1907, of the Conway circuit court, accused Arthur De Long of the crime of felony. The indictment is as follows: "The grand jury of Con-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

way county, in the name and by the authority of the state of Arkansas, accuse Arthur De Long of the crime of felony, committed as follows, to wit: The said Arthur De Long, in the county and state aforesaid, on the 28th day of May, 1907, in and upon one Pat Hunter, then and there being, unlawfully, feloniously, willfully, deliberately, and of his malice aforethought did make an assault with a certain deadly weapon, to wit, a knife, no considerable provocation appearing, with the felonious intent then and there him, the said Pat Hunter, to kill and murder, against the peace and dignity of the state of Arkansas."

A warrant was issued and served. The case came on to be heard at the March term of the Conway circuit court, and defendant filed his demurrer as follows: "(1) Comes the defendant, and for cause of demurrer to the indictment herein says the said indictment does not allege the manner of using the knife in making the assault. (2) The indictment does not state facts sufficient to constitute a public offense."

The court sustained the demurrer, and the state, electing to stand on the indictment, has duly prosecuted an appeal to this court.

Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State. Sellers & Sellers, for appellee.

HART, J. (after stating the facts as above). The question for decision is as to the sufficiency of the indictment. Counsel for appellee insist that the indictment is defective because it does not charge the manner of using the knife in making the assault; but in this we cannot agree with them.

We do not think the case of *Commonwealth v. White*, 109 S. W. 324, 33 Ky. Law. Rep. 70, cited by counsel for appellee, sustains their contention. There the indictment was framed under a section of the Kentucky Statutes which provides that "if any person shall draw a deadly weapon, or shall point any deadly weapon at another," etc. The court held that "the weapon should be so described in the indictment that the fact that it is a deadly weapon as used must appear from the language of the charge." In that case, the statute made the use of a deadly weapon an essential element of the offense. Hence the court held that the indictment should charge the defendant in appropriate language "with having drawn or pointed a weapon which from its description or manner of use would be a deadly weapon."

In the present case appellee was indicted under section 1588, Kirby's Dig. The gist of the offense was an assault with a felonious intent. The kind of weapon used, or the manner of its use, is not material, except to show the intent with which the assault was made. In *Russell v. State*, 52 Ark. 276, 12 S. W. 564, it was held that it was sufficient to allege that an assault with intent to kill and

murder was committed in the manner and with the intent necessary to constitute the offense charged, without expressly averring "the present ability" necessary under the statute to constitute the assault. The indictment approved in that case is similar to the indictment in this case. In *Lacefield v. State*, 34 Ark. 282, 36 Am. Rep. 8, the court said: "The rule is well settled that, in an indictment for an assault with intent to commit an offense, the same particularity is not necessary as is required in an indictment for the actual commission of the offense; and an indictment for an assault with intent to murder need not state the means made use of by the assailant to effect his murderous intent." To the same effect, see *Bishop on Crim. Proc.* vol. 2, § 77; 21 Cyc. p. 863, and cases cited; *State v. Croft*, 15 Tex. 575; *State of Minnesota v. Henn*, 39 Minn. 476, 40 N. W. 572; *People v. Savercool*, 81 Cal. 650, 22 Pac. 856.

Mr. Wharton says: "In an indictment for an assault with intent to murder, at common law, or under a statute which does not specify the instrument, it has been held unnecessary to state the instrument or means made use of by the assailant to effectuate the murderous intent, though, where the pleader has it within his power to aver the weapon, it is better that the averment should be made; and where the statute speaks of 'dangerous weapons,' or in any way points to a particular instrument, then the weapon should be specified. The details of effecting the criminal intent, or the circumstances evincive of the design with which the act was done, are considered matters of evidence to the jury to establish the intent, and are not necessary to be incorporated in the indictment. And in any view it is sufficient, unless the statute impose special conditions, if the use of a deadly weapon be averred, and the intent be specifically stated." Wharton's *Criminal Law* (10th Ed.) vol. 2, § 644. In the present case, the use of a deadly weapon is charged, and the intent is distinctly averred; and we think it was unnecessary to state in the indictment the manner of using the weapon. That was a matter of evidence to show the intent.

Therefore it is ordered that the judgment sustaining the demurrer be reversed, and the cause be remanded for further proceedings.

WOLFORT v. HOCHBAUM et al.

MODERN LAUNDRY v. HOCHBAUM.

(Supreme Court of Arkansas. March 1, 1909.)

1. CORPORATIONS (§ 169\*)—STOCK—LIEN OF CORPORATION—TRANSFER—ACTION TO ENJOIN—SUFFICIENCY OF EVIDENCE.

In an action to enjoin defendant from transferring certain stock in a laundry of which he was formerly secretary, and to have an amount claimed to be due the laundry company from defendants declared a lien on the stock,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

evidence held to sustain a finding that the laundry company was a party to a contract between defendants and another stockholder by which it was agreed that defendants owed the laundry a certain amount, which the purchaser of the stock agreed to pay as a part of the consideration therefor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 623; Dec. Dig. § 169.\*]

## 2. TRIAL (§ 67\*)—ORDER OF PROOF—REOPENING CASE—AFTER RESTING.

Where defendant, after offering his evidence in chief and himself testifying, rested, and plaintiff offered his rebuttal testimony, defendant could not thereafter open his case in chief except by the court's permission.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 157; Dec. Dig. § 67.\*]

## 3. TRIAL (§ 67\*)—ORDER OF PROOF—REOPENING CASE.

In an action on a note given by defendant for laundry stock purchased, and to declare a lien therefor, on the stock, defendant claimed that at the time the stock was sold plaintiff agreed to pay certain sums which he owed the laundry, which amounts were a lien on the stock, and plaintiff claimed that the laundry company was a party to the agreement between himself and defendant for the sale of the stock, and that the amount of such indebtedness was fixed thereby and defendant agreed to assume it. Defendant introduced his evidence in chief and rested, and plaintiff testified in rebuttal, when the court permitted defendant to reopen his case in chief and testify as to the transaction by which the stock was sold. Held, that there was no abuse of discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 157; Dec. Dig. § 67.\*]

## 4. APPEAL AND ERROR (§ 1047\*)—HARMLESS ERROR—REFUSAL TO REOPEN CASE—PREJUDICIAL EFFECT.

Defendant was not prejudiced by a ruling forbidding him to reopen his case in chief after he had put in his evidence and plaintiff had testified in rebuttal, where he was afterward virtually permitted to reopen his case in chief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4132; Dec. Dig. § 1047.\*]

## 5. CORPORATIONS (§ 169\*)—LIEN ON STOCK—ENFORCEMENT IN ACTION ON NOTE — EVIDENCE.

In an action on a note given for laundry stock, where the defense was that plaintiffs were indebted to the laundry company, which indebtedness was a lien on the stock, and that they had not paid the debt as agreed, the burden was on defendant to prove such defense, having admitted the execution of the note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 620; Dec. Dig. § 169.\*]

## 6. CORPORATIONS (§ 169\*)—LIEN ON STOCK—ENFORCEMENT—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action on a note given for laundry stock, defendant's evidence tended to show that plaintiff was indebted to the laundry company, which debt was a lien on the stock, and had not paid the indebtedness as agreed, while plaintiff claimed that before the stock was sold the amount of his indebtedness to the laundry was agreed upon, and defendant agreed to assume it as a part of the purchase price. The court instructed that the amount of plaintiff's indebtedness to the laundry should be deducted from the amount of the note in finding for plaintiff, unless plaintiff, defendant, and the laundry company agreed as to the amount thereof, and defendant assumed the debt as a part of the price of the stock, when plaintiff would be entitled to recover the full amount of the note. Held, that

the instruction was proper and presented the issues, the only issue being whether plaintiff's indebtedness to the laundry was settled.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 620; Dec. Dig. § 169.\*]

## 7. EVIDENCE (§ 413\*) — PAROL EVIDENCE — VARYING WRITINGS—CONTRACTS OF SALE.

Testimony by plaintiffs, in an action on a note given by defendant for laundry stock, that defendant insisted upon an indebtedness of plaintiffs to the laundry being fixed and settled before purchasing, did not conflict with the contract for the sale of the stock, which required defendant to pay the laundry company, as a part of the price, certain amounts which plaintiff owed the laundry, and release plaintiff from liability to the laundry company.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1835; Dec. Dig. § 413.\*]

## 8. CORPORATIONS (§ 169\*)—LIEN ON STOCK—ENFORCEMENT—INSTRUCTIONS.

Plaintiff having introduced a written contract between himself and defendant by which defendant agreed to assume certain debts, without mentioning any others, and which provided that plaintiff was to be released from all liability to the laundry company, the only issue was whether defendant agreed to pay the amount stated in the agreement as plaintiff's indebtedness to the laundry, and a requested instruction that the written contract did not release plaintiff from any other sums due by him to the laundry was properly refused as misleading.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 620; Dec. Dig. § 169.\*]

## 9. CORPORATIONS (§ 169\*)—LIEN ON STOCK—ENFORCEMENT—SUFFICIENCY OF EVIDENCE.

In such action, evidence held to sustain a verdict for plaintiff in the full amount of the note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 620; Dec. Dig. § 169.\*]

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Actions by the Modern Laundry against William Hochbaum and another, and by William Hochbaum and another against L. Wolfert, the cases being consolidated upon the hearing. From a judgment for defendants in the first action, and for plaintiffs in the second, the Modern Laundry and Wolfert appeal. Affirmed.

Bradshaw, Rhoton & Helm, for appellants.  
J. H. Herrod, for appellees.

### Modern Laundry v. Hochbaum.

This suit was begun in the chancery court of Pulaski county, February 28, 1908. The complaint alleged: That William Hochbaum was the secretary of the plaintiff, the Modern Laundry, a corporation, during the years 1905, 1906, and 1907; that as such secretary he kept the books of account of plaintiff, and received and paid out money belonging to plaintiff; that as such secretary William Hochbaum was short in his accounts, and was due the plaintiff the sum of \$1,104.78, as shown by statement of his account which was made an exhibit; that Hochbaum owed plaintiff said sum on the 22d of October, 1907, and that on and prior to that date he

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

owned 50 shares of stock in plaintiff corporation; that these shares of stock had never been transferred on the books of the corporation, and no certificate of transfer had been filed with the county clerk of Pulaski county; that plaintiff had a lien upon the stock to secure it for the amount that Hochbaum was due it; that Louis Wolfort claimed to be the owner of the stock, but that his right was inferior to plaintiff's.

Plaintiff further alleged that D. Hochbaum and William Hochbaum had instituted suit in the Pulaski circuit court on a promissory note, asking judgment on the note, and authorizing them to sell the shares of stock of William Hochbaum to satisfy same; that, if such judgment were obtained and the stock sold, plaintiff would suffer irreparable injury. The prayer was for an injunction to restrain William Hochbaum and Louis Wolfort from making any transfer of the shares of stock, or offering same for sale, or from disposing of same in any manner whatever, and for judgment against Hochbaum for the amount sued for, and that same be declared a lien on the shares of stock mentioned, and that same be sold if necessary to satisfy the judgment.

Hochbaum answered, denying that he was indebted to the plaintiff in any sum whatever, and alleging that, when he sold his stock to Wolfort, he paid plaintiff all he owed it. Wolfort answered, alleging that it was true that Hochbaum was due plaintiff the sum of \$1,104.46 with interest; that Hochbaum sold the stock to him (Wolfort), and that he had not paid the amount of plaintiff's debt; that, if the shares of capital stock purchased by Wolfort should be charged with a lien for the amount due plaintiff, Wolfort should have judgment against Hochbaum for such sum. Wolfort prayed for judgment and for complete relief.

On behalf of appellant the testimony tended to show that Will Hochbaum was the secretary of the plaintiff, and as such kept the books and attended to the financial transactions of the corporation; that he was indebted to the plaintiff in the sum of \$1,104.76.

The testimony on behalf of the appellees tended to prove that negotiations for the sale of the stock of the Hochbaums in the Modern Laundry to Wolfort were pending for some time; that during the conferences that were had with reference to the sale all of the stockholders, who were also directors, were present, and they discussed, in connection with the sale of the stock, the indebtedness of William Hochbaum to the laundry. Finally, all the stockholders agreed that the debt of William Hochbaum to the plaintiff laundry should be definitely fixed at \$468.10, and this amount was settled under the terms of the written agreement between Wolfort and the Hochbaums as follows:

"This agreement between D. Hochbaum and William Hochbaum, parties of the first

part, and Louis Wolfort, party of the second part, witnesseth:

"That the parties of the first part hereby sell to the party of the second part one hundred and ninety-two (192) shares of stock in the Modern Laundry, a corporation engaged in the laundry business at Eleventh and Main streets, in Little Rock, Ark., at 120, the purchase price being \$5,760.00, and the party of the second part buys said stock at said price.

"Terms of payment: \$100.00 cash; \$1,900.00 to be paid November 4th, 1907; \$2,000.00 to be paid by party of second part assuming the payment of that amount parties of the first part owe the Southern Trust Company, Little Rock, and having parties of the first part released from said debt, which is to be done on November 4th, 1907. The balance—\$1,760.00—to be paid February 4th, 1908. In this way party of second part to pay Modern Laundry \$282.53 which William Hochbaum owes it on overdraft, and party of second part to pay Modern Laundry \$180.57 difference in cash shown by books and cash on hand, unless William Hochbaum can show party of second part he is entitled to some credit on said \$180.57, in which case he is to have said credit. The balance of said \$1,760.00, to wit, \$1,296.90, to be paid cash to parties of first part on February 4th, 1908, by party of second part. Party of second part to give note for said \$1,296.90 to be secured by forty-nine shares of stock in Modern Laundry. The parties of the first part are to be released from all notes of the Modern Laundry. Stock to be delivered to party of second part on November 4th, 1907, as soon as he pays the \$1,900.00, assumes the \$2,000 debt to Southern Trust Co., and has party of first part released therefrom, and has parties of first part released from all other notes of Modern Laundry, and executed and delivers the note for \$1,296.90 secured as aforesaid. The said parties of the first part agree not to go into the laundry business in Little Rock before February 4th, 1908; but this agreement is not to prevent either of them from taking employment with any laundry if they should desire. William Hochbaum's salary as secretary and treasurer to stop October 20th, 1907.

"Given under our hands this October 25th, 1907.

"[Signed]

Louis Wolfort.

"Wm. Hochbaum.

"D. Hochbaum."

The stockholders and directors of the plaintiff agreed to the arrangement and accepted the terms of the agreement, and credited Will Hochbaum with the amount Wolfort was to pay. The testimony on the part of the plaintiff in rebuttal tended to prove that Wolfort signed the contract for himself and not for the plaintiff, and that the stockholders and directors of plaintiff did not agree to the contract; that there was no agreement on the part of the plaintiff that the terms of

the written contract should settle the indebtedness of William Hochbaum to the Laundry; that there was no contract between Hochbaum and the plaintiff as to the amount of the shortage of Hochbaum, and as to how same should be settled. It was not disputed that all the stock of the Modern Laundry before the Hochbaums sold out was owned by Franklin, Wolfort, and the Hochbaums, nor was it controverted that the Hochbaums sold their stock to Wolfort under the terms of the written agreement in evidence. The court, after considering the evidence, dismissed the complaint for the want of equity.

WOOD, J. (after stating the facts as above). This case was consolidated for the purpose of the hearing with No. 455, in which the opinion has just been handed down, and it will be observed that the testimony in each case is substantially the same. The question was purely one of fact, and in our opinion the finding of the chancellor is not clearly against the weight of the evidence. On the contrary, viewing the negotiations in the light of reason, under the circumstances shown by the oral testimony and the terms of the written contract, it seems to us that the finding of the chancellor is sustained by a preponderance of the evidence. It is more reasonable that Wolfort, knowing that Hochbaum was indebted to the laundry, and that such indebtedness was a lien on his stock, would have desired to have such indebtedness ascertained and settled before he purchased the stock than that he would have purchased same with such indebtedness "in the air," so to speak. He was paying 120 for the stock, and it is hardly probable that a business man would buy incumbered stock without knowing precisely the amount of the incumbrance he was assuming. The proof shows that all the stockholders were present at conferences when the subject-matter of discussion was the purchase of the Hochbaum stock. Hochbaum was short in his accounts. It was his desire to get out, and doubtless the desire of the other stockholders, not of kin to and in friendly interest with him, to have him get out. Therefore it is entirely consistent with reason that the appellant, as the Hochbaums testify, was a party to the settlement agreed upon between the Hochbaums and Wolfort, and hence the provisions of the written contract for Will Hochbaum's salary as secretary and treasurer to cease on a day certain, and that the Hochbaums should not engage in competitive business for a certain period. The books were audited by order of the directors, and all the stockholders were cognizant that this was to bring about a settlement of his shortage and to enable Wolfort to buy his stock. The laundry accepted the payment on his account made by Wolfort under the terms of the agreement. In the conflict of evidence, the chancellor was correct under the circumstances in sustaining the contention of the appellee.

The decree is affirmed.

#### Wolfort v. Hochbaum et al.

On February 10, 1908, D. and William Hochbaum instituted a suit against L. Wolfort in the Pulaski circuit court on a note of \$1,356.90, dated November 4, 1907, claiming a lien on 50 shares of the capital stock of the Modern Laundry as security for the note. Wolfort had purchased this stock from the plaintiffs. Appellant filed an answer, cross-complaint, and motion to transfer to the chancery court, in which he admitted the execution of the note, alleging it was part of the consideration for the purchase of 50 shares of the capital stock of the Modern Laundry, which he purchased from the plaintiffs; that at the time of the purchase Will Hochbaum had been acting as secretary and treasurer of the Modern Laundry, a corporation; that he had collected large sums of money, and had failed to account for the same in a sum in excess of \$900; that at the time of the transfer of the stock D. and William Hochbaum each agreed with the defendant to pay the Modern Laundry any and all sums due by Will Hochbaum to the laundry; that no certificate of transfer of the 30 shares of stock owned by William Hochbaum and sold to the defendant had ever been filed in the county clerk's office; that the Modern Laundry claims a statutory lien upon the stock for the payment of the amount due; that he believed that the Modern Laundry was entitled to recover from William Hochbaum and to have a lien declared upon the stock; alleging that William Hochbaum was insolvent, and if compelled to pay would not only lose the shares of stock, but would be compelled to lose the amount paid to Hochbaum; and he asked to have the case transferred to the chancery court, and to be subrogated to the rights of the Modern Laundry. The circuit court refused to transfer the case, and defendant excepted.

The appellees (plaintiffs below) introduced the note sued on. Appellant introduced an expert accountant who testified that the books of the corporation showed that William Hochbaum was indebted to the corporation in the sum of \$1,104.66. Appellant testified that William Hochbaum was the secretary and treasurer of the corporation; that he had charge of the books, handled the cash, and settled the bills. Appellant then rested. Appellee Will Hochbaum then testified in rebuttal: "That he, Sam Franklin, L. Wolfort, and D. Hochbaum were the stockholders of the Modern Laundry. That a difference arose between him and his father on one side, and Franklin and Wolfort on the other. That he offered to sell his stock to Wolfort; first asked him 150, and negotiations continued until the last part of October. That he agreed to take or give 185 for the stock. Wolfort would not accept, but he finally sold to him for 120. That while the negotiations were pending his indebtedness to the laundry was a matter of discussion between them for several months. That Wolfort said, 'Hochbaum,



whenever I make a deal with you those books will all have to be fixed up, and whatever you owe will have to be fixed up."

Appellant objected to the testimony because appellee claimed under a written contract of sale. The court overruled the objection, and appellant duly saved his exceptions. The witness continued as follows:

"The books were audited at the direction of the board of directors, six weeks or two months before I sold out, by B. W. Bartlett. Wolfort knew that Bartlett was auditing them. He was engaged in the audit for some time; then he took sick and took the books with him to Colorado. I settled with the Modern Laundry by an agreement with Wolfort in writing, as follows:

"This agreement between D. Hochbaum and William Hochbaum, parties of the first part, and Louis Wolfort, party of the second part, witnesseth:

"That the parties of the first part hereby sell to the party of the second part one hundred and ninety two (192) shares of stock in the Modern Laundry, a corporation engaged in the laundry business at Eleventh and Main streets, in Little Rock, Ark., at 120, the purchase price being \$5,760.00, and the party of the second part buys said stock at said price.

"Terms of payment: \$100.00 cash; \$1,900 to be paid November 4th, 1907; \$2,000.00 to be paid by party of second part assuming the payment of that amount parties of the first part owe the Southern Trust Company, Little Rock, and having parties of first part released from said debt, which is to be done on November 4th, 1907. The balance—\$1,760.00—to be paid February 4th, 1908. In this way party of second part to pay Modern Laundry \$282.53 which William Hochbaum owes it on overdraft, and party of second part to pay Modern Laundry \$180.57 difference in cash shown by books and cash on hand, unless William Hochbaum can show party of second part he is entitled to some credit on said \$180.57, in which case he is to have said credit. The balance of said \$1,760, to wit, \$1,296.90, to be paid cash to parties of first part on February 4th, 1908, by party of second part. Party of second part to give note for said \$1,296.90 to be secured by forty-nine shares of stock in Modern Laundry. The parties of the first part are to be released from all notes of the Modern Laundry. Stock to be delivered to party of second part on November 4th, 1907, as soon as he pays the \$1,900, assumes the \$2,000 debt to Southern Trust Co., and has party of the first part released from all other notes of Modern Laundry, and executed and delivers the note for \$1,296.90 secured as aforesaid. The said parties of the first part agree not to go into the laundry business in Little Rock before February 4th, 1908; but this agreement is not to prevent either of them from taking employment with any laundry if they should

desire. William Hochbaum's salary as secretary and treasurer to stop October 20th, 1907.

"Given under our hands this October 25th, 1907.

"[Signed]

Louis Wolfort.

"Wm. Hochbaum.

"D. Hochbaum."

"In pursuance of this agreement, all the stock was delivered to Wolfort, who was to pay the laundry \$463.10. I was sick in bed when the agreement was signed. Wolfort knew that the books were out of balance and that I was overdrawn, and knew there was a difference between my cash as shown by the books and the cash turned over by Franklin. Wolfort knew these facts. He had the books at that time. I don't know whether he knew the exact amount or not. I turned the books and cash over when I went home sick. I claimed I only owed the laundry \$282. Wolfort and Franklin claimed I owed \$482. I told them I would pay that much, but when I got well and came to the office and showed them I was entitled to a credit, then the amount was to be returned to me. I don't know that Wittenberg's report is fair. I never went through the books with him. I don't know what he has there. I know whatever money came in is accounted for. No doubt there were errors both ways. Every item of money I collected was turned over to the laundry, and I did not abstract a nickel of its funds." Witness denied that Mr. Harrod, for him, stated that it did not make any difference what the shortage was, he would pay it.

The testimony of D. Hochbaum tended to corroborate that of William Hochbaum. The appellant was then recalled, and the following occurred: "Q. Begin with your negotiations there to buy or sell with the Hochbaums, and state what took place with reference to auditing the books, and everything on up to the consummation of the trade. Court: He has been on the stand once. If you have got anything in rebuttal, you can bring it out. Mr. Bradshaw: When I put him on the stand, in my direct examination, in making my case, it was only to show that Will Hochbaum was secretary and treasurer, and that is the only question I asked him. Court: If you want to direct his attention to something else about it—this is rebuttal—you can do so, but you can't rehash the case here."

The appellant duly excepted to the court's ruling. Witness continued as follows: "Witness: I did not know that Bartlett was auditing the books. Neither of the Hochbaums ever offered me 150 for the stock, or 140. At the time the contract was closed in Harrod's office, no books were there. I made the deal with Mr. Harrod acting for Hochbaum. I stated that the books would be audited, and Hochbaum should pay all that he owed the laundry. Mr. Harrod stated that anything he was short he would pay. Mr. Harrod did not contend that the contract

made was a final settlement of what Hochbaum owed the laundry. I did not understand it was a final settlement. I never accepted the statement made by Bartlett as correct. I contended that it was no statement; it was a trial balance that did not balance."

The appellant asked the following instruction: "The defendant admits the execution of the note sued on herein, but denies that he is liable for the full amount thereof, for the reason that he claims that the plaintiff William Hochbaum is indebted to the Modern Laundry in the sum of \$1,104.00, and interest on the same at 6 per cent. per annum, which indebtedness is a lien upon the stock which L. Wolfort purchased from the plaintiffs. You are therefore instructed to find for the plaintiffs in some amount; but, in determining the amount due by the defendant, it will be necessary for you to first determine from all the facts and circumstances in evidence the amount, if any, the plaintiff Will Hochbaum is indebted to the Modern Laundry Company; and, if you find from the testimony in this case that the said Hochbaum is indebted to Modern Laundry Company in any sum, it will be your duty to deduct that sum from \$1,391.95, the amount of the note and interest sued on, and return a verdict for the difference."

But the court refused to give the instruction in that form, and gave it by adding the following: "Unless there was a controversy between the Modern Laundry and William Hochbaum as to the amount of his debt to the laundry, and the matter was investigated by all parties—the Laundry Company, Hochbaum, and Wolfort, as an officer of the company and stockholder and prospective purchaser of Hochbaum's stock—and the amount of said debt was agreed upon and fixed by all the parties at a certain sum, and Hochbaum parted with his stock and sold it on the basis of his debt being fixed at that sum, and Wolfort agreed to pay said debt as a part of the purchase money he was to give Hochbaum for the stock, then, as between Hochbaum and Wolfort, the debt is paid, and plaintiffs are entitled to judgment for the amount of the note sued on."

The appellant duly excepted to the ruling of the court in giving the instruction as modified.

The appellant requested the following: "You are instructed that the written contract of sale and purchase of stock between the parties to this suit does not release the plaintiff Will Hochbaum from any other sums, if any, due by him to the Modern Laundry Company than therein stated."

The court refused the request. Appellant duly saved his exceptions.

The jury returned a verdict in favor of appellees for \$1,356.90. Judgment was entered accordingly, and this appeal has been duly prosecuted.

WOOD, J. (after stating the facts as above). First. The ruling of the court was correct in confining the testimony of appellant, when he was introduced the second time, to rebuttal. Appellant had adduced his evidence in chief, and had been on the witness stand himself, and after testifying rested. Then appellees adduced their testimony in rebuttal. Appellant then, except by permission of the court, could not reopen his case. The court, however, not only permitted appellant to testify in rebuttal of the statements of appellees, but also to testify as to what took place between himself and Harrod, the attorney for appellees. In this way the court permitted appellant virtually to reopen his case in chief and to give his version of the negotiations. This method of procedure was in the discretion of the court, and we find no abuse of the discretion. There was no prejudice to appellant in the ruling of the court.

Second. The defense to the note in suit was that Will Hochbaum was indebted to the Modern Laundry in a sum in excess of \$900, which sum was a lien on the stock that appellant had purchased of appellees; that it was agreed between the parties, when the sale of the stock was consummated, that appellees should pay the debt of Will Hochbaum to the laundry, which they had not done. The burden was upon appellant, having admitted the execution of the note, to prove this defense. The evidence in his behalf tended to prove that the indebtedness of Will Hochbaum to the laundry amounted to \$1,104.66, which remained unpaid; that at the time the written contract of sale was entered into and the note in suit was executed it was understood that the books of the laundry would be audited, and that appellees would pay all that was found to be due by Will Hochbaum. On the other hand, the appellees contended that, before appellees and appellant entered into the written contract for the sale and purchase of the stock, appellant insisted that the indebtedness of Will Hochbaum to the laundry should be settled; that the books were audited by direction of the board of directors; that there was a controversy between appellees and appellant and the laundry as to the amount that Will Hochbaum owed the laundry; that it was finally agreed between them that the amount should be fixed at \$463.10; that same was settled by appellant under the terms of the written contract with appellee supra, by which they sold and delivered to him the stock mentioned therein.

The instruction of the court was correct. The laundry was not a party to this suit, and the only issue between appellees and appellant is whether or not, as between them, the indebtedness of Will Hochbaum to the laundry was settled. The testimony of appellees to the effect that before appellant would purchase their stock he insisted that the amount of Will Hochbaum's indebtedness to the laundry would have to be ascertained and settled

is not, as appellant contends, in conflict with the written contract of sale and purchase. The written contract was introduced by appellees without objection of appellant, as evidence tending to support their contention that, in the sale of their stock to appellant, the indebtedness of Will Hochbaum to the laundry was fixed at \$463.10, which appellant was to pay as a part of the consideration to appellees for their stock. The written contract is silent as to any other indebtedness of Will Hochbaum to the laundry than the \$463.10. It does not purport to set forth other indebtedness, or to specify how it should be paid. But the contract provides that appellees were to be released from all the liabilities of the laundry company. Taking all the provisions of the contract together, it tends strongly to corroborate the oral testimony of appellees, and to support their contention that appellant, in purchasing their stock, as a part of the consideration therefor settled not only Will Hochbaum's individual indebtedness to the corporation, but also appellees' pro rata of all the debts for which the laundry was liable. The court did not err, therefore, in refusing appellant's prayer for instruction No. 2. It was well calculated to mislead the jury. The question at issue was not whether the written contract in evidence in terms released appellee Will Hochbaum from any other sum due the Modern Laundry than the amount stated therein, but, as we have stated, the only question between appellees and appellant was whether or not appellant had agreed to settle the entire amount that Will Hochbaum might be due the Modern Laundry, which amount they had fixed at \$463.10. The question was whether they had settled on that basis, regardless of what might thereafter be shown to be the true amount, or whether the Modern Laundry had released Will Hochbaum from the sums due it or not. The issue was fairly presented in the court's charge, and the evidence sustains the verdict.

The judgment is therefore affirmed.

#### GROSS v. STATE.

(Supreme Court of Arkansas. March 8, 1909.)

#### 1. CRIMINAL LAW (§ 1182\*)—APPEAL—DISPOSITION—AFFIRMANCE—FAILURE TO PROSECUTE.

Under Kirby's Dig. § 2614, regulating appeals to the Supreme Court in misdemeanor cases, the Supreme Court cannot take jurisdiction to affirm a misdemeanor judgment for failure to prosecute the appeal where the record is not filed in the clerk's office within the required time; Supreme Court rule No. 7, relating to motions to affirm judgments for failure to prosecute, applying only to civil actions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3207; Dec. Dig. § 1182.\*]

#### 2. CRIMINAL LAW (§ 1106\*)—APPEAL—RECORD—FAILURE TO FILE IN TIME—DISMISSAL.

Where the record was not filed in the office of the clerk of the Supreme Court within 60

days after a misdemeanor judgment was entered, as required by Kirby's Dig. § 2614, the appeal will be dismissed, with directions to certify the dismissal to the circuit court, so that judgment may be enforced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2801; Dec. Dig. § 1106.\*]

Appeal from Circuit Court, Perry County; Edward W. Winfield, Judge.

A. T. Gross was convicted of soliciting a bribe, and he appeals. On motion to affirm the judgment of conviction for failure to prosecute the appeal. Motion denied, and appeal dismissed.

PER CURIAM. Appellant, A. T. Gross, was tried in the circuit court of Perry county upon an indictment, and convicted of the crime of soliciting a bribe, being a misdemeanor under the statute, and his punishment assessed at a fine of \$10. He prayed for and obtained an appeal to this court on August 12, 1907, and gave a supersedeas bond, with sureties, but has wholly failed to prosecute the appeal. The Attorney General now files in this court a certified copy of the judgment and the supersedeas bond, and moves the court to affirm the judgment on account of appellant's failure to prosecute his appeal.

The statute regulating appeals to the Supreme Court in misdemeanor cases provides that "the appeal shall be prayed during the term at which the judgment was rendered, and shall be granted upon condition that the record is lodged in the clerk's office of the Supreme Court within sixty days after the judgment." Section 2614, Kirby's Dig. It appears from this statute that an appeal granted by the circuit court is conditional upon the record being filed here within the specified time, and this court cannot take jurisdiction for the purpose of affirming or reversing the case unless the transcript is lodged within that time. Rule 7 of this court, concerning motions to affirm judgments on account of failure of appellants to prosecute appeals, applies only to civil cases, and cannot be invoked in a criminal case.

Therefore the motion to affirm the judgment is denied; but the appeal is dismissed, with directions that the judgment of dismissal be certified down to the circuit court of Perry county, to the end that the judgment may be enforced, and that the prosecuting attorney may institute proceedings on the supersedeas bond, if so advised.

#### GREER et al. v. NEWBILL.

(Supreme Court of Arkansas. March 8, 1909.)

#### 1. APPEARANCE (§ 20\*)—WANT OF SERVICE.

Where a defendant, not served, appeared and filed a demurrer, which he asked should be sustained, the appearance was sufficient to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

make a decree binding on him until reversed or set aside.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 91; Dec. Dig. § 20.\*]

### 2. PLEADING (§ 221\*)—OVERRULING DEMURBER—EFFECT.

Where defendants failed to plead further after their demurrer to the complaint had been overruled, the allegations of the complaint stating a cause of action for unliquidated damages stood confessed, except as to the damages, and were sufficient to sustain the court's findings on the merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 567; Dec. Dig. § 221.\*]

### 3. PLEADING (§ 221\*)—OVERRULING DEMURBER—EFFECT—ALLEGATIONS OF DAMAGES.

Where, in an action for unliquidated damages, defendants declined to plead further after the overruling of their demurrer, plaintiff was still bound to prove the damages sustained, under Kirby's Dig. § 6137, declaring that allegations of value or of amount of damage shall not be considered as true by a failure to controvert them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 567; Dec. Dig. § 221.\*]

Appeal from Pulaski Chancery Court, John E. Martineau, Chancellor.

Action by L. W. Newbill against W. L. Greer and others. From a judgment for plaintiff, defendants Greer and Silverthorne appeal. Reversed in part, and affirmed in part, and remanded.

W. T. Tucker, for appellants. L. C. Maloney and W. C. Adamson, for appellee.

**BATTLE, J.** This suit was brought by L. W. Newbill against W. L. Greer, J. H. Kinsworthy, C. M. Dart, C. L. Silverthorne, and St. Louis, Iron Mountain & Southern Railway Company; and for cause of complaint plaintiff alleges that J. H. Kinsworthy, by his attorney, W. L. Greer, brought an action against him before C. L. Silverthorne, a justice of the peace of Pulaski county, to recover a debt of \$25, alleged to be due to Kinsworthy; that on the 10th day of January, 1907, all parties appearing, the action came on for trial, and was dismissed as to Newbill; that Greer and Silverthorne entered into a conspiracy to defraud him, and at some time subsequent to the 10th day of January, 1907, Silverthorne, in furtherance of his conspiracy, and despite the fact that he had partially written a record of his proceedings in the action of Kinsworthy against him, with the aid of Greer, procured another leaf or page from another docket of same number, color and size, and pasted it over the minutes of the proceedings which he had already written, and then wrote a judgment, dictated by Greer, against him, for the amount sued for by Kinsworthy; that he had no notice or knowledge of the judgment against him until about the last day of May, 1907, when Silverthorne, at the request of Greer, issued a writ of garnishment against the St. Louis, Iron Mountain & Southern Railway Company, and stopped payment by it of his wages, which

was five months or more after the trial of the action of Kinsworthy against him, when his right of appeal had expired; that since May, 1907, he has been greatly harassed by writs of garnishment of the wages owing him by the railway company for work and labor performed, repeatedly issued at the instance of Greer, and compelled to expend his wages in filing schedules at \$1.25 each, which was divided equally between Greer and Silverthorne pursuant to their agreement; that Greer falsely claims to have transferred the judgment entered against him in favor of Kinsworthy to C. M. Dart, and has sent it to Kansas City, in the state of Missouri, for the sole purpose of defeating the exemptions from execution and sale allowed him by the laws of Arkansas; that Kinsworthy, Greer, and Silverthorne reside in Little Rock, Ark.; that a writ of garnishment has been issued in Kansas City, Mo., at the request of Greer, and has been served upon the railway company, and it now holds his wages that he earned in the month of December, 1907, on account of the garnishment, and he has thereby been deprived of his rights as a married man and the head of a family residing in this state, and it is beyond his power to claim his wages under the exemptions allowed him, because he cannot claim them in the state of Missouri, he not being a resident of that state. He therefore asks that the judgment entered against him by Silverthorne be, upon final hearing, canceled for fraud, and that he have judgment in the sum of \$200 against Greer, Kinsworthy, and Silverthorne for damages on account of the loss of time, of the loss of employment by the railway company on account of the numerous garnishments, and the detention of his wages.

The defendants demurred to the complaint.

The court overruled the demurrer as to all the defendants, except Kinsworthy, and dismissed the complaint as to him, and, the defendants declining to plead further, found that the judgment rendered against Newbill, in favor of Kinsworthy, on the 10th day of January, 1907, was obtained by fraud, and without any notice to Newbill, and that Greer and Silverthorne had no right to enforce the same, and ordered and decreed that Greer and Silverthorne be perpetually enjoined from enforcing, or attempting to enforce, or collecting, or transferring the judgment, or issuing or causing to be issued any writ of garnishment thereon, and enjoined the railway company from paying any money in its hands, belonging to Newbill, to Greer and Silverthorne, and rendered judgment against them in favor of Newbill for \$200 damages; and they, Greer and Silverthorne, appealed.

The court found that all the defendants, except Kinsworthy, were duly served with process within the time and in the manner prescribed by law. It found that Kinsworthy

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was not served; but the record shows that he and the other defendants appeared and filed a demurrer to the complaint, and asked that it be sustained. This was a sufficient appearance to make the decree binding upon him, until it is reversed and set aside. The defendants having failed to plead further after their demurrer was overruled, but standing upon it, the allegations of the complaint, except as to damages, stood confessed. They are sufficient to sustain the findings of the court. No one appeals, except Greer and Silverthorne, and the decree is valid as to them, except as to damages (Kirby's Dig. § 6137); and as to that it is reversed, and in other respects, as to Greer and Silverthorne, it is affirmed, and the cause is remanded, with directions to the court to ascertain the damages, if any, and render judgment for the same.

### VAUGHAN v. McDANIEL.

(Supreme Court of Arkansas. March 1, 1909.)

**ASSAULT AND BATTERY (§ 35\*)—ACTION FOR—SELF-DEFENSE—EVIDENCE—SUFFICIENCY.**

Evidence in an action for assault and battery held not to sustain a verdict for defendant on the theory that he acted in self-defense.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 51; Dec. Dig. § 35.\*]

Appeal from Circuit Court, Ouachita County; G. W. Hays, Judge.

Action by Mack Vaughan, by W. H. Vaughan, next friend, against O. S. McDaniel. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Mack Vaughan, by his next friend, W. H. Vaughan, brought this action against the Freeman-Smith Lumber Company and O. S. McDaniel, one of its employes, to recover damages for an assault and battery alleged to have been committed upon him by McDaniel on the 27th day of August, 1906. The Freeman-Smith Lumber Company in its answer denied liability. McDaniel answered, and after denying that he assaulted Vaughan in his capacity as agent or employe of said lumber company, and that Vaughan suffered injuries to the extent alleged in his complaint, alleges the truth to be "that the plaintiff, Mack Vaughan, and himself had a disagreement and a personal difficulty, wherein the plaintiff harassed and annoyed and greatly incensed this defendant, causing him to strike the said plaintiff with a piece of iron pipe, which would not have been done, except for the gross insult and indignity imposed upon him by the said plaintiff, and that said plaintiff is responsible for their trouble and for his own injury in the manner aforesaid." Before the trial the action against the lumber company was dismissed.

There was evidence introduced on the trial tending to prove the following state of facts:

In August, 1906, O. S. McDaniel, as foreman, and Mack Vaughan, a boy aged 17 years, with other day laborers, were in the employment of the Freeman-Smith Lumber Company. Some of the laborers wished to attend the unveiling of a monument at Salem, near their place of work, and asked permission of the foreman to do so, which was refused by him. Among this number was Vaughan. On the day of the unveiling, all the laborers except Mack Vaughan showed up for work. On that morning McDaniel met Vaughan near the mill, and asked him why he was not at work. Vaughan replied that he had laid off. McDaniel then told him to come and get his time. There was a dispute about his wages; McDaniel insisting that he would only pay him at the rate of \$1.10 per day. Later in the morning McDaniel saw Vaughan in the mill talking to some of the hands, and walked into the room where he was and asked him what he wanted. Vaughan replied that he did not want anything. McDaniel told him to go away and let the men alone, saying: "If you haven't got any business here, this is no place for loafers." McDaniel went to the case in the filing room, and stood there, studying out some work he had to do. He then turned around to go out of the filing room. Vaughan had changed positions, and was standing nearly in line between McDaniel and the door. There was room to pass. McDaniel walked up to him, raised his hand, and said: "If you have no business here, you go on away and leave these men alone." When McDaniel got up to him, Vaughan had his hands closed in front of him. He then moved his right hand behind him, and looked McDaniel in the face. His face got red, and his jaw commenced to quiver, and he said: "You can make me get out of the filing room, but not off the platform." McDaniel replied: "If you have got me to fight, I will do it right now." McDaniel further testified: "I looked around, and took this, and hit him right on this side. He fell out of the door on his knees. I saw what I had done, and laid my stick down, and he was getting up, and Jess Lindsay came up, and I told him to take Mack and take him away. Then I went to Mr. Jones and gave myself up."

This is substantially the version of the occurrence as stated by McDaniel at the trial. In another portion of his testimony, after stating that Vaughan said, "You can make me get out of the filing room, but not off the platform," McDaniel said: "I just stepped over and picked this up, and he still had his left hand this way, and still had his right hand like it was in his pocket, and then I struck him. Q. Do you know whether that lick struck his shoulder before it struck his jaw? A. No, sir; I couldn't say. It was all done in a second. It went all over me that he wanted to interfere with my business, and from the appearance of everything I thought

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he wanted his way about it, and was going to give me trouble over it; and, if that was it, we would just have it right there and be done with it."

Mack Vaughan testified that he was struck from behind as he was walking out of the door of the filing room, and that the force of the blow broke his jaw. Other witnesses said that the instrument used was made of iron. McDaniel was arrested for assault and battery. He entered a plea of guilty, and his punishment was fixed at a fine of \$100 and three hours in jail. Other evidence was introduced to show the extent of the injuries suffered by the plaintiff. Defendant also introduced other testimony which would tend to mitigate damages; but, as the verdict was in his favor, it is not necessary to abstract it.

Judgment was entered upon the verdict in favor of the defendant, and the plaintiff has duly prosecuted his appeal.

Thornton & Thornton, for appellant.

HART, J. (after stating the facts as above). No complaint is made of the instructions given by the court, and the sole question raised by the appeal is: Was the evidence sufficient to sustain a verdict for appellee? In other words, was appellee justified in striking appellant, under the evidence, when considered in the light most favorable to him? We think not. The blow inflicted by him was not given in necessary self-defense. He had not been assaulted by appellant. In speaking of our statute in regard to assaults, in the case of Pratt v. State, 49 Ark. 179, 4 S. W. 785, the court said: "The intention and ability to commit the battery must both be shown, before an assault of any kind can be made out." This was approved in the later cases of Anderson v. State, 77 Ark. 37, 90 S. W. 846, and Williams v. State (Ark.) 113 S. W. 799.

It is manifest from appellee's own testimony that appellant did not intend to strike him; for he says that appellant told him that he could make him get out of the filing room, but not off of the platform. It is also manifest from his own testimony that he did not strike appellant because appellant had offered to strike him; for he says, in effect, that he struck appellant because he was interfering with the work of the other employes. The undisputed testimony shows that appellee was the aggressor. His answer does not set up any matter of justification, but in it his only averment is of facts in mitigation of damages.

In his answer appellee averred that he struck him with an iron pipe because of the insults and indignities that appellant offered him. In his testimony he states that he struck appellant with the stick because he was interfering with his men, and nowhere in the record does it appear that he struck him in necessary self-defense. A careful consideration of the testimony leads us to con-

clude that the evidence is not sufficient to support the verdict.

Therefore the judgment is reversed, and the cause remanded for a new trial.

# ST. LOUIS, I. M. & S. RY. CO. v. WALKER et al.

(Supreme Court of Arkansas. March 1, 1909.)

## 1. WATERS AND WATER COURSES (§ 126\*)—FLOODING LANDS—LIABILITY—SUBSEQUENT REPAIRS—EVIDENCE—ADMISSIBILITY.

In an action against a railway company for damage caused by an insufficient opening in its embankment for the passage of water, it was improper to allow plaintiff to show that after the damage complained of the opening was enlarged.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 126.\*]

## 2. APPEAL AND ERROR (§ 1032\*) — ERRORS — PREJUDICE PRESUMED.

The improper admission of evidence is presumed to be prejudicial; the burden being on the party introducing it to show that no prejudice resulted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.\*]

## 3. WATERS AND WATER COURSES (§ 119\*)—OBSTRUCTIONS—RAILROAD EMBANKMENTS.

A railroad company was not bound to construct its embankment so as to let overflow waters of a creek flow as they naturally would; its duty being to use ordinary care to provide other channels to carry off waters in their diverted course, if the embankment diverts them into unnatural courses.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 131-134; Dec. Dig. § 119.\*]

Appeal from Circuit Court, Hempstead County; J. M. Carter, Judge.

Action by A. V. Walker and another against the St. Louis, Iron Mountain & Southern Railway Company. From judgment for plaintiffs, defendant appeals. Reversed and remanded.

The appellee, A. V. Walker, as administrator of the estate of J. R. Jones, sued appellant, alleging, in substance, as follows: That in the year 1902 the defendant company owned and operated and now owns and operates a line of railway on and through the plaintiff's farm. That the Terre Rouge creek, a stream called "Dry Creek," and a slough, ran through said farm. That in the year 1902 plaintiff had in cultivation on said farm 55 acres of crop, 41 acres north and 14 acres south of defendant's line of railway. That defendant's line of railway crosses said streams on said farm, and that its embankment there is several feet high. That defendant carelessly and negligently erected its said embankment without sufficient openings in same to allow the water that naturally accumulates in said streams and upon said farm, north of said embankment, to naturally flow off and pass away. That it negligently failed to leave any openings at all where

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

its embankment is built across said Dry creek and said slough, and thereby wrongfully and negligently obstructed the natural flow of water in said streams. That by means of said embankment across said streams without openings and ditches, dug by it, the defendant wrongfully and negligently diverted the water from said streams over and across plaintiff's farm into said Terre Rouge creek, north of said embankment, thereby causing said farm to overflow. That it left a small, but insufficient, opening where said railway line crosses said Terre Rouge creek; but at said point defendant negligently threw large timbers and dirt, and suffered logs and driftwood to accumulate in said creek, after changing the bed of said creek at said place, and thereby negligently obstructed the natural flow of water in said Terre Rouge creek. That on the — day of July, 1902, defendant's wrongful and negligent erection and maintenance of its said embankment without sufficient openings and the wrongful and negligent diverting of water from said Dry creek and slough over and across plaintiff's farm into said Terre Rouge creek by defendant, and defendant's wrongful and negligent filling up of said Terre Rouge creek, obstructed the natural flow of water in said streams and backed same upon said farm and cotton north of said embankment, and held same there for several days, and said 41 acres of cotton north of said embankment was thereby overflowed and destroyed. That said cotton would not have been overflowed and destroyed had it not been for the said wrongful and negligent acts of defendant, and said wrongful and negligent acts of defendant directly caused the overflow and destruction of said cotton. That said cotton had been cultivated well, and when destroyed was in a good, healthy, and flourishing condition and worth \$1,025.

The plaintiff, further complaining of the defendant, says: That because of the said wrongful and negligent act of the defendant in and about the erection and maintenance of said embankment, which have been hereinbefore fully described, the natural flow of water in said stream was wrongfully and negligently obstructed, and on said — day of July, 1902, a large body of water was accumulated on said farm north of said embankment, and held there for several days; that the only outlet for said water was the said small and insufficient opening left by defendant at Terre Rouge creek; that said water, in passing through said opening, moved with such great force and at such a great velocity that it caused a swift current in the water as it passed over plaintiff's farm and cotton south of said embankment, which beat down, washed away, and destroyed plaintiff's said 14 acres of cotton south of said embankment; that, had it not been for the wrongful and negligent acts of defendant, the natural flow of water in said stream would not have

been obstructed, and said body of water would not have been accumulated on said farm north of said embankment; that the water that accumulated in said creek and upon said farm north of said embankment would not, in passing away, have moved with great force or at a great velocity, and would not have formed a swift current, and would not have beaten down, washed away, and destroyed said 14 acres of cotton, and, had it not been for said wrongful and negligent acts of said defendant, all water that accumulated in said creeks and upon said farm north and south of said embankment would have naturally flowed off and passed away without damage to the plaintiff; that said cotton south of said embankment had been cultivated well, and, when destroyed, was in good and healthy condition and worth \$350; that all of said cotton destroyed north and south of said embankment, by the said wrongful and negligent acts of the defendant, was worth \$1,375. And so the wrongful and negligent acts of defendant have damaged the plaintiff in said sum of \$1,375.

The answer denies specifically each and every allegation of the complaint, and, as an additional defense, states: That the defendant's roadbed and embankment, as it is now and as it was at the time of the alleged overflow, was built more than five years before the alleged overflow; that it had been for many years maintained in its present condition; that, if plaintiff had any cause for action, it arose more than three years prior to the damage complained of; and that same is barred by the statute of limitations. And further it is alleged that plaintiff planted and cultivated his crop with the knowledge of the condition of the creek and with the knowledge that it would overflow, and took the chances and assumed the risk of his crop being washed away. And it further alleges: That Terre Rouge creek and the slough and Dry creek mentioned in plaintiff's complaint, overflowed independently of defendant's embankment; that his crops would have been destroyed had there been no embankment; that defendant's railroad and embankment were built by skilled engineers, and the work was done with due caution and circumspection; and that it has not been guilty of any negligence or damage to plaintiff in any way.

A similar complaint was filed by appellee Holt, alleging that he was a tenant on the Jones farm during the year 1902, and had a crop of cotton consisting of 12 acres situated south of the line of appellant's railway. The complaint then alleged negligence the same as in the Jones case, and the total destruction of his crop thereby to his damage in the sum of \$300 for which he prayed judgment. The answer set up the same defenses as in the Jones case. The cases were consolidated and tried with a jury, who returned a verdict in favor of the Jones estate for \$400, and in favor of Holt for \$120. Judge

ment was entered accordingly, and this appeal duly prosecuted.

E. B. Kinsworthy and Lewis Rhoton, for appellant. Jas. H. McCollum, for appellees.

WOOD, J. (after stating the facts as above). First. There was evidence to sustain the allegations of the complaints, and the verdicts were not excessive.

Second. Appellees asked a witness the following question: "Q. I want you to state whether or not the railroad company, any time since 1902, have made that trestle larger?" Appellant objected to the question. Thereupon counsel for appellees said: "I offer to make this proof to show that the opening at the creek was smaller than it is now, and for that purpose only." The court overruled appellant's objection and permitted the witness to answer, as follows: "A. Yes, sir; \* \* \* a good deal. I don't know exactly. I have never measured it, but it is about the length of a sill, somewhere about 16 feet. \* \* \* There was a wreck there in 1903, and they built a longer trestle." The appellant excepted to the ruling of the court. This court, in *St. Louis Southwestern Ry. Co. v. Plumlee*, 78 Ark. 147, 95 S. W. 442, held (quoting syllabus) that "where it was a matter of dispute whether the deceased was killed by the defective condition of the wheels of a hand car, it was prejudicial error to permit plaintiff to prove that some time after the accident defendant removed the wheels in question from the hand car." The following rule laid down in 8 Enc. Ev. p. 914, is sustained by numerous authorities: "Evidence of alterations, repairs, or additional safeguards after the accident is not ordinarily competent, either to show the defective condition at the time of the accident, or for other purposes. Even when such evidence is put in by the defendant, it cannot be considered by the jury in determining whether or not the thing was in a defective condition at the time of the accident, for such evidence has no legitimate tendency to show unsafeness before the accident, and thus is irrelevant, for the reason that the change may as well have been prompted by information gained from the accident as information with which the defendant was chargeable previously, and accordingly the exercise of greater care after the accident does not reasonably tend to show a want of previous due care." See cases cited in note, and among them *Prescott & N. R. Ry. Co. v. Smith*, 70 Ark. 179, 67 S. W. 865, where Judge Riddick, speaking for the court, recognized and approved the doctrine in a quotation from *Morse v. Minneapolis & St. L. Ry. Co.*, 30 Minn. 468, 16 N. W. 359, as follows: "A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives

of others, the more likely he would be to do so; and it would seem to be unjust that he could not do so without being liable to have such act construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct and virtually holds out an inducement to continued negligence." *Morse v. M. & St. L. Ry. Co.*, 30 Minn. 468, 16 N. W. 359. In the case of *Railway v. Smith*, supra, we held that the admission of such evidence was error, but found that it was not prejudicial error in that case for the reason that the negligence of the railway company was conclusively established by other evidence.

In the case at bar, it cannot be said that the negligence of appellant was conclusively established by other evidence, and that therefore the objectionable evidence did not work any prejudice to appellant. The announcement by counsel for appellee, at the time the testimony was offered, that the sole purpose was to show that the opening of the creek was smaller at the time of the injury than at the time of the trial, did not make the testimony competent for the purpose avowed. The court did not tell, and was not asked to tell, the jury that the evidence could only be considered to determine the width of the opening at the time of the overflow. The width of the opening at the time of the overflow was not in dispute, and the width of the opening at the time of the trial, or after the overflow, was not in issue at all. The very fact "that the opening of the creek was smaller in 1902 than now" at the time of the trial, because appellant had enlarged it since the accident, was the fact that contravened the rule announced, and was the fact that, under the rule, could not be proved. It was proper to show what the width of the opening was at the time of the overflow, but such fact could only be established by competent testimony that would show the fact. In the case of *Bodcaw Lumber Co. v. Ford*, 82 Ark. 555, at page 561, 102 S. W. 896, 989, the court declared the rule as here announced, but held that the incompetent evidence elicited there "came out incidentally in the testimony of witnesses introduced by each party" to show the condition of the machine at the time of the accident. There they were seeking to prove directly the condition of the machine at the time of the accident, and that there had been alterations and repairs made after the accident; but here they were seeking to show "that the opening of the creek was smaller in 1902 than now." In other words, the fact that the testimony tended directly to establish in this case was that since the injury the appellant had built a longer trestle, as the witness answered, "somewhere about 16 feet" longer. Appellee relies upon the case of *Bodcaw Lumber Co. v. Ford*, supra, to sustain his contention that the testimony set out above was not prejudicial error, but we are of the opinion that there is a clear distinction between that case and this on



the point under consideration. "When incompetent evidence is introduced, prejudice is presumed, and the burden is on the party introducing it to show that no prejudice resulted." *St. L. I. M. & Sou. R. Co. v. Courtney*, 77 Ark. 431, 92 S. W. 251.

Third. The instructions given at the instance of appellant were certainly as favorable to it as it could ask, and the court did not err in its ruling upon the prayers refused.

Fourth. In view of a new trial, should the evidence warrant the court in submitting the question as to whether the overflow of 1902 was of such extraordinary character as that it could not have been reasonably anticipated and guarded against by the exercise of ordinary care, then the court should make its instructions on this phase of the case harmonious. The court in some of its instructions presented this idea, as in those numbered 2, 7, and 10 given at the instance of appellant and 1 and 2 asked by appellees; but in instructions numbered 3 and 4 given at the request of appellees this idea was not presented, and therefore the instructions covering this particular phase of the case might be construed as conflicting. The charge should conform to the law as announced in *Railway Co. v. Cook*, 57 Ark. 387, 21 S. W. 1066, and it should constitute a consistent whole. It was not the duty of the railway company to construct its embankment so as "to let the waters, in time of overflow, pass off and flow as they naturally or otherwise would have done." The necessary uses of the embankment and the proper construction thereof as a roadbed for appellant's railway might have made it impossible not to obstruct the natural flow of the waters in their accustomed channels. The exercise of ordinary care might not have been able to prevent this, and it was not required. The only duty of the company was to so construct its embankment that, if there was a diversion thereby into other channels than those followed by the water in its natural course, then the railway company should exercise ordinary care to provide other channels, or sufficient openings in its embankment to carry off these waters in their diverted course, so as to prevent injury to others. This refers only to waters or freshets that are not extraordinary and unprecedented, as explained above.

The judgment is reversed, and the cause is remanded for new trial.

# **TITLE GUARANTY & SURETY CO. v. BANK OF FULTON.**

(Supreme Court of Arkansas. Feb. 15, 1909.)

## **1. INSURANCE (§ 136\*)—FIDELITY BOND—DELIVERY.**

A written application for a fidelity bond, having been mailed by the applicant to defendant's authorized agents, was forwarded to defendant. Defendant, having approved the appli-

cation, signed the bond and sent the same by mail to plaintiff, the obligee, the letter inclosing the bond being addressed to the applicant, who at that time was the cashier of the obligee. The bond was forwarded to defendant's agents unconditionally, with instructions to deliver to the obligee, and shortly thereafter the premium was paid to and accepted by defendant. *Held* sufficient delivery of the bond to make it effective.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 136.\*]

## **2. INSURANCE (§ 133\*)—FIDELITY BOND—SIGNATURE BY APPLICANT.**

Where a fidelity bond did not stipulate that it was essential to its validity that the employee should sign as obligor, his failure to sign did not render the bond unenforceable by the beneficiary against the surety.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 133.\*]

## **3. INSURANCE (§ 146\*)—FIDELITY BOND—NATURE OF CONTRACT.**

A fidelity bond issued by a paid surety is in the nature of an insurance policy, and must be strongly construed against the insurer.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 146.\*]

## **4. INSURANCE (§ 264\*)—FIDELITY BOND—APPLICATION—REPRESENTATIONS.**

Where a fidelity bond issued by a paid surety did not state that the representations by the employer on which the bond was issued should be regarded as a warranty, but only recited that they should constitute a part of the contract, such statements would be considered as mere representations, the falsity of which would be insufficient to bar a recovery on the bond in the absence of bad faith.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 562; Dec. Dig. § 264.\*]

## **5. INSURANCE (§ 665\*)—FIDELITY BOND—DEFALCATION—EVIDENCE OF SHORTAGE.**

In an action on a bank cashier's fidelity bond, the surety could not be charged with alleged losses of currency shipped to the bank established only by information alleged to have been received by an accountant from letters or statements contained in letters sent by the banks claiming to have shipped the currency not otherwise shown to have ever been received by the bank or its cashier.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.\*]

Battle, J., dissenting.

Appeal from Circuit Court, Hempstead County; J. M. Carter, Judge.

Action by the Bank of Fulton against the Title Guaranty & Surety Company. Judgment for plaintiff, and defendant appeals. Affirmed on condition.

J. W. Blackwood and Bradshaw, Rhoton & Helm, for appellant. Jas. H. McCollum and Etter & Monroe, for appellee.

FRAUENTHAL, J. On June 22, 1906, T. C. Hockersmith was the cashier of the Bank of Fulton, and he had been such cashier for some time prior to that date. On that day he made application for a surety bond guaranteeing his fidelity as such cashier to Duncan, Horton & Robinson, located at Poplar Bluff, Mo., who were the local agents of the Title Guaranty & Surety Company. On the same day Duncan, Horton & Robinson trans-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mitted by mail the application to the Title Guaranty & Surety Company at Scranton, Pa., the domicile of that company, and in their letter stated that the application was for bond in the sum of \$10,000 in behalf of T. C. Hockersmith as cashier of the Bank of Fulton. Thereafter the Title & Guaranty Company transmitted by mail the bond from Scranton, Pa., to Duncan, Horton & Robinson, at Poplar Bluff, Mo., and in their letter transmitting same stated: "We inclose herewith bond No. 44,478 in behalf of T. C. Hockersmith; the premium upon which of \$25.00 we have charged to your account." On June 28, 1906, Duncan, Horton & Robinson transmitted the bond by mail to T. C. Hockersmith at Fulton, Ark., who at the time was cashier of the bank, and in their accompanying letter state: "We are pleased to inclose you Title Guaranty & Surety Bond in the sum of \$10,000.00 issued to the Bank of Fulton in your behalf as Cashier." Prior to transmitting the bond to Fulton, Ark., a record of the bond was made in their registry by Duncan, Horton & Robinson, which shows: "Bond No. 44,478 dated May 16th, 1906, term one year, expiration May 16th, 1907; name of employer, Bank of Fulton, address, town of Fulton, Arkansas; position, cashier, amount of bond \$10,000, premium \$25.00." The original bond could not be found, but E. M. Robinson, the agent of appellant, testified that it was on one of the regular forms of surety bonds issued by appellant, a copy of which was produced, and is as follows:

"The Title Guaranty & Surety Company.

"Amount, \$10,000. Annual Premium, \$25.

"Bond No. 44478.

"Whereas, Bank of Fulton, hereinafter called the employer, is employing or intends to employ T. C. Hockersmith in the capacity as cashier; and,

"Whereas, the employé has filed with the Title Guaranty and Surety Company, hereinafter called the company, an application specifying the amount of security required from said employé, and they jointly having applied to the company for the grant of this bond; and,

"Whereas, the company in consideration of the sum of twenty-five and no/100 dollars, now paid as a premium from May 16th, 1906, to May 16th, 1907, 12 o'clock noon, has agreed, upon the terms, provisions and conditions herein contained, to issue this bond to the employer; and,

"Whereas, the employer has heretofore delivered to the company certain representations and promises relative to the duties and accounts of the employé, and other matters, it is hereby understood and agreed that those representations and such promises, and any subsequent representations or promises of the employer, hereafter required by or lodged with the company, shall constitute part of the basis and consideration of the contract hereinafter expressed.

"Now, therefore, this bond witnesseth: That for the consideration of the premises the company shall, during the term above mentioned, or any subsequent renewal of such term, and subject to the provisions and conditions herein contained, at the expiration of three months next after proof satisfactory to the company, as hereinafter mentioned, make good and reimburse to the said employer, such pecuniary loss as may be sustained by the said employer, by reason of the fraud or dishonesty of the said employé in connection with the duties of his office or position, amounting to embezzlement or larceny, and which shall have been committed during the continuance of said term, or of any renewal thereof, or within six months thereafter, or within six months from the death or dismissal or retirement of said employé from the service of the employer within the period of this bond, whichever of these events shall first happen; the company's total liability on account of said employé under this bond or any renewal thereof, not to exceed the sum of ten thousand and no/100 dollars. \* \* \*

"That, no one of the above conditions or of the provisions contained in this bond shall be deemed to have been waived by or on behalf of the company, unless the waiver be clearly expressed in writing, over the signature of its president and its secretary, and its seal thereto affixed.

"And the employé doth hereby for himself, his heirs, executors and administrators, covenant and agree to and with the company, that he will save, defend and keep harmless the company from and against all loss and damage of whatsoever nature or kind, and from all legal and other costs and expense, direct or incidental, which the company shall or may at any time sustain or to be put to (whether before or after any legal proceedings by or against it to recover under this bond, and without notice to him thereof), or for or by reason or in consequence of the company having entered into the present bond.

"In witness whereof, the said — (employé) has hereunto set his hand and seal and the company has caused this bond to be sealed with its corporate seal, duly attested by the signature of its — president, and of its — secretary, this — day of —, one thousand nine hundred and —.

"Signed, sealed, and delivered by the employé at —. —, Employé.

"In the presence of:

"—.

"—.

"The Title Guaranty and Surety Company.

"Attest:

"—, Secretary."

On August 6, 1906, a draft of the Bank of Fulton on the Exchange National Bank of Little Rock for \$25 was received by Duncan,

Horton & Robinson in payment of the premium of the bond, which they had transmitted to appellant on July 25, 1906.

At the time the application was made for the bond there was transmitted therewith the following statement:

**"Employer's Declaration.**

"The foregoing applicant has been in the service of the undersigned employer two years and ——— months, and the duties required have always been performed in a faithful and satisfactory manner. The accounts were last audited on the 11th day of June, and were correct in every particular. There has never come to the notice or knowledge of the employer any act, fact, or information tending to indicate that the applicant is negligent, unreliable, deceitful, dishonest, or unworthy of confidence. As far as the employer knows, applicant's habits are good, and the employer knows no reason why you cannot safely assume the suretyship applied for.

"The above and foregoing statements and representations are made for the purpose of inducing the Title Guaranty & Surety Company to execute said bond.

"Dated at Fulton, Arkansas, the 21st day of June, 1906.

"Bank of Fulton [Employer].

"By H. L. B'Shers.

[Officer's name and title of corporation.]"

This statement was signed by H. L. B'Shers, who at the time was president of the Bank of Fulton. On June 11, 1906, there was a stockholders' meeting of the bank. At that meeting Mr. B'Shers testified: Hockersmith made a statement of everything relating to the books and accounts of the bank, and he, B'Shers, and some one else, went through the books. Hockersmith on that day made a report of the condition of the affairs of the bank to the board of directors, who examined the report. The officers of the bank had great confidence in Hockersmith, and did not know, and had no reason to know, of any dereliction or dishonesty on the part of Hockersmith; and, when Mr. B'Shers signed the above statement, he did so in good faith, believing same to be true. It appears from the teller's cash-book that there was an item of debit on the account of Hockersmith of \$1,492.25 which occurred in every date from February 21, 1906, until Hockersmith left the bank in May, 1907. Hockersmith continued as cashier of the Bank of Fulton until May, 1907, when he absconded. Thereafter an examination of the books of the Bank of Fulton was made by an expert accountant, from whose testimony it appears that Hockersmith had embezzled from the Bank of Fulton the sum of \$11,773.90 from May 16, 1906, to May 16, 1907. Thereafter the appellee instituted suit against appellant on said bond and recovered judgment for \$10,000 against appellant, from which this appeal is taken.

1. The appellant contends that the evidence in this case fails to show that the bond was actually delivered, or that it was signed by Hockersmith, and that on that account the judgment should be reversed. The testimony in this case shows that a written application was made and sent by mail by the cashier, Hockersmith, to the appellant, through its duly authorized agents, for the execution of the bond sued on herein; that the appellant accepted and approved the application, and thereupon signed the bond, and through its authorized agents sent the bond by mail to the appellee. The letter inclosing the bond was addressed to T. C. Hockersmith at Fulton, Ark., who at the time was the agent and cashier of the appellee at its place of business at Fulton, Ark. Within a short time thereafter the premium and consideration for the execution of the bond was paid to the appellant and accepted by it. This operated as a full delivery of the bond. In this case the bond was first sent by the appellant to its agents unconditionally, and with instructions to deliver the same to the appellee. This itself would bind the appellant, and was tantamount to a delivery to the appellee, even though the agent had never parted with the possession of the bond. *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134. In fact, the acceptance of an application for indemnity or insurance and mailing of the bond or policy are all of the acts that are necessary or essential to put the contract into force. *Fidelity Mutual Life Ins. Association v. Harris*, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 818. In the case of *Bostwick v. Van Voorhis*, 91 N. Y. 353, it was shown that one Bartow was chosen cashier of the bank, and his bond fixed at \$30,000, upon which suit was brought. The bond was actually executed by the sureties, and Bartow thereafter entered into the discharge of his duties as cashier. No direct evidence was given that the bond was ever delivered to or that it was ever in the possession of the bank, or that the sureties were ever formally approved. And in that case it was held that it was a fair and legal inference from these facts that the bond was delivered to and accepted by the bank. In the case of the *State Mutual Fire Insurance Association v. Brinkley, Stave & Heading Co.*, 61 Ark. 1, 31 S. W. 157, 20 L. R. A. 712, 54 Am. St. Rep. 191, this court held that when an application made to the local agent of a foreign insurance company is by him forwarded to the company at its domicile, at which place the application is accepted, and the policy of insurance signed and mailed to the applicant, the contract is then and there complete. So in this case, when the appellant accepted the application for the bond and approved the same, and thereupon actually signed the bond and deposited it in the mail addressed to its agents, with instructions for unconditional delivery, and thereupon the agents mailed

same to appellee, these acts constituted a delivery of the bond to appellee. *Travelers' Fire Insurance Co. v. Globe Soap Co.*, 85 Ark. 169, 107 S. W. 386, 122 Am. St. Rep. 22. The letters that passed between the various parties showed clearly the execution of the bond, the amount thereof, the length of time for which it ran, and that it was executed to the appellee as obligee to guarantee the fidelity of Hockersmith, its cashier. The evidence shows that the premium for the bond was actually paid and received by the appellant, and the appellant therefore understood that the bond was in full force and effect. It is claimed by the appellant that the evidence does not show that the cashier, Hockersmith, had signed the bond. This bond does not stipulate that it is essential to the validity of the contract that the employé Hockersmith should sign the same, and that it should be of no effect until he did sign it. The bond was executed for the benefit of the appellee, and it was the one who under the terms of the bond was to be protected by its provisions. The appellee was the party indemnified and the sole obligee in the bond; and, unless the bond had expressly stated that it should not take effect until it was signed by Hockersmith, the employé, it was binding upon its execution by the appellant and delivery to the appellee. Nowhere in the correspondence, which was introduced in evidence, does the appellant even suggest that the employé, Hockersmith, should sign the bond, and under the testimony in this case there is nothing to show that the signature of Hockersmith was essential to the validity of the bond. *First National Bank v. Fidelity Co.*, 110 Tenn. 10, 75 S. W. 1076, 100 Am. St. Rep. 765, 770, note.

2. It is urged by the appellant that the statement designated above as the "Employer's Declaration" became a part of the bond, and is a warranty, and that, if any of the statements therein contained is incorrect, the bond became thereby avoided. In order to determine whether these statements are warranties or mere representations, it is necessary to consider the nature of the bond sued on, and what construction the law makes relative to the provisions of such bonds. This is not an ordinary obligation given by a surety, but it is an indemnity bond, and is in the nature of a contract of insurance, insuring the fidelity of the employé. It is said by this court in *American Bonding Co. v. Morrow*, 80 Ark. 49, 96 S. W. 613, 117 Am. St. Rep. 72: "It is now well settled that the bond of a surety company, like any other insurance policy, is to be most strongly construed against the insurer. The language of the bond is that selected and employed by the insurer, and, when doubtful or ambiguous, must be given the strongest interpretation against the insurer which it will reasonably bear." And so, in determining the nature of the provisions of this bond, we first look to see whether the provisions are susceptible of two con-

structions. If they are, then we must adopt that construction which is most favorable to the bank. This is the well-settled doctrine as to the construction of such instruments as the bond sued on in this case. *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977. Now, if it had been the intention of the parties to make these provisions in the bond a warranty, it should have been so stated. But the bond does not say that any of these provisions is a warranty. It does not employ any language which says, or can be construed to say, that any of these provisions is a warranty. If it had been so desired, the bond could have well stated that, if any of the statements made in the "Employer's Declaration" was incorrect, then the bond should be void. But there is no language of that kind in the bond, or in the employer's declaration, and the court cannot construe any such language into it. In the case of *Supreme Council of Royal Arcanum v. Brashears*, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244, it is held that statements by an applicant for life insurance which by the terms of the policy are made part of the contract with the insurance company are not to be regarded as warranties, unless the policy upon its face plainly declares that they shall be treated as such. *Supreme Council, etc., v. Fidelity & Casualty Co.*, 63 Fed. 48, 11 C. C. A. 96. The general rule is that a statement in an application is a representation rather than a warranty, unless it is made a warranty by express terms, or by such language that it cannot be construed otherwise. 2 *Joyce on Insurance*, § 1891.

It is contended that because the bond states that the representations in the declaration shall constitute a part of the basis of the contract these representations should be considered warranties. But in the case of *American Popular Life Insurance Co. v. Day*, 39 N. J. Law, 89, 23 Am. Rep. 198, the application for the policy involved contained an agreement that the answers and statements should be the basis and form part of the contract of the policy, and the policy further declared that the insurance was in consideration of the representations; and in that case the court held that the agreement and statements in the application were not warranties, and that the policy could be only avoided for fraud or intentional misrepresentation. It is well settled that forfeitures are never favored, and, if the contract does not specifically and definitely provide for such forfeiture, the courts will not by a species of construction read a forfeiture into it. So in the construction of the provisions of this bond, if by any reasonable interpretation thereof a forfeiture of it can be avoided, such interpretation should be given to it, and the contract sustained. Taking into consideration all of the terms contained in the "Employer's Declaration," it is shown that it was intended by the statements therein to

represent the condition of the bank, and the accounts of the bank, as it was then understood, and the character and habits of the employé, Hockersmith, as then known to the employer. These were mere representations, and, if they were made honestly and in good faith, the fact that they were incorrect would not vitiate the bond. The testimony shows clearly that these representations were made in good faith, and that there was an honest basis for the making of the same. There had been a meeting of the board of directors, and a report of the condition of the bank was presented to them, and the books of the bank were before them. It is true that no expert accountant examined these books and accounts, but the terms of this declaration did not call for such an examination. The examination made was such as the board of directors were accustomed to make of the accounts of the bank in the ordinary discharge of their duties, and the statement set forth in the declaration was honestly made. We are therefore of the opinion that even though the above "Employer's Declaration" was duly authorized by the bank, and the statements therein were afterwards found to be incorrect, they were not warranties nor were they of such a material and essential nature as that their incorrectness would work a forfeiture of the contract, if they were made in good faith.

3. It is urged by the appellant that the evidence does not show that the shortage amounted to \$10,000. The evidence shows that soon after the cashier, Hockersmith, absconded, the appellant sent to the bank of Fulton an expert accountant for the purpose of going thoroughly through the books and accounts of the bank and find out the amount of the shortage during the life of the bond—between May 16, 1906, and May 16, 1907. This accountant testified that the amount of the shortage that occurred during that period was \$11,773.90. This shortage was made up of items to which the accountant testified, and the only items that were not established by competent testimony were the item of \$2,000 for currency shipped May 11, 1907, by the National Bank of Commerce of St. Louis, and the item of \$1,000 for currency shipped on May 8, 1907, by Exchange National Bank of Little Rock. The accountant testifies that he did not get the information as to these two items from the books of the Bank of Fulton, and that he only obtained the information from letters or statements contained in letters sent by the banks claiming to have shipped the currency. Such letters were ex parte statements, and did not prove by themselves the statements therein contained. Such testimony was not competent to show that said items of currency had been actually shipped to and received by the Bank of Fulton or its cashier. The witness testified that he obtained this information

outside of the books of the bank, and there was no competent evidence introduced relative to these two items. And the court is therefore of the opinion that these two items of the shortage have not been proved by competent evidence, and that the amount of the shortage that occurred during the life of the bond, as shown by competent evidence, is \$8,773.90.

If, therefore, the appellee will within 15 days file a remittitur, so as to make the amount of judgment \$8,773.90, the judgment of the lower court will be affirmed; otherwise the judgment will be reversed, and the cause remanded for a new trial.

BATTLE, J., dissenting.

# ST. LOUIS SOUTHWESTERN RY. CO. v. THOMPSON.

(Supreme Court of Arkansas. March 8, 1909.)

## 1. RAILROADS (§ 390\*)—INJURIES TO PERSON ON OR NEAR TRACK—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

Where the engineer of the train which struck plaintiff saw her walking so near the track that her situation was perilous, and with her back toward the train, and apparently oblivious to her danger, in time to have avoided striking her had he exercised ordinary effort, the railroad company is liable, notwithstanding she may have been guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1324, 1325; Dec. Dig. § 390.\*]

## 2. RAILROADS (§ 376\*)—INJURIES TO PERSONS ON OR NEAR THE TRACK—DUTY TO GIVE WARNING SIGNALS.

Where the engineer of the train which struck plaintiff saw her ahead, and so near the track that she would be struck, her back toward the train, and apparently was oblivious to her danger, and failed to give any warning signal, the railroad company is liable for the injuries she sustained.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1275–1279; Dec. Dig. § 376.\*]

## 3. RAILROADS (§ 398\*)—INJURIES TO PERSONS ON OR NEAR TRACK—ACTIONS—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a finding that plaintiff, who was walking along a railroad track, was struck by a train, and not to show that her injuries were due to her suddenly turning in her fright as the train passed and falling to the walk.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 398.\*]

Appeal from Circuit Court, Lafayette County; J. M. Carter, Judge.

Action by M. E. Thompson against the St. Louis Southwestern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

S. H. West and Gaughan & Sifford, for appellant. Warren, Hamiter & Smith, for appellee.

FRAUENTHAL, J. The appellee, Mrs. M. E. Thompson, instituted this suit against ap-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pellant, and alleged in her complaint that on December 11, 1906, the defendant did carelessly and negligently run one of its engines and trains against and upon her in the town of Stamps, and thereby did injure her in the sum of \$2,000.

The answer denied the allegations of the complaint and pleaded contributory negligence, alleging that the plaintiff was walking along near the track where defendant's trains were passing, and by her own carelessness and negligence fell against one of its cars after the engine had passed her, and that on account of her age she was careless in walking along so near the track. The evidence tended to establish the following state of case: In the forenoon of December 11, 1906, the plaintiff had gone to the post office, and was returning to her home. The track of defendant's road in the town of Stamps runs practically east and west. The depot in use at the time of the accident is about one-quarter of a mile west of the old depot, and between these and on the north side of the railroad is the post office. There is a walk leading from the post office to the railroad, and a walk or pathway continues on the railroad right of way, east and west, and runs near to and by the side of the railroad track. The public in going from the post office to points in the town would travel along this walk to the railroad, and then upon the walk or path along and near the railroad track, and at the time of the accident, and for a long period prior to that time, this walk and pathway was used by everybody generally, to the knowledge of and without objection by defendant. The plaintiff on this occasion had gone from the post office to the railroad, and then was walking along the pathway or walk by the side of the track going east towards the old depot. When she reached the railroad, she looked up and down the track to see if any train was moving thereon, and, seeing none, she proceeded along the pathway next to the track, going east in the direction of the old depot and also of her home. She was an old lady and wore a bonnet. She had traveled by the side of the railroad track for a distance of from 75 yards to 100 yards, when the defendant's passenger train coming from the west and at her back struck her. From the new depot to the old depot the track was perfectly straight and level, and there was no obstruction, and the plaintiff, with her bonnet covering her head, could have been easily seen by any one in the cab of the engine. The train had stopped at the new depot and then had pulled out, going east, and at the time it struck plaintiff was going at the rate, as variously estimated by witnesses, of from 6 to 20 miles per hour. The plaintiff was on the left side of the track, and her right side was next the track. The engineer was in his cab on the right side of the track, and, as the train approached the plaintiff from her back, he

was up in the cab looking down the track in the direction plaintiff was going, and the evidence tended to prove that he saw the plaintiff the entire distance from the new depot and until he got within a few feet of her, when his vision was obstructed by the smokestack of the engine. The plaintiff was walking up against the end of the ties, and so near to the track that her position was perilous, and so apparent that it attracted the attention of a number of the witnesses. One of the witnesses was standing on the opposite side of the track, and when the train approached near her, fearing that she would be struck by the train, because she was walking so close up to the track, he cried out to her to warn her of the danger, but she did not hear him. Another witness, who was walking behind her at some distance, seeing plaintiff walking so near the track as the train was approaching, and realizing her imminent danger, was so frightened by the sight that, as the witness says: "She was scared so bad she was sick." Another witness had just passed the plaintiff going in the opposite direction along the track. When this witness had gone about 75 yards past her, and the train had passed him going in direction of plaintiff, he stopped and turned to look at plaintiff, fearing that the train would strike her. She was walking so close to the track, as he looked towards her and saw the train approaching her, that he believed the train would strike her. The train was then 75 yards away from plaintiff and was approaching her from the rear. The engineer was in the engine looking directly out of the cab and in her direction. There was no whistle blown, no bell was rung, and the speed of the train was not slackened until after it struck the plaintiff. The evidence tended to show that the pilot on the engine or the step on side of coach struck her on the right hip, turning her around, and then causing her to fall. The evidence tended to show that the engineer saw the plaintiff and saw her perilous situation before the train struck her, and at such a distance and in such time as to have stopped the train, and that after thus seeing her perilous condition he did not give any signal or warning. A verdict was returned in favor of plaintiff for \$250, and, judgment being rendered thereon, the defendant has appealed to this court.

We find no error in the instructions given by the court. They were favorable to the appellant. They were entirely based upon the theory that the plaintiff was either a trespasser or negligent in walking so near the track and that the responsibility of defendant only began after the defendant discovered her peril. Upon the part of the plaintiff, the court instructed the jury as follows: "(1) The court instructs the jury that the defendant cannot be held liable for negligence in this cause if the plaintiff, by her own negligence, has contributed to the in-

jury complained of, unless it was a willful injury, or one resulting from want of ordinary care on the part of the defendant to avert it after the negligence of the plaintiff had been discovered; but such a failure to use ordinary care to avoid injuring the plaintiff after her peril had been discovered, if you find it was discovered, rises to the grade of wanton or reckless conduct, and renders immaterial the inquiry as to the contributory negligence of the plaintiff in exposing herself to danger. (2) If the jury find from a preponderance of the evidence in this cause, either direct or circumstantial, that the engineer of the train which struck the plaintiff saw her walking dangerously near the track in time to have avoided injuring her, and knew, or had reasonable grounds for believing, that she was not aware of the approach of the train, and so oblivious of her danger, and that by using with ordinary care the means within his control he could have prevented injuring her, but thereafter failed to use with reasonable care the means within his control to prevent injuring her, but willfully or wantonly or recklessly ran the train or engine onto or against her, and thereby injured her, you will find for the plaintiff, notwithstanding you believe she was guilty of negligence contributing to her injury."

And upon the part of defendant the court instructed the jury as follows: "(2) The jury are instructed that if they find the plaintiff was walking along a path by the side of defendant's railway where people were accustomed to walk in safety, and you further find that the engineer in charge of defendant's train saw her in time to have stopped the train before reaching her, but that he, in the exercise of ordinary care, believed the train would pass her without striking her, and you further find that the engine did pass her without striking her, and that some other portion of the train brushed her or frightened her so that she fell and was hurt, your verdict should be for defendant. (3) Unless you find from a preponderance of the evidence that the engineer in charge of defendant's train saw plaintiff in time to have prevented the injury, your verdict should be for defendant."

The law governing the duty of a railroad company to a trespasser upon its track, or to one who, at or near its track, has become imperilled by his own negligence, has been stated frequently by this court. It is well established that when a defendant becomes aware of the plaintiff's negligence and of the danger to which that negligence exposes him, and yet fails to exercise ordinary care in avoiding it, he is liable for the injury. In such a case it matters not if the plaintiff was guilty of negligence. The failure to use ordinary care to avoid injuring the plaintiff after his perilous situation has been discovered renders immaterial the inquiry as to the contributory negligence of

the plaintiff in exposing himself to injury. In such a case, as has been said by this court: "The defendant would be guilty either of willful negligence or of negligence which might be said to be the proximate cause of the injury; while the negligence of the plaintiff would be but the remote cause or a mere condition of the injury." *Johnson v. Stewart*, 62 Ark. 164, 34 S. W. 889; *Sibley v. Ratliffe*, 50 Ark. 477, 8 S. W. 686; *Kansas City R. Co. v. Fitzhugh*, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211; *St. Louis & San Francisco R. Co. v. Townsend*, 69 Ark. 380, 63 S. W. 994; *St. L., I. M. & Sou. Ry. Co. v. Evans*, 74 Ark. 407, 86 S. W. 426; *St. L., I. M. & Sou. R. Co. v. Hill*, 74 Ark. 478, 86 S. W. 303; *Griffie v. St. L., I. M. & Sou. R. Co.*, 80 Ark. 186, 96 S. W. 750; *Mo. & North Ark. Ry. Co. v. Bratton*, 85 Ark. 326, 108 S. W. 518.

In this case the evidence tended to prove that the engineer saw the plaintiff walking so near the track that her situation was perilous. Her back was towards the train, and a bonnet was over her head, so that it was apparent that she was oblivious to her danger. This was apparent to the engineer at a distance when he could by ordinary effort have stopped the train before striking plaintiff; but the defendant is further liable because its engineer saw the plaintiff ahead and so near to the track that she would be struck by the passing train, and that she gave no evidence that she was aware of the approach of the train, and after thus discovering her perilous situation the defendant negligently failed to give any warning signal of the danger. In *2 Thompson on Negligence*, § 1741, quoted with approval in *St. L., I. M. & Sou. R. Co. v. Evans*, 74 Ark. 407, 86 S. W. 426, it is said: "The most obvious suggestion of prudence and social duty requires that the engineer who is driving the train shall give warning signals to a trespasser, whom he sees on the track in front of the train with his back to it, in sufficient time to enable him, after hearing the engine, to quit the track in safety; and this is so although the trespasser suddenly and unnecessarily assumes a place in dangerous proximity to the track."

It is contended by defendant that the train did not strike the plaintiff, that the plaintiff turned suddenly in her fright as the train passed her, and that in so turning she fell to the gravel walk, and whatever injury she sustained was caused by her fall on the walk. There was some testimony introduced to sustain that theory; but we think there is ample evidence to sustain the finding that she was struck by the train on her right hip as it passed her, and that by the stroke she was knocked around and away from the moving train.

After a careful examination of the testimony, we think there is sufficient evidence to sustain the verdict of the jury.

The judgment is therefore affirmed.

**ROAD IMPROVEMENT DIST. NO. 1 et al.  
v. GLOVER.**

(Supreme Court of Arkansas. March 8, 1909.)

**1. HIGHWAYS (§ 90\*)—ROAD DISTRICTS—THEORY OF FORMATION AND EXTENT.**

Districts formed for the construction and maintaining of roads, the cost thereof to be defrayed by the lands benefited, are sustainable only on the theory that the local assessments levied therefor are imposed on the property of persons peculiarly benefited in the enhanced value of their property, so that, while they bear the cost, they suffer no loss, and hence a district should not extend beyond the limits of the benefits of the improvements made, and include territory not affected by all the improvements, so that neither, the state nor a county could be organized into such a district without usurping the exclusive jurisdiction of roads vested in the county court by the Constitution, though this would not apply to districts including cities and towns.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 90.\*]

**2. HIGHWAYS (§ 90\*)—ROAD DISTRICTS—ESTABLISHMENT—POWERS OF LEGISLATURE.**

The Legislature may authorize the organization of a part of a county into a road district for repairing, maintaining, and improving roads already in existence, on petition of a majority in value of the landowners therein, the cost to be paid with money derived from local assessments; but such districts cannot be formed or authorized to lay out and establish new roads, and impose on the county court the duty to maintain them, as provided by section 9, Act April 4, 1907 (Acts 1907, p. 348).

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 90.\*]

**3. CONSTITUTIONAL LAW (§ 70\*)—AMENDMENT OF DEFECTIVE STATUTES—EXCLUSIVENESS OF LEGISLATIVE FUNCTION.**

The power to amend a defect in a statute which is otherwise inoperative belongs exclusively to the legislative department.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132; Dec. Dig. § 70.\*]

**4. HIGHWAYS (§ 90\*) — ROAD IMPROVEMENT DISTRICTS—INOPERATIVE STATUTE.**

As Act April 4, 1907 (Acts 1907, p. 340), providing for road improvement districts, does not provide for the assessment of lands benefited, or how it is to be made, it is inoperative.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 90.\*]

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Action by E. D. Glover against Road Improvement District No. 1 and others. From a decree in favor of plaintiff, defendants appeal. Affirmed.

See, also, 111 S. W. 1125.

J. C. Marshall, for appellants. Ratcliffe, Fletcher & Ratcliffe, for appellee.

**BATTLE, J.** Sections 1, 2, and 9 of the act entitled "An act to provide for the creation of improvement districts for the building, constructing, maintaining, and repairing of public roads in the state of Arkansas," approved April 4, 1907 (Acts 1907, p. 340), are, in part, as follows:

"Section 1. Whenever a majority in value of the landowners of any county, or part of

a county, such majority in value to be determined by the assessment for purposes of general taxation in force at the time, shall present a petition to the county court of any county in this state, praying for the formation of a road improvement district, the said county court shall, after having given notice for twenty days by printed copies posted in ten places in said county or a part thereof, one of which shall be posted on the principal door of the court house of said county, determine the fact that such petition is so signed by such majority in value of said landowners. \* \* \*

"Sec. 2. \* \* \* Upon ascertaining, as aforesaid, that the necessary majority in value of the landowners have requested the formation of said district, the said county court shall make an order declaring the same to be and exist under the name and style 'road improvement district No. — of the county of —.' That the said district shall be and become a body politic and corporate by said name and may sue and be sued, implead and be impleaded and have perpetual succession for the purpose of building, constructing, repairing, and maintaining within the territory described in said petition and order, such public roads as may from time to time be designated by the board of directors thereof to be chosen as hereinafter stated."

"Sec. 9. All roads built, constructed, maintained, and repaired under the authority of this act shall be public roads, and after the roads shall have been built, constructed, maintained, and repaired, the same shall be and constitute a part of the general highways of the county, to be thereafter cared for and maintained by the county court out of the general revenues and special road tax authorized by the Constitution and laws of the state of Arkansas."

Is this act valid? Its object is to authorize the county court of any county to form such county, or parts thereof, into a district or districts upon petition of a majority in value of the landowners in such county or part of a county, for the purpose of "building, constructing, repairing and maintaining" roads within the district; the cost and expense thereof to be defrayed by assessments upon the lands benefited, with such aid as the county court may contribute. Such districts are based and sustainable only upon the theory that the local assessments levied to sustain them are imposed upon the property of persons, who are specially and peculiarly benefited in the enhancement of the value of their property by the expenditure of the money collected on the assessment, and that, while they are made to bear the cost of the local improvement, they at the same time suffer no pecuniary loss thereby; "their property being increased in value by the ex-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



penditure to an amount at least equal to the sum they are required to pay." Rector v. Board of Improvement, 50 Ark. 118, 129, 6 S. W. 519. According to this theory, the district should not extend beyond the limits of the benefits of the improvements made in pursuance of the object of its organization, and should not be so extended by many and independent improvements as to include territory in no wise affected by all the improvements. It is obvious the state cannot be organized into a district to construct or maintain improvements to be paid for with money derived from local assessments. So counties cannot be organized into districts for the building, repairing, and maintaining roads without usurping the exclusive jurisdiction of roads vested in the county court by the Constitution. Its roads and need for roads are too numerous, diverse, and independent, and some too remote from each other, to be embraced in one district and sustained by local assessments. In such a case the board of directors of the road district would become a partial substitute for the county court vested with its jurisdiction over roads. We do not mean to apply what we have said to improvement districts including cities and towns. That subject is not presented for consideration in this case, but has been considered in another case. *Crane v. Siloam Springs*, 67 Ark. 30, 55 S. W. 955.

We are of opinion, however, that the Legislature can by a valid act authorize the organization of a part of a county into a road district for the purpose of repairing, maintaining, and improving public roads in such district already in existence, upon the petition of the majority in value of the landowners in the territory to be affected, the cost and expense of such improvement to be paid with money derived from local assessments, and that this can be done upon the theory before suggested; but a majority of the judges of this court are of opinion that such districts cannot be formed or authorized to lay out and establish new public roads, and impose upon the county court the duty to maintain them, as in section 9 of the act. They hold that this would be a usurpation of the exclusive jurisdiction of the county court over roads. The writer does not concur in this view.

The act further provides: "That before any tax is levied under the authority of this act, the several and particular tracts of land that are to be benefited by the building, construction, maintenance, and repair of any existing or contemplated road shall be considered and determined by said board of directors," etc. But there is no provision made for the assessment of the land—no provision as to how the assessment of the land shall be made upon which a tax can be levied. This

is a defect which could be easily cured, if we had the power to amend; but that belongs to the legislative department.

Endlich, on the Interpretation of Statutes, says: "It has been seen that the plain meaning of the language used in a statute will not be departed from in its construction, though the purpose of the enactment be defeated by following it. Upon the same principle, courts cannot supply legislative defects and omissions, although by reason of such the statute becomes, in whole or in part, practically unenforceable or inoperative. So an act which authorized municipalities, according to the procedure therein described, to open and widen streets, and prescribed a procedure for the opening, but none for the widening of the same, was held to that extent inoperative." *Chaffee's App.*, 56 Mich. 244, 22 N. W. 871; Endlich on the Interpretation of Statutes, § 22.

In *Jones v. Smart*, 1 T. R. 52, Mr. Justice Buller said: "Be that as it may, we are bound to take the act of Parliament as they made it. A *casus omissus* can in no case be supplied by a court of law, for that would be to make laws. Nor can I conceive that it is our province to consider whether such a law that has been passed be tyrannical or not."

In *Crawford v. Spooner*, 6 Moore, P. C. 1, Lord Broughman said: "We cannot aid the Legislature's defective phrasing of the act. We cannot add, and mend, and by construction, make up, deficiencies which are left there."

In *Hobbs v. McLean*, 117 U. S. 567, 579, 6 Sup. Ct. 870, 29 L. Ed. 940, the court said: "When a provision is left out of a statute either by design or mistake of the Legislature, the courts have no power to supply it. To do so would be to legislate and not to construe. 'We are bound,' says Mr. Justice Buller, in *Jones v. Smart*, 1 T. R. 44, 'to take the act of Parliament as they made it.' Mr. Justice Story, in *Smith v. Rines*, 2 Sumner, 338, 354, 355, Fed. Cas. No. 13,100, observes: 'It is not for courts of justice *proprio marte* to provide for all the defects or mischiefs of imperfect legislation.' See, also, *King v. Burrell*, 12 A. & E. 460; *Lamond v. Elffe*, 3 Q. B. 910; *Bloxam v. Elsee*, 6 B. & C. 169; *Bartlett v. Morris*, 9 Port. (Ala.) 268." See, also, *Lessee of French and Wife v. Spencer*, 21 How. 228, 238, 16 L. Ed. 97; *Yturvide's Executor v. United States*, 22 How. 290, 293, 16 L. Ed. 342.

The foregoing doctrine applies peculiarly to cases like this, where the object of the act may be to incumber lands with liens of local assessments.

It is not necessary to consider other objections to the act in this opinion. The act is inoperative.

Decree affirmed.

## JACKSON v. CLAY.

(Supreme Court of Arkansas. March 8, 1909.)

## 1. HABEAS CORPUS (§ 99\*)—CUSTODY OF CHILDREN—RIGHT OF FATHER.

The father's right to the custody of infant children is not an absolute right given him because he is its father, but a qualified right, to be exercised for the child's benefit, and results from the presumption that as a general rule its welfare is best subserved by intrusting it to his care.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99;\* Parent and Child, Cent. Dig. §§ 4, 14.]

## 2. HABEAS CORPUS (§ 99\*)—CUSTODY OF CHILDREN—GROUNDS—PREFERENCE OF CHILDREN.

In awarding the custody of infants on habeas corpus, the court not only considers the rights of the parents, but also the wishes of the child, when it is of sufficient age and intelligence to make a choice.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99;\* Parent and Child, Cent. Dig. §§ 4-32.]

## 3. HABEAS CORPUS (§ 85\*)—CUSTODY OF INFANTS—SUFFICIENCY OF EVIDENCE—RIGHT OF FATHER TO CUSTODY.

In habeas corpus by a father for the custody of a 12 year old child, evidence, in view of the rights of the parents, the child's welfare, and his preferences, held to require that the custody of the child be awarded to the mother and not to the father.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 85;\* Parent and Child, Cent. Dig. §§ 4-32.]

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Habeas corpus proceedings by R. El. Clay against Hallie Jackson to obtain the custody of a child. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

Marshal & Coffman, for appellant. Robertson & De Mers, for appellee.

HART, J. This is a contest between father and mother for the custody of their son, Charlie, who was about 12½ years of age at the date of the trial. When he was born, his mother became seriously ill, and for thirty days was not expected to live. She was confined to her bed for over two months. She was unable to do anything scarcely for two or three years according to the testimony of herself and of her mother. In any event, soon after his birth, Charlie was placed in the custody of his paternal grandparents, and remained with them until his grandmother's death, which occurred in his sixth year. His parents separated when he was seven or eight months old, and his father went to the Indian Territory to live. Afterwards his mother obtained a divorce. When his grandmother died, his father returned to Arkansas to live and took him into his custody. His father, in a short time afterwards, married again. Charlie lived with his father and stepmother for something over two years until their separation. He

then went to live with his mother, and has lived with her most of the time for the past four years, making occasional visits to his father. In the meantime, his father secured a divorce from his second wife and has remarried. His mother, also, married J. W. Jackson about four months before the present action was instituted. Habeas corpus proceedings were instituted in the Pulaski chancery court by R. El. Clay, the father, against Hallie Jackson, the mother, to obtain the custody of the child. The chancellor awarded the custody of the infant to his father, and his mother has duly prosecuted an appeal to this court.

The determination of a contest involving the custody of infant children must necessarily depend to a large extent upon the evidence in each case. However, it may be well to notice the general principles which control in such cases. The opinion in the case of Coulter v. Sybert, 78 Ark. 193, 95 S. W. 457, contains an extended and instructive discussion of the principles governing the custody of infants. The court said that the father has no proprietary right or interest in or to the custody of his infant child, and held that "while the custody of an infant is generally awarded to the father, as being its natural protector, the courts are not bound to deliver the infant into the custody of the father, or of any other person, but will investigate all the circumstances, and act according to sound discretion as the welfare of the child appears to require." From the reasoning of the court, it will be seen that the right of the father to the custody of his infant child is not an absolute right given to him because he is the father, but it is rather a qualified right to be exercised for the benefit of the infant, and has arisen from the presumption of the law that the welfare of the child, as a general rule, is best promoted by having the care of his natural protector. In the case of Lipsey v. Battle, 80 Ark. 287, 97 S. W. 49, the court held that "in awarding the custody of infants the courts not only respect the rights and feelings of the parents, but also, when the child is of sufficient age, they give consideration to his wishes." In the case of Wofford v. Clark, 82 Ark. 461, 102 S. W. 216, the contest was between the father and grandmother of the child. Under the facts of that case, the court was of the opinion that the custody should be awarded to the father, but the principles above announced were expressly recognized.

In the present case, the testimony adduced by the mother shows that, by reason of her long-continued illness, she was unable to give the child a mother's care after its birth, and was on this account compelled to acquiesce in the child being taken from her and placed in the care of his paternal grandmother. Her testimony shows that her husband gave

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

her but little care and attention during her illness, and, in seven or eight months after the birth of their child, abandoned her while she was yet unable to care for herself. The testimony in her behalf, also, shows that Clay is a man who constantly drinks, and that his course of conduct toward the child has been harsh and unfeeling. She shows that she has land of her own and is well able to take care of the child, and that her present husband also has property of his own and is able and willing to help her take care of him. She says that for the past four years she has sent the boy to school, and has for the most part supported him. On the other hand, the father claims that he has always been kind and indulgent toward the child, and that, while he lived in another state, he came back to visit his boy and contributed largely to his support while he lived with his grandparents, and later while he lived with his mother. He denied the habitual use of intoxicants, and said that Charlie always expressed himself as satisfied with his treatment and as content to live with him. He, also, states that, while he owns no land, he has plenty of stock and makes a good living. At the time of the trial, Charlie was 12 years and 5 months old, and was a witness in the case. His testimony shows him to be a bright and intelligent boy. He unhesitatingly said that his father was unkind to him. He said that his father was in the habit of drinking, and that he had on one occasion kicked him while he was sick, and that he had, on different occasions, severely whipped him without cause. He expressed a positive desire to live with his mother, and said that his life with her was happier and his treatment there far better than when with his father. The unfortunate circumstances of the separation of his father and mother has placed the child in a situation in life where he has lived separately with each of his parents. This fact has perhaps made a decided impression upon his mind, and has caused him to make a comparison of their conduct toward him. Be that as it may, his testimony shows that he is capable of understanding his situation in life, and his testimony, which appears to have been given freely and without suggestions or prompting from any one, shows a decided preference on his part to live with his mother. The rights of the respective parents, the welfare of the child, and his preference, viewed in the light of his mental development, are to be considered together in determining the question of custody, and when so considered, under all the facts and circumstances developed by the proof, we are led to the conclusion that the custody of the child should be awarded to the mother.

The decree of the chancery court is therefore reversed, and the cause remanded, with

directions to place the custody of the infant in the mother, with the usual directions concerning the right of visitation of the father.

# FLOWERS et al. v. UNITED STATES FIDELITY & GUARANTY CO.

(Supreme Court of Arkansas. March 8, 1909.)

## 1. HOMESTEAD (§ 32\*)—UNOCCUPIED PROPERTY—INTENTION.

Where certain premises had never been used by a debtor as a homestead, and there was only an intent to occupy the property as a homestead at some indefinite future time, when the debtor should be able to build a house thereon, such intention was not sufficient to raise a homestead exemption as against creditors.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 41; Dec. Dig. § 32.\*]

## 2. HOMESTEAD (§ 58\*)—PROPERTY INCLUDED—HOUSE.

A homestead necessarily includes the idea of a house for a residence. It may be a mansion, a cabin, or a tent; either being sufficient to bring the land under the protection of the homestead law, provided the debtor makes his home therein.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 86; Dec. Dig. § 58.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3327-3336; vol. 8, pp. 7679, 7680.]

## 3. EXECUTION (§ 163\*)—VACATION AFTER TERM—FRAUD.

Under Kirby's Dig. § 3224, providing that a judge of a court out of which an execution issues may for good cause shown stay, set aside, or quash the execution, an application to quash, after the term at which the judgment was rendered, because there was no service of summons, was properly denied, where the judgment was valid on its face, and there was no showing that the defendant had any valid defense thereto.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 476; Dec. Dig. § 163.\*]

Appeal from Circuit Court, Garland County; W. H. Evans, Judge.

Action by H. B. Flowers and another against the United States Fidelity & Guaranty Company. Judgment for defendant, and plaintiff King B. Flowers, Jr., appeals. Affirmed.

G. G. Latta, for appellant. Greaves & Martin, for appellee.

HART, J. On the 14th day of June, 1906, the United States Fidelity & Guaranty Company recovered judgment against Henry Flowers and King B. Flowers, Jr., for \$286.85, in the circuit court of Garland county, Ark. At that time King B. Flowers, Jr., owned the following described tract of land, to wit: S. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  and N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of section 14, township 2 S., range 19 W., in said county, and about one year afterwards sold it to C. T. Bailey for the sum of \$800. In April, 1908, an execution was issued and levied on the lands above described, and the same were advertised to be sold on the 11th day of May, 1908. Before the day of sale, King B. Flowers, Jr.,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

moved to quash the execution under section 3224 of Kirby's Digest, and for cause stated that he had never been served with summons in the case of United States Fidelity & Guaranty Co. v. Henry Flowers and King B. Flowers, Jr., and had no knowledge that judgment had been rendered against him in said cause in the Garland circuit court, until the execution was issued and levied upon the said lands. King B. Flowers, also, filed his schedule before the clerk of said circuit court, claiming that said property was his homestead at the time of the rendition of said judgment, and as such was exempt from execution. The clerk denied his application for a supersedeas. The proceedings to quash the execution and to compel the clerk to issue a supersedeas were, by agreement of parties, consolidated and considered by the court together. The court denied the motion to quash the execution, and held that the property was not exempt from seizure and sale under the execution. King B. Flowers, Jr., has duly prosecuted an appeal from this judgment of the court.

Should the judgment be affirmed? Briefly stated, the evidence shows that, about two years before the judgment against him was rendered, Flowers, who was a married man and a resident of the state of Arkansas, purchased the land in question with the intention of making it his homestead. It was heavily timbered, and had no improvement of any character on it. Flowers cut a great deal of the timber into cordwood and hauled it away. He partly cleared about eight acres. He never built a house, dug a well, or built a fence on any part of it. He never lived on it, but lived in the city of Hot Springs during the whole time he was cutting the timber. He said that he became ill and on the advice of his physician went to Texas for several months. On his return to Hot Springs he engaged in the plumbing business, and for lack of means was unable to prepare himself a dwelling house on the land. The premises were never used by Flowers as a home. There was only an intention to occupy it as such at some indefinite future time, when he should become able to build a home or house thereon. This was not sufficient to impress upon the land the homestead character.

In the case of Williams v. Dorris et al., 31 Ark. 466, the court said: "A homestead necessarily includes the idea of a house for residence, or mansion house. The dwelling may be a splendid mansion, a cabin, or tent. If there be either, it is under the protection of the law; but there must be a home residence before it and the land on which it is situated can be claimed as a homestead." This language was quoted with approval in the later cases of Tillar v. Bass, 57 Ark. 179, 21 S. W. 34, and Shell v. Young, 78 Ark. 479, 95 S. W. 798. In the case of Patrick v.

Baxter, 42 Ark. 175, the facts were as follows: Patrick recovered a judgment before a justice of the peace against Baxter. An execution was issued and returned nulla bona. Patrick filed a certified transcript of the judgment in the office of the circuit clerk. An execution was issued by the clerk, and levied upon the lot of Baxter. At the time of the levy, Baxter was building a house on the lot, with the intention of making it his home. The court held that he had not impressed upon it the character of a homestead when the execution was levied upon it, and that it was not exempt from execution. In the case of Gebhart v. Merchant, 84 Ark. 359, 105 S. W. 1034, the court held that occupancy of a dwelling house with the intention of making it a home some time in the future does not constitute an impressment upon it of the homestead character.

Section 3224 of Kirby's Digest provides that a judge of a court out of which an execution issues may, for good cause shown, stay, set aside, or quash the execution. The ground upon which Flowers invoked the aid of the court under this section was that the judgment, upon which the execution was issued, was rendered without any service of summons being had upon him. The court was right in not quashing the execution. The judgment was valid upon its face, and the term at which it was rendered had elapsed. Flowers does not even claim that he had valid defense to the action. Conceding that no summons was served upon him, and that because of this fact the judgment was obtained through fraud or mistake, the court which rendered it could not have vacated it until it was adjudged that there was a valid defense to it. Chambliss v. Reppy, 54 Ark. 539, 16 S. W. 571. Besides this, the court may have well found from the evidence that service of summons was had upon Flowers. While the summons itself was lost, and Flowers testified positively that no service was had upon him, the attorney for the plaintiff in the case was equally positive that the service was had, and detailed the circumstances that caused him to examine the return of the service at the time the judgment was rendered.

The judgment is affirmed.

#### HALL v. RUTHERFORD.

(Supreme Court of Arkansas. March 15, 1909.)

#### 1. EXECUTORS AND ADMINISTRATORS (§ 256\*)—ALLOWANCE OF CLAIMS—RIGHT OF APPEAL—GRANTEE OF HEIRS.

Heirs of a decedent have no right of appeal from a judgment of the probate court allowing a claim against the estate; and hence a grantee of heirs, who had purchased all the property of the estate and was not a party to the record in probate proceedings for the allowance of a claim

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

against the estate, has no right of appeal from a judgment allowing the claim.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 913; Dec. Dig. § 256.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 256\*)—ALLOWANCE OF CLAIMS—DUTY OF ADMINISTRATOR.**

The administrator is the proper person to represent the estate of a decedent in all personal actions involving the estate, especially in respect to the allowance or defense of claims against it; he being a trustee, representing all persons interested in the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 913; Dec. Dig. § 256.\*]

**Appeal from Circuit Court, Garland County; W. H. Evans, Judge.**

Proceedings for the allowance of the claim of Scott Boaz against the estate of Bolinda Todhunter. There was a judgment allowing the claim, and subsequently J. H. Hall, who was not a party to the proceeding, was granted an appeal to the circuit court, where, on motion of T. E. Rutherford, administrator, the appeal was dismissed, and Hall appeals. Affirmed.

Jas. L. Graham, for appellant. C. Floyd Huff, for appellee.

**FRAUENTHAL, J.** On the 8th day of October, 1906, Scott Boaz filed in the Garland probate court his account and claim against the estate of Bolinda Todhunter for \$340. The claim was duly verified in manner prescribed by law, and had been duly presented to and allowed by the administrator of said estate. On October 27, 1906, the claim came on for hearing before the probate court of Garland county, and that court, finding the same correct, rendered judgment for the amount of the claim in favor of Scott Boaz and against said estate. In that court the only parties who appeared or who were made parties to the proceedings were the said Boaz and the administrator of said estate. On October 14, 1907, nearly a year thereafter, J. H. Hall filed an affidavit for an appeal to the Garland circuit court from the order and judgment of the Garland probate court allowing said claim, which appeal was granted by said probate court on October 26, 1907. On May 23, 1908, T. E. Rutherford, administrator of said estate, filed a motion in the Garland circuit court to dismiss said appeal; and the circuit court, finding that "said J. H. Hall was not a party to the probate court proceedings on the allowance of said claim, and that he was not an heir or legal representative of said estate," dismissed his appeal; and from the judgment of the circuit court, dismissing his said appeal, J. H. Hall now prosecutes this appeal to this court.

The appellant offered to prove, and contended, that he had purchased from the heirs of Bolinda Todhunter all the property of the said estate, and he claimed and offered to

prove that the account of said Scott Boaz had been settled; and he contends for this reason that he is a party interested in the estate, and has the right to prosecute the appeal from the judgment of the probate court allowing the claim. This court has held that the heirs of a decedent had no right to take an appeal from the judgment of the probate court allowing a claim against the estate of the decedent. *Johnson v. Williams*, 28 Ark. 478. In that case the court says: "If the administratrix was mismanaging or wasting the estate, she was liable upon her official bond; or, if collusion and fraud were had in the allowance of this claim, the heirs could have filed their bill in the proper court, and had such allowance held for naught." In the case of *Arnett v. McCain*, 47 Ark. 411, 1 S. W. 873, the right of heirs to appeal from an order of the probate court directing the administrator to sell lands of the ancestor's estate to pay debts was denied. In the case of *Scott v. Penn*, 68 Ark. 492, 60 S. W. 235, the devisees of a testator had secured a decree setting aside the allowance by a probate court of a claim against the testator's estate. In that case the devisees were the appellees in this court, and, in passing upon the question of their right to have appealed to the circuit court from the judgment of the probate court allowing the claim, this court said: "Appellant contends that the appellees had a remedy at law by appeal from the judgment of the probate court allowing the claim of Robert M. Scott. The administrator, Miller, might have appealed, and was urged to do so, but he would not. The appellees here could not appeal, because they were not parties to the record."

In this case the rights or interest of the appellant can be no greater than that of the heir or devisee of the decedent, because he only claims an interest through a grant to him of the property of the estate by the heirs of the decedent. He was not a party to the record in the probate proceedings wherein the judgment for allowance was made. Besides, by the policy of our law, the administrator is the proper party to represent the estate of a decedent in all personal actions involving the estate. Especially is this true in the matter of the allowance or defense of claims against the estate. It furnishes a speedy and the least expensive mode for the determination and settlement of these estates. For this reason a statute of nonclaim has been established, providing for the presentation of the claims against the estate to the administrator within a limited time. If any and all persons claiming an interest in the estates could appeal from these numerous orders of allowance, the delay in winding up such estates might prove interminable, and the expense might result in the insolvency of the estates. The administrator is a trustee, representing all persons interested in the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

estate, and is responsible upon his official bond for the honest and faithful management of the affairs and assets of the estate.

The appellant relies upon the case of Ouachita Baptist College v. Scott, 64 Ark. 349, 42 S. W. 536, as sustaining the right to appeal without having been a party to the proceedings. But, as was said in the case of Turner v. Williamson, 77 Ark. 586, 92 S. W. 867, the decision in that case "was put on the ground that adversary rights were involved in the judgment admitting the will to probate, and that no other method was under the law afforded the heirs for contesting the will." But in the matter of demands against an estate the administrator is the proper party to represent the estate and to contest same, if advisable, by making proper defense and appeal. One claiming some interest in an estate, but who is not a party, but a stranger, to the record of the probate proceedings in the allowance of a claim against the estate, cannot appeal therefrom to the circuit court. The appeal of J. H. Hall was therefore properly dismissed.

Judgment affirmed.

**JONESBORO, L. O. & E. RY. CO. v. CABLE.**  
(Supreme Court of Arkansas. March 8, 1909.)

**1. WATERS AND WATER COURSES (§ 118\*)—CONSTRUCTION OF RAILROAD—SURFACE WATERS—OPENINGS FOR FLOW OF WATER—FLOODING LANDS.**

It is negligence for a railroad company, in constructing its road, to fail to provide openings sufficient to permit the free flow of water from adjoining land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 128; Dec. Dig. § 118.\*]

**2. DAMAGES (§ 112\*)—INJURIES TO CROPS—MEASURE OF DAMAGES.**

In an action for damages to crops, to instruct that, if plaintiff made some crop, then the measure of damages would be the difference between the crop he made and the crop he would have made, but for defendant's negligence, was error, because it failed to require a deduction of the difference between the cost of producing and gathering the crop that was made and that which would have been made, but for the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281-283; Dec. Dig. § 112.\*]

**3. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—INSTRUCTIONS AS TO DAMAGES—CURE BY VERDICT.**

Error in an abstract instruction as to the measure of damages for injuries to crops was not prejudicial, when the crop in question was totally destroyed, and the jury obviously did not base the verdict on a partial destruction thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. § 1068.\*]

**4. APPEAL AND ERROR (§ 930\*)—REVIEW—ASSUMPTIONS AS EFFECT OF ERROR IN INSTRUCTIONS.**

It cannot be assumed on appeal that the jury might have disregarded an instruction as to the measure of damages on which there was un-

disputed evidence, and followed one on which there was no evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3757; Dec. Dig. § 930.\*]

**5. DAMAGES (§ 188\*)—EVIDENCE OF ENTIRE DESTRUCTION OF CROP—SUFFICIENCY.**

Evidence held to warrant a recovery for the entire destruction of a crop.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 188.\*]

Appeal from Circuit Court, Craighead County; Frank Smith, Judge.

Action by Sam Cable against the Jonesboro, Lake City & Eastern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. F. Brown, for appellant. J. H. Edwards, D. F. Taylor and J. T. Coston, for appellee.

**McCULLOCH, C. J.** The plaintiff, Sam Cable, owned a farm in Mississippi county, Ark., lying on the north side of the railroad of the defendant, and sues to recover damages for destruction of the crops which he attempted to raise during the years 1903 and 1904, an account of inundation by water alleged to have been caused by negligence of defendant in the construction of its roadbed. It is alleged in the complaint that in constructing the road the natural flow of water from plaintiff's land was obstructed, and that sufficient openings were not left to let the water flow through. The venue was changed to Craighead county, and on a trial of the case there a verdict and judgment was rendered in favor of the plaintiff for damages in the sum of \$600, and the defendant appealed.

It is contended that the testimony was insufficient to sustain a finding that the flow of water from the plaintiff's land was obstructed by the railroad bed; but we are of the opinion that there was sufficient evidence of that fact, and that defendant was guilty of negligence in failing to provide openings of capacity to permit the free flow of water. The law with respect to the duty of the railroad company is plain, and need not be restated here at any length. The instructions of the court to the jury stated the law correctly, and no complaint is made here on that point.

Error is assigned in the instruction of the court as to the measure of damages. After instruction as to the measure of damages in case of total destruction of plaintiff's crop, to which instruction no objection is made here, the court further told the jury that, if the plaintiff "made some crop, then the measure of damages would be the difference between the crop he made and the crop he would have made, but for defendant's negligence, if it was negligent." This instruction is in conflict with the rule of law announced by this court in *St. L. S. W. R. Co. v. Morris*,

76 Ark. 549, 89 S. W. 846, and is therefore erroneous, because it failed to require a deduction of the difference between the cost of producing and gathering the crop that was made and that which would have been made, but for the injury caused by the overflow. We think, however, that the error was not prejudicial, for the reason that the crop was totally destroyed, and the jury could not, under the evidence, and obviously did not, base the verdict upon a partial destruction of the crops.

This part of the instruction was abstract, and usually abstract instructions submitting issues upon which there is no evidence are held to be erroneous and misleading, but not so in this instance, for the reason that there was undisputed evidence of substantial damage for total destruction of the crop, and none on the theory of partial destruction. We cannot assume that the jury might have disregarded an instruction as to a measure of damages on which there was undisputed evidence, and followed one on which there was no evidence. *Miller v. Nuckolls*, 77 Ark. 64, 91 S. W. 759, 4 L. R. A. (N. S.) 149, 113 Am. St. Rep. 122. The jury necessarily based the verdict on a total destruction of the crop, as to which there was evidence, and not on a partial destruction. Therefore no prejudice could have resulted from the erroneous instruction, which was entirely abstract.

It is contended by counsel that there was evidence that some crop was raised, but we do not agree with him. The plaintiff testified that he raised and gathered a little corn, but of so little value that it was not worth the trouble or expense of gathering. All of the evidence was directed to the amount of damages by loss of rental value of the inundated land and the expense of planting and cultivating the crop up to the time it was destroyed. There was evidence that a few bales of cotton were raised by a tenant on the place, but another instruction given by the court precluded recovery for damage done to the crop of a tenant.

The evidence was sufficient to sustain the amount of damage awarded by the jury.

Judgment affirmed.

# SLOAN v. LITTLE ROCK RY. & ELECTRIC CO.

(Supreme Court of Arkansas. March 15, 1909.)

## 1. CARRIERS (§ 316\*)—INJURY TO PASSENGERS—NEGLIGENCE—PRESUMPTIONS AND BURDEN OF PROOF.

From the derailment of a car by which a passenger was injured, a presumption arises that it occurred by the negligence of the carrier, and placed on it the burden of accounting for the derailment, and of showing that it was without negligence on the part of its servants.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1288; Dec. Dig. § 316.\*]

## 2. CARRIERS (§ 316\*)—INJURY TO PASSENGERS—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Proof that the derailment of a car occurred from some unaccountable cause is insufficient to overcome the presumption of negligence arising from the fact of derailment.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1288; Dec. Dig. § 316.\*]

## 3. TRIAL (§ 278\*)—OBJECTIONS TO INSTRUCTIONS.

The use of an objectionable word in an instruction should be raised by a specific objection, and not by a general one to the entire instruction.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 689; Dec. Dig. § 278.\*]

## 4. CARRIERS (§ 320\*)—INJURY TO PASSENGERS—ACTION—PROVINCE OF COURT AND JURY.

In an action for injuries to a passenger by the derailment of a car, where there is undisputed evidence that the car was in good order and suitable for the purpose, and that the track where the derailment occurred was in a safe condition, it was proper for the court to eliminate the question of negligence on those points.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1179, 1180; Dec. Dig. § 320.\*]

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action for personal injuries by E. S. Sloan against the Little Rock Railway & Electric Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Riffel, Dunaway & Cox, for appellant. Rose, Hemingway, Cantrell & Loughborough, for appellee.

MCCULLOCH, C. J. The plaintiff, while a passenger on one of the defendant's electric cars, received personal injuries by reason of a derailment of the car. He sues to recover damages, and alleges negligence of the defendant's servants, causing the derailment, in two particulars: First, that the motorman operated the car at an unusually high and dangerous rate of speed; and, second, that the car was old and unsafe for service, and that defendant knew of its unsafe condition, or could have known of it by the exercise of ordinary care. A trial resulted in a verdict and judgment in favor of the defendant, and plaintiff appealed.

The testimony was conflicting on the question whether or not the car was being operated at a high or unusual rate of speed at the time of its derailment, and this question was properly submitted to the jury upon correct instructions. The court gave the following instructions requested by plaintiff, after making certain modifications, the correctness of which is not challenged here: "(1) If you find from the testimony in this case that plaintiff was a passenger on one of the defendant's cars, and that said car was derailed, and plaintiff was thereby injured, then the law presumes that the derailment and injury were occasioned by the negligence of the defendant street car company, and it will be your duty to find for the plaintiff, unless the defendant has shown by the testimony that it was not guilty of any

negligence. (2) If you find from the testimony in this case that the plaintiff was a passenger on one of defendant's cars, then the defendant owed him the highest degree of care consistent with the practical conduct of its business to transport him to his destination without injuring him; and, if the defendant, its agents, or employes failed to exercise that high degree of care for the protection of plaintiff, and he was thereby injured, it will be your duty to find for the plaintiff. (3) If you find from the testimony in this case that the defendant negligently operated its cars, downhill and around a curve at such a rate of speed as to cause a derailment of the car on which plaintiff was passenger, then the defendant was guilty of negligence, and it will be your duty to find for the plaintiff." The fourth instruction requested by plaintiff, which the court refused to give, was covered, in substance, by those given, and we think there was no error in refusing to give it.

Error of the court is assigned in giving each of the following instructions at the request of the defendant: "(1) If you find from the evidence that plaintiff was a passenger on defendant's car, and the car became derailed, then the court instructs you, while proof of the derailment raises a presumption of negligence against the defendant, yet defendant may rebut this presumption by showing that the derailment arose from an unaccountable or unavoidable accident, or an occurrence which could not have been prevented by the highest degree of care, foresight, and diligence of the defendant consistent with the practical conduct of its business; and if you find from the evidence that defendant has rebutted this presumption of negligence arising from derailment, then it is your duty to find in its favor." "(4) If you find that, although the car was derailed, yet the preponderance of the evidence shows that at the time and place of the derailment both car and the track were in good order and condition, and without defects or imperfections, and the car was not being operated in a negligent manner, then the presumption of negligence against the defendant which arises from the derailment of the car would be overcome, and it would be your duty to find for the defendant. It does not devolve upon the defendant to show the cause of the derailment, or to explain it, further than to show that it was not guilty of negligence which caused the derailment, and that it exercised the highest degree of care for its passengers consistent with the practical conduct of its business." The word "unaccountable" was erroneously used in the first instruction. A presumption arose from the derailment of the car that it occurred by reason of the negligence of the defendant, and this placed the burden on the defendant, in order to exculpate itself from the charge of negligence, of accounting for the cause of the derailment, to the extent of

showing that it occurred without fault or negligence on the part of its servants. It was not sufficient, therefore, for the defendant merely to show that the derailment occurred from some unaccountable or inexplicable cause, for that would not overcome the presumption that it resulted from negligence. The defendant in such a case must, in order to rebut the presumption of negligence, close up by proof every avenue leading to a reasonable conclusion that it was guilty of any negligence which caused the injury complained of. 3 Hutchinson on Carriers, §§ 1413, 1414; 4 Elliott on Railroads, § 1644. We are of the opinion, however, that these instructions, taken as a whole, fairly expressed this view of the law, and the jury must have so interpreted them. The use of the objectionable word in the instruction should have been met with a specific objection, and not a general one to the whole instruction. We find no reversible error in these instructions. *Railway Co. v. Barnett*, 65 Ark. 255, 45 S. W. 550.

The court also gave the following instructions at the request of defendant, the giving of which is assigned as error: "(6) You are instructed to find in favor of the defendant upon the issue of fact whether the car upon which plaintiff was riding was safe and suitable for the purpose used. The undisputed proof shows that the defendant was not negligent in this respect. (7) You are instructed to find in favor of the defendant upon the question of fact whether the track furnished by the defendant was safe and suitable for the purpose for which it was used. The uncontradicted proof shows that the defendant was not negligent in this respect." The instructions were correct. The uncontradicted evidence adduced by defendant established the fact that the derailed car was in good order, and was safe and suitable for the purpose used. Also that the track where the derailment occurred was in safe condition. This evidence being uncontradicted either by direct proof or by circumstances, the jury would not have been warranted in sustaining a charge of negligence on either of these two grounds. Therefore it was proper for the court to so inform the jury, and to thus eliminate those two charges from their consideration. Though the burden was cast upon the defendant to exonerate itself from the charge of negligence, the undisputed evidence did so completely as to the two charges mentioned in these instructions, and the jury should not have been permitted to disregard it. *Railway v. King*, 66 Ark. 439, 51 S. W. 319; *K. C. S. Ry. Co. v. Lewis*, 80 Ark. 396, 97 S. W. 56; *St. L. S. W. Ry. Co. v. O'Hare*, 115 S. W. 942.

The issues in the case were fairly tried, and the evidence was sufficient to sustain the verdict.

Affirmed.



## McKENZIE v. NEWLON.

(Supreme Court of Arkansas. March 8, 1909.  
On Rehearing, March 29, 1909.)

## 1. MUNICIPAL CORPORATIONS (§ 604\*)—POLICE POWER—IMPOUNDING OF ANIMALS.

A city ordinance, empowering the chief of police to impound animals running at large within the stock limits of the city for five days, subject during that time to be claimed by the owner upon payment of costs of taking up, keeping, and advertising, is a valid police regulation under Kirby's Dig. § 5450, empowering cities of the first and second class to prevent the running at large within their corporate limits of cattle, etc., and to restrain and impound them when so running in violation of an ordinance, and section 5451, prescribing the procedure upon taking up such animals.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1336; Dec. Dig. § 604.\*]

## 2. ANIMALS (§ 50\*)—"RUNNING AT LARGE"—WHAT CONSTITUTES.

Under Kirby's Dig. § 5450, animals are "running at large" if they are within the corporate limits of the city without being under the control of any one, regardless of whether or not the owner was at fault in permitting their escape, or in not making diligent search for them.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 154, 155; Dec. Dig. § 50.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 604-607.]

## 3. ANIMALS (§ 51\*)—IMPOUNDING ANIMALS AT LARGE—PAYMENT OF FEES AND EXPENSES.

Under Kirby's Dig. § 5451, prescribing method of procedure where animals running at large are impounded by city authorities by virtue of section 5450, and providing that if the owner within 24 hours after being notified appears and claims the animal it shall be delivered to him, and if he does not that he shall pay the actual expenses of keeping the animal, which provisions must be incorporated in any ordinance providing for the impounding of animals under the sections, a person living outside the corporate limits having stock taken up under such an ordinance has the right to the possession of it upon demand made within 24 hours after notice without paying an impounding fee; but, if demand be not made until later, the actual expenses of taking care of the animal prescribed by the ordinance must be paid before recovery may be had.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 166, 169, 170; Dec. Dig. § 51.\*]

On Rehearing.

## 4. EVIDENCE (§ 10\*)—JUDICIAL NOTICE—GEOGRAPHICAL FACTS.

The court will take judicial notice that the Arkansas and Poteau rivers bound the city of Ft. Smith on the west.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 13; Dec. Dig. § 10.\*]

## 5. ANIMALS (§ 50\*)—STOCK LIMITS—DESIGNATION.

The stock limits of a city, set out as beginning at a point on the Poteau river, thence to designated points east and north, and thence west to the Arkansas river, sufficiently designated the limits without continuing the boundaries along the rivers to the beginning point.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. § 152; Dec. Dig. § 50.\*]

## 6. ANIMALS (§ 50\*) — ESTABLISHING STOCK LIMITS — SUFFICIENCY OF BOUNDARIES.

The fact that a city in fixing stock limits included territory outside the corporate limits would not render the stock limits void in so far as the district was within the city.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. § 152; Dec. Dig. § 50.\*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Replevin by Walter Newlon against Loney McKenzie. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

This is a suit by appellee to replevin a certain bull from appellant, who held the same as keeper of the pound in the city of Ft. Smith. The bull was found running at large within the stock limits as designated by an ordinance of the city of Ft. Smith. The proof showed that the animal was legally impounded. A section of the ordinance provided that the chief of police "shall cause to be kept impounded such animals seized for the period of five days subject during that time to be claimed by the owner or his agent upon the payment \* \* \* of the amount of all costs incurred in taking up, keeping and advertising thereof, which shall be as follows: fifty cents each for the seizure of each and every head of cattle, and fifty cents per day for the keeping of each such animal." The bull was put in the pound Wednesday afternoon, and there was evidence tending to show that the owner was notified the next morning. Saturday morning following he made demand for the bull. The poundkeeper refused to let the owner have the animal unless he would pay the charges for impounding, which were placed at \$1, and the charges for feed, amounting to \$1. The owner refused to pay these charges. He did not offer to pay the amount for the feed of the animal while impounded. The bull escaped from the pasture of the owner where he had been confined. The owner did not suffer him to run at large. There was evidence tending to show that the bull escaped without any fault on the part of the owner. The owner was a farmer and lived beyond the city limits. There was evidence tending to show that he made diligent search for the animal. The court gave the following instructions: "(1) Under the ordinance the chief of police, under the direction of the mayor, shall appoint some suitable and competent person to seize and impound stock found at large within the city limits, as designated by the ordinance. (2) The city of Ft. Smith has the right to demand and collect \$1 for the seizure of each and every head of cattle found running at large within the stock limits, and the city has the right to collect the expense in taking care of said animals while in the city pound. (3) If the jury find from the evidence that the plaintiff permitted the animal to run at large, and it was found within the stock limits of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

city of Ft. Smith, it was the duty of the defendant to impound it, and the plaintiff cannot recover unless he has paid the pound fees. (4) If plaintiff exercised ordinary care and diligence in restraining the animal from running at large, but, without fault on his part, it escaped, and he made a diligent search for it, the animal cannot be said to have been running at large. (5) If the pound fees have not been paid, and if the animal was found running at large in the city of Ft. Smith, and plaintiff has not exercised ordinary care and diligence in restraining it from running at large, and through plaintiff's fault the animal escaped, and plaintiff did not make diligent search for it, your verdict should be for the defendant." Appellant objected to the giving of the second, third, and fourth, and duly excepted to the ruling of the court in overruling his objection. Appellant asked, and the court refused, the following prayer: "No. 6. The defendant, Loney McKenzie, is entitled to recover from plaintiff a reasonable amount for feeding and taking care of the bull while in the city pound." The appellant duly objected and excepted to the court's ruling. The verdict was in favor of appellee. Judgment was entered accordingly, and this appeal was taken.

J. F. O'Melia, for appellant. T. S. Osborne and W. H. Dunblazler, for appellee.

WOOD, J. (after stating the facts as above). The ordinance of the city of Ft. Smith authorizing the impounding of the animals therein enumerated when "found running at large within the city limits as specified" is a valid police regulation. *Ft. Smith v. Dodson*, 46 Ark. 296, 55 Am. Rep. 589. The legislative sanction for such ordinances is contained in sections 5450, 5451, Kirby's Dig. This court, in *Benton v. Willis*, 76 Ark. 443, 88 S. W. 1000, held that both of these sections were in force; the former giving in general terms the power to impound, and the latter prescribing the method of procedure. Instruction numbered 4 was erroneous. Under this instruction appellee could recover if he exercised ordinary care in restraining the animal, and if the animal escaped without fault on his part and he made diligent search for it. Under the statute (sections 5450 and 5451) the animals are "running at large" if they are within the corporate limits, without being under the control of any one. See *Clarendon v. Walker*, 72 Ark. 8, 80 S. W. 883; *Benton v. Willis*, 76 Ark. 443, 88 S. W. 1000. And the city officers, designated for the purpose, are authorized, when such is the case, to impound them, regardless of whether or not the owner was at fault in permitting their escape, or in not making diligent search for them thereafter.

We held in *Benton v. Willis*, supra. "that a person living outside the town limits, having stock taken up under the ordinance, had the right to the possession of same upon de-

mand made within 24 hours, without paying any fee for impounding same." Here the owner, appellee, although notified, did not make demand for his bull within the 24 hours prescribed by the statute. This must be the time under any ordinance within which the owner of animals impounded under authority of sections 5450 and 5451, supra, shall demand same before he can recover without the payment of the actual expenses incurred in taking care of them. The facts in this case made it incumbent upon the owner, before he could recover his bull, to pay the actual expenses incurred in taking care of him. See *White v. Town of Clarksville*, 75 Ark. 340, 87 S. W. 630. The officer could only charge the amount prescribed by the ordinance "for the keeping" of such animal.

The instructions of the court numbered 2 and 4 were erroneous. No. 5 was not objected to. The verdict was not sustained by the evidence.

The judgment is therefore reversed, and the cause is remanded for new trial.

#### On Rehearing.

The testimony shows that appellee's bull "was inside the stock limits, as defined by the ordinance, in the north part of the city." The ordinance sufficiently described the stock limits. The starting point was on Poteau river on a line with Emma street. Thence the directions were given according to certain objects which are designated; the general direction from the starting point being first east, thence north, thence west, to the Arkansas river. As the last call was the Arkansas river, it was unnecessary to continue the description by saying, "from the point where the line reaches the Arkansas river, to the point of beginning in the Poteau river." The court will take judicial cognizance of the fact that the Arkansas and Poteau rivers bound the city on the west. They are natural boundaries that the court will take notice of. If the stock limits extended to these rivers on the western part of the city, it would be wholly immaterial that the rivers were beyond the corporate limits, for that would only show that the stock limits in that direction were at least coextensive with the corporate limits. Because the council fixed the stock limits to include territory outside the corporate limits would not render the district or "stock limits" inside thereof void. It is not pretended that this bull was found beyond the corporate limits or within the alleged strip outside those limits. The only contention on this point is that the limits as designated were void. We do not think so. The ordinance is a direction to the officers that they prevent certain animals from running at large. As to whether the owners have to pay the penalties for impounding depends upon whether they have been diligent in making search after their stock have escaped; but the statute itself makes ample provision for the diligence of the owner in the

24 hours allowed him to make demand for his animal. If he has not made demand in that time, having been notified, he is in no position to complain. He is not diligent.

Overruled.

### NATIONAL SURETY CO. v. COATES.

(Supreme Court of Arkansas. Feb. 22, 1909.)

JUDGMENT (§ 726\*) — RES JUDICATA — PRIOR JUDGMENT—ISSUES DETERMINED.

In a prior action for breach of a mail contract against the contractor and his surety, defendants pleaded that the contractor had been induced to make the contract by plaintiff's fraudulent representations, and then pleaded an alteration of the contract and later its rescission. In addition, defendants denied that the contractor broke the contract, but qualified the denial by averring that the changes were made therein by mutual consent, and denied that plaintiff by reason of the contractor's neglect had been compelled to hire other drivers. Plaintiff sought to recover damages accruing from April 1, 1904, to July 1, 1906, but a general verdict was returned for defendants. Judgment was rendered on the verdict, which was not appealed from, after which plaintiff sued to recover alleged damages accruing after July 1, 1906. *Held*, that the alleged breach of the original contract was the gist of both actions, and, the jury having necessarily found such issue in favor of defendants, the judgment in the first action was a bar.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1256; Dec. Dig. § 726.\*]

Appeal from Circuit Court, Pulaski County; Robert J. Lea, Judge.

Action by James Coates against the National Surety Company. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

Wiley & Clayton, for appellant. Vaughan & Vaughan, for appellee.

HART, J. The present suit was commenced on the 23d day of April, 1906, by James Coates to recover for a breach of a condition of a bond executed in his favor by the National Surety Company as surety for one Bishop. The surety company answered, and later amended its answer by interposing a plea of res adjudicata, to which a demurrer was sustained. This court held that the judgment sustaining the demurrer was erroneous and remanded the cause for a new trial. The opinion is reported in 83 Ark. 343, 104 S. W. 219, in which it was held that: "According to the allegations of this amendment (referring to the answer as amended), the question of the defendant's liability on the contract of suretyship sued on was determined in the former action adversely to the plaintiff's contention in this case, and therefore barred a recovery."

On the new trial in the circuit court, the only defense offered was a plea of res adjudicata. The evidence relied upon to sustain it is the record of a former suit between the

same parties, which shows the following state of facts: On the 4th day of April, 1902, James Coates and J. W. Bishop entered into a written contract, whereby the latter obligated himself for the period of four years from and after July 1, 1902, to furnish the teams and messengers to perform the screen wagon mail service on a certain route in the city of Little Rock for the consideration of \$158½ per month. The National Surety Company became his surety in the sum of \$1,000 for the faithful performance of the contract. On March 24, 1903, Coates brought suit in the Pulaski circuit court against Bishop and the National Surety Company on their contract and bond, alleging their failure to perform said contract since October 1, 1902, and that he was compelled thereby to hire other men, horses, etc., to perform the same, and to pay them therefor \$183.33.

The answer of the defendant Bishop was filed on April 14, 1903, and is in words and figures following, to wit:

"For answer to the complaint, the defendant Joseph W. Bishop admits the execution of the contract of April 4, 1902, but he says that he was induced to make said contract by certain false and fraudulent representations made by the plaintiff and his agent, who represented and stated to the defendant that it would be necessary to make only 18 trips per day, and that 3 horses would be all that would be necessary to do the work, when in fact the number of trips on this route was 24, and it was essential to have 6 horses to do the work, and this defendant contracted to make 18 trips per day. The defendant Bishop lived about 20 miles in the country and had little knowledge of the work, and, on the contrary, the plaintiff and his agent, one Catching, were perfectly familiar with the routes and what was required in the way of horses and the number of trips, and the plaintiff and his agent, in making the statements above mentioned, knew that these statements were false; whereas, the defendant Bishop relied upon them to state to him the facts, and they knew that the defendant Bishop relied upon them as to these facts. The defendant Bishop, supposing that only 3 horses would be needed to do the work, and that there were not more than 18 trips, made his bid and entered into the contract sued on with reference to the expense and labor which this would entail in making 18 trips per day, and the compensation which the contract sued on specified was not enough to pay the expenses and leave him any remuneration for his labor and services, and if the defendant Bishop had known the facts and the number of horses it would require, and the number of trips to be made, he would not have entered into the contract, and the plaintiff knew this when the contract was made.

"For a further defense, this defendant, re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

iterating all the allegations in the foregoing paragraph, says that after the contract had been made, and its execution entered into, to wit, on or about the ——— day of September, 1902, this defendant having learned by actual experience that the statements made to him, and which induced him to enter into the contract, were false, made complaint to the plaintiff and his agent, and it was then and there agreed between this defendant and the plaintiff that, instead of \$158 per month, the plaintiff should pay to the defendant \$166.66 per month, and that this amount should be taken as the true amount from the first day the work was undertaken, to wit, on the 1st day of July, 1902, and under this agreement this defendant proceeded to carry out the contract and to perform the work and furnish the teams required, and the plaintiff paid him the sum of \$166.66 for each month from the 1st day of July, 1902. And afterwards, to wit, the ——— day of October, 1902, it was further agreed by and between the plaintiff and this defendant that the amount of \$166.66 was not enough to pay for the services required at the hands of this defendant under said contract, and as extra trips had been added, the plaintiff and this defendant then and there rescinded the contract sued on, and the plaintiff then and there agreed with this defendant that, if the defendant would do the work required, he would pay to this defendant the sum of \$183 per month, and it was further agreed between the plaintiff and this defendant that one Peters should become a partner of this defendant, and that thereafter the work should be done by this defendant and Peters as partners, and that each of them should furnish the same number of horses and perform the same amount of services, and that the compensation should be divided equally between them, and from that time on they, as partners, performed the services for the plaintiff, and the plaintiff paid them \$183 per month, and they continued to carry the mails and carry out the contract until on or about December 26, 1902, at which time it was mutually agreed by and between the plaintiff and this defendant and Peters that the contract which had been existing between the plaintiff and this defendant and Peters up to that time should be rescinded, and that the partnership between this defendant and Peters should be dissolved, and that Coates should make a new contract with Peters and one Gray, which he did then and there make, and by which contract Peters and Gray agreed that they would carry the mail and perform all the work that this defendant had originally undertaken to do, and that plaintiff should pay Peters and Gray the sum of \$183 per month, and this defendant should thereby and thereafter be released from any further obligation to carry the mail, and from any and all liability under said contract. And the said Peters and Gray, in pur-

suance of this contract so made on December 26th, proceeded on January 1, 1903, to carry the mails on said route No. 447002, and they have even since continued to do so, and therefore this defendant says that he is not liable to the plaintiff in any sum whatever.

"The defendant denies that he broke his contract with the plaintiff on October 1, 1902, or at any other time, but states that the changes made in the said contract were made by mutual agreement of all parties concerned. He denies that plaintiff, by reason of neglect of duty of the defendant or his drivers and messengers, was ever compelled to hire other drivers and messengers and pay them an advance in salary to what he (Bishop) was then receiving, but states that he (Bishop) kept sufficient drivers and messengers to do the work required of him. Wherefore he asks to be dismissed, with the reasonable costs in his behalf expended.

"And on April 15, 1903, the defendant surety company filed its answer to the complaint in that suit; its answer being in words and figures following: Comes the defendant, National Surety Company, and for separate answer to the complaint says that they adopt the answer of the defendant Bishop, and make all the denials and allegations thereof a part and parcel of this answer as if set out at length herein, and they further say that they were not consulted with reference to, or notified of the change made in the contract on September ———, 1902, or that made in October, 1902, and that, by reason of this change in the contract and want of notice to them, this defendant was released from any further liability on this bond. For a further defense, this defendant says that on December 26, 1902, the defendant Bishop, by agreement with the plaintiff, rescinded the contract which had been made with defendant Bishop, and it was expressly agreed by and between the plaintiff, the defendant Bishop, and this defendant, that Bishop should be, and he was, released from all further obligation, and that this defendant should no longer be liable on this bond for any amount whatever, and therefore this defendant says that its obligation on the bond sued on was discharged and released by mutual agreement of all parties."

The issues thus raised by the pleadings were tried before a jury, who, after hearing the evidence and the instructions of the court, returned a general verdict in favor of the defendants. Judgment was entered accordingly on the 24th day of March, 1904.

J. W. Bishop, for the defendant, testified as follows: "I was present at the first trial, and testified that there were changes made in the contract, and that I complained to Judge Coates that I was not getting enough, that he made the change, and gave me a little more money. I introduced three or four other witnesses on the same subject. I also testified to giving up the contract." There-

upon the plaintiff introduced the following evidence: James Coates: "I was the plaintiff in the first suit, and am plaintiff in this suit. I testified in regard to my claim that Bishop took a contract to carry the mail from April 1, 1902, to April 1, 1906, and about the middle of September, 1902, he gave me notice that he would quit the services at the end of that month, and on the 20th of that month I notified the surety company. The 1st of October, 1902, he told me he had quit, and went home and never returned to the work, and I was compelled to keep the mails going, and I employed others to complete the work. Q. For what damage did you sue in that case? A. For the damages I had sustained from July 1, 1902, to April 1, 1904, the date of the judgment. I testified I was damaged in the sum of \$1,000 between those dates. There was no fraud in the making of the contract. Q. Why did you bring the present suit? A. To recover damages that accrued from April 1, 1904, to July 1, 1906. The first complaint I remember his making, about wanting an increase of compensation, was in August, 1902." On this evidence, the court, sitting as a jury, found in favor of the plaintiff for \$1,000, and rendered judgment in his favor against the defendant for that amount. The defendant properly saved its exceptions, and has duly prosecuted an appeal to this court.

There is but one question in the appeal, and that is: Should the plea of *res adjudicata* have been sustained? Counsel for Coates urge that one of the defenses to the first suit was a denial that Coates was damaged, and that the verdict being general, and not special, the jury might have believed that the evidence of damage to the plaintiff was not sufficient to warrant a finding in his behalf. To sustain their contention, they point to the paragraph of the answer, which is as follows: "The defendant denies that he broke his contract with the plaintiff on October 1, 1902, or at any other time, but states that the changes made in the said contract were made by mutual agreement of all parties concerned. He denies that plaintiff, by reason of neglect of duty of the defendant or his drivers and messengers, was ever compelled to hire other drivers and messengers and pay them an advance in salary to what he (Bishop) was then receiving, but states that he (Bishop) kept sufficient drivers and messengers to do the work required of him." In the first paragraph of the answer, the defendants claim that they were induced to enter into the contract by certain false and fraudulent representations on the part of the plaintiff. In the next paragraph, they plead an alteration of the contract in September, 1902, and then that it was rescinded in December, 1902. Then follows the clause relied upon by counsel for Coates. True, in the last paragraph, they deny that Bishop broke the contract;

but in the same sentence this is qualified by the averment that changes were made in the contract by mutual consent, and immediately follows the denial that Coates by reason of their neglect of duty was compelled to hire other drivers, etc., thus showing that they did not mean to deny that they had not complied with the contract as originally executed, and that Coates did not suffer any damage, but they were only intending to justify their nonperformance of it on the ground that it had been changed by mutual consent. This denial must be read in connection with the rest of the answer, and the answer construed as a whole; and, when so read and construed, it is manifest that the answer does not deny that if there was a breach of the contract, as alleged by Coates, he did not suffer any damages, and for this reason should not recover.

An alleged breach of the original contract was the foundation of the first suit, as well as of the present action. The defendants admitted their failure to perform the contract, and sought to justify their action in this respect by an averment that Coates, recognizing the inadequacy of Bishop's compensation for his services, agreed to and did pay Bishop \$166.66 per month, that later on this amount was raised to \$183.33, that still later other parties were substituted in the place of Bishop and were paid \$183.33 per month for their services, and that thereafter Bishop was released from any further obligations under the contract. Thus it will be seen that the particular matter in issue was whether or not there had been a breach of the contract, and the verdict in the suit could not have been rendered without deciding this question. If the jury had determined that issue in favor of Coates, it necessarily follows that some damage must have resulted, and they would have found in his favor, for the averments of the answer would have been express and explicit admissions of the amount of damages he had suffered; but the verdict was for the defendants. Judgment was entered upon it, and no appeal was taken. Therefore the jury actually and necessarily found that there was no breach of the contract, and that their verdict could not have been based upon a finding that there was a breach of the contract, but that no damage had been suffered by Coates. In the opinion in this case on the former appeal, the court held that, according to the allegations of the amendment to the answer, the question of the defendant's liability on the contract of suretyship sued on was determined adversely to the contention of Coates in this case; and, having determined that the allegations have been established by the undisputed evidence, we must conclude that the judgment in that case is a bar to the present suit.

Judgment reversed, and cause dismissed.

**MAYFIELD WOOLEN MILLS v. LEWIS**  
et al.

(Supreme Court of Arkansas. March 8, 1909.)

**1. SHERIFFS AND CONSTABLES (§ 90\*)—LIABILITY—FAILURE TO LEVY EXECUTION AT COMMON LAW.**

At common law an officer was bound to levy execution on defendant's property, whether claimed by third persons or not, and must show that the property was exempt to excuse a failure to levy, nor could he require a bond for indemnity in case the property was actually owned by another, but by statute and the practice of the courts, he may refuse to levy, unless indemnity is given, whenever a third party actually claims the property, or the circumstances justify a prudent person in apprehending litigation.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 130; Dec. Dig. § 90.\*]

**2. SHERIFFS AND CONSTABLES (§ 90\*)—LIABILITIES—FAILURE TO LEVY EXECUTION.**

Under Kirby's Dig. § 3248, providing that, if an officer doubts whether property is subject to execution, he may require plaintiff to give an indemnity bond, and section 3247, permitting him to refuse to levy execution if such bond is not given, an officer cannot arbitrarily refuse to levy execution unless an indemnity bond is given, but must have a bona fide doubt as to whether the property is subject to execution, based upon a claim actually made to the property, or on circumstances justifying a prudent person in apprehending litigation.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 130; Dec. Dig. § 90.\*]

**3. SHERIFFS AND CONSTABLES (§ 168\*)—LIABILITIES—ACTIONS—PLEADING—SUFFICIENCY OF COMPLAINT.**

Allegations that plaintiff recovered certain judgments on which executions were issued and delivered to a constable, who levied on the debtor's goods and advertised them for sale, but afterwards neglected to sell the goods, and that the debtor thereafter became insolvent, whereby plaintiff lost his debt, sufficiently alleged a cause of action against the constable and his sureties, under Kirby's Dig. § 3286, making an officer who neglects or refuses to sell property levied on liable for the amount specified in the execution, or sufficiently alleged a common-law liability for actual damages caused by negligence or refusal to levy execution.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 398; Dec. Dig. § 168.\*]

**4. SHERIFFS AND CONSTABLES (§ 106\*)—PENAL STATUTES—OFFICER'S LIABILITY FOR FAILURE TO LEVY.**

Kirby's Dig. § 3286, making an officer liable in the amount specified in the execution for his neglect or refusal to sell property levied upon, is highly penal, and should not be extended to cases not within its plain meaning.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Dec. Dig. § 106.\*]

**5. SHERIFFS AND CONSTABLES (§ 106\*)—LIABILITY—FAILURE TO LEVY EXECUTION.**

Construing the statute strictly, a constable and his sureties would not be liable under Kirby's Dig. § 3286, making an officer liable in the amount specified, in the execution for neglect or refusal to sell property levied upon, where a constable, after refusing to make the sale, readvertised goods under the execution for sale within the life of the execution, and the goods were seized before that time under bankruptcy proceedings instituted by the execution debtor.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 175; Dec. Dig. § 106.\*]

Appeal from Circuit Court, Union County; G. W. Hays, Judge.

Action by the Mayfield Woolen Mills against W. S. Lewis and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded for new trial.

R. G. Harper and Thornton & Thornton, for appellant.

**FRAUENTHAL, J.** The appellant, who was the plaintiff below, instituted this suit against the appellees, and in its complaint alleged that W. S. Lewis, one of the defendants, was constable of Laple township in Union county, and that the other defendants were sureties upon his official bond, that the plaintiff had recovered two several judgments, before the justice of the peace of the above township, against Tucker and Woods, aggregating \$507, and that on the 4th and 6th days of May, 1905, executions were duly issued upon said judgments against the property of said Tucker and Woods, and were directed and delivered to said Lewis as such constable in manner prescribed by law; that on May 8, 1905, said Lewis as such constable, and by virtue of said executions, levied the same upon the goods and chattels of the defendant in said executions of the value of \$981.01, and advertised same for sale on May 20, 1905, but that the constable thereafter neglected to sell the goods so levied on, or any part thereof; that the defendants in the execution became thereafter wholly insolvent; and that, by reason of the negligence of said constable, the plaintiff lost its debt. And the plaintiff asked for judgment for the \$507, and interest and 10 per cent. damages. The defendants admitted in their answer that the judgments were recovered in favor of plaintiff, but denied that the executions issued thereon were delivered to the defendant Lewis. They alleged that the executions were delivered to one Baker, who was not the deputy of the constable, that when said Lewis, constable, was notified of the issuance and levy of said executions, and before the time set for the sale of the goods levied on, he doubted whether the same was subject to execution, and gave notice to the attorney of plaintiff, and demanded an indemnifying bond, which was refused, and that for this reason Lewis refused to sell the property levied on under the executions. They denied that plaintiff lost its debt by reason of the failure of the constable to sell the property; but alleged that the defendant in the execution was preparing to file a voluntary petition in bankruptcy, which he at once did, and that the above goods were taken charge of and administered under said bankruptcy proceedings, and that in said bankruptcy proceedings the debt of plaintiff was proven and allowed, and thereunder plaintiff received its pro rata of the proceeds of said bankrupt's

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

estate. Upon a trial of the case a verdict was rendered in favor of the defendants, and from the judgment given thereon the plaintiff appealed.

In the trial of the cause below the only issue that appears to have been presented by the instructions, and the only issue that appears to have been attempted to be fully developed by the evidence, was the one set out in that part of the answer which alleged that, before the time set for the sale of the goods levied upon, the constable, doubting whether same was subject to execution, demanded an indemnifying bond, and, the giving of this bond by plaintiff being refused, the constable refused to sell the property under the executions for that reason. The evidence tended to prove that the executions were issued upon the judgments in favor of plaintiff, as set out in the complaint, and were delivered to one Baker, as deputy constable of Lewis, and that Baker was the deputy of the constable, Lewis, that on May 8, 1905, the said deputy constable levied said executions upon a stock of goods of the value of \$981.01 as the property of C. B. Wood, one of the defendants in said executions, and that he duly advertised the sale of the goods thereunder for May 20, 1905. The constable, Lewis, testified that on May 17, 1905, he learned of the issuance and levy of the executions by his deputy, and the advertised sale thereunder, and that on that day he demanded from the attorney of plaintiff an indemnifying bond before he would proceed with the sale, and again demanded this bond on May 20, 1905, and because a sufficient indemnifying bond was not given him by the plaintiff or its attorney is the reason why he refused to make the sale under the executions. He also stated that the reason why he demanded the giving of an indemnifying bond was that he demanded such bond in all cases of making levy and sale under execution, and also because he heard that the defendant in the execution was going into bankruptcy. He also stated that he thought the goods belonged to Mrs. Woods, but in the same connection he testified that she was not claiming, and did not claim, the goods, and other evidence tended to prove that she never did, at any time, claim to own the goods. No other reason was given for the demand by the constable for the indemnifying bond. The evidence tended to prove that prior to May 20th an indemnifying bond was given to the deputy constable, and that the surety thereon was the attorney of plaintiff; that on the day advertised for the sale of the goods under the execution the constable notified the attorney that the bond was not sufficient, and another indemnifying bond would have to be given. This was not done, and the constable refused to make sale of the goods.

The following are all the instructions that were requested by the defendants, and they were given by the court: "(1) The court instructs the jury that an officer who levied an

execution, or is required to levy an execution, on personal property, and doubts whether it is subject to execution, may give the plaintiff in said execution, or his attorney or agent, notice that an indemnifying bond is required. Bond may therefore be given by or for the plaintiff, with one or more sufficient sureties, to be approved by the officers, to the effect that obligors therein will indemnify him against the damage he may sustain in consequence of the seizure or sale of the property, and will pay to any claimant thereof the damage he may sustain in consequence of the seizure or sale, and will warrant to any purchaser of the property such estate or interest therein as is sued on, the officer thereupon shall proceed to subject the property to the execution, and shall return the indemnifying bond to the court from which it is issued. (2) The court instructs the jury, if the bond mentioned in the first instruction is not given, the officer may refuse to levy the execution, or if it had been levied, and the bond is not given in a reasonable time after it is required by the officer, the officer may restore the property to the person from whose possession it was taken, and the levy shall stand discharged. (3) The court instructs the jury that, if they find a bond was demanded by the officer, and bond was furnished, signed by the plaintiff and its attorney, yet if you further find from the evidence that the defendant, in the reasonable execution of his official duty, believed the bond insufficient, and so notified the plaintiff's attorney, and on account of said bond being insufficient refused to sell, then, and in that event, you are instructed that the defendant had the right to refuse to sell, and your verdict must be for the defendant." The plaintiff requested that the court give the following instruction to the jury, which was refused: "The jury are instructed that an officer, called upon to levy an execution, or to make a sale under a levy already made, cannot arbitrarily demand an indemnifying bond; and, if you find from the evidence in this case that the property levied on was the property of the defendant in the execution, and was not exempt under the exemption laws of this state, and that no other person was claiming the same, nor setting up any title thereto, but that the defendant in the execution, C. B. Wood, was then present and admitting the property to be his own, and that the only reason that the defendant Lewis had for demanding an indemnifying bond was that he had heard that the defendant in the execution was contemplating filing a petition in bankruptcy, and that he thought that some of the property might belong to the defendant's wife, although he had never heard any one say so, and that she was not claiming the same, then, under the law, said Lewis, had no right to demand of plaintiff an indemnifying bond."

The question thus presented for determination is, What is a proper case in which an

officer can demand indemnity for levying an execution upon property, or for making sale thereof under such execution? In order to arrive at a proper solution of this question it is well to examine what is the duty and responsibility of such an officer under the common law when he receives an execution, and to what extent that duty and responsibility has been modified or relaxed by the practice of our courts or the statutes of our state. By the common law it is the first duty of such an officer, after he receives an execution, to make reasonable effort and inquiry to ascertain whether the defendant in the execution has any property in his township or county subject to levy; and, if he finds any such property in the possession of the defendant, it is his duty to levy the execution thereon, and it was his duty to make such levy whether the property was claimed by a third person or not. It devolved upon the officer, under the common law, to show that such property was not subject to execution, if he failed to make the levy. On the other hand, if he made the levy, and the property actually belonged to a third person, he became liable to the true owner for trespass or conversion. In this dilemma he could not, under the common law, demand indemnity from the plaintiff even though the third person asserted his title to the property in the most solemn manner. In the performance of his duty the officer was thus required to act at his peril. But this embarrassing position of such officer has been greatly modified, and his responsibility relaxed, both by the practice of the courts and the statutes of the various states. By the English practice the officer was permitted to show to the court issuing the writ that disputes in reference to the title to the property existed, and it was then discretionary with the court to interpose its protection; and this discretion seems always to have been exercised in his favor whenever it appeared that doubts in regard to the title to the property were reasonable, and the officer acted in good faith. And therefore it permitted the officer to obtain indemnity in cases where the title was involved in substantial doubt.

In many of the states it is provided by statute under what circumstances an officer may demand a bond of indemnity. And the general effect of these statutory provisions, and the practice of the courts, is that, where reasonable doubt exists, either with respect to the title or to the defendant's right to hold the property as exempt from execution, the officer may demand indemnity by the plaintiff, and upon his failure or refusal to give same, the officer is warranted in not seizing or not holding the property. But a mere suspicion or rumor that the property was not subject to seizure, it is held, in a great majority of the states, will not excuse the officer in his failure or refusal to make a seizure, if the property is in fact subject to the execution. 25 Am. & Eng. Ency. Law (2d Ed.)

692, 693; 2 Freeman on Executions, §§ 254, 274a, 275; Whitsett v. Slater, 23 Ala. 626; Marshall v. Simpson, 13 La. Ann. 437; Parks v. Alexandria, 29 N. C. 412. So that, in the absence of statutory provision giving in detail the circumstances under which indemnity could be demanded by the officer, a reasonable rule was established. That rule prescribed that the officer could not refuse to execute every final process without indemnity. On the other hand, the officer should not be restricted to cases where the opposing or involved claim was obviously formidable. The officer is entitled to his indemnity "whenever a claim is actually made or such circumstances exist as might well justify a prudent person in apprehending litigation." Murfree on Sheriffs, §§ 619, 620.

Section 3246, Kirby's Dig., provides: "If an officer who levies or is required to levy an execution upon personal property, doubts whether it is subject to execution, he may give to the plaintiff therein or his agent or attorney notice that an indemnifying bond is required." And section 3247, Kirby's Dig., provides: "If the bond mentioned in the last section is not given, the officer may refuse to levy the execution; or if it had been levied and the bond is not given in a reasonable time after it is required by the officer, he may restore the property to the person from whose possession it was taken, and the levy shall stand discharged." Now this statute does not provide that the officer can at his own election demand the indemnifying bond. If it had been the intention of the Legislature to permit the officer to require indemnity in every case where an execution was placed in his hands, it could easily have used apt words to express that intention. But it provided that it should only be required in cases where the officer doubted that the property was subject to execution. The Legislature thus presupposed that in certain cases, upon a due consideration of the circumstances, a doubt might arise as to whether the property was subject to the execution. So that there would have to be circumstances that would cause this doubt to arise, and the doubt would thus be founded on some reason, and would not be based on the sole arbitrary determination of the officer. To hold otherwise would permit the officer to act in bad faith; would permit the officer to act with favor towards either party; would permit an absolute control of final process to an officer, when the statute does not so specifically provide. We are therefore of the opinion that under the provisions of the above sections the doubt as to whether the property is subject to execution arises when the officer acts in good faith, and a claim is actually made relative to the property, or such circumstances exist as might well justify a prudent person in apprehending litigation relative thereto; and in such cases the officer has the right to demand an indemnifying bond. And the officer



in whose hands an execution has been placed cannot arbitrarily demand an indemnifying bond. The court, therefore, erred in refusing the above instruction requested by the plaintiff.

As this cause must be remanded for a new trial, we note some other questions that appear to be involved in the case, but which were not developed sufficiently in the trial, for a determination thereof. As before stated, it would appear, from the instructions that were given to the jury, that the sole issue submitted and tried was the right of appellee to demand an indemnifying bond. The answer alleges that the property of the execution debtor that had been levied on was subsequently taken possession of, and administered under certain bankruptcy proceedings instituted by the execution debtor. The evidence tends to show that on the day on which the goods had been advertised to sell under the execution, and after the constable had refused to make sale because an indemnifying bond that he would approve was not given, the constable readvertised the goods for sale for another day under the execution. But this phase of the case was not fully developed in the evidence. It does not appear to what exact day these goods were readvertised to sell, and on what exact day the bankruptcy proceedings were begun, and upon what day the goods were seized under the bankruptcy proceedings. In this case the complaint makes sufficient allegations to prosecute an action under section 3286, Kirby's Dig., for the recovery against the constable and the sureties on his bond of the penalty prescribed by that section, which is the amount specified in the execution, for the neglect or refusal of the officer to make sale of the property levied on under the execution. Or it makes sufficient allegations to support a common-law liability for actual damages caused by the officer, and sustained by the plaintiff, by reason of the negligence of the officer, or his refusal to perform certain duties which by the law he was under obligation to perform for the plaintiff. *De Yampert v. Johnson*, 54 Ark. 165, 15 S. W. 863; 3 *Freeman on Executions*, § 368; 16 *Ency. of Pleading & Practice*, 244. "The statute (section 3286, Kirby's Dig.) is highly penal, and its terms should not be extended by construction to cases not within its plain meaning." *Hawkins v. Taylor*, 56 Ark. 45, 19 S. W. 106, 35 Am. St. Rep. 82; *Moore v. Rooks*, 71 Ark. 562, 76 S. W. 548. And so, if the evidence should show that the constable readvertised the goods under the execution, which he retained, for a day of sale within the life of the execution, and before such day the goods were taken and seized under bankruptcy proceedings instituted by the execution debtor, the defendants would not be liable for the penalty prescribed by said statute. There would not in such

event, under a strict construction of that statute, be such a neglect or refusal to make sale of the property under the execution as to penalize the defendants. Because these matters have not been sufficiently developed on the former trial, we do not now pass thereon. Upon a further trial of this case the exact nature of the cause of action and the evidence can be fully developed, so that the cause can be finally determined.

The judgment of the lower court is reversed, and the cause is remanded for a new trial.

### JONES et al. v. LEWIS.

(Supreme Court of Arkansas. Feb. 22, 1909.)

#### 1. APPEAL AND ERROR (§ 927\*)—DIRECTION OF VERDICT—REVIEW.

The appellate court, in passing on the propriety of directing a verdict for one of the parties, must consider the evidence in the light most favorable to the adverse party.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3748; Dec. Dig. § 927.\*]

#### 2. TRIAL (§ 143\*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

Though the great preponderance of the evidence is in favor of the contentions of one of the parties, the adverse party who presents evidence to sustain the issue in his favor is entitled to go to the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 342; Dec. Dig. § 143.\*]

#### 3. VENDOR AND PURCHASER (§ 18\*)—OPTION CONTRACT—ACCEPTANCE.

An instrument, reciting that, in consideration of \$1 and the undertaking by defendant to pay a specified sum on or before a designated date, plaintiff granted and sold land to defendant, and providing that on defendant failing to pay the specified sum within the designated time the conveyance should be void, was only an offer of plaintiff to sell, which he could withdraw at any time before acceptance; but, after acceptance, the resulting contract is unaffected by the antecedent offer.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 23; Dec. Dig. § 18.\*]

#### 4. CONTRACTS (§ 176\*)—CONSTRUCTION—QUESTION FOR JURY.

Since an instrument, whereby plaintiff agreed to pay defendant a specified sum, if defendant sold plaintiff's land as mentioned in a deed, which was in fact only an offer to sell, when considered in connection with the deed, did not disclose the intention of the parties, the question of intent was for the jury.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 767-768; Dec. Dig. § 176.\*]

#### 5. TRIAL (§ 11\*)—ACTIONS FOR PARTICULAR DOCKETS—LEGAL OR EQUITABLE.

An action by a principal for the recovery of money paid to the agent in reliance of the latter's false representations, and defended by the latter denying the material allegations of the complaint, is an action at law, and it is proper to refuse to transfer it to the chancery court.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 28-30; Dec. Dig. § 11.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
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**6. SET-OFF AND COUNTERCLAIM (§ 29\*) — CLAIMS AVAILABLE AS COUNTERCLAIMS.**

Under Kirby's Dig. § 6098, authorizing counterclaims, a defendant, in an action for false representations inducing plaintiff to pay him a specified sum, is not entitled to set up as a counterclaim a claim based on plaintiff wrongfully securing the arrest of defendant on the charges of obtaining money under false pretenses and of embezzlement.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 49-51; Dec. Dig. § 29.\*]

Appeal from Circuit Court, Polk County; Jas. S. Steel, Judge.

Action by M. J. A. Lewis against M. W. Jones and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Olney & Lundy, for appellants. J. I. Alley and Pole McPhetridge, for appellee.

**FRAUMENTHAL, J.** The appellee, who was the plaintiff below, instituted this suit against the defendant, and, in substance, alleged: That he was the owner of 125 acres of land. That in 1907 he employed the defendant to sell the land for him. That it was agreed that, if the land was sold for as much as \$1,000, the defendant was to have \$200, and one Heath \$50, leaving the net sum of \$750 for plaintiff. That afterwards the defendant represented that he had sold the land to one Harrington, a resident of Kansas City, Mo., for \$1,000, and that Harrington had resold the land to one Andrews for \$2,000, thereby leaving a profit to Harrington of \$1,000. That relying on these representations, plaintiff executed a deed for the land to Andrews, who paid to plaintiff \$2,000, and thereupon plaintiff paid over to defendant \$1,250 to pay over as follows: To Harrington \$1,000, to defendant \$200, and to Heath \$50. That later he found that the representations made by defendant as to said sale to Harrington and resale by Harrington to Andrews were false and made for the purpose of defrauding him. That as a matter of fact Harrington had no interest in the sale. That the sale was made by defendant for \$2,000. And that by the above false representations he induced plaintiffs to pay him the \$1,000, for which sum he asks for judgment against defendant. The defendant filed an answer denying the material allegations of the complaint, and also filed a cross-complaint, in which he alleged that plaintiff had wrongfully secured the arrest of defendant on the false charges of obtaining money under false pretenses and of embezzlement, and prayed for judgment for damages against plaintiff. The defendant also filed a motion to transfer the cause to the chancery court, which motion was overruled, and to said ruling defendant excepted. The plaintiff filed a demurrer to the cross-complaint, which was sustained, to

which ruling defendant duly excepted. The cause proceeded to trial with a jury, and also a number of witnesses testified on both sides. After the jury had deliberated for a considerable time in endeavoring to arrive at a verdict, they reported that they could not agree upon a verdict. The court thereupon peremptorily directed the jury to return a verdict in favor of the plaintiff for \$1,000, which was done, and judgment was entered up accordingly, from which this appeal is prosecuted.

It appears from the testimony that the plaintiff owned 165 acres of land, and that in April, 1907, he was contemplating selling same, and defendant, learning of this, spoke to plaintiff about it and agreed to endeavor to sell the land for him. The plaintiff after some discussion agreed to sell the 165 acres for \$1,000. Later the defendant claims that he secured one Heath to agree to purchase 40 acres of the land, and in July, 1907, reported this to plaintiff, who declined to sell the 40 acres. Thereupon on July 28, 1907, the plaintiff executed to defendant an instrument, styled an "option deed," by which it is provided that in consideration of \$1 and the undertaking by defendant to pay the sum of \$1,000 on or before January 1, 1908, the plaintiff granted and sold the remaining 125 acres of land to defendant, with the further provision that, if defendant failed to pay the said sum within said time, the conveyance should be void, and all rights and liabilities thereunder should cease. This instrument was signed also by plaintiff's wife, who therein relinquished dower. On the following day, as the instrument is dated, or on the same day, as would appear from its context, the plaintiff and his wife executed the following: "Board Camp, Polk Co., Ark., July 29, 1907. Be it known that we, the undersigned below, promise to pay Morris W. Jones the sum of two hundred and fifty dollars, if he or we sell our land situated in Polk Co., Ark., as mentioned in the deed this day between the said M. W. Jones and M. J. Lewis and Maud Lewis, his wife. Witness our hands this 29th of July in the year 1907. M. J. Lewis. Maude Lewis." On December 28, 1907, by written indorsement thereon signed by plaintiff and his wife, the terms of agreement of the above instrument were extended from January 1, 1907, to March 1, 1908, and on the same day, by indorsement made in said "option deed" signed by plaintiff and his wife, the time of the "option" was extended to March 1, 1908. On January 31, 1908, the plaintiff testified the defendant reported the sale to Harrington and the resale by him to Andrews, as set out above in the complaint, and on that day plaintiff executed the deed to Andrews and paid the \$1,250 to defendant. The preponderance of the testimony indicates that of this sum defendant retained \$1,000 in addition to the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

\$200 and paid \$50 to Heath, although it is admitted that he sent a draft for \$500 to Harrington. The evidence also tends to prove that plaintiff had employed defendant to sell the land, and for his services defendant was to receive \$200, that \$50 was to be paid to Heath, that defendant made the sale for \$2,000, and that he had received from plaintiff \$1,250 under the belief by plaintiff that defendant had actually sold to Harrington and that Harrington had resold to Andrews. The plaintiff also testified that he had agreed to take \$750 net in event defendant had sold the land for \$1,000, and that if defendant had actually sold to Harrington for \$1,000, and Harrington had resold to Andrews for the \$2,000, he would not have made any complaint. It is contended by appellee: That the undisputed evidence is that there was no consideration paid for the "option deed," and therefore it was not effective and binding; that the above-written agreement to pay defendant \$250 was executed after the "option deed," which, if effective, was merged in the said last agreement; that this written agreement provided for the entire remuneration which defendant was to receive; that, being the agent of plaintiff, the defendant was liable for the additional \$1,000 which he had received; and that on this account plaintiff was entitled to a peremptory instruction.

In determining on appeal the correctness of the trial court's action in directing a verdict for either party, the rule is to take that view of the evidence that is most favorable to the party against whom the verdict is directed. *La Fayette v. Merchants' Bank*, 73 Ark. 561, 84 S. W. 700, 68 L. R. A. 231, 108 Am. St. Rep. 71; *Rodgers v. Choctaw, O. & G. R. Co.*, 76 Ark. 520, 89 S. W. 408, 1 L. R. A. (N. S.) 1145, 113 Am. St. Rep. 102. And where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury. *St. L., I. M. & Sou. R. Co. v. Petty*, 63 Ark. 94, 37 S. W. 300; *Wallis v. St. L., I. M. & Sou. R. Co.*, 77 Ark. 556, 95 S. W. 446; *St. L., I. M. & Sou. R. Co. v. Vincent*, 36 Ark. 451; *Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9; *Boyington v. Van Etten*, 62 Ark. 63, 35 S. W. 622; *Fidelity Mutual Life Ins. Co. v. Reck*, 84 Ark. 57, 104 S. W. 533, 1102. The defendant was a witness in the case, and he testified: That when plaintiff spoke to him in April, 1907, about selling his land, the plaintiff was willing to sell the whole 165 acres for \$1,000; that in July, when Heath agreed to purchase 40 acres thereof, the plaintiff had reconsidered and declined to sell the 40 acres, but was willing and desirous to sell the remaining 125 acres for a sum that would net to him \$750; that thereupon plaintiff executed to him the "option deed"; that he was not then acting as agent of plaintiff in selling the land; and that then and thereafter he was

acting for himself in selling the land under the "option deed." He stated that the reason why the instrument agreeing to pay to him \$250 in event the land was sold for \$1,000 was executed was that originally plaintiff was willing to take \$1,000 for the entire 165 acres, and when Heath agreed to purchase the 40 acres thereof, and plaintiff declined to do so, the plaintiff was then willing and anxious to take and receive \$750 net to him for the remaining 125 acres; and inasmuch as defendant had been to some trouble for plaintiff in the matter to that date, and Heath had lost time in investigating the land and attending to the business in which he made the offer to buy the 40 acres, the plaintiff agreed to pay to defendant \$200 and to Heath \$50, making the \$250 named in the instrument, in event the 125 acres were sold for \$1,000, which would still net to plaintiff the sum of \$750. He also testified that he had actually communicated with Harrington, and that Harrington had secured Andrews the purchaser, and that he had been engaged for more than six months in endeavoring to sell the land. He denied that he had ever stated or agreed that all sums in excess of \$1,000 should belong to plaintiff, and denied that the \$250 was in payment for his services in making the sale, and denied that he was acting as agent for plaintiff in making the sale; but that the total amount that plaintiff was willing to take and did agree to take for the land was the sum of \$750 net to plaintiff. Giving the evidence of defendant its strongest probative force, it tended to prove the above. Now, even though the great preponderance of the evidence was against this version of defendant, still his testimony tended to sustain the issue in his favor, and he was therefore entitled to the right to have the issue submitted to a jury. *Little Rock & Ft. Smith R. Co. v. Henson*, 39 Ark. 414; *Little Rock & Ft. Smith Ry. Co. v. Barker*, 39 Ark. 491; *Oliver v. Ft. Smith Light & Traction Co.*, 116 S. W. 204. We are therefore of the opinion that the court erred in directing a peremptory verdict.

The instrument called "option deed" was an offer to sell, which might have been withdrawn at any time before its acceptance; but after its acceptance the resulting contract was not affected by the antecedent offer. 21 Am. & Eng. Enc. Law (2d Ed.) 926. It was not withdrawn on December 28, 1907, or considered by plaintiff on that date as merged in the agreement dated July 29th, because on December 28, 1907, the plaintiff in writing extended its terms until March 1, 1908. There is no endeavor here to enforce it as an executory contract. It is now only a piece of evidence. The plaintiff claims it was given to aid the defendant as the agent of plaintiff to effect a sale of the land, and the defendant claims that it was executed to him as an option or offer to sell independent of any question or relation of

agency. The instrument dated July 29, 1907, above, does not state that the \$250 was to pay for the services of defendant in making the sale. It does not state for what consideration it was given. It does not appear clearly and definitely from this instrument itself and the "option deed" what the intention of the parties was in this regard, and, where this intention of the parties does not appear clearly from the written instrument, the question should be left to the jury for its determination. *Massey v. Dixon*, 81 Ark. 337, 90 S. W. 383.

Inasmuch as the above opinion of the court must result in a reversal of the judgment and a new trial, we note the other questions raised in this case: The lower court properly overruled the motion of defendant to transfer the cause to the chancery court. It also properly sustained the demurrer to the cross-complaint, as it did not allege a proper counterclaim. *Kirby's Dig.* § 6098; *White v. Reagan*, 32 Ark. 281; *Hudson v. Snipes*, 40 Ark. 75; *Ward v. Blackwood*, 48 Ark. 396, 3 S. W. 624; *Barry Webmiller Mach. Co. v. Thompson*, 83 Ark. 281, 104 S. W. 137.

We find no error in the instructions given or refused, except in the seventh instruction given on the part of the plaintiff. This instruction should be modified by adding thereto the following: "Unless you further find from the evidence that defendant was not at the time acting as the agent of plaintiff in making the sale of the land."

The judgment of the lower court is reversed, and the cause remanded for a new trial.

#### SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. BRUCE.

(Supreme Court of Arkansas. March 15, 1909.)

##### 1. ELECTRICITY (§ 14\*)—PREVENTING CONTACT BETWEEN DIFFERENT WIRES.

A telephone company running its wires across a lot without permission from the owner owes to one rightfully on the lot engaged under employment in erecting a building thereon the duty to use ordinary care to prevent injury by the transmission through its wires of electricity escaping from other wires.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 7; Dec. Dig. § 14.\*]

##### 2. ELECTRICITY (§ 19\*)—RES IPSA LOQUITUR.

The rule that proof of an unusual accident resulting in injury occasioned by an instrumentality under the control of defendant, and which accident would not have occurred if defendant had used proper care, is proof of defendant's negligence, applies to electric companies in the control of their lines and apparatus.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.\*]

##### 3. NEGLIGENCE (§ 121\*)—BURDEN OF PROOF.

The prima facie case of negligence established by the proof of an accident and resulting

injury is not conclusive, but the burden shifts to the person charged with negligence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 218, 225; Dec. Dig. § 121.\*]

##### 4. ELECTRICITY (§ 19\*)—INJURIES FROM CONSTRUCTION — NEGLIGENCE — QUESTION FOR JURY.

In an action against a telephone company for injuries occasioned by coming in contact with a broken electric wire charged with electricity in consequence of having come in contact with a trolley wire, evidence held to require the submission to the jury of the issue of the company's negligence.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.\*]

##### 5. NEGLIGENCE (§ 136\*)—QUESTION FOR JURY.

Where there is any evidence, viewed in its most favorable light, to establish the issue in favor of one charged with negligence, an instruction that his negligence has been conclusively proved is erroneous, and to justify the withdrawal of the question of negligence from the jury the facts must not only be undisputed, but such that the conclusion to be drawn from them is indisputable.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 290-297; Dec. Dig. § 136.\*]

##### 6. TRIAL (§ 253\*) — INSTRUCTIONS — IGNORING EVIDENCE.

An instruction, in an action against a telephone company for injuries to one coming in contact with a broken wire heavily charged with electricity, that the jury on finding facts recited based on plaintiff's evidence must find that the company was negligent and must find for plaintiff unless he was guilty of negligence, was erroneous as withdrawing from the jury's consideration defendant's evidence showing its freedom from negligence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 616; Dec. Dig. § 253.\*]

##### 7. NEGLIGENCE (§ 15\*)—PERSONS LIABLE.

Where an injury was the result of the concurrent negligence of two persons, and would not have occurred in the absence of either, either is liable.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 18; Dec. Dig. § 15.\*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Action by D. E. Bruce against the Southwestern Telegraph & Telephone Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This was a suit instituted by the appellee, who was plaintiff below, against appellant, in which he alleged: That the defendant had negligently erected and strung its telephone wires across a street and over certain vacant lots in the city of Ft. Smith, in such a manner as to endanger persons thereon; that the wires had become detached from their fastenings by reason of having been negligently strung and maintained; that the plaintiff had come in contact therewith; that the telephone wire had come in contact with a wire of the street railway, and had thereby become charged with electricity, as a result of which plaintiff was severely burned about his hands, arms, and body, disabling him for a great length of time and perma-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

nently injuring his fingers and hand. The defendant in its answer denied that its wires were negligently strung and maintained, and that they were dangerous to persons on said streets or lots, denied that the wire had become detached from its fastening on account of any negligent manner in which it was strung and maintained, and denied the other material allegations in the complaint. It alleged that its wires were located and maintained and operated in a skillful manner, and further pleaded contributory negligence on the part of plaintiff.

The evidence upon the part of plaintiff tended to show: That the defendant had stretched two of its wires from a pole located on North Sixteenth street in the city of Ft. Smith across the street, and thence across three vacant lots, and thence across an alley to a house located upon North F street; that the wires were attached to the pole on North Sixteenth street at a height of about 24 feet from the ground, and were strung without any further support to the house on North F street, a distance of 330 feet, where they were attached at a height of about 18 feet from the ground; that the wires were so strung as to cross over the trolley line of the street railway; that this trolley line was heavily charged with electricity; that there were no guards or other mechanism to protect the telephone wires from the trolley wire; that this telephone wire was thus erected on May 23, 1907, and the accident complained of occurred on the 26th day of June, 1907. Plaintiff was a carpenter, and on June 25th, in connection with two other carpenters who were working under him, began the erection of a barn on the vacant lots. About 10 o'clock of the morning of June 26th, they had raised some outside studding on the barn, and put one joist on that end thereof. This telephone wire ran through the barn, and the place where the barn was located was about midway between the telephone pole on North Sixteenth street and the house whereon the telephone wires were attached, and the wires at this place were about 9 or 10 feet from the ground. While these two men were working on the barn, one of the wires was lying on top of the joist, and one of the men stood the ladder up and threw the wire on the outside of the joist, and before he got upon the top of the ladder the wire broke, and each end sprung back; one of the ends falling upon the foundation of a house which was being erected upon the vacant lots several feet from the barn. This workman claimed: That he did not strike the wire with any hammer or other instrument, but that he did not know whether the ladder hit the joist, or whether it hit the wire; that the wire broke out from the barn, but he did not know how far; that the joist was about 14 or 15 feet from the ground. At the time that the wire broke plaintiff was not present, but

came within a few minutes thereafter, and, seeing the end of the wire lying on the foundation, asked who broke the wire, and immediately picked up the wire, and it knocked him down and injured him in the manner set out in the complaint. The evidence tended to show that when the telephone wire broke it fell across the trolley wire, by which it became heavily charged with electricity.

The testimony on the part of the defendant tended to show: That the telephone wire was put up on May 23, 1907, and was No. 14 iron wire, which was regularly used for telephone wire, and was the best grade of galvanized wire, such as other companies used for this purpose; that this span of wire from the telephone pole to the house was about 300 feet, and there was no danger of No. 14 wire breaking ordinarily when strung that distance; that the wires were securely attached at both ends, and the poles and their fastenings were in good condition; that the wire was new when put up and appeared new at time of accident, and it was skillfully stretched from the pole to the house, and under ordinary circumstances such wire would not break, and it would require an unusual strain to break such a wire when it was strung the distance that it was between the pole and the house; that servants of the defendant went to the wire upon the morning of the accident and shortly thereafter; and that it looked like the wire had been mashed at the place where broken, and seemed to be flattened a little on one side at the broken end, as though cut with a hatchet while resting on wood.

Upon the part of the plaintiff the court instructed the jury, in substance, that the defendant was required, in constructing and maintaining its lines of wire, to exercise that reasonable care and caution which would be exercised by a reasonably prudent person under similar circumstances, and to maintain its wires suspended a safe distance from the ground, and to guard its wires falling by the exercise of due care. Instructions were also given relative to contributory negligence and the burden of proof thereof, and the following instructions were also given:

"(4) If you find that plaintiff was injured by the wire in question, and that said wire was hanging down on said lot, and that said wire was erected, maintained, and owned by the defendant, and was under its management and control, and that by contact with said wire the plaintiff, having a right to be on said property, was injured, a prima facie case of negligence is made out, and the burden was cast upon the defendant to show that this wire was hanging down through no fault of its servants and agents."

"(9) If you find that the injury was the result of the concurring negligence of two parties, and would not have occurred in the absence of either, you are charged that the negligence of both parties was the proximate

cause of the injury, and defendant is not excused because of the other concurring act of negligence.

"(10) Plaintiff claims: That at the place where he was injured the defendant had stretched two of its wires from a pole located on North Sixteenth street across the street; thence across lots numbered 1, 2, and 3, block 33, Fitzgerald's addition to the city of Ft. Smith, Ark.; thence across an alley running back of said lots running parallel and between Sixteenth and Seventeenth streets; thence to a house, No. 1620 North F; that said wires were run across said lots, and in their course across said lots were allowed to run within 9 or 10 feet of the ground; that the distance between the pole on North Sixteenth street, where the wire started, and house No. 1620 North F, to which the wires were attached, was about 300 feet; that for this distance said wires had no support except the aforesaid pole and the aforesaid house; that the wire was so constructed as to cross a trolley line, and nothing had been done to protect the wire from the trolley wire; that defendant erected and allowed their wires to remain in this condition for many weeks, and they were in such condition just prior to the time plaintiff was injured; that plaintiff, who was engaged at work erecting a building at a point on said lot, by and with the consent of the owner, was injured by reason of one or both of these wires having fallen to the ground, on account of having been so erected and maintained. If you find from the evidence that the above facts are true, then you must find that defendant was guilty of negligence, and you must find for the plaintiff, unless you further find that plaintiff was guilty of contributory negligence."

Other instructions were given on the part of the plaintiff which are not necessary to be set out in order to convey a fair understanding of the issues involved in this appeal. A number of instructions were given on the part of the defendant, and some requested by defendant were refused. The jury returned a verdict for the plaintiff assessing his damages at \$3,000, and from the judgment entered thereon defendant has appealed to this court.

Walter J. Terry (Brizzalara & Fitzhugh, of counsel), for appellant. Ben D. Kimpel, for appellee.

FRAUENTHAL, J. (after stating the facts as above). The liability of the defendant in this case depends upon the duty which it owed to the plaintiff under the circumstances of this case and the manner in which it performed that duty. The defendant owned and controlled a telephone system in the city of Ft. Smith. It had strung its telephone wires from a pole on North Sixteenth street to a house on North F street for a distance

of from 300 to 330 feet, making one span unsupported between these points. The telephone wires extended above the electric wires of a street car company which were heavily charged with electricity. The telephone wires were wholly unprotected from coming in contact with the trolley wires should they fall. They were stretched across vacant lots where they sagged down to a distance of 9 or 10 feet from the ground. The telephone wires were maintained in this way for several weeks before the accident occurred by which the plaintiff was injured. Upon the vacant lots a house was being erected, and on the day of the accident the plaintiff was employed in erecting a barn on the vacant lots near the house. The wires ran through the barn, and in the absence of the plaintiff one of the wires broke, and one end thereof lay hanging down on the foundation of the house when the plaintiff returned to his work. He picked the wire up to throw it aside and was burned and injured by an electric shock. In breaking, the telephone wire fell across the trolley wire, and thus became heavily charged with the current of electricity. The plaintiff was rightfully upon the lots engaged under employment in erecting structures thereon. The defendant in running its wires across those lots owed to the people who were accustomed to be on and go across these lots the same duty to use the same care in maintaining its wires as it did to those upon the streets of the city where it had its wires. *Guinn v. Delaware & N. Tel. Co.*, 72 N. J. Law, 276, 62 Atl. 412, 3 L. R. A. (N. S.) 988, 111 Am. St. Rep. 668.

The plaintiff and other mechanics had been engaged for several days in their work on these lots and were accustomed with other people to travel on and across the lots. The defendant had no interest in the lots and showed no special permission or right from the owner to stretch its wires across the lots. The defendant was under the duty to so maintain its wires as not to interfere with the safe use of the lots. It owed the duty to the plaintiff and those accustomed to go on and across these lots to exercise due and reasonable care in maintaining these wires. This electric company owed the duty to plaintiff to use ordinary care to prevent injury by the transmission through its wires, suspended over the streets and these vacant lots, of electricity escaping from any other wires that might come in contact with them. *City Electric Street R. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262; *Rowe v. N. Y. & N. J. Tel. Co.*, 66 N. J. Law, 19, 48 Atl. 523.

Now where the defendant owes a duty to plaintiff to use care, and an accident happens causing injury, and the accident is caused by the thing or instrumentality that is under the control or management of the defendant, and the accident is such that in the ordinary course of things it would not occur

If those who have the control and management use proper care, then, in the absence of evidence to the contrary, this would be evidence that the accident occurred from the lack of that proper care. In such case the happening of the accident from which the injury results is *prima facie* evidence of negligence, and shifts to the defendant the burden of proving that it was not caused through any lack of care on its part. *Railway v. Hopkins*, 54 Ark. 200, 15 S. W. 610; *Railway v. Mitchell*, 57 Ark. 418, 21 S. W. 883; *Ark. Tel. Co. v. Ratteree*, 57 Ark. 429, 21 S. W. 1059; *City Electric Street Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262; *Jack v. Reeves*, 78 Ark. 426, 95 S. W. 781. Now this rule applies to electric companies in the control and management of their lines and apparatus for the further reason that they have almost exclusive knowledge of the facts relative thereto. The plaintiff ordinarily has not the power or opportunity to test these lines and apparatus, and it is reasonable that the party having the power and opportunity should be required to give an explanation of the accident, and to prove that it did not occur through a lack of care on its part. *Keasbey on Electric Wires*, § 271; *Newark Electric Light & Power Co. v. Ruddy*, 62 N. J. Law, 505, 63 N. J. Law, 357, 41 Atl. 712, 46 Atl. 1100, 57 L. R. A. 624; *Denver Consolidated Elec. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 490, 31 L. R. A. 566; *W. U. Tel. Co. v. State*, use *Nelson*, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464. But the happening of the accident under these circumstances is not a conclusive proof of negligence. As is said in the case of *Jack v. Reeves*, 78 Ark. 426, 95 S. W. 781, where the court found from the circumstances of that case that the evidence of the accident was *prima facie* evidence of negligence, the court said it "shifted the burden onto the defendant to prove that it was not caused by any want of care on his part." 29 Cyc. 591; *Newark Electric L. & P. Co. v. Ruddy*, 62 N. J. Law, 505, 63 N. J. Law 357, 41 Atl. 712, 46 Atl. 1100, 57 L. R. A. 624. And so in this case we are of the opinion that the evidence on behalf of the plaintiff made out a *prima facie* case of negligence against the defendant by which the accident occurred to the injury of plaintiff; but we are also of the opinion that the testimony on behalf of the defendant tendered an issue. The testimony of the defendant, viewed in its most probative force, tended to prove that the wire, when put up in May, was new, and that all the apparatus was in good condition and was so maintained to the time of the accident. Witnesses on behalf of defendant testified that the wire was stretched over the trolley wire and from the pole to the house in a skillful manner, and it was also contended by defendant that the wire was broken or cut by the carpenters independent of and unconnected with defendant or any act of negli-

gence on the part of defendant, and this was not caused by the wire being improperly or negligently hung by defendant. Before the jury can be instructed that the negligence on the part of the defendant has been conclusively proved, and thus in effect directing a verdict upon that issue, that view of the evidence that is most favorable to the party against whom the verdict is thus directed must be taken; and if there is any evidence tending at all to establish the issue in his favor, such instruction should not be given. *Lafayette v. Merchants' Bank*, 73 Ark. 561, 84 S. W. 700, 68 L. R. A. 231, 108 Am. St. Rep. 71; *Rodgers v. C., O. & G. R. Co.*, 76 Ark. 520, 89 S. W. 468, 1 L. R. A. (N. S.) 1145, 113 Am. St. Rep. 102; *Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9; *Jones v. Lewis*, 117 S. W. 561. "The better opinion would seem to be that in order to justify the withdrawal of the question of negligence from the jury (or a peremptory finding of negligence by the jury), the facts must not only be undisputed, but such that the conclusion to be drawn from them is indisputable." 6 *Thompson on Negligence*, § 7393; 29 Cyc. 645.

Now in instruction No. 10 set out in the above statement, which was given on the part of the plaintiff, the court, after reciting certain facts which the evidence on the part of the plaintiff tended to establish, instructed the jury that: "If you find from the evidence that the above facts are true, then you must find that defendant was guilty of negligence, and you must find for the plaintiff, unless you further find that plaintiff was guilty of contributory negligence." This in effect was a peremptory instruction to the jury to find that negligence on the part of the defendant was conclusively proved, and a peremptory instruction to find in favor of the plaintiff; but the facts set out in the instruction only made out a *prima facie* case of negligence. It wholly ignored the testimony introduced and the issues offered by the defendant. According to this instruction No. 10 given on the part of the plaintiff, it was the duty of the jury to return a verdict for the plaintiff without regard to the care, skill or diligence which the evidence might have shown was exercised by defendant, and without regard to any evidence that might tend to show that the carpenters cut or broke the wire without any fault or negligence of defendant. *Southwestern Tel. Co. v. Beatty*, 63 Ark. 65, 37 S. W. 570; *Western Coal & Mining Co. v. Garner* (Ark.) 112 S. W. 392. The existence of negligence should be passed upon by the jury, as any other fact, in the light of all the testimony in the case. 15 Cyc. 480. In this instruction No. 10 the court should only have told the jury that, if they found the statements recited therein established by a preponderance of the evidence, then they would be justified in finding the defendant negligent, or that such facts, if established by a preponderance of the evidence, made out

a prima facie case of negligence against the defendant.

The appellant contends that the court erred in giving instruction No. 9, which is set out above and was given on the part of the plaintiff; but we are of the opinion that said instruction is not erroneous. "The fact that another person contributed, either before the defendant's interposition or concurrently with such interposition, in producing the damage, is no defense." Wharton on Negligence (2d Ed.) § 144. In the case of *City Electric Street Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262, it is said: "The injury was the result of the concurring negligence of the two parties, and would not have occurred in the absence of either. In that case the negligence of the two was the proximate cause of the same, and both parties are liable." *St. L. I. M. & S. Ry. Co. v. Coolidge*, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. Rep. 21; *Hayes v. Town of Hyde Park*, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249.

The defendant duly saved exceptions to the giving of each and all the instructions that were given at the request of plaintiff, and also to the refusal to give certain instructions requested by it, and here urges each of these exceptions as an error. It also urges that error was committed in permitting the introduction of certain testimony. We do not think it necessary to set out each of these contentions. We have carefully examined the instructions and the testimony referred to, and we are of the opinion that none of these contentions on the part of the defendant is well taken; but we are of the opinion that error was committed in the giving of said instruction No. 10 on the part of the plaintiff, and that this error was prejudicial.

On account of the giving of this instruction, the judgment is reversed, and the cause remanded for a new trial.

#### ALUMINUM CO. OF NORTH AMERICA v. RAMSEY.

(Supreme Court of Arkansas. March 1, 1909.)

#### 1. APPEAL AND ERROR (§ 927\*)—PEREMPTORY INSTRUCTION—REFUSAL—REVIEW.

In reviewing the refusal to grant a peremptory instruction in favor of defendant, the Supreme Court, after verdict for plaintiff, must consider the testimony in its aspect most favorable to plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3748; Dec. Dig. § 927.\*]

#### 2. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a servant, plaintiff's contributory negligence is for the jury if reasonable and fair-minded men from all the

facts and circumstances proved may come to different conclusions on the question.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1069; Dec. Dig. § 289.\*]

#### 3. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—RAILROADS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Plaintiff, a railroad engineer, whose duty it was also to fire his engine, after having run the engine ahead of his train in order that a switchman, then at the switchstand, might throw the switch according to his duty, and send the train on another track according to custom, left the engine and took a stand in the middle of the track behind the engine to rake out clinkers, and while doing this was struck by the cars continuing on the same track because of the switchman's failure to properly throw the switch of which plaintiff was not warned, though he could have heard a warning if given. *Held*, that plaintiff was not negligent as a matter of law.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1122; Dec. Dig. § 289.\*]

#### 4. MASTER AND SERVANT (§ 179\*)—INJURIES TO SERVANT—FELLOW-SERVANT ACT—VALIDITY.

Act March 8, 1907 (Acts 1907, p. 162), abolishing the fellow-servant rule, is valid.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 354; Dec. Dig. § 179.\*]

#### 5. MASTER AND SERVANT (§ 228\*)—INJURIES TO SERVANT—FELLOW-SERVANT ACT—CONTRIBUTORY NEGLIGENCE.

Acts 1907, p. 162, providing that, in cases of corporations, the master shall be liable for injuries or death caused by any other servant of the master in the same manner and to the same effect as if the negligence causing the injuries or death was that of the employer, while giving the servant a right to rely on the exercise of reasonable care by his fellow servants, does not relieve him from the duty to exercise ordinary care for his own safety.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 670; Dec. Dig. § 228.\*]

#### 6. MASTER AND SERVANT (§ 294\*)—INJURIES TO SERVANT—FELLOW-SERVANT RULE—STATUTES—INSTRUCTIONS.

Under Acts 1907, p. 162, abrogating the fellow-servant rule, an instruction that the law imposed on plaintiff the exercise of ordinary care, and in determining that question the jury might consider the fact that he relied on his fellow-servant performing his duty, at the same time having due regard himself to the danger to be apprehended, was not error as giving plaintiff an absolute right to assume that his fellow servants would do their duty.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1162; Dec. Dig. § 294.\*]

#### 7. TRIAL (§ 278\*)—INSTRUCTIONS—AMBIGUITY—OBJECTIONS.

A general objection is insufficient to point out an ambiguity in an instruction, which must be specifically called to the court's attention.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 689; Dec. Dig. § 278.\*]

#### 8. MASTER AND SERVANT (§ 296\*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

The court was requested to charge that if the jury found from the evidence that the fire in the engine which plaintiff was operating could have been attended to by plaintiff remaining on the engine, and, instead, plaintiff stood behind on the track, and thereby was injured, he needlessly placed himself in a dangerous posi-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



tion, and was negligent. Another instruction directed that if, in order to make a customary flying switch, the time the person throwing the switch had to perform was short, so that he had to act with promptness, and notwithstanding plaintiff's knowledge of the fact he assumed that the switch would be thrown in time for the cars to take another track, and did not look to ascertain that the switch had been turned, but went on the track in front of the moving cars and was injured, he was negligent, and could not recover. *Held*, that such instructions were properly refused as charging that, if the jury found the facts stated, plaintiff was negligent as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1180; Dec. Dig. § 296.\*]

**9. TRIAL (§ 194\*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY.**

Since the existence of negligence is a question of fact, it is improper to charge that a certain fact or group of facts constitutes negligence per se unless they are so declared by law or are such as induce an inference of negligence in all reasonable minds.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 465; Dec. Dig. § 194.\*]

**10. TRIAL (§ 194\*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY.**

Instructions on contributory negligence so written as to be peremptory and invade the province of the jury on such question are improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 465; Dec. Dig. § 194.\*]

**11. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL OF REQUESTS—INSTRUCTIONS GIVEN.**

A request to charge that tracks on which railroad cars are moving are dangerous, and that it is the duty of persons having occasion to go on the tracks to use their senses to ascertain that no moving trains are near, and that it was plaintiff's duty before going on the track where he was injured to use such care as a prudent person under the circumstances would use, and, if he failed to exercise such care, he could not recover, was sufficiently covered by other instructions defining contributory negligence, and charging that if plaintiff failed in any respect to use the care which an ordinarily prudent person would use under the circumstances, and such failure contributed to his injury, he could not recover, and that the operation of trains and working on or about tracks was dangerous, and a person so working was bound to use care and watchfulness commensurate with his dangerous surroundings to avoid injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.\*]

**12. MASTER AND SERVANT (§ 296\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

Defendant requested a charge that if after plaintiff, an engineer, passed a switch with his engine before getting down to fix the fire, looked back and saw that the cars he had been drawing had not passed the switch, and if he had known the switch was still turned for the track he was on, he would not have got on the track behind his engine where he was hurt, and that the switch and tracks were in plain view, and he could have seen the switch was not turned if he had looked at it or at the tracks at that point, but he failed to look, etc., and "thereby" did not exercise the care of a reasonably prudent person under the circumstances, he could not recover. *Held*, that the word "thereby" referred to "but he failed to look," etc., and hence the instruction was properly refused as

ambiguous, and as withdrawing the issue of contributory negligence, from the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1180; Dec. Dig. § 296.\*]

**13. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.**

In an action for injuries to a servant, the burden of proving plaintiff's contributory negligence rests on the defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 908; Dec. Dig. § 265.\*]

**14. DAMAGES (§ 132\*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.**

Plaintiff, a tram road engineer, was 22 years old, and a man of average intelligence. His left leg was so injured that it was amputated 5½ inches below the hip. He suffered great pain, and lay in a hospital for a month. On his return home he fell and hurt the stump, so that he was carried back to the hospital, and remained there six weeks longer. His medical and hospital bill was \$386.22, and his earning capacity at the time he was injured was \$2.40 a day. Prior to his employment by defendant, he had worked 15 nights in railroad yards, running a switch engine. *Held*, that a verdict awarding plaintiff \$20,320 was excessive, and should be reduced to \$12,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 380; Dec. Dig. § 132.\*]

Wood, J., dissenting. Battle, J., dissenting in part.

Appeal from Circuit Court, Saline County; W. H. Evans, Judge.

Action by George M. Ramsey against the Aluminum Company of North America. Judgment for plaintiff, and defendant appeals. Affirmed on condition.

George M. Ramsey brought this action against the Aluminum Company of North America to recover damages for physical injuries alleged to have been received by him while in the employment of said company on account of the negligence of one of his fellow servants. The defendant company answered, setting up contributory negligence on the part of the plaintiff as a defense to the action.

The Aluminum Company of North America is engaged in the mining of bauxite in Saline county, Ark., and in connection with its plant operates a narrow-gauge railroad with a trackage of two miles which is used for the purpose of hauling the ore from the mines to the drying shed. The equipment of the road consisted of one locomotive and about 80 train cars. The roadbed was new and the track in good shape at the time the accident in question happened. At the time of the trial in September, 1907, George M. Ramsey, the plaintiff, was nearly 23 years old. He commenced working for the company on the 31st day of August, 1906. He commenced to run the engine on the 22d day of January, 1907, and continued to run it up to the time he was injured, which occurred on the 18th day of June, 1907. The shed runs north and south. One track runs east and one north-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

east. The cars from the northeast track were placed in the shed by kicking them there. From the east track they were run in by means of a "flying switch." There was no "Y" or turntable. When the cars came in from the Martin mine, they were run in the shed by means of the flying switch, and were unloaded there. The customary manner of making the flying switch is described as follows: The locomotive was in front of the cars, coming from the mines, and, when it arrived at a big cut about 200 yards from the switch, the engineer would blow the whistle. In response to this signal two employees of the company would come out of the car sheds, go down along the track, and jump on the moving cars to assist in bringing them in. One of them would jump on the engine to pull the pin for the flying switch when the engineer gave the signal. The switch was always left open so that the engine could take the right-hand track, which led around to the end of the shed. After the engine passed the switch, the switch would be thrown so that the cars would take the left-hand track, which led into the shed to the ore bins. When in about 50 yards of the switch, the engineer would check the speed of the engine, and this would cause the coupling between the engine and the car next to it to slacken so that the pin could be pulled. The engineer would then increase the speed of the engine so that it could pass the switch and get on the right-hand track ahead of the cars. When the engine reached the switch, the man on the engine with the engineer would jump off the engine, and throw the switch in order to place the cars on the left-hand track leading to the sheds. The switchman would then jump on the moving cars to assist the brakeman in setting the brakes so as to stop them at the ore bins. The engine was a small one, and had no tender. The train crew consisted of the engineer and a brakeman. Sometimes the brakeman pulled the pin to make the flying switch, but he usually rode on the rear end of the train of cars, so that, if the train broke, he would be in a better position to control the cars which had broken loose from the engine.

The accident happened on the second trip that had been made on the morning of its occurrence. The brakeman was riding on the rear end of the train, and the signal for the switchman to come to throw the switch was blown in the cut as usual. When the engine arrived at a point about 50 yards from the switch, the engineer pulled the pin to uncouple the cars from the locomotive. When the plaintiff got back on his feet after pulling the pin, and looked ahead, McLaughlin was walking up the track toward the engine about 10 steps away, and Page was standing at the switch with his foot on the sill. McLaughlin and Page had come out of the shed for the purpose of throwing the switch and of assisting the brakeman in stopping

the cars at the ore bins in the shed. It was the duty of Page to throw the switch. The engine was about 40 yards ahead of the cars when it passed the switch. As it passed McLaughlin and Page, plaintiff said: "You come out here next time and pull this pin. We are in a hurry this morning. I don't want to pull the pin another time. I pulled it last time." They said: "All right." Plaintiff rolled the engine down to the road crossing, and stepped off right behind it when it stopped. He grabbed the clinker hook, and turned around. The cars were then within 10 steps of the switch. Page was standing at the switch, but plaintiff did not notice whether the switch had been thrown or not. He was in a hurry, and had stepped down to attend to the fire in his engine. Just as he raised up, the cars ran into him, knocked him down, and up against the engine. The cars were moving at the speed of seven or eight miles per hour. When the cars hit him, McLaughlin was four car lengths from the first car and Page was behind him at the switch. Plaintiff was both engineer and fireman. It was necessary for him to rake the fire and to get out the clinkers to get up steam enough to move the engine back up the grade. He said that he could not do this work in any other position than that assumed by him at the time of the injury; that the work could not be done from the boiler because the platform from behind the end of it was only two feet wide, and the fire would burn him if he stood so close, and that besides this in standing on the platform he could not get the clinker hook down in the fire; that he could not do this work from either side of the engine because there was no opening into the fire box on either side, and that, in consequence thereof, he had to stand right in front of the door and in the middle of the track to do the work. The plaintiff gave the signal for the men to come out to throw the switch when he was about 200 yards from it, and it was his duty to direct when the flying switch was to be made. When he gave the signal, it was the duty of one of the men to pull the pin, and, after the engine passed the switch, it was the duty of the other to throw the switch. Plaintiff relied upon Page to throw the switch. Plaintiff's leg was crushed so badly that it had to be amputated.

The above is the substance of the testimony of the plaintiff detailing the circumstances relating to the injury. On cross-examination he stated that sometimes in making a flying switch one splits the switch; that sometimes it happens that a piece of coal or wood will get into the switch and prevent its being thrown; that, if he had looked a few seconds longer, he could have seen whether the cars took the left-hand track, but that he could almost have the engine hot in that time; and that he was in a hurry. On redirect examination he testified that the track

on which he was injured was so curved that he could not tell from where he was, whether the switch was open or shut; that the switch bar was small and flat on one side or the other as the switch is open or shut; that at the time of the injury he was absorbed in getting the engine ready to go back to the mine; that, if there was a piece of coal in the switch, the man at the switch could have told it better than he, and that, if the switch failed to work, could have notified him of that fact by hollowing to him, as he was only five or six car lengths away.

R. L. Page, for the defendant, testified: "I am 23 years old, and reside at Bauxite, Ark., and work for the defendant. I have been at work for that company about one year. I was working for it when Ramsey was hurt. We always made a drop of the cars, or flying switch, when bringing ore from the Martin mine. The engine would pull the cars down, and then we would meet them. One of us was supposed to get on the cars and cut the engine off and ride the engine to the switch, the engine taking the right-hand track, drop off, and turn the switch for the main line, so that the cars would run on into the shed. Always two of us went out to meet the train. When it whistled on this occasion, Sam McLaughlin and I went out. I ran past the switch stand, and, as the engine ran past me, Ramsey said: 'Bob, I want you to be here next time to pull this pin.' I said: 'All right, Houston, I will.' That was about 20 yards from the switch stand. I ran on east and caught the cars, getting on the fourth car, and McLaughlin caught on about four cars back of me. I was about 20 yards from the switch when the engine passed me, and proceeded to run east until I climbed on the cars. I was on the left-hand side of the track, the side the switch is on. I did not stop after leaving the switch. Mr. Pipkin, the shed foreman, sent us out, and we ran until we met the train. McLaughlin and I did not stop and sit on the coal box. There was no one at the switch to throw the switch after the engine passed. I could not have run ahead of the cars to throw the switch, and the cars ran into the siding. McLaughlin was on the opposite side of the track. Forrest Raper, the brakeman, was on the last car. I have never known of Ramsey's pulling the pin himself on any other run. Before that it had been the custom for the enginuer to stop and wait for us if we did not come out in time to pull the pin and throw the switch. The engine ran about 20 steps beyond the switch before it stopped, stopping on the road crossing. The engine, when it passed me, was running too fast for me to get on without running a risk of getting hurt."

Other evidence was adduced tending to corroborate the testimony of Page. There was a jury trial and verdict for the plaintiff in

the sum of \$20,320. The defendant has duly prosecuted an appeal to this court.

Appellee asked the court to instruct the jury as follows:

"(1) You are instructed that, while an employé assumes all the risks and hazards usually incident to the employment he undertakes, he does not assume the risk of the negligence of the company for whom he was working or any of its servants. In other words, he has a right to assume, not only that the master will perform its duty, but he has a right to assume that each of the other servants will perform their duty; and if, while in the exercise of ordinary care, he is injured, either by the negligence of the master for whom he works or by the negligence of any other servant of the master, he has a right to recover, and if you find from the evidence in this case that the plaintiff, Ramsey, while in the exercise of ordinary care, relied upon the other servants performing their duties, and was injured by the negligence of some other servant, your verdict must be for the plaintiff.

"(2) You are instructed that negligence is the doing of something that a man of ordinary prudence would not do under the circumstances, or the failure to do something which a man of ordinary prudence under the circumstances would do, and, if you find from the evidence in this case that Ramsey was doing what a man of ordinary prudence would have done under the circumstances, he is not guilty of contributory negligence, and your verdict must be for the plaintiff.

"(3) You are instructed that contributory negligence cannot be presumed, but must be proven, and the burden of proving it is on the defendant.

"(4) If you find for the plaintiff in assessing his damages, you may take into consideration his pain and suffering, both mental and physical, caused by the injury, if any is proven, his probable future suffering as a result of the injury, if any future suffering appears from the evidence to probably result from the injury, and his expenses for medical attendance caused by the injury, if any are proven.

"(5) If you find that the plaintiff, while in the exercise of ordinary care upon his part, was injured by reason of the carelessness or omission of duty of the defendant, its servants, or employes, you will find for the plaintiff."

These instructions were given over the objections of appellant.

At the request of appellant, the court gave the following instructions:

"(2) You are instructed that the mere fact that plaintiff was injured while in defendant's employ, or was injured about the works of defendant, creates no liability upon defendant to pay for any damages he may have suffered; nor is there any presumption

that because of such injury defendant or any of its agents or servants was negligent and is responsible therefor, but the burden of proof is on the plaintiff to establish by a preponderance of the evidence that his injury and damage were caused by the negligence of defendant.

"(3) You are instructed that contributory negligence is the failure to use that degree of ordinary care and caution to avert injury to himself which would be used by an ordinarily prudent person under the circumstances; and if you find from the evidence that plaintiff failed in any respect to use that degree of care and caution which an ordinarily prudent person would use under the circumstances, and that his failure to use such care contributed to cause his injury, so that but for his concurring negligence the injury would not have happened, your verdict will be for the defendant, and by ordinary care is meant the exercise of reasonable diligence and implies such watchfulness, caution, and foresight as under all circumstances of the particular service would be exercised by ordinarily careful and prudent persons."

"(5) Even though defendant's agents or employees may have been guilty of negligence which caused plaintiff's injury, still if plaintiff was guilty of any carelessness or negligence which contributed in any degree to cause his injury, so that but for his concurring negligence the accident would not have happened, your verdict will be for the defendant.

"(6) You are instructed that the operation of trains and working on and about tram-road tracks are necessarily dangerous; and a person working about moving trains and about tracks where trains are being moved is bound to use care and watchfulness commensurate with his dangerous surroundings to avoid injury to himself."

"(11) If you find from the evidence that, immediately preceding the time of the occurrence of the accident complained of in this suit, plaintiff was in charge of defendant's engine and a string of tram cars, and that, as he approached the switch leading to the shed of defendant's mill, it was his custom to blow his engine whistle, and thereupon switchmen were sent from defendant's mill to meet the engine and train for the purpose of switching the cars into the mill and of controlling their speed with brakes, and that it was the custom for one of these switchmen to get upon the engine and pull the coupling pin connecting the engine with the first car, and thereupon the engine would increase its speed and run ahead of the cars which were coming behind it, the switchman who pulled the coupling pin remained on the engine, and getting off at the switch for the purpose of turning it so the cars could take the siding, and if you find from the evidence that at the time this injury occurred the switchman did not reach his engine in time to make the

switch as described, and thereupon he uncoupled the engine from the train of tram cars himself and increased the speed of his engine and ran ahead of the cars, and did not use care to ascertain whether the switchman whose duty it was to turn the switch was at the switch, but proceeded and after passing the switch got on the track behind his engine, and that, if he had looked when passing the switch, he would have seen that no one was there to turn it, you are instructed that his injury is due to his own fault and neglect, and your verdict will be for the defendant."

"(12) You are instructed that there is no evidence in this case that the engine, cars, brakes, switch, or track of the defendant company was out of repair; and there is no evidence in this case of any negligence on the part of defendant or its agents or employees in this respect."

"(16) If you find from the evidence that it was not plaintiff's duty to uncouple the engine from the cars, and that his doing so made the drop switch more dangerous and contributed in any degree to cause his injury, so that but for his contributory negligence the accident would not have happened, then his act was contributory negligence, and your verdict will be for the defendant."

"(17) If you find from the evidence that it was plaintiff's custom and duty when making trips from the Martin mine to stop his train and wait until the switchmen came from the mill to assist in switching the cars, and that he failed to stop his train and wait for the switchmen to arrive at the train to assist in making the switch that was attempted before his injury, and that his conduct in this respect contributed in any degree to cause his injury, so that without his concurring negligence the accident would not have happened, your verdict will be for the defendant."

"(37) The testimony of Bullock of any statement made by Page that Page was at fault for the accident or was at the switch in time to turn it is not admissible as tending to prove that Page was at the switch in time to have turned it and have prevented the accident, but is only admissible as it may affect the credibility of Page."

These instructions were given by the court. Other instructions were asked by appellant, which were refused. As they will be sufficiently set out in the opinion, it will not be necessary to do so here.

Rose, Hemingway, Cantrell & Loughborough, for appellant. Mehaffy, Williams & Armstead, for appellee.

HART, J. (after stating the facts as above). 1. It is earnestly insisted by counsel for appellant that the first instruction asked by him, which was peremptory, should have been given. On this view of the case, we must

consider the testimony in its most favorable aspect to the appellee, for it is the province of the jury to pass upon the weight of the evidence. With that we have no concern, however greatly we may think it preponderates one way or the other. The test is: Could reasonable and fair-minded men from all the facts and circumstances adduced in evidence have come to different conclusions as to whether or not negligence on the part of appellee might be inferred. If so, the right to draw the inference is for the jury. On the other hand, if reasonable minds could have reached but one conclusion from the evidence, then the question of contributory negligence is one of law for the court. Appellee, when he was injured, was not a trespasser upon the track. His work required him to be there. He testified that the engine was so constructed that it was necessary for him to stand in the middle of the track to rake out the clinkers. His work required haste for the rapidity with which he hauled the cars to and from the mines necessarily facilitated the operation of the mines. It is true that, if he had waited a few seconds, he could have seen that the switch was not thrown; but he said that the switchman was standing there with his foot on the sill of the switch stand, and that it was his duty to throw the switch. He further stated that at the time of the injury he was only five or six car lengths away from the switch stand, and could have heard a warning cried by the switchman if the switch had failed to operate. Under these circumstances, we do not think he was necessarily negligent because he did not wait to see if the switch was thrown and the cars took the left-hand track before he commenced to fix his fire. As was said in the case of *Rahman v. Minn. & N. W. Rd.*, 43 Minn. 42, 44 N. W. 522: "The law imposed upon him the exercise of ordinary care and prudence, and in considering what this is, under a given state of facts, regard must be had for the danger to be apprehended, the reasonable probability of incurring it, as well as the natural presumption that other persons will discharge their duty, and act with due care." See, also, *Henry v. Railway Co.*, 75 Iowa, 84, 39 N. W. 193, 9 Am. St. Rep. 457. This is not a case where the physical facts were such that reasonable minds must come to the conclusion that appellee heedlessly took a position of danger. Certainly he would have been in no danger if the switchman had thrown the switch as his duty required him to do, or, even if it failed to operate, had the switchman called out to him that fact, he could have escaped injury. Hence we think from all the facts and circumstances of the case as they appear from the record that the question of contributory negligence was one for the jury, and that the court was right in not directing a verdict for the appellant.

2. Instructions Nos. 26 to 36, inclusive, pass out of the case. The act of our Legislature

approved March 8, 1907, which abolishes in this state the common-law rule that a servant assumes the risk of negligence of his fellow servant, has been sustained by this court in the case of the *Ozan Lumber Co. v. Biddle* (Ark.) 113 S. W. 796, decided since the trial of this case in the court below. Hence it is not necessary to notice the refusal to give these instructions which were asked by the appellant, and which were based upon the unconstitutionality of that act, except to say that the opinion in the case of the *Ozan Lumber Co. v. Biddle* is in accord with the modern text-writers on the subject, and as well the great majority of adjudicated cases.

3. The first assignment of error is based upon the action of the court in giving instruction No. 1 at the request of appellee. The instruction is set out in the statement of the case. It is claimed that the language of the instruction was susceptible of the construction that appellee had an absolute right to assume that his fellow servants would do their duty, and that it was therefore misleading and prejudicial. It may be well here to notice the principles of law upon which this instruction is based. The common-law doctrine was that a servant assumed the negligence of his fellow servant. In discussing the question of contributory negligence under such conditions Mr. Elliott says: "An employé may, within limits, act upon the assumption that the employer's duty to exercise ordinary care has been performed, but the fact that the employé may act upon such assumption does not relieve him from the duty of exercising ordinary care to avoid the injury. The presumption that the duties of the employer to the employé have been performed does not authorize the employé to carelessly or heedlessly venture into danger, nor does it relieve him from the duty of taking knowledge of and guarding against dangers plainly and fully open to observation." 3 Elliott on Railroads, p. 768. Again, the right of the servant to rely on the care of the master is thus stated: "Unless the danger is actually known to the servant, or is so obvious and imminent that an ordinarily prudent person would refuse to incur it, he had a right to rely upon the performance by the master or his authorized agents other than his own fellow servants of the duties imposed upon the master by law for the protection of his servants." 26 Cyc. 1233.

The act of March 8, 1907, of the General Assembly of the state of Arkansas (Acts 1907, p. 162), abrogated the common-law rule that a servant assumes the risk of negligence of his fellow servant. It is very broad in its terms, and in effect provides that, in cases of corporations, the master shall be liable to the servant for injuries or death caused by the negligence of any other servant of the master in the same manner, and to the same extent as if the negligence causing the in-

jury or death was that of the employer. The rule as to the right of a servant to rely on the exercise of due care by his fellow servants under statute, similar to our fellow-servant statute is aptly stated as follows: "While under statutes limiting the fellow-servant doctrine, a servant has a right to rely upon the exercise of reasonable care by his fellow servants, this does not absolve him from caring for his own safety, as an ordinarily prudent man would do under like circumstances, and he cannot recover for an injury received by reason of the negligence of a fellow servant, if he knew, or by the exercise of ordinary care might have known, thereof." 26 Cyc. 1236, and cases cited. An examination of the cases cited in the text shows that they support the rule as stated. Tested by these principles, we think the instruction was correct. We do not think it is open to the construction that it told the jury that the appellee had an absolute right to assume that his fellow servant would perform his duty, regardless of the fact of whether appellee was himself under all the circumstances of the case in the exercise of ordinary care and prudence. We think the effect of the instruction was to tell the jury that the law imposed upon appellee the exercise of ordinary care and prudence, and in determining that question that the jury might consider the fact that he relied upon his fellow servant performing his duty, at the same time having due regard himself for the danger to be apprehended and the reasonable probability of incurring it. We do not wish to be understood as approving the instruction in the form in which it was given, but, if the language was thought to be ambiguous or of doubtful meaning, counsel for appellant should have specifically called the court's attention to that fact, and asked that the instruction be amended, instead of making a general objection to it. *St. L., I. M. & Sou. R. Co. v. Hoshall*, 82 Ark. 391, 102 S. W. 207, and cases cited; *St. L., I. M. & Sou. R. Co. v. Hardie* (Ark.) 113 S. W. 31. A general objection is insufficient to point out an ambiguity in an instruction. *Burnett v. State*, 80 Ark. 225, 96 S. W. 1007, and cases cited.

4. Counsel for appellant insists that the court erred in not giving instructions Nos. 8 and 13. As these instructions are open to the same objection, they may be considered together. They read as follows:

"(8) If you find from the evidence that the fire in the engine which plaintiff was operating could have been attended to by plaintiff by remaining on the engine, but that, instead of remaining on the engine to attend to the fire, he got off the engine and stood behind it upon the track, and thereby was injured, you are instructed that plaintiff placed himself in a dangerous position needlessly, and was guilty of contributory negligence, and your verdict will be for defendant."

"(13) If you find from the evidence that in order to make the flying switch, such as was customary at defendant's plant and as described in evidence, the time in which the person throwing the switch had to perform this duty was short, and the person throwing the switch had to act with promptness in order to have the switch thrown in time for the cars to take the track to the shed, and that plaintiff knew of this fact, but notwithstanding such knowledge he assumed that the switch would be turned in time for the cars to take the other track, and did not look or make other reasonable effort to ascertain that the switch had not been turned, but got upon the track in front of the moving cars and was injured, you are instructed that he had no right to place himself in that position of danger in absolute reliance upon the switch being turned in time to divert the cars, although, when he passed the switch with his engine, he may have seen some person at the switch who apparently expected to turn it, and, if he acted in this manner, he was guilty of contributory negligence, and your verdict will be for the defendant."

It will be noted the instructions single out certain facts, and tell the jury that, if they find these facts to exist, appellee was guilty of contributory negligence. The effect of the instruction was to tell the jury, if they found the facts stated in them to exist, that appellee as a matter of law was guilty of contributory negligence. "The existence of negligence should be passed upon by the jury as any other fact, and it is improper to instruct them that a certain fact or group of facts amounts to negligence per se unless such acts are declared by law to be negligence per se, or are such as to induce an inference of negligence in all reasonable minds." 29 Cyc. 645, and cases cited; *Pauckner v. Waken et al.*, 231 Ill. 276, 83 N. E. 202, 14 L. R. A. (N. S.) 1118; *Louisiana & T. Lumber Co. v. Brown* (Tex. Civ. App.) 109 S. W. 950. The instructions as written were peremptory in their nature, and took away from the jury the question of contributory negligence. Consequently they invaded the province of the jury, which is never permissible. *Rector v. Robins*, 82 Ark. 424, 102 S. W. 209; *Stephens v. Oppenheimer*, 45 Ark. 492; *Reed v. State*, 54 Ark. 621, 16 S. W. 819; *Blankenship v. State*, 55 Ark. 244, 18 S. W. 54.

5. Instructions Nos. 7, 9, 10, 14, 22, asked by appellant and refused by the court, are open to precisely the same vice as is contained in instructions Nos. 8 and 13, already discussed. What has been said in condemnation of them applies with equal force to the ones here under consideration. No useful purpose can be served by setting them out in the opinion, and we need only say that the court was right in refusing them for the reasons already given.

6. Counsel for appellant insists that the court erred in not giving instruction No. 15 asked by them. It reads as follows: "(15) You are instructed that the tracks on which cars are moving are dangerous, and that it is the duty of persons having occasion to go upon tracks to make use of their senses to ascertain that no moving trains are near which may do them harm; and it was the duty of plaintiff before getting upon the track to use such care as a prudent person under the circumstances would use to ascertain if any moving cars were on the track on which he was standing that might possibly cause his injury, and if you find that he failed to keep such a lookout as a prudent person under the circumstances would keep on such moving cars, and that by reason of such failure he was injured, your verdict will be for the defendant, even though you may find that some of defendant's other employés were also guilty of negligence." We think this instruction was covered by the other instructions given in the case, particularly by instructions Nos. 3 and 6, given at the request of appellant. A comparison of the instructions will show that the same matters embodied in this instruction are substantially embraced in the instructions given. A refusal to give an instruction that is substantially covered by another instruction given is not prejudicial. *Fox v. Spears*, 78 Ark. 71, 93 S. W. 560; *Burrow v. City of Hot Springs*, 85 Ark. 396, 108 S. W. 823. In the case of *Sadler v. Sadler*, 16 Ark. 628, English, C. J., speaking for the court, said: "A multiplication of instructions, announcing in effect the same legal principle, tends only to incumber the record, perhaps to confuse the jury, and is not to be encouraged." To the same effect, see *Haney v. Caldwell*, 43 Ark. 184. This applies with striking appropriateness to cases like the present one where, although the testimony is voluminous, the issues to be submitted to the jury are not complicated, and 38 instructions were requested by the appellant. We may add in this connection that instructions Nos. 4, 18, 19, and 20 are substantially the same as other instructions given by the court, consequently no prejudice resulted to appellant from the refusal of the court to give them.

7. Counsel for appellant assigns as error the refusal of the court to give instruction No. 23 asked by them. It reads as follows: "(23) If you find from the evidence that after plaintiff had passed the switch with his engine, and had brought it to a stop, before getting to the ground to fix the fire, he looked back and saw that the cars had not passed the switch, and, if he had known that the switch was still turned for the track he was on, he would not have gotten on the track behind his engine where he was hurt, and that the switch and tracks were in his plain view, and he could have seen that the switch

was not turned if he had looked at it or at the tracks at that point, but he failed to look at the switch or track at that point, and thereby did not exercise the reasonable care of an ordinarily prudent person under the circumstances, your verdict will be for the defendant." We think this instruction is open to the objection that the effect of it was to take the question of contributory negligence from the jury. The word "thereby" refers to "but he failed to look at the switch or track at that point," and thus makes appellee's failure to look contributory negligence as a matter of law. In any event the language used is doubtful or ambiguous, and it is not prejudicial for a trial judge to refuse an instruction which in his opinion has a tendency by its terms to take from the consideration of the jury a disputed question of fact, and thus mislead them as to the issues submitted to them for their decision.

8. Counsel for appellant assigns as error the action of the court in giving instruction No. 3 at the request of the appellee. There was no error in giving this instruction. In the case of *L. R., M. R. & T. Ry. Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230, the court said: "Contributory negligence is a matter of defense. It is not presumed, but must be proved, and the burden of proving it rests on the defendant." This court has ever since adhered to that rule. *Jones v. Malvern Lumber Co.*, 58 Ark. 125, 23 S. W. 679. In the case of *Hot Springs Street Railroad Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245, the court said: "The burden of proving negligence is on the plaintiff, and of proving contributory negligence is on the defendant, unless it is shown by the testimony of the plaintiff." The act of March 8, 1907, commonly known as the "fellow-servants act," makes the master liable for the negligence of all his servants, but it does not take away his defense of contributory negligence, and the rule in regard to the burden of proof is not changed by the terms of the act. Hence we can see no reason for a change of the rule, and adhere to our former rulings in that respect.

9. We now come to the question: Was the verdict excessive? This question has given us much concern. It is an extremely difficult and a somewhat delicate matter in cases like this to tell when the verdict is or is not excessive. It has been frequently said that it is difficult to find a measure of damages for pain, for the obvious reason that none would be an acceptable inducement to suffer it; but, when it has occurred, the compensation as such must be considered upon a reasonable basis of estimate. Under our system of jurisprudence the amount of damages must be left largely to the reasonable discretion of the jury. Again, we may say it has been repeatedly held that they may not give any amount they please. The appellee in

this case was 22 years old at the time of the accident. He had been to school but little, but his testimony shows him to be a man of fair average intelligence. His left leg was injured, and had to be amputated about 5½ inches below the hip. He suffered great pain, and lay in the hospital for one month after his leg was amputated. On his return home he fell and hurt it again, so that he had to be carried back to the hospital and remained there for six weeks longer. His medical bill and hospital fees were \$386.22. He commenced working for the appellant in August, 1906, and worked for it until the time of the accident. He commenced to run the engine on the 22d of January, 1907, and was earning \$2.40 per day when he was hurt. Prior to his employment by appellant he had worked for 15 nights in the railroad yards at Hot Springs, running a switch engine. This was all the experience he had had in running an engine for pay prior to his employment by appellant. He said he had learned how to run an engine by riding on railroad locomotives with engineers who were his friends, and who would teach him. Dr. Gann, the surgeon who amputated his leg, said that nearly all stumps give a man

more or less pain some time during life, but not necessarily in every case. It will be seen that appellee had not followed the occupation of running an engine on a regular line of railroad, and it is a matter of common knowledge that he would have had to serve as a fireman before he could obtain such position. His means of earning a living in many other occupations is still open to him, and the amount he will recover in this case properly invested will yield an income that will materially assist him in providing for his future support. Everything considered, we think the verdict was excessive, and that the amount recovered should be reduced to \$12,000.

If appellee will, within 15 days, remit the amount of damages down to \$12,000, the judgment will stand affirmed; otherwise the judgment will be reversed and the cause remanded for a new trial.

Mr. Justice BATTLE dissents from the construction we have placed upon instruction No. 1 given by the court at the request of appellee and upon instruction No. 23 asked by appellant and refused by the court.

Mr. Justice WOOD dissents upon the whole case.



## ROBINSON v. LEVY.

(Supreme Court of Missouri, Division No. 2.  
March 9, 1909.)

1. COURTS (§ 472\*) — CONCURRENT JURISDICTION OF CIRCUIT AND JUSTICE COURTS—SPECIAL ASSESSMENT—ACTION TO ENFORCE.

Though a justice of the peace has jurisdiction where the sum demanded does not exceed \$250 (Rev. St. 1889, § 1604), the circuit court has jurisdiction of an action to enforce collection of \$71.32 as an assessment for street improvements, since Rev. St. 1889, § 1674 (Ann. St. 1906, p. 1217), gives that court and a justice of the peace concurrent jurisdiction, where the demand is more than \$50 and less than the maximum jurisdiction of a justice.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1206; Dec. Dig. § 472.\*]

2. MUNICIPAL CORPORATIONS (§ 570\*)—SPECIAL ASSESSMENTS—ACTION TO ENFORCE—JUDGMENT—COLLATERAL ATTACK.

A petition for the enforcement of a special municipal tax bill for a street improvement held sufficient to support the judgment so as to withstand a collateral attack.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1284; Dec. Dig. § 570.\*]

3. PLEADING (§ 310\*)—EFFECT OF EXHIBITS.

An exhibit is no part of the petition though it is attached, and the petition states it is made a part thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 944; Dec. Dig. § 310.\*]

4. MUNICIPAL CORPORATIONS (§ 570\*)—SPECIAL ASSESSMENT—JUDGMENT—COLLATERAL ATTACK.

In an action to enforce a special assessment for street improvements, the failure of the mayor to sign and the clerk to attest the tax bills, the omission to file as an exhibit the original tax bills, or the fact that such tax bills were invalid or barred by limitations, are matters of defense, of which defendant cannot avail himself in a collateral attack on the judgment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1284; Dec. Dig. § 570.\*]

5. MUNICIPAL CORPORATIONS (§ 558\*)—ENFORCEMENT OF SPECIAL ASSESSMENTS—JURISDICTION.

Though the action provided by statute for the enforcement of a special assessment may be deemed statutory when the court obtains jurisdiction thereof, it does not proceed to judgment in the mere exercise of statutory powers, but it exercises its general jurisdiction.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1265; Dec. Dig. § 558.\*]

6. COURTS (§ 1\*)—"JURISDICTION."

The word "jurisdiction" may be defined as "the right to adjudicate the subject-matter in a given case." To constitute this, there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be in substance and effect within the issue."

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3876-3885; vol. 8, pp. 7697, 7698.]

7. MUNICIPAL CORPORATIONS (§ 570\*)—ENFORCEMENT OF SPECIAL ASSESSMENT—SUFFICIENCY OF PETITION.

The allegation, in a petition to enforce a special assessment for a street improvement,

that "this plaintiff is the owner of such tax bill, and the same nor any part has been paid," sufficiently shows that the tax has not been paid to withstand a collateral attack on the judgment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1284; Dec. Dig. § 570.\*]

8. MUNICIPAL CORPORATIONS (§ 570\*)—ENFORCEMENT OF SPECIAL ASSESSMENT—COLLATERAL ATTACK.

Under Rev. St. 1889, § 672 (Ann. St. 1906, p. 686), providing that no judgment after trial or submission shall be reversed or in any way affected by certain omissions in pleadings, the failure of a petition for the enforcement of a special tax bill to allege nonpayment of such bill cannot be made the basis of a collateral attack on the judgment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1284; Dec. Dig. § 570.\*]

9. MUNICIPAL CORPORATIONS (§ 582\*)—SPECIAL ASSESSMENT—ENFORCEMENT—PUBLICATION OF NOTICE—RECITALS IN DEED.

A sheriff's deed on a sale on a judgment to enforce a special municipal assessment, reciting the publication of a proper notice of sale in a newspaper published in the city in which the land is situated, is sufficient, without stating whether the newspaper was a weekly or daily, or a weekly and daily.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1299, 1300; Dec. Dig. § 582.\*]

10. MUNICIPAL CORPORATIONS (§ 570\*)—SPECIAL ASSESSMENT—ENFORCEMENT—NATURE OF JUDGMENT.

A judgment for the enforcement of a special municipal assessment is not personal against a landowner because it recites that "defendant is indebted to" the city in the sum sought to be enforced, where it directs the amount of the judgment to be levied on the property assessed, which is described.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1284; Dec. Dig. § 570.\*]

11. HOMESTEAD (§ 105\*)—EXEMPTION FROM MUNICIPAL ASSESSMENT.

A homestead is not exempt from sale on a judgment enforcing a special municipal assessment for street improvements.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 162-164; Dec. Dig. § 105.\*]

Appeal from Circuit Court, Jackson County; Jno. G. Park, Judge.

Action by R. B. Robinson against Max Levy. From a judgment for defendant, plaintiff appeals. Affirmed.

This appeal, on the part of the plaintiff, is from a judgment of the circuit court of Jackson county, Mo., at Kansas City, in favor of the defendant. This proceeding is predicated upon the provisions of section 650, Rev. St. 1889 (Ann. St. 1906, p. 667), by which it is sought to have the court ascertain and determine the title, estate, and interest of plaintiff and defendants herein, respectively, in and to the following real estate: The east forty (40) feet of a tract of land, bounded as follows, to wit: On the north and west, by Westport avenue; on the south, by the south line of section 19, in township 49, range 33; on the east, by lot one (1) of Jones and Fisher's addition to the

\*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

city of Westport, now being a part of Kansas City.

The answer interposed by the defendant to the petition was, first, a general denial of each and every allegation in said petition contained, except the allegation that defendant claims some title, estate, or interest in the real estate described in the petition. The defendant, further answering, specifically denies that plaintiff has any right, title, or interest in said land, or is in the possession of the same. Then follows in said answer the allegation that the defendant is, and for a long time past has been, the owner in fee of the real estate in controversy, and that he is now in possession of the same.

This cause was submitted to the court upon an agreed statement of facts. We do not deem it necessary to reproduce this statement, with all the details of the agreed statement of facts as disclosed by the record. A brief reference to the facts as applicable to this controversy will be sufficient to enable us to determine the legal propositions disclosed by the record.

It appears from the agreed statement of facts that in 1893 one Augustus Smith was the undisputed owner of and in possession of the land in question, and that in September, 1893, a suit was filed against said Augustus Smith to enforce against the land a lien for certain special tax bills issued by the city of Westport to pay the cost of paving Main street, upon which street the land in question abutted.

As the sufficiency of the petition in that case is challenged, it is well to reproduce it. It was as follows:

"Plaintiff, for cause of action, states: The city of Westport is a municipal corporation organized and existing under and by virtue of the laws of the state of Missouri, and is a city of the fourth class; that heretofore, and prior to the 17th day of June, 1891, the said city of Westport, for the purposes of improving Main street from South Main street to the southern city limits by paving the same in said city, by ordinance No. 143, entitled, 'An ordinance to pave Main street from South Main street to the western limits of the city of Westport,' which ordinance was approved on the 17th day of June, 1891, and in pursuance to such ordinance, such improvement was made and said street was paved, and, when the work was completed, the cost thereof was apportioned among the several lots and parcels of land to be charged therewith, and each lot and parcel of property was charged with its proper share of such costs, according to the frontage of the property, and there was charged against the following described lot or parcel of land in the city of Westport, county of Jackson, state of Missouri, to wit: The east forty (40) feet of a tract of land bounded as follows: On the north and west by Westport avenue; on the south by the south line of

section nineteen (19), township forty-nine (49), range thirty-three (33) west; on the east by lot one (1), Jones & Fisher's addition, in the city of Westport—the sum of fifty-one and 32/100 (\$51.32) dollars, its proper share of such costs. That the said city of Westport, for the purpose of paying for such improvements, caused its certain tax bill to be issued against the above-described property for the said sum of fifty-one and 32/100 (\$51.32) dollars, which bill was issued on the 6th day of May, 1892, which bill bears interest at the rate of ten per cent. per annum after thirty days from the date of issuance, and, if not paid in six months from date of issue, it shall bear interest at the rate of fifteen per cent. per annum until paid, a copy of which bill is hereto attached, and made a part of this petition. That this plaintiff, S. Howard McCutcheon, is the owner of such tax bill, and that the same, nor any part thereof, has been paid. That the above defendants have, or claim to have, some interest in the above-described property, and that there is due plaintiff from defendants the sum of fifty-one and 32/100 dollars, and interest thereon at the rate of ten per cent. per annum for the first six months from thirty (30) days after date of issuance as above stated, and fifteen per cent. per annum since such time for the improvements above set out. Wherefore, plaintiff asks judgment for the sum of fifty-one and 32/100 dollars, and interest thereon at ten per cent. per annum for six months from May 6, 1892, and at fifteen per cent. per annum since such time, and the costs herein expended, and that the same be declared a special lien upon the above-described property, to wit: The east forty (40) feet of a tract of land bounded as follows: On north and west by Westport avenue; on the south by south line of section nineteen (19), township forty-nine (49), range thirty-three (33) west; east by lot one (1), Jones & Fisher's addition, in the city of Westport.

"Plaintiff, for a second and additional cause of action, states that the city of Westport is a municipal corporation, organized and existing under and by virtue of the laws of the state of Missouri, and is a city of the fourth class. That heretofore, and prior to the 26th day of October, 1891, the said city of Westport, for the purpose of improving Main street from South Main street to a point 658½ feet west of the center of Chestnut street by curbing the same, pursuant to its ordinance No. 218 of the city of Westport, entitled, 'An ordinance to construct curbing on both sides of Main street, from South Main street to a point 658½ feet west of the center of Chestnut street,' which ordinance was approved and adopted on the 17th day of October, 1891. That pursuant to such ordinance such improvement was made, and said curbing was laid, and, when such work was completed, the cost thereof was appor-

tioned among the several lots and parcels of land to be charged therewith, and such lot or parcel of land was charged with its proper share of such cost, according to the frontage of the property, and there was charged for such improvement, against the following described property, situated in the city of Westport, Jackson county, Missouri, to wit: The east forty (40) feet of a tract of land bounded as follows: On the north and west, by Westport avenue; on the south, by south line of section nineteen (19), township forty-nine (49), range thirty-three (33) west; on the east, by lot one (1), Jones & Fisher's addition to the city of Westport—the sum of twenty-two (\$22.00) dollars, its proper share of such costs. That the said city of Westport, for the purposes of paying for such improvement, caused its certain tax bill to be issued against the above-described property for the said sum of twenty-two (\$22.00) dollars, which bill was issued on the 26th day of October, 1891, and which bill bears interest at the rate of 10 per cent. per annum after thirty days from the time the same was issued, and if not paid in six months after the date of issuance, then at the rate of 15 per cent. per annum until paid; a copy of which bill is hereto attached, marked 'Exhibit B,' and made a part of this petition. That this plaintiff, S. Howard McCutcheon, is the owner of such tax bill, and that the same, nor no part thereof, has been paid. That the above defendant owns, or claims to own, the above-described property, and that there is due plaintiff from defendants, for such improvements, the sum of \$22 and interest thereon, at the rate of ten per cent. per annum for the first six months from 30 days after date of issuance as above stated, and fifteen per cent. per annum thereafter. Wherefore, plaintiff asks judgment for the sum of \$22 and interest thereon at 10 per cent. per annum for six months from the 26th day of November, 1891, and at fifteen per cent. per annum thereafter, and the costs of this action, and that the same may be declared a special lien upon the above-described property, to wit: The east forty (40) feet of a tract of land bounded as follows: On the north and west, by Westport avenue; on the south, by south line of section nineteen (19), township forty-nine (49), range thirty-three (33) west; on the east, by lot one (1), Jones & Fisher's addition to the city of Westport, Jackson county, Missouri."

Upon this petition being filed, a summons was issued and returned personally served upon said defendant Smith.

At the regular January term, 1894, of the circuit court of Jackson county, judgment was rendered in the proceeding upon this special tax bill. As the sufficiency of this judgment is challenged, we will be pardoned for burdening this statement with a reproduction of it. It was as follows:

"S. Howard McCutcheon vs. Augustus Smith.

"Now on this day comes plaintiff by attorney, and defendant, though lawfully summoned, comes not, but makes default, and having failed to appear and plead to the petition herein, and this cause having been submitted to the court upon the evidence adduced, the court finds that defendant is indebted to plaintiff in the sum of \$60.60 upon the first count of plaintiff's petition, and the special tax bill therein set out, and that said tax bill and the amount due thereon are a lien against the property in said tax bill described, which said real estate is owned and claimed by the defendant.

"The court further finds that defendant is indebted to plaintiff in the sum of \$27.15 upon the second count in plaintiff's petition, and the special tax bill therein set out, and that special tax bill and amount thereof are a lien against the property in said special tax bill described, which real estate is owned and claimed by defendant.

"It is therefore ordered and adjudged that plaintiff recover of and from defendant the sum of \$87.75, with interest at the rate of fifteen per cent. per annum, and all costs to be levied on the following described property, to wit: The east forty (40) feet of a tract of land bounded as follows: On the north and west, by Westport avenue; on the south, by south line of section nineteen (19), township forty-nine (49), range thirty-three (33) west; on the east, by lot one (1), Jones & Fisher's addition to the city of Westport, in Jackson county, Missouri; and that plaintiff have hereof special execution."

On the 4th day of June, 1894, a special execution was issued upon said judgment in pursuance to the judgment theretofore rendered, and the real estate was, on the 30th day of June, 1894, under such special execution, sold and was purchased by Max Z. Levy, the respondent in this case. On the 10th day of July, 1894, the sheriff executed and delivered his deed to the said respondent in accordance with his purchase, and said deed was on the same day filed and recorded in the proper office for the recording of deeds.

This sufficiently indicates the basis of the claim of title on the part of the respondent.

On August 14, 1897, Augustus Smith and wife executed and delivered to C. C. Clemons a quitclaim deed to the real estate in controversy, reserving the buildings upon said land. Shortly after the execution of this deed, the family of Augustus Smith moved from the premises, and the buildings also were removed. On the 28th day of June, 1900, Charles C. Clemons and Mary Ann, his wife, of Jackson county, Mo., executed and delivered to the appellant in this cause a general warranty deed to the real estate involved in this controversy. This is a sufficient indication of the claim of title on the part of the appellant.

In May, 1901, this suit was brought under the provisions of section 650, Rev. St. 1899, praying the court to define and adjudge by its judgment or decree the title, estate, or interest of the parties hereto in and to said premises, according to the statute in such cases made and provided.

It further appears from the agreed statement of facts that since the recording of the sheriff's deed, executed and delivered to the defendant, Max Levy, the defendant has also asserted and claimed a fee-simple title to said land. There are no improvements upon said land, and no one in the actual occupancy thereof. It also appears from the agreed statement of facts that plaintiff, without any request from the defendant, paid the taxes upon said land for several years. It was further agreed that at the time of the sheriff's sale, and the delivery of the deed to the defendant, Levy, by the sheriff (which delivery was made on the 10th day of July, 1894), said Augustus Smith was the head of a family, and a resident of the state of Missouri, and was living and residing on said lot, and had it fenced in, and said property in dispute was worth not to exceed one thousand dollars (\$1,000), and said Smith was in the possession of said lot at the time he and his wife conveyed the same to said Clemons, which was on the 14th day of August, 1897, and that said Smith and his grantees, C. C. Clemons and R. B. Robinson, have claimed to own the fee-simple title to said land since 1876.

This additional fact was agreed to by counsel for appellant and respondent; that is, that, at the time the tax suit was brought on the tax bill against Augustus Smith, Augustus Smith was living on the premises sued for, and that he lived there continuously with his family up until about the 15th of September, 1879, when he sold the ground to C. C. Clemons and moved the house off by an agreement in the deed, heretofore mentioned in the agreed statement of facts.

The cause was submitted to the court substantially upon the facts as heretofore indicated, and the findings of the court were for the defendant, and judgment was rendered in accordance with such findings. A timely motion for new trial was filed, which by the court was overruled, and from the judgment rendered the plaintiff prosecutes this appeal, and the record is now before us for consideration.

J. B. Hammer and W. W. Calvin, for appellant. M. F. Ringolsky and Edward C. Wright, for appellee.

FOX, J. (after stating the facts as above). The record in this clause discloses numerous assignments of reasons why the judgment of the trial court should be reversed.

1. It is insisted by learned counsel for appellant that the trial court in a tax proceed-

ing had no jurisdiction, for the reason that the suit should have been brought before a justice of the peace. It will be observed that the aggregate amount of the tax bills sued on in that proceeding was \$71.32. It is sufficient to say upon that proposition that while under the provisions of section 1604, Rev. St. 1889, to which our attention has been directed, such suit may be brought before a justice of the peace of the county for the enforcement of liens as above, when the amount does not exceed \$250, this provision of the statute by no means makes the jurisdiction of the justice of the peace exclusive in the enforcement of liens in all amounts less than \$250. Under the third subdivision of section 1674, Rev. St. 1899 (Ann. St. 1906, p. 1217), it is expressly provided that the circuit court and justice of the peace shall have concurrent jurisdiction in all civil actions for the recovery of money, whether such actions be founded upon contract or tort, or upon bond or undertaking given in pursuance of law, when the sum demanded, exclusive of interest and costs, shall exceed \$50. Consequently, under this provision, the circuit court had concurrent jurisdiction with the justice of the peace in the recovery of the amount in these tax bills and in the enforcement of the liens.

2. It is next contended that the original tax bills sued on were not filed with the petition, and it is further contended, in relation to these tax bills, that they were improperly issued, and that by reason of these facts the petition stated no cause of action, and the judgment rendered upon it was void. We have reproduced in full the petition in the proceeding to enforce the lien for the tax bills, and in our opinion it is sufficient to support the judgment rendered in this cause. It will be observed that the petition makes all the necessary allegations concerning the improvement of the street, and sufficiently identifies the ordinance under which such improvements were made, and then alleges that the said city of Westport, for the purpose of paying such improvement, caused a certain tax bill to be issued against the property which is described in the petition, giving the date of the issuance of the tax bill, and the rate of interest it bore after 30 days from the date of issuance; also contains the allegation that the plaintiff, S. Howard McCutcheon, was the owner of such tax bill. Then follows the allegation that the defendant had, or claimed to have, some interest in the property described against which the charge for improvement was made.

There are two counts in the petition which are substantially the same, except the amounts are different. Directing our attention to this proposition, it is clear that the tax bills sued on, if filed, were filed as mere exhibits, and, as is conceded in the brief of learned counsel for appellant, an

exhibit is no part of the petition, even though it is attached, and the petition states it is made a part thereof. *Vaughan v. Daniels*, 98 Mo. 230, 11 S. W. 573; *Moore v. Dixon*, 50 Mo. 424; *Poulson v. Collier*, 18 Mo. App. 583. If, under the law, the original tax bills had to be filed as exhibits, that was a matter that the defendant could interpose as a defense. There was personal service, and the defendant had an opportunity for his day in court, and, if he failed to avail himself of any rights that he had under the law, he cannot now be heard in a collateral attack upon the judgment.

In *Rankin v. Real Estate Company*, 199 Mo. 345, 97 S. W. 877, it was sought to recover certain lands in the possession of the defendant. In that case it appeared by stipulation that defendant was in possession at the institution of the suit and at the date of trial, that the title of the lot was in plaintiff, and that he was entitled to recover unless he had been divested of title by certain tax deed of date, September 8, 1896. Plaintiff introduced the written stipulation, and rested. Defendant then introduced the tax deed mentioned in the stipulation, together with the petition, summons and return, judgment, execution, and report of sale in the tax proceeding. This tax proceeding was, according to petition, entitled: "The State of Missouri, at the Relation and to the Use of V. P. Hart, Collector of the City of Sedalia, Plaintiff, v. John H. Rankin, Defendant." The summons was so entitled. Personal service was had and judgment taken by default; the petition declared for city taxes; the judgment was for taxes, without designating the kind of taxes. The execution recites that the judgment was for certain delinquent state, county, and special taxes and interest, and for certain costs, and declares a special lien upon the lot in question. The deed contains the same recitals as are found in the execution as hereinabove set out. Timely and proper objections were made to the introduction of all this documentary evidence, and exceptions properly saved. Judge Graves, speaking for this court, thus ruled upon the two contentions that are applicable to the case at bar:

"(1) Appellant contends that, if the judgment is for state and county taxes, it is void for the reason that the collector of the city of Sedalia has no right to sue for and collect such taxes. It is true that the relator in the tax proceeding, the collector of the city of Sedalia, had no right to sue for state and county taxes; but in this case the defendant was properly served with process, and had the city collector sued for state and county taxes, which he did not do, the proper time to have raised that question would have been by demurrer prior to judgment. The defendant in the tax proceeding made no appearance, and, had the petition demanded judgment for state and county taxes, and the

judgment had been entered in accordance with the petition, no complaint could afterwards be urged against the judgment. The defendant had an opportunity for his say in court upon that question, but, having 'sinned away' his day of grace, cannot now be heard in a collateral attack upon the judgment.

"(2) It is also further contended that at the time the tax proceeding was instituted, by an amendment of the statutes, the lien for city taxes was given to the city of Sedalia, and the suit could not be maintained in the name of the state for city taxes, and for that reason the judgment is void. What has been said above as to appellant's first contention applies with equal force in reply to this second contention. If the suit was for city taxes, as in fact it was, then the defendant in the tax proceeding should have raised by proper plea the question of the right of the state to enforce the lien for city taxes. This was not done, and judgment followed. John Jones may not have a right to enforce a lien against my property, but if he brings suit so to do, and I, after being duly served with process, permit him to obtain a judgment enforcing the lien, I would be in no position to attack the judgment collaterally. This second contention is therefore ruled against the appellant."

While it may be conceded that the causes of action provided for by statute in the enforcement of liens may be termed statutory actions, however, when the circuit court obtains jurisdiction of such causes, it does not proceed to judgment in the exercise of mere statutory powers. In *Charley v. Kelley*, 120 Mo. 141, 25 S. W. 572, this court, in treating of actions of this character, thus stated the law: "The causes of action were statutory, but the circuit court, in the exercise of its general jurisdiction, was given cognizance over them."

It is next insisted that the law in force, as applicable to cities of the class to which the city of Westport belonged, required the city clerk, or other proper officer, to make out the special tax bills, and also it was essential that they be signed by the mayor and attested by the city clerk, and, this not having been done, counsel for appellant contends that the tax bills were void. This was clearly a matter of defense to the suit upon such tax bills. The petition alleged that the city caused its certain tax bills to be issued against the property for the sums with which such property was chargeable. This allegation must be treated, at least by implication, as a statement that the city caused legal tax bills to be issued, and manifestly, if the tax bills were illegally issued, or defective in form or substance, it was a matter of defense that the defendant could avail himself of in responding to the summons, which had been personally served upon him.

The circuit court of Jackson county, Mo.,

is a court of general jurisdiction. The definition of jurisdiction is nowhere more clearly or correctly stated than in *Munday v. Vall*, 34 N. J. Law, 422. In treating of that subject, it was there said: "Jurisdiction may be defined as the right to adjudicate the subject-matter in a given case. To constitute this, there are three essentials: First. The court must have cognizance of the class of cases to which the one to be adjudged belongs. Second. The proper parties must be present. And, third, the point decided must be in substance and effect within the issue.

In *Hope v. Blair*, 105 Mo., loc. cit. 93, 16 S. W. 597 (24 Am. St. Rep. 366), Macfarlane, J., in discussing the subject of jurisdiction, said: "A court may be said to have jurisdiction of the subject-matter of a suit when it has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed. What the controversy or issue in any case is, can only be determined from the pleadings. When the court has cognizance of the controversy, as it appears from the pleadings, and has the parties before it, then the judgment or order, which is authorized by the pleadings, however erroneous, irregular, or informal it may be, is valid until set aside or reversed upon appeal or writ of error. This doctrine is founded upon reason and the 'soundest principles of public policy.' 'It is one,' says the court of Virginia, 'which has been adopted in the interest of the peace of society, and the permanent security of titles. If, after the rendition of a judgment by a court of competent jurisdiction, and after the period has elapsed when it becomes irreversible for error, another court may in another suit inquire into the irregularities or errors in such judgment, there would be no end to litigation and no fixed established rights'"—citing, in support of the rule announced: *Lancaster v. Wilson*, 27 Grat. (Va.) 624; *Adams v. Cowles*, 95 Mo. 506, 8 S. W. 711, 6 Am. St. Rep. 74; *Rosenheim v. Hartsock*, 90 Mo. 365, 2 S. W. 473; *Morris v. Gentry*, 89 N. C. 248; *Porter v. Gile*, 47 Vt. 620; *Paul v. Smith*, 82 Ky. 451; 1 Black on Judg. § 245.

In *Charley v. Kelley*, supra, it was contended by the appellant in that case, which was concerning the enforcement of tax liens, that the circuit court was exercising special statutory powers, and the jurisdiction, as of inferior tribunals, must appear on the face of the record, otherwise no valid judgment could be rendered. It was further contended that no presumptions favorable to the validity of the proceedings and judgment can be indulged. In discussing that proposition, this court held that the position of appellant was not sound, and that the circuit court, in proceeding to judgment in the enforcement of these liens, was not exercising mere statutory powers. The causes of action were statutory, but the circuit court, in

the exercise of its general jurisdiction, was given cognizance over them, and that the cause of action was brought within the general jurisdiction of the court.

The tax bills in the case at bar may be collected by suit in any court of competent jurisdiction, and, as was said by this court in the case last cited: "No special or summary proceeding in derogation of common law is required to be followed. In such case the same presumptions attend its jurisdiction, in the silence of its record, as in the case of judgments or decrees rendered in the exercise of its general jurisdiction. They are not open to collateral attack"—citing, in support of such rule announced: *Brown v. Walker*, 11 Mo. App. 230; *Wellshear v. Kelley*, 69 Mo. 351; *Allen v. McCabe*, 93 Mo. 143, 6 S. W. 62.

In *Wellshear v. Kelley*, 69 Mo. 343, this court, in treating of a tax proceeding, expressly held that, if the court had jurisdiction of the subject-matter of the suit, the proceedings and the judgment thereon stand upon the same ground as the proceedings and judgment in a suit between individuals. There is no principle which requires the application of different rules to test the validity of a judgment in a cause between the state and an individual from those which apply to a judgment rendered in a suit between individuals. The same presumptions in favor of the judgment are indulged in the one case as in the other, and it was said in that case: "Although a statement may be defective, yet, if it appear after the verdict that it could not have been given, or that a judgment could not have been rendered without proof of the matter omitted, the defect will be cured by the statute."

In *Castleman v. Relfe*, 50 Mo. 583, the rule was there announced in no uncertain or doubtful terms that "the circuit court is a court of general jurisdiction, and when it has acquired jurisdiction, however erroneous and irregular its proceedings may be, they are regarded as valid and binding until they have been reversed or annulled by suitable proceedings instituted for that purpose, and titles acquired by sales under them will be protected."

That the circuit court in the case at bar had jurisdiction of the subject-matter, as well as of the person of the defendant, is too plain for discussion, and, if the rules as heretofore indicated are to be longer followed, then it must be ruled that the mere omission to file as an exhibit the original tax bills, or the fact that such original tax bills were invalid, are matters of defense, and, if the defendant in that proceeding failed to avail himself of such defense, he cannot take advantage of such failure by seeking in this collateral proceeding to assail the judgment in that cause.

3. It is next insisted by counsel for appellant that the lien of the tax bills, upon

which the tax suit was predicated, had expired. It is unnecessary, in order to clearly determine this proposition, to discuss the provisions of section 1592, Rev. St. 1889, which provides the manner and method of issuing tax bills and when they become due, but it is a sufficient answer to the contention of appellant upon that question to say that what was said upon the other propositions is equally applicable to this one. If these tax bills were invalid, or their force and vitality had expired by reason of being barred by the statute, that was clearly a matter of defense to be interposed upon the trial of the tax proceeding. In *Wellshear v. Kelley*, supra, it was contended by appellant that, upon the face of the petition in the suit against Mary A. Henry, it appeared that a portion of the taxes sued for and embraced in the judgment were barred by the statute of limitations, and that the judgment was therefore void. This court, in responding to that contention, said: "It was for Mary A. Henry, the defendant in that suit, to make that defense there, but neither she nor any one else can make it in this collateral proceeding." It is clear that even though it be conceded that the lien of the tax bills had expired, yet that was a matter for the court to determine in that case. It had jurisdiction of the subject-matter, as well as the parties, and, as heretofore stated, however irregular or erroneous the judgment of the trial court may have been upon the question as to whether or not the lien of the tax bills had expired, the judgment and finding of the court must be regarded as valid and binding until it has been reversed or annulled by proper proceedings instituted for that purpose.

4. Appellant also complains that the petition fails to allege that the tax bills had not been paid. The allegation upon this question is as follows: "This plaintiff, S. H. McCutcheon, is the owner of such tax bill, and the same, nor any part thereof, has been paid." Now, while it is true that this allegation was merely a negative pregnant, yet in our opinion it is not sufficient to warrant this court in saying that the petition did not state any cause of action, and that the judgment upon such petition was absolutely void. Manifestly, that suit was for the recovery of the amount of those tax bills, and the trial court could not have reached the conclusion it did, or rendered the judgment for recovery of the amounts of such bills, unless it necessarily found that they had not been paid.

The statute of Jeofails, section 672, Rev. St. 1899 (Ann. St. 1906, p. 686), provides in certain subdivisions of that section, applicable to the question now in hand, that no judgment after trial or submission, or upon failure to answer, shall be reversed, impaired, or in any way affected by reason of the following things: Fifth. For mispleading, or insufficient pleading. Eighth. For the want of

any allegation or averment, on account of which omission a demurrer could have been maintained. Ninth. For omitting any allegation or averment, without proving which the triers of the issue ought not to have given such a verdict. Thirteenth. For any informality in entering a judgment or making up the record thereof, or in any continuance or other entry upon the record.

This court, in *Robinson v. Railway Construction Company*, 53 Mo. 435, held: "That the defendant's failure to answer the plaintiff's petition admitted his right of recovery, if the petitioner stated facts sufficient to constitute a cause of action. And the law is that, when a judgment is given on failure to answer, it cannot be reversed, impaired, or in any way affected by reason of the omission of any allegation or averment, on account of which omission a demurrer could have been maintained, nor for omitting any allegation or averment, without proving which the triers of the issue ought not to have given a verdict."

In *People's Bank of New Orleans v. Scalzo*, 127 Mo. 164, 29 S. W. 1032, in discussing the proposition now under consideration, this court, speaking through Judge Gantt, announced this rule: "It does not follow that because a petition is defective, and subject to a general demurrer, that it would be insufficient to sustain a verdict. On the contrary, the well-settled rule, both at common law and under our Code, is that, if a material matter be not expressly averred in the petition, but the same is necessarily implied from what is stated in the context, the defect is cured after verdict, the doctrine resting on the presumption that plaintiff proved on the trial the facts imperfectly alleged, the existence of which was essential to his recovery"—citing in support of such rule: *Rush-ton v. Aspinwall*, 1 Smith's Lead. Cases (4th Am. Ed.) 649, notes, 654; 2 Tidd's Practice, 919; *Shaler v. Van Wormer*, 33 Mo. 386; *McDermott v. Claas*, 104 Mo. 14, 15 S. W. 905; *Bank v. Leyser*, 116 Mo. 61, 22 S. W. 504; *Bliss on Code Plead.* (3d Ed.) § 438; *Lynch v. Railroad*, 111 Mo. 604, 19 S. W. 1114; Rev. St. Mo. 1889, § 2113, clauses 8 and 9.

Following the rule as above indicated, it must be held that, even conceding that there was an omission to state that the tax bills were not paid, such omission is cured by the finding and judgment of the trial court, and cannot be made the basis of a collateral attack upon the judgment in that proceeding.

5. It is also suggested by counsel for appellant that the sheriff's deed in the tax bill proceeding, upon which the defendant in this cause predicates his claim to title, was invalid. It is insisted that it is essential in the recitals of the deed to designate after the word "publish" the character of the paper, as to whether it was a weekly or a daily, or weekly and daily, paper. In *Chandler v. Bailey*, in 89 Mo. 641, 1 S. W. 745, it was

expressly ruled that "a sheriff's deed which recites a notice of sale for twenty days 'by advertisement in the Gazette-Tribune, a newspaper published in my said county,' is not void because it omits to state that the paper was a daily or weekly newspaper." This deed, the sufficiency of which is challenged, concerning the subject of notice, recited: "And having, prior to the day of sale hereinafter mentioned, given at least twenty days' notice of the time, terms and place of sale, together with a description of the real estate to be sold, and where situated, as the law directs, by publishing said notice in the Kansas City Mail, a newspaper printed and published regularly in Kansas City, Jackson county, Missouri." In our opinion, this recitation as to the publication of the notice of sale was at least a substantial compliance with the law upon that subject.

It is also suggested that in one portion of the deed Robert S. Stone, sheriff of Jackson county, supplants the name of John P. O'Neill. It will be observed that this apparent discrepancy in the deed was not brought to the attention of the trial court, and manifestly it escaped the attention of counsel, both for respondent as well as appellant. At most, this was simply a clerical mistake and is a mere irregularity, and it is made manifest that the counsel in this case, as well as the trial court, treated this deed as an act of John P. O'Neill, sheriff of Jackson county. Manifestly, when this conveyance is considered from its four corners, there is no escape from the conclusion that the sale was made by John P. O'Neill, as sheriff, and that he executed and delivered this deed. Counsel for appellant does not cite any authority to support the contention that this clerical mistake would render the deed void.

6. This brings us to the final contention of learned counsel for appellant; that is, that the judgment rendered in the tax proceeding was a personal judgment against Augustus Smith. To this insistence, we are unable to give our assent. While the judgment does recite that the defendant is indebted to plaintiff in the sum of \$60.60 upon the first count of plaintiff's petition, it will be observed that, following that recitation, reference is made to the special tax bill embraced in the petition, and then recites that said tax bill, and the amount due thereon, are a lien against the property in said tax bill described, which said real estate is owned and claimed by defendant. The same recitation occurs in the judgment as to the second count. Then follows the order of judgment for the recovery of the total amount of both counts, with interest, and directs such amounts to be levied upon the property in controversy, which is described in the judgment. We are of the opinion that this judgment properly ordered and adjudged the enforcement of the tax bill

liens, and that the contention of the appellant upon that proposition is without merit.

Having reached the conclusion, as herein indicated, that the judgment rendered in the tax bill proceeding is not a personal judgment, but was simply the enforcement of a lien for certain taxes which had been levied upon such property, it logically follows that the question of a homestead being occupied by Augustus Smith at the time of the sale of this property has no place in this controversy. Even though it was the homestead, it would not follow from that that it was exempt from taxation. The beneficial provisions of our statute providing for the exemption of homesteads by no means reached to that extent of exempting a homestead from taxation. Manifestly learned counsel for appellant embraced the homestead question in the agreed statement of facts, upon the theory that the judgment against Augustus Smith was simply a personal judgment, and was not one which undertook to enforce a lien for certain taxes levied upon the property.

We have given expression to our views upon the controlling questions disclosed by the record, which results in the conclusion that the judgment of the trial court should be affirmed, and it is so ordered. All concur.

#### MATZ et ux. v. MISSOURI PAC. RY. CO. (Supreme Court of Missouri. March 9, 1909.)

##### 1. RAILROADS (§ 401\*)—ACTION FOR KILLING CHILD ON TRACK—INSTRUCTIONS.

Though, in an action for the death of a child at a railroad crossing, there is evidence that he was in the center of the main track a sufficient time to have been discovered in time to have averted the injury had ordinary care been used, yet if there is also evidence that he had crossed the track, and was 14 feet away when he suddenly jumped back in front of the rapidly moving engine, it was error to refuse an instruction predicated on the assumption that he came suddenly back on the track in front of the engine.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 401.\*]

##### 2. NEGLIGENCE (§ 83\*)—COMPARATIVE NEGLIGENCE—"HUMANITARIAN OR 'LAST CHANCE' DOCTRINE."

If the negligence of both parties co-operate to produce the injury, there is usually no liability, except for what is denominated the "humanitarian or 'last chance' doctrine," which means that, though the injured party may have been negligent in placing himself in a position of peril, yet if defendant, by ordinary care, did see, or could see, him in time to have averted injury, defendant is liable.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4006.]

##### 3. RAILROADS (§ 358\*)—LIABILITY FOR KILLING CHILD ON TRACK.

A child killed by a passing engine, at a point which had long been used by pedestrians, with knowledge of the railroad company, was entitled to such care only as would be due a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



licensee of his years; and, if he was across the main track, and it was the engineer's duty to look for licensees at the point of injury, and he did so when he was 1,200 feet away, and probably saw him on the track, and then later leave it, he had a right to expect that he would continue on his journey, and not suddenly return to a place of danger, and if he did so, there could be no recovery, notwithstanding the dangerous rate of speed and the failure to ring the bell or whistle.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1236-1237; Dec. Dig. § 358.\*]

**4. NEGLIGENCE (§ 83\*)—HUMANITARIAN DOCTRINE—NATURE AND APPLICATION.**

If the negligence of both parties contributed to and produced the injury, there could be no recovery, except on the theory of imminent peril recognized by the last chance doctrine; but, if the injured party alone was negligent there could be no recovery, except on the humanitarian doctrine, which depends on the fact that the defendant did see the peril of the injured party, or, by the exercise of ordinary care could have seen him, in time to have averted the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.\*]

**5. TRIAL (§ 418\*)—PRESENTATION OF GROUNDS OF REVIEW—DEMURRER TO EVIDENCE.**

The better practice is to renew at the end of the whole case a demurrer to the evidence offered at the close of plaintiff's case, but where the prima facie case is not aided by subsequent evidence, the demurrer may be considered on appeal, where urged as error in moving for a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 98; Dec. Dig. § 418.\*]

**6. RAILROADS (§ 398\*)—ACTION FOR KILLING CHILD ON TRACK—EVIDENCE—SUFFICIENCY.**

Evidence, in an action for killing a child run over by an engine, held insufficient to justify a verdict against the railroad company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1356-1363; Dec. Dig. § 398.\*]

In Banc. Appeal from Circuit Court, Jackson County; Herman Brumbach, Judge.

Action by Peter Matz and wife against the Missouri Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

The following is the opinion of GRAVES, J., in division No. 1:

"The plaintiffs, who are husband and wife, bring this action for the alleged negligent killing of their child, Carl Matz. By the petition it is charged that the child, a boy over 10 years of age, was killed by a Missouri Pacific east-bound passenger train, near the intersection of Chestnut and Guinotte avenues in Kansas City, Mo., at about 5:30 p. m., August 3, 1904. It is charged that this portion of defendant's railroad track had been continuously used for a long period of time by pedestrians, and that such use was well known by defendant. For negligence the petition charges (1) a violation of a speed ordinance of Kansas City, which ordinance limits the speed of trains at street crossings to 6 miles per hour; (2) reckless and dangerous rate of speed in a thickly populated portion of the city; (3) the failure of defendant to

protect deceased whilst in imminent danger, when by the exercise of ordinary care and caution the servants of defendant could have seen him in such peril in time to have avoided the injury, either by stopping or slowing the train, or by sounding the whistle or ringing the bell, neither of which was done. This last portion of the petition fully and explicitly pleaded the necessary elements and facts for the application of the humanitarian doctrine. Answer was a general denial and plea of contributory negligence upon the part of deceased. For the plaintiffs the cause was submitted solely on the humanitarian rule, as appears by the following instruction: 'The court instructs the jury that if you believe from the evidence that the defendant, on the afternoon of August 3, 1904, operated a certain engine, tender, and train of cars by its servants, agents, and employes upon and in charge thereof, upon its railroad over and across a certain public street and thoroughfare in Kansas City, Mo., known as Chestnut avenue, at or about the place where said avenue intersects a certain street or avenue in Kansas City, Mo., known as Guinotte avenue, and that Carl Matz was the infant, unmarried son of the plaintiffs herein, and that plaintiffs were husband and wife, and that he, the said Carl Matz, was upon the railroad track of the defendant in front of said engine, tender, and train of cars, and upon the same track as said engine, or near thereto, and in a position of danger and peril from said approaching engine and train, and that the agents, servants, and employes of the defendant in charge of said engine and train saw, or by the exercise of ordinary care might have seen, him, the said Carl Matz, upon said railroad track, or near thereto, and in a position of danger and peril from said approaching locomotive and train in time, by the exercise of ordinary care, to have avoided any injury to him, and they failed to exercise ordinary care to avoid injuring him, and by such failure to exercise ordinary care they caused or permitted said locomotive to run upon and against the said Carl Matz and to injure him, and that he died as the result of such injuries, then your verdict should be for the plaintiffs in the sum of \$5,000.' The instruction is but a slight modification of one asked by plaintiffs. They asked but one instruction, so that their theory of the case is clearly outlined in the instruction above, for the slight amendments made by the court do not change the theory. At the close of plaintiffs' case the defendant asked an instruction in the nature of a demurrer to the evidence. This the court refused. At the close of the whole case the defendant asked some five instructions, two of which were given and three refused, but did not ask an instruction in the nature of a demurrer to the evidence at this time. This we deem unimportant, as the defendant introduced no ev-

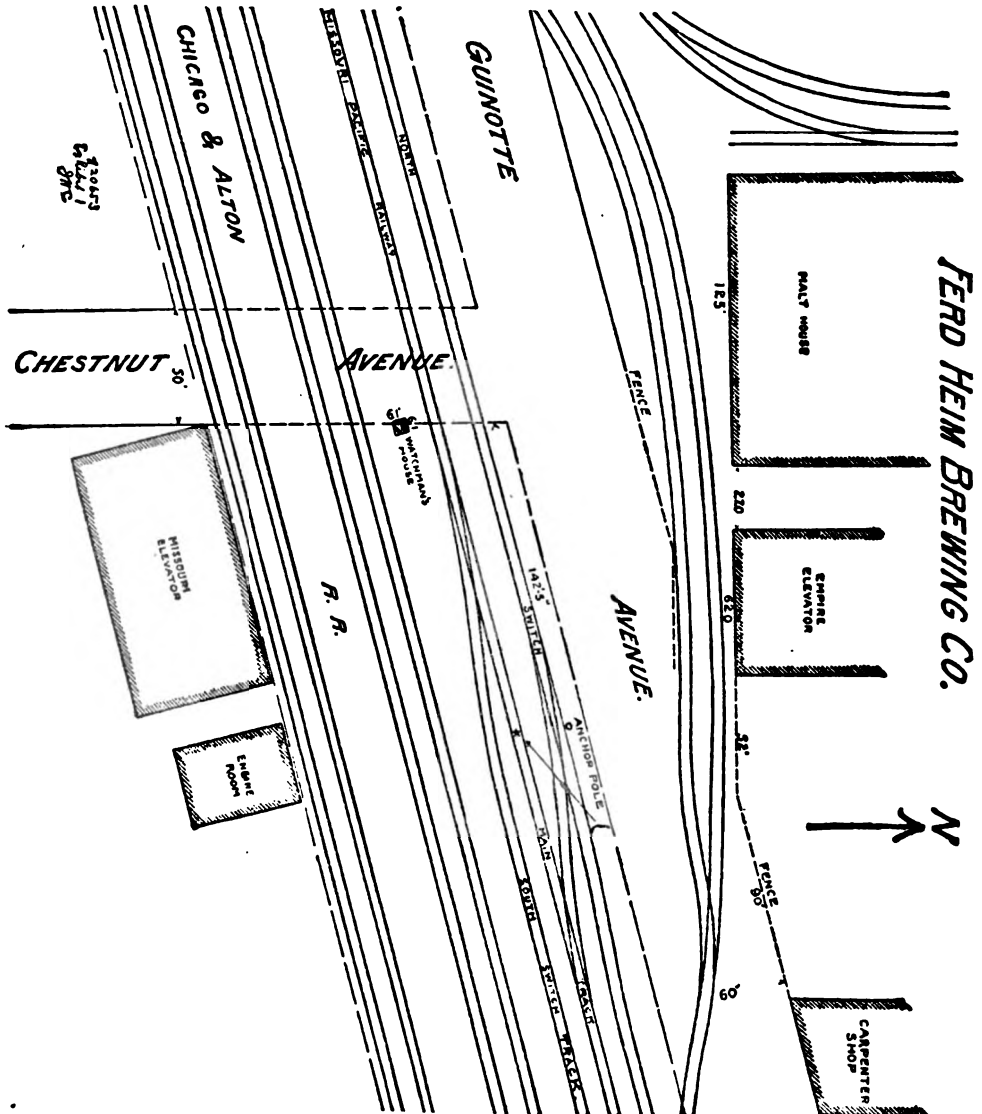
\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

idence which would aid in the least the case made by plaintiffs. Verdict and judgment went for plaintiffs in sum of \$5,000, and defendant brings the case here. In the brief it is strenuously insisted that there is no case to go to the jury, and the demurrer should have been given.

"The locus in quo is fully presented by a plat in evidence, which we attach and use to lend us assistance in detailing the facts. The plat is thus:

three sides of the Helm Brewing Company property.

"The deceased, Ottis Rich, Lonnie McCall, and George Kumpf, all about the same age, had been at a pond north and east of the brewery property. In the crowd was a little girl, who did not testify. With them, upon their return from the pond, was Alex Kumpf, father of George. They came from the north, on the east side of the brewery property, to the corner on the plat, marked 'carpenter



"The plat does not specifically so show, but the evidence does show that the streets running north and south, indicated both to the east and west of the Ferd Helm Brewing Company property, are continuations of Guinotte avenue. The south line of the Helm's property is the line indicated by the word 'fence,' so that Guinotte avenue, is upon

shop.' The deceased to go home had to go south on Chestnut avenue, and beyond the Chicago & Alton Railway tracks. The other members to get home had to simply proceed west on Guinotte avenue. The deceased was struck by an east-bound train on the main line of the Missouri Pacific, thrown high in the air, and fell to the ground, a little east

of an anchor post, which stands a little north of the north switch track of that road. The exact point where the child was when he was struck is not made certain, but it was evidently to the west of the point where his body fell. The evidence shows that the people, in going from Chestnut avenue to that part of Guilnotte avenue east of the brewery property, frequently angled from Chestnut avenue at the Missouri Elevator, and, going in a northeasterly course, crossed the several tracks of the Chicago & Alton Railway Company and the Missouri Pacific Railway Company, and in returning they would come back in a southwesterly direction, and into Chestnut avenue at or near the Missouri Elevator corner. It is quite clear from the evidence that this little boy undertook to angle across the tracks at some point after they reached the railroad tracks, but the exact point as to where he left Guilnotte avenue to go upon and across the tracks is not clear. The evidence shows that a boy upon the track could be seen by the engineer of an east-bound train from a point a quarter of a mile or more west of Chestnut avenue, and west of the point where this child was hurt. The evidence shows that the train was running 18 miles per hour, and with the appliances could have been stopped within 250 feet. The real dispute between the parties is where the boy was just before the moment prior to the collision. Plaintiffs urge that the evidence shows that the boy had been on the main track where he was struck for at least two minutes or more prior to the collision, and that there was no bell rung, whistle sounded, or attempt to slow the train. On the other hand, the defendant urges that the evidence shows that the boy had crossed over its main track, and had gotten about to the north track of the Chicago & Alton Railway which was 14 feet south of the defendant's main track, and that as he was about to cross the Chicago & Alton track a west-bound freight train came along on the north track of that company, at which the boy darted back to the north, and toward his companions, and, upon reaching the main track of the Missouri Pacific, was struck and killed. The evidence comes from these three little boys, and the old German, Alexander Kumpf, and is difficult to understand and analyze. The old gentleman, Kumpf, evidently talked in broken English, and did not understand questions readily. However, he was picking up bits of wood and coal, putting them in a little wagon which the children were pulling, and does not claim to have seen the deceased just at the time of the collision. The three little fellows are the only ones who locate the deceased just the moment before and at the time of the accident.

"Ottis Rich, 12 years of age, and the oldest boy in the crowd, after detailing their doings at the pond and their return to the street corner near the railway tracks, being further in-

terrogated, said: 'And when we got to where the road turns up in there, he cut across to go home, and when he got about the middle of the tracks— Q. (Interrupting) What corner did you get to? Mr. Robinson: I object to that. He said when he got to the middle of the tracks. The Court: Finish what you started. Mr. Scarritt: He said he got to the corner, and I asked him what corner, and was going to follow it by asking where he went then. Mr. Robinson: I object to that. He didn't say he got to the corner. By the Court: Go ahead, and say what you started to say, Ottis. A. Just as we got down along there by that little gashouse, or whatever you call it, the road turns— By Mr. Scarritt: Q. Where is that? A. Where the road turns; the road turns there and goes straight. Q. In which direction? A. West. Q. Now, is the house you mean the house at the corner of the Helm Brewery property? A. I don't know what you call it there. Q. How close to the railroad tracks were you? A. About half a block. Q. Now what happened? Go ahead and tell your own story in your own way. A. Where the road turns he cut across and tried to go home, and just as he got on this here track, on this side of the Missouri Pacific, the freight train came, and he jumped on the other track to get out of the road, and the passenger train came along and struck him.' Then, after stating that they all came down close to the railroad tracks, he further says: 'Q. What did you come to when you turned? A. I don't know what you call it. Q. Did you come to the railroad tracks? Mr. Robinson: I object to that question. (Objection overruled, to which ruling of the court defendant duly excepted at the time.) Q. Go ahead and answer the question, Ottis. A. Not clear to them; about two yards from them. Q. And when you got that close to the railroad tracks, which way did you and the wagon go? A. West. Q. Who was pulling the wagon? A. Mary, George and Lonnie. Q. What were you doing? A. Pushing. Q. What was Charlie Matz doing? A. He was crossing the railroad. Q. Which direction was he going? A. Southwest. Q. How far did he go now from that before the train struck him? A. About one-half a block. Q. In which direction did he go? A. Southwest. Q. And where was he walking? A. Across the railroad. Q. In which direction was he walking? Mr. Robinson: I object to that as repetition. The Court: Objection sustained. He has said "southwest" twice. Q. Now, were you, or any of you children, talking to Charlie Matz? A. No, sir; but Mr. Kumpf was. Q. Where was Mr. Kumpf? A. He was walking behind the wagon. Q. Where was he walking? A. Behind the wagon. By the Court: Q. Was he walking in the road? A. Yes; we was all in the road. By Mr. Scarritt: Q. Was Charlie Matz in the road? A. No, sir. Q. Where was he walking? A. He cut across to go home. Q. Now, after he left you, how far

did he go before he was struck? A. About half a block. Q. What did he have with him? A. He had a can of fish. Q. And in which direction were you and the wagon going? A. West. Q. And how far did you and the wagon go after you turned west before he was struck? A. We went about four yards from the road; from Guinotte avenue. Q. You went pretty close up to Guinotte avenue? A. Yes, sir. Q. What did you say happened when you got up there? A. Just as we got up there, he was going across. He was on this side, on this track on this side of the Missouri Pacific, and there was a freight train there, and he jumped out of the road of it onto the Missouri Pacific, and then the train came. He got about a foot from there, and then he started to run back to us, and the train struck him. Q. What did you see then? A. Well, I seen him go up in the air, and I seen him fall.'

"Lonnie McCall, aged 11 years, among other things, says: 'Q. Now, just tell the jury how you came as you came southeast to the brewery property? A. Well, we came right straight on down there, and came right up the wagon road, and Carl was walking on the track. Q. Where were you walking? A. Pulling the wagon out in the road. Q. How far did he walk up the track? A. He walked about half a block. Q. Was that the same track he was killed on? Mr. Robinson: I object to that question. Let him state what track it was. Objection overruled, to which ruling of the court defendant duly excepted at the time. By the Court: Q. Was that the same track he was killed on? A. No, sir; he had got on one track, and went to cross back, and got on the same track he had been on. By Mr. Scarritt: Q. Then how far did he walk up that track? Mr. Robinson: I object to that question because it assumes that he did walk up that track before he was killed. (Objection overruled, to which ruling of the court the defendant duly excepted at the time.) Mr. Robinson: I don't like Mr. Scarritt to suggest these answers to this little boy by assuming a state of facts that does not exist. (Objection overruled, to which ruling of the court defendant duly excepted at the time.) Q. How far did he walk up that track? A. I couldn't say just how far, but I think a half a block. Q. What happened then? A. He got out of the way of one train, and when he went to get out of the way of the other one, a freight train, he got in the way of the passenger. Q. What did he have with him? A. He had a can with some little fish in it. Q. Were you and the other children talking with him as he walked? A. Yes, sir. Q. How far apart were you and he as you walked up there? A. Well, we was just a little ways apart, and he was in front of us. Q. What were you doing? A. Pulling the wagon. Q. What was he doing? A. Carrying the fish on the railroad. Q. Which track was he on? A. He was on the north track. Q. Do you know what railroad track

that is? A. No, sir. Q. Do you know what company it belongs to? A. No, sir. Q. How far did he walk up that track? A. He walked about half a block. Q. Now was that the track he was on when he was struck? Mr. Robinson: I object to that question as leading. The Court: Objection overruled. Mr. Robinson: I want to make my objection explicit. He said he got on the north track, and walked along that track, and then Mr. Scarritt asked him if that was the track on which he was killed, and the evidence shows that he was not killed on the north track. (Objection overruled, to which ruling of the court the defendant duly excepted at the time.) Q. Was that the track on which he was killed or not? A. He was killed by the passenger, and the passenger was on the main track. Q. Was that the track he was walking on? A. Yes, sir. Q. Did you hear that Missouri Pacific train that struck him ring the bell or blow the whistle before it struck him? A. No, sir.'

"Cross-examination by Mr. Robinson: 'Q. Did you holler at him before he was struck? A. Yes, sir. Q. Who else hollered at him besides you? A. George Kumpf did, and Mr. Kumpf. Q. What was it you hollered at him? A. To get out of the way. Q. The train was right close to him when you hollered, was it? A. Yes, sir. Q. And he didn't have time to get out of the way? A. No, sir. Q. Now was he struck on the track closest to you, or the next track south of that? A. We was between the two tracks. Q. Did you have your wagon between the two tracks? A. We had the wagon between the old switch track and the main track. Q. The old switch track is the north track there? A. Yes, sir. Q. That is the track you said Carl was walking on about half a block? A. No, sir; I said he was walking on the main track. Q. Had he got off that main track, and started to go across the other track when he saw this freight train coming? A. Yes, sir. Q. That is, after he was walking along the main track, he got off of this main track and started onto the other track, and saw this freight train coming, and jumped back on the main track to get out of the way of the freight train, and you saw this passenger train coming, and hollered at him to get off the track—is that right? A. Yes, sir. Q. But the passenger train was so close to him then, after he jumped off that track and back onto the main track, that he didn't have time to get off before the passenger train struck him—is that it? A. Yes, sir. Q. If he hadn't seen that other train coming after he had got off the main track, and jumped back onto the main track again, he would not have been struck, would he? A. No, sir.'

"George Kumpf, aged 12 years, said: 'Q. Where did you go then? A. We stopped to play a little, and papa came, and said, "Why don't you come on?" and we went on, and he was picking up little pieces of wood and

putting them on the wagon, and he saw a piece of coal across the track and started to get it, and Carl started straight over, and when he got to the Missouri Pacific track he turned west. Q. What happened then? A. A freight came on the Chicago & Alton. Q. You say after you came down he went over on the tracks? A. Yes, sir. Q. Which direction did he go then? A. Southwest. Q. Which way was he walking? A. When he got over on the main track he turned down. Q. Which direction? A. West. Q. How far did he go along that track? A. About half-ways between the flagman and the street. Q. What do you mean by the flagman? A. Where he has got the little house there at Chestnut avenue. Q. Is there a flagman here at Chestnut? A. Yes, sir. Q. Where does he stay? A. He has a little building there now. Q. How far did you say Carl went up that track? A. He went halfway from Chestnut to Guinotte, back of the brewery. Q. About halfway from the east line of the Helm Brewery to Chestnut? A. Yes, sir. Q. What happened then? A. A freight came on the Chicago & Alton, and that was just a little past when the engine struck him. Q. The engine of what struck him? A. The passenger. Q. Which direction was the passenger going? A. East, and the freight was going west. Q. What track was the passenger train on? A. On the Missouri Pacific. Q. Is that the same track Carl was on? A. Yes, sir. Q. Then what happened? A. It struck him and he flew up in the air, and he fell right on the switch track. Q. Whereabouts did he fall on that switch track? A. He fell about 10 feet back. Q. Do you know where that anchor post, or big post like a telephone pole is? A. He went just a little past that, about a yard. Q. East of that? A. Yes, sir; his head was laying on the track. Q. Did you hear any bell rung or whistle blown on that passenger train before it hit him? A. No, sir.

"Cross-examination by Mr. Robinson: 'Q. Did you hear any whistle blow at all? A. No, sir. Q. No whistle blown on either of the trains? A. No, sir. Q. Have you talked with this gentleman recently, George? A. Yes, sir. Q. How many times? A. About four times. Q. When did you talk to him last? A. Last Monday, I believe it was. Q. And you talked to him about three times before that, did you? A. Yes, sir. Q. About how Carl got killed? A. Yes, sir. Q. Now, you testified before the coroner, didn't you, sonny? A. Yes, sir. Q. Didn't you testify before the coroner that you heard a whistle blown, but that it was a whistle on the Chicago & Alton freight train? A. Yes, sir. Q. You did hear a whistle blown then? A. Yes, sir; but I didn't hear any on the passenger. I just heard one whistle, and that was on the freight. Q. How could you tell it was on the freight train? A. Because I seen the freight when it passed. Q. You say the

freight went past about the time the passenger train struck Carl? A. Yes, sir; it was just about passing when the passenger struck him. Q. You say when Carl left you he started to go in a southwest direction? A. Yes, sir. Q. That was across the tracks? A. Yes, sir. Q. Across towards the corner of the Missouri Elevator building there? A. Yes, sir. Q. In a southwestern direction across these railroad tracks? A. Yes, sir. Q. You said he walked along one of the tracks? A. Yes, sir. Q. You testified before the coroner that he walked along the middle of the track? A. He went southwest first, and then turned down the Missouri Pacific track. Q. Then he got off that track and started to go across these others, and saw this freight train coming? A. Yes, sir. Q. And then when he saw this freight train coming he jumped back on the Missouri Pacific track? A. Yes, sir. Q. And then the Missouri Pacific engine was there and struck him? A. Yes, sir.'

"Redirect examination by Mr. Scarritt: 'Q. How long was this freight train? A. It has 8 or 10 cars in it. Q. A regular freight train? A. Yes, sir. Q. Coming into Kansas City? A. Yes, sir.'

"Recross-examination by Mr. Robinson: 'Q. After he had walked along the track there and got off and started to go across the other tracks and saw that freight train, if he hadn't got scared and jumped back on the other track, he wouldn't have been struck, would he? A. No, sir.' Then follows a bit of testimony upon which much stress is placed by the plaintiffs. Redirect examination by Mr. Scarritt: 'Q. How long had Carl been back on the Missouri Pacific track after stepping back on it before the train hit him? A. Just about two minutes. Q. In which direction was he going? A. West. Q. Now, were you talking to him just before he was struck? A. Yes, sir. Q. What did you say? A. I said, "Good-bye, Charlie," and he turned around and said, "Good-bye," and papa asked him if he was going home, and he said "Yes." Q. And then what happened? A. It struck him.'

"Counsel for defendant took out his watch and pencil, for the purpose of testing the question of the knowledge of the witness as to what was in fact two minutes, and witness told him when to stop, but this would indicate nothing to us in the present shape of the record. It might have indicated much to the jury. Then follows: 'Q. You indicated awhile ago, when I held up my pencil, how long you thought two minutes was? A. Yes, sir. Q. And Carl had been on the track about that long after he jumped back? A. Yes, sir. Q. And it was just after he jumped back that he said "Good-bye," and you said "Good-bye"—he had just been on the track long enough for you to say "Good-bye"—and he to say "Good-bye," when the passenger struck him? A. Yes, sir.'

"Alexander Kumpf, the old German, said:

'Q. Were you all coming down the road on the east side of the Helm property? Were you walking in the road with the children? A. Yes, sir; they were pulling the wagon, and I was picking up the wood, and all at once I looked ahead and seen Charlie Matz about 50 feet ahead of me, and started right over the railroad, and I don't know—I hol-lered. Q. That is right at the street east of the brewery? Mr. Robinson: I object to that. Mr. Scarritt oughtn't to tell him what to say. The Court: Go ahead. He told the witness what it was. (To which ruling of the court defendant duly excepted at the time.) A. He turned around; he turned right over on the railroad, and he crossed the first switch, and then went in the center from the main track. Q. Which way did he go then? A. To go home. Q. Well, which way? A. West. Q. Right in the main track? Mr. Robinson: I object to that, if the court please. I am going to protest every time Mr. Scarritt puts words into the mouth of the witness, whether it is after the witness has made a response to another question or before. I don't think it is the proper way to try the case. The witness ought to be permitted to tell in his own way what he knows. Q. Where did you go? A. I followed the wagon, and my children pulled on it, and some of the other children—I don't know who—and I say, "Carl, you go home?" and he say "Yes." \* \* \* A. And then some of my children said to him, "You go home?" and he said "Yes; I have to hurry to go home." And I said, "Good-bye, sweetheart." I just felt that that, and every one of the children laughed, and said, "Good-bye, sweetheart," and then I followed, and seen them talking, and I came around this corner. Then I seen him follow straight between them tracks, and then when I seen him going round to go west I seen him about 50 feet ahead of me towards the watchhouse. Q. What watchhouse is that? A. Where the street crossing is. Q. The little house where the watchman stays? A. Yes, sir. Q. Is that watchman's house there yet? A. Yes, sir; it is there yet. Q. A little house about 6 feet square, a little frame house? A. Yes, sir; and that is the last what I seen from him. By the Court: Q. You didn't see him hit? A. No, sir; I didn't see him any more. Then I picked up some wood. This was for winter time, and I was crippled, and I do the best I can, so I saw on the other side of the railroad a piece of coal, and I went across, and when I went across I didn't hear any whistle at all. And when I went to pick up that piece of coal, all at once a train along, and I had to jump back myself, or I would be as dead as that child. And as soon as the train was past, I heard my children crying. Then I went across.'

"On cross-examination he further said: 'Q. Well, now, listen to my question. Did you see two trains passing at that time? A. Yes. Q. And you thought it was the Chicago &

Alton train that came pretty near striking you? A. Yes; that is what I thought. I mean the train that came from the west, but I don't know exactly from all the excitement how it was. You know I was so all excited. Q. Now, listen; you say that Charlie Matz left your children and started to go home, and started to go across the railroad tracks? A. Yes, sir. Q. And he started across from the north side over in a southwestern direction towards the south side of the tracks? A. Yes, sir. Q. And you say he got on the Missouri Pacific track, and walked a little ways up that track? A. Yes, sir. Q. And you went on then picking up wood? A. Yes. Q. And you were looking around for pieces of wood, and you didn't notice Charlie any more until that train came pretty near striking you; is that right? A. Yes, sir. Q. And you then heard the children crying, and you went over and saw his body? Q. And you don't know what he did from the last time you saw him, until you jumped out of the way of that train? A. No, sir. Q. He may have got off that track, and then jumped back on it again for all you know? A. Yes, sir; I don't know.'"

Such is the unsatisfactory state of the evidence in this case. We have set out the material positions in full, so that a connected view, if possible, may be taken from it as a whole, when considered with the other circumstances and the surroundings.

"1. In addition to the demurrer interposed at the close of the evidence for the plaintiffs, the overruling of which is charged as error, the defendant asked an instruction in this language: 'The court instructs the jury that if you believe from the evidence in this case that the deceased got off of defendant's track, and beyond the reach of danger of being struck by defendant's engine, and that, after having done so, he again came suddenly back on defendant's track just in front of defendant's engine, and so close to said engine that the same could not possibly be stopped in time to avoid the accident, then the plaintiffs are not entitled to recover, and it is your duty as jurors to return a verdict for the defendant, notwithstanding you may further believe from the evidence in the case that the engine which struck the deceased was running at a speed of about 18 miles an hour, or more, and although you may further believe that no bell was rung or whistle sounded on said engine when approaching the point where the accident occurred.' The refusal of this instruction was error, for the sake of mere argument on this point grant it for the plaintiff that the evidence in some instances tends to show that the child was in the center of the main track for sufficient length of time to have been discovered in time to have averted the injury, had ordinary care been used, yet it must be conceded that there is ample evidence in the record tending to prove that the boy had crossed the track and was near the Chicago & Alton track, 14 feet to

the south thereof, when he suddenly jumped back to this track in front of a rapidly moving engine and train. With such in the record this instruction should have been given. After discussing the degree of care which must be shown toward children, and the proper gauge of their acts, and as to what should be the rule as to them on the question of contributory negligence, the writer, in 7 Am. & Eng. Ency of Law, p. 409, says: 'But this will not warrant a recovery when the child suddenly puts himself in a dangerous place, where there was no reason to expect him, and too late for the danger to be averted by the person inflicting the injury.'

"This case proceeds upon the humanitarian doctrine. Plaintiffs so limit it in their one instruction. That doctrine has for its origin a concession of negligence contributing to the injury upon the part of the injured or deceased. In this state we have no such thing as comparative negligence, and, further, if the negligence of both operate together to produce the injury, there is usually no liability, except for what we denominate the "humanitarian" or "last chance" doctrine. By this we mean that although the injured party may have been guilty of negligence, by placing himself in a position of peril, yet if the defendant, by the exercise of ordinary care did see him in such position, or by the exercise of such ordinary care could have seen him in such position, in time to have averted the injury, then the defendant is liable. In this case the deceased was but a licensee at best, and entitled to such care only as would be due a licensee of his years. If it is true that deceased was across the main track of defendant, and if it be granted there was the imposed duty upon defendant's agents to look for licensees at the point of injury, then if the engineer looked when he was 1,200 feet or more to the west, he probably saw this boy on his track, and then later leave it and start south, and under such circumstances he had a right to expect that he would continue on his journey, and not suddenly return to a place of danger. If he did suddenly return to a place of danger, the defendant was entitled to the instruction asked. It is not so much the question of negligence on the one side, and contributory negligence on the other, as it is, What was the proximate cause of the injury? The humanitarian doctrine had its origin in conceded negligence. If both parties were negligent, which contributed to and produced the injury, there could be no recovery, except on the theory of imminent peril recognized by the humanitarian doctrine. If, on the other hand, the injured party alone was negligent, there could be no recovery, except upon the principle of humanity expressed in the humanitarian rule. This rule depends upon the fact that the defendant did see the peril of the injured party, or by the exercise of ordinary care to see (in places where the party might be ex-

pected, and had a right to be) could have seen him, in time to have averted the injury. The case at bar is quite different from the case of *Holmes v. Mo. Pac.*, 207 Mo. 149, 105 S. W. 624, for there the boy was going toward the track; and, had the engineer looked, he would have so seen. Here had he looked, he would have seen the boy going from the track. What would be demanded of defendant in the *Holmes Case* would not be demanded of it here under the evidence we are now discussing.

"In *King v. Wabash R. R. Co.*, 211 Mo., loc. cit. 13, 109 S. W. 673, we said: 'If the deceased was in a place of safety, and placed himself, by inadvertence or otherwise, immediately in front of a moving train or engine, and was thereby injured, the defendant is not liable. In other words, if the conduct of deceased, in a place of safety, was such that he put himself so suddenly in a place of danger that the accident could not have been avoided, even if the defendant had complied with the ordinance in the strictest terms, then the plaintiff cannot recover on the bald proposition that the defendant had not complied with the ordinance. In such case the failure to comply with the ordinance would not be the proximate cause of the injury. The cause of the injury would be the inadvertent act of deceased in taking the step from a place of safety to one of danger. The evidence tends to show that this change was but the work of an instant, thereby furnishing no time for warning.' So there is ample evidence that the reappearance of the boy on the track was but the work of an instant. The refusal of the instruction above set out is prejudicial error.

"2. It is in a way insisted that defendant has waived the right to insist upon the demurrer offered at the close of plaintiffs' case, by not renewing it at the end of the whole case where the defendant introduces evidence. In this case the defendant introduced but one witness. If the plaintiffs had failed to make a prima facie case in the first instance, the evidence of this witness did not add to the case. The failure to give the demurrer is urged in the motion for new trial as error. It is also urged in that motion that: 'The verdict is against all the evidence in the case, and upon the undisputed evidence the verdict should have been for the defendant.' In our judgment the better practice is to renew the demurrer at the end of the whole case, but in a case where there has been no aid to the prima facie case by the subsequently introduced evidence, we can see no reason, in our practice, for not considering such demurrer, where it is urged as error in the motion for new trial. It challenges the sufficiency of the evidence at a certain point, and if no additional evidence is brought forth, it in fact challenges the whole case. But aside from that, the sufficiency of the whole evidence is challenged in the motion for new trial, in the clause-

therefrom quoted above, so that upon whatever source we consider the challenge to the sufficiency of the evidence, we must examine this evidence, and pass upon its probative force.

"3. It is hard to discard one's sympathies in a case of this kind. Here we have parts of three families approaching this network of railroads. There was no necessity for any to cross them except the little fellow who was killed. Evidently they all lived an humble life. Carl, the deceased, left them at some point after they got to the southeast corner of the brewery property. Then, with childish glee, he started to angle across this network of railroad tracks. He had three little fish that he was taking home. The description of the parting, when the 'Good-bye, sweetheart,' was said to him by the old man and his other little playmates, in view of what followed so shortly, is almost heart-rending. With care we have read and re-read this evidence. With the map and other admitted facts we can reach some conclusions as to its probative force, and this we should do irrespective of the sympathetic feelings aroused by the kindly and affecting incidents just prior to the fatal moment. From what we have quoted it appears that the trial court was exceedingly lenient in relaxing the strict rules of evidence in the course of the trial. That court evidently considered the age of the witnesses on the one hand, and the inability of the old German, Kumpf, to fairly understand and describe things, upon the other. Whether right or wrong, the plaintiffs had the benefit of this leniency, and in the appellant's briefs here the specific grounds of error in this regard, if error there was, are not pointed out to us, and we owe no special duty to point them out or seek for them. In view of the fact that the case must be at least reversed and remanded, and of the further fact that if we should reverse and remand simply, it might be construed that we were of opinion that there was in fact a case upon the facts, we will take up this evidence and indicate our views thereon.

"From it we conclude that the deceased left his friends and started to cross these railroad tracks at some point east of Chestnut avenue. This is shown by all the witnesses. The 'Good-bye, sweetheart' that was said to him evidently occurred at the point of separation, and this was where the little wagon was on Guilnotte avenue. Mr. Kumpf says he looked up and saw him ahead and 'hollered' to him, and then details the incident of separation. He then said his children proceeded toward the west, and Carl toward the watchman's house, which would be southwest; that he then began to pick up wood, and finally went after a lump of coal; that whilst doing this two trains suddenly appeared, going in opposite directions; that he had to jump back to save himself, from what he judged was the Chicago &

Alton train going west; that after the other train passed, hearing the distressed cries of his children, he went across, and found Carl dead. To our mind this shows that in his search for coal and wood he had reached the Chicago & Alton track. The last he saw of Carl he was going up the Missouri Pacific track, but he did not see him just prior to the accident. The other little fellows all agree that Carl jumped back from one track to dodge a train, and was caught on the other track by defendant's train. This could only mean that he left the Chicago & Alton track, and was caught on defendant's track. The old man says that the two trains were there practically at the same time. To our mind the only bit of testimony lending color to a case for the plaintiffs is the following, brought out on a redirect examination: 'Q. How long had Carl been back on the Missouri Pacific track after stepping back on it before the train hit him? A. Just about two minutes. Q. In which direction was he going. A. West. Q. Now, were you talking to him just before he was struck? A. Yes, sir. Q. What did you say? A. I said, "Good-bye, Charlie," and he turned around, and said, "Good-bye," and papa asked him if he was going home, and he said "Yes." Q. And then what happened? A. It struck him.' Emphasis is given to the question of two minutes. They urge that if he had been there two minutes, the servants of defendant had opportunity to discover him and give him warning. This statement of the little boy George Kumpf should be closely scrutinized. His age and parentage should not be forgotten. He had just been describing the course of the party from the little fish pond to the death of his little playmate. He speaks here of bidding little Carl good-bye. In that he evidently referred to the time they separated, just before Carl started across for home—just before he started across the tracks. The time of the separation and the accident was short. In our judgment he, as to the two minutes, was referring to that space of time which intervened between the parting of the parties and the accident. The question 'Now, were you talking to him just before he was struck?' and the answer 'Yes, sir,' was literally true, but, taken with all the witness has detailed, referred to the first, and in our judgment only, parting and separation of the parties, when they all told Carl good-bye. So considering it, there is no force in the contention of plaintiffs.

"I am of opinion that there is no redress for this unfortunate accident, for accident I think it was. So viewing the evidence, the cause should be simply reversed. It is so ordered."

Elijah Robinson and M. L. Clardy, for appellant. Scarritt, Scarritt & Jones, for respondents.



**PER CURIAM.** The opinion of GRAVES, J., in division is adopted as the opinion of the court in banc. All concur, except LAMM, J., who is of opinion that the case should be reversed, but should also be remanded, rather than reversed outright.

# **POTTER v. ST. LOUIS & S. F. R. CO.**

(St. Louis Court of Appeals. Missouri. March 9, 1909.)

## **1. DEATH (§ 97\*)—ACTION FOR WRONGFUL DEATH—AMOUNT OF RECOVERY—QUESTION FOR JURY.**

Rev. St. 1899, § 2864, as amended by Acts 1905, p. 136 (Ann. St. 1906, p. 1637), fixes the amount of recovery for death from fault or negligence at not less than \$2,000, and not exceeding \$10,000, "in the discretion of the jury," and the court cannot limit the recovery to \$2,000.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 123; Dec. Dig. § 97.\*]

## **2. TRIAL (§ 255\*)—CONTROL OF JURY'S DISCRETION—NECESSITY OF ASKING FOR INSTRUCTION.**

It is incumbent on a defendant desiring to have the discretion of the jury controlled as to the measure of damages to ask for an instruction to that effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 640; Dec. Dig. § 255.\*]

## **3. DEATH (§ 14\*)—ACTION FOR WRONGFUL DEATH—GROUNDS OF ACTION.**

It is as much the law since, as before, the amendment of Rev. St. § 2864, by Acts 1905, p. 136 (Ann. St. 1906, p. 1637), fixing recovery for death at not less than \$2,000 nor more than \$10,000, that recovery cannot be had where the injury was not the result of unskillfulness, negligence, or criminal intent.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 16; Dec. Dig. § 14.\*]

## **4. DEATH (§ 99\*)—ACTION FOR WRONGFUL DEATH—EXCESSIVENESS OF VERDICT.**

A verdict of \$3,000 for the death of a common laborer who was the sole support of his wife and three children is not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 129; Dec. Dig. § 99.\*]

## **5. DEATH (§ 75\*)—ACTION FOR WRONGFUL DEATH—EVIDENCE SHOWING CRIMINAL CARELESSNESS.**

Evidence in an action for wrongful death held to show such negligence as to closely border on criminal carelessness.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 93; Dec. Dig. § 75.\*]

## **6. RAILROADS (§ 401\*)—ACTION FOR DEATH OF PERSON ON TRACK—INSTRUCTIONS—"ORDINARY CARE."**

In an action for the death of a person at a station, the court instructed that, though decedent was negligent, defendant was liable if the train employes saw decedent who was unaware of his peril, and failed to give a proper warning by a signal which decedent would be likely to hear, and such signal being unheeded, failed to stop the train. The court further instructed that if decedent was struck between the street crossing and the depot at which defendant's trains made regular stops, and the track was so that a pedestrian could have been seen for a long distance with ordinary care and diligence, and was frequently used at such point by pedestrians, and deceased, while walking thereon, be-

came in imminent peril, and the trainmen became aware thereof in time, by ordinary care, to have stopped the train and averted the injury, and they failed to use such care and stop the train, and decedent was struck and killed, the jury must find for plaintiff, though they found that decedent was negligent, and that by ordinary care was meant such as an ordinarily careful and prudent person would exercise under the same or similar circumstances. *Held*, not to conflict with an instruction that it was decedent's duty to look both ways and listen for the approach of trains, and if at any time before he was injured he could, either by looking or listening, have known of the train's approach in time to get off and avoid the accident, plaintiff was not entitled to recover.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1387-1390; Dec. Dig. § 401.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740.]

## **7. RAILROADS (§ 401\*)—ACTION FOR DEATH OF PERSON ON TRACK—INSTRUCTIONS.**

In an action for the death of a person killed by an incoming train as he was walking along the track toward a country station in the usual way of reaching it from a nearby crossing, an instruction which, taken literally, required him to look both ways at once and listen while he was walking along, was erroneous.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1389; Dec. Dig. § 401.\*]

## **8. APPEAL AND ERROR (§ 882\*)—INVITED ERROR—REQUESTED INSTRUCTION.**

A party cannot invite error by requesting an erroneous instruction and then complain of it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. § 882.\*]

## **9. EVIDENCE (§ 492\*)—OPINION EVIDENCE—SPEED OF TRAIN—COMPETENCY OF WITNESS.**

If a witness is familiar with trains and accustomed to seeing them run, he need not be an expert to testify to the speed of a train.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2270; Dec. Dig. § 492.\*]

## **10. RAILROADS (§ 397\*)—ACTION FOR DEATH OF PERSON ON TRACK—ADMISSIBILITY OF EVIDENCE.**

In an action for the death of a person killed by a train, the testimony of a passenger, sitting in the rear coach at the time of the accident, that she felt no jar, was competent in determining the truth of the engineer's testimony as to his having applied the air and brought the train to a sudden stop.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1353; Dec. Dig. § 397.\*]

## **11. NEGLIGENCE (§ 83\*)—CONTRIBUTORY NEGLIGENCE—AS PROXIMATE CAUSE OF INJURY.**

Though a person by his own negligence exposes himself to the risk of injury, he may recover if the injury is more immediately caused by defendant's omission to avoid the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.\*]

## **12. NEGLIGENCE (§ 83\*)—RECOVERY NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.**

Plaintiff should recover, notwithstanding his own negligence, if the injury was more immediately caused by defendant's omission, after having such notice of plaintiff's danger as would put a prudent man on his guard, to use ordinary care to avoid the injury, and it is not necessary that defendant should actually know of the danger, but it is sufficient if he has sufficient notice to put a prudent man on the alert.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**13. RAILROADS (§ 387\*)—KILLING PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE OF INJURY.**

If, by ordinary care, an engineer could have seen a person on the track in time to have saved his life by such care, his negligence, and not that of the person killed, is the direct, immediate, proximate cause of the injury, and plaintiff in such case may recover.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1296; Dec. Dig. § 387.\*]

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by Mattie Potter against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Action by respondent, plaintiff below, against the defendant railway company, appellant, to recover damages for the death of her husband, which took place at Holland, in Pemiscot county, on the 22d of June, 1905. The petition is in the usual form, charging negligence on the part of the defendant, and claiming \$10,000 damages. The answer, after a general denial, sets up contributory negligence, to which a general denial was filed by way of reply. From the evidence in the case it appears that the deceased, Jonathan Potter, was a man about 74 years old, a tall, slender man, walked stoop-shouldered and in rather a tottering manner, often using a cane; had been crippled some years before by an accident, which he met with while employed in a sawmill, and was slightly deaf. His occupation was that of an ordinary laborer in a country town, working on farms and at different jobs, and it was developed by the defendant in the course of the cross-examination of plaintiff that the family consisted of Potter, his wife, and three children, and that he made most of the living for the family by his own labor. On the day of the accident, he had on a red shirt and no coat. The tracks of the defendant's road run through Holland from a northeasterly to a southwesterly direction, Holland being some distance south of Caruthersville, and being a town of some hundred or more inhabitants. The railroad line divides the residence district about equally, it being to the east and west of the road. Potter resided in that part of the town to the east of the road. There is a depot at Holland, the platform of which is about 200 feet long. On the day of the accident, the train which occasioned it was coming from the north toward the station, at about 5 o'clock in the afternoon, about on time. It had been raining that day, and the rails were slippery. About 72 feet north of the north end of the station platform, there is a street crossing; at 620 feet north of the end of the station platform is a country road crossing, and 190 feet beyond that is a water tank. The plat used in evidence by defendant places the water tank 820 feet beyond the north end of the station platform. The railroad was

in good condition, laid with heavy steel rails, rock ballasted, and, while practically straight for a long distance south of the station, to the north it was on a slight curve to the west as the track comes from the north. As is usual, the witnesses differed in their estimate of distances. The defendant put in evidence a plat, drawn to scale. We take the distances as given on the plat, with this difference, that what is called the "street crossing," where Potter entered on the track, is marked "road crossing," and what is referred to as road crossing, meaning the country road, is designated "street line." Assuming the plat is drawn to scale, these distances used by us are correct; only the names of the points given on the plat not corresponding to the testimony, and in designating them we follow the testimony. The track was in plain view from the country road crossing certainly, possibly from the tank, clear to the station. There were no buildings or other obstruction near the railroad on either side of it north of the depot for the distance of about a quarter of a mile. The land on either side of the road is level, and, where the road passes through the town from the street crossing to the platform or depot, it is low and wet, and the trenches or borrow pits along the sides are usually filled with water. The people of the town had, ever since the construction of the road, used the portion between the tracks extending from the street crossing to the depot platform as a footpath in going to and from the depot. Potter had been in the habit, when around town, of going over to the depot and watching the arrival of the trains, and in going to and from the depot had always traveled on the railroad track from this street crossing to the depot platform. The people of the town living on the east side of the railroad used the track in like manner. On the day of the accident, Potter left his house at about the time for the arrival of the southbound train, and going onto the track between the rails, at what we call the "street crossing," 72 feet north of the north end of the depot platform, was walking south on it toward the depot platform. There is evidence to the effect that when he came upon the railroad at the street crossing he stopped and looked up and down the track, and, seeing no train, started down the track to the depot platform. He walked slowly and in a stooping position. The train which caused the accident was a passenger train, comprising the engine, tender, and three coaches; it was equipped with air brakes, and appears to have been in perfect control of the engineer.

Giving the defendant the full benefit of the testimony of its main witnesses, we follow that of the fireman and engineer in describing the accident. The fireman was in his place on the engine, on the seat box, on the left-hand side—that is, on the east side

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the train as it was running—and as Potter was struck as he was crossing or had crossed to the right or west rail, the boiler and the cab on the front of the locomotive being between the fireman and Potter, the fireman says he did not see Potter the instant he was struck, but had seen him just before. He further testified that the engineer blew the whistle as quick as Potter got on the track, and that the bell was ringing. After the sounding of the whistle and of the bell, the fireman testifies that he did not observe Potter increase his gait. He further testified that the engineer sounded the whistle at the signal station above town and set the air. This signal station appears, according to the evidence, to have been about at the road crossing, or between that and the water tank. He testified that at that time the train was running at about 35 or 40 miles an hour. After the engineer whistled for the station he slowed down. The curve in the road appears to be about where this water tank is, and the fireman testified that after the engineer got by the tank he released the air, and after he had released it applied it again to the brakes at the road crossing, which, he says, "is about 175 yards north of the depot." In point of fact, as we have seen, it is about 630 feet or 210 yards north of the depot. After the engineer applied the emergency brake, the train was going at the rate of about "5 or 6 miles an hour," said this witness; that was before the emergency brake had been applied. On cross-examination the fireman said that he knew where the public road is north of the station; did not appear to know where the street crossing is; that the engineer had whistled for the road; had whistled for the station something like a mile north of it, and then north of the public road crossing he whistled for "the red board," as it is called—that is, the signal board which controls the approach of trains to the station and which is handled from the station, the red or white face being turned as a signal to the approaching train. When the engineer whistled for the station he was right at the public road crossing, about at the water tank—between the tank and the road crossing, but "right about the tank," said the witness. He estimates this tank as located about 40 or 50 yards north of the public road crossing. In point of fact, as we have seen, according to the measurement on the plat, it is 190 feet or 63½ yards north of the public road crossing, and it was about at this tank that the engineer "whistled for the red board," and answered it by sounding the whistle again to indicate he saw and understood. This point was "about 200 yards north of the place where Potter was struck and killed," said this witness. The speed of the train had been cut down for the station before the train got to the tank and curve, and then the engineer applied his air brake again, but the witness does not know whether he released or put it on afterwards, but, says witness,

"after he saw he was going to strike the man he put it on." Does not know exactly where the train was when Potter got on the track; Witness saw him, but doesn't know whether the engineer saw him. "There was nothing to keep him (the engineer) from seeing Potter, although the engineer would not have as plain a view of him getting on the track as I did, because Potter got onto the track on my side," and then he was immediately in front of both of them—that is, of both the engineer and fireman. Noticed that Potter was a tall man, walked in a stooped position, and was gray-headed. Asked if he could tell how far they were from Potter when he first saw him, said he did not think it was as much as half a mile; "you can't see that far from the depot." That is to say, the curve occurs within about a quarter of a mile of the end of the depot; from the water tank or from the public road crossing, it appears to straighten out. (In the plat furnished us by defendant, however, this curve is so slight as to be hardly noticeable.) Doesn't think he said anything to the engineer about seeing Potter on the track. After Potter passed out of his sight—that is, after Potter had got over toward the right-hand rail and was out of the line of vision of the fireman—he asked the engineer if he had hit him; asked the engineer that, while he was trying to stop the train. Thinks that Potter was going upon the track—that is, about to enter upon the track—when the engineer called for the "red board." He repeats that the curve in the track is right at the tank, and that "you can't see the depot until you get around this curve." Asked if he saw Potter before the engineer did, said that he doesn't know whether he did or not, but he thinks that they saw him about the same time, and that when he saw Potter enter on the track the engine was running just about on a straight line, where the track was straight. (This witness' idea of distance was very confused. He testified that to the best of his judgment the place where Potter got on the track was 15 or 18 feet from the end of the platform, and at that time the pilot of the engine was about 50 yards north and away from the platform, and that it was then that the engineer gave the signal at once and applied the brakes, and that the bell was ringing. The plat in evidence contradicts this, and there was abundant testimony to the effect that this witness was in error in his estimate of distances.)

The engineer testified that at the time of the accident he was at the right-hand side of the locomotive, the locomotive being headed south, and that that is the proper station for the engineer; could not say "just to the dot" how far Potter was from him when he first discovered him on the track, but should judge that he was about 40 or 50 steps. Being asked if he had seen him before that time, and, if not, why not, he said: "When you are going into Holland

south on an engine, you turn round a curve right there, just by the water tank; like, for instance, this is the track now here; I am on this side of the engine; when this engine starts out here I am looking off here; I couldn't look around there; a man would have to have a twice eye; and as the engine makes the curve, the farther she curves the farther you can see until you strike the straight." The curve is as you are going south, bends around to the west. Saw Potter just as he left the curve and struck the road crossing; "just as I hit the edge of the road crossing is when I saw him. \* \* \* He couldn't have been over 35 or 40 feet." Potter was walking right down the track. Blew the whistle at him and reversed the engine; "whistled at him until about the time we hit him." It would not take over a second to blow four blasts of the whistle. When he saw Potter, the train was running about 15 miles an hour, and then he tried to stop it; went at it by using the brakes. When he saw the engine was not going to stop with the brakes, he reversed her, that "is, made her work against herself"; applied the train brake and the air brake, the train brake being operated by air from the engine, as is also the engine brake. What he means to call the other brake, he says, is "the reverse lever"; it is no brake, but "it changes the motion of her link motion, and when she is backing up she is trying to back up against herself." At that time, when he applied the brakes, he was running at the rate of about 15 miles an hour anyhow. At the rate of speed he was running he could not have stopped the engine after discovering the position of Potter, "You would have done pretty well if you would have stopped it in a hundred feet." After applying the emergency brake, would judge the distance he ran was probably 100 feet. The usual stopping place at Holland is for the locomotive to stop its length south of the platform. Stopped the locomotive this time about two car lengths sooner than the usual stopping place. Supposes the coaches are 30 or 35 feet long. In coming toward Holland that day, sounded the station whistle at the station whistle crossing, where there is a whistling board located, placed there so that you can tell when you are coming into the station, and when the locomotive reaches that board the engineer is supposed to whistle for the station—to give one loud whistle. At the time he whistled at this whistling station the train was going at the rate of about 35 miles an hour. When they whistled for the station they always slowed up for the curve; cut speed down to 15 or 20 miles an hour as they hit the curve, and check up to go into the station, "and commence making your station stop." Did that on this day. When he whistled for the station, he shut off steam; commenced using the station stop about the time he was hitting the edge of the street, just as he started to hit

the straight track as he came around the curve, and that is where he saw the man, and when he got near the crossing (that is, the street crossing) he threw "it all on"; that is, threw all the air pressure on (70 pounds in this case) and reversed the engine. Had a wet rail that day, and that fact made a little difference in trying to stop, because the brakes will not hold like they will on a dry rail; would make the difference of about a car length in running at the speed they were going at that time. When he first sounded the whistle, Potter was between the rails, walking toward the depot. "He never done anything, only seemed to keep walking; was kind of hugging the right rail as though he was figuring on getting off at the depot." This rail that he was getting off on was on the west side. When the locomotive struck him, says the engineer, "he looked to me just as if he was figuring on going to step from the rail. \* \* \* He seemed to me as though he were raising up his right foot to step over the rail when she hit him." Was walking at a very slow gait. Did not know anything about Potter's age, or physical condition, or about his hearing; would think he was somewhere about 40 or 50 feet from Potter when he sounded the emergency whistle. Could not possibly have stopped the engine after he discovered the position of Potter, and could not have discovered his position on the track before he did, because he (witness) was on the outside of the curve and could not see on a straight line. (It will be observed that this is directly contrary to the testimony of the fireman, and is entirely inconsistent with the witness' own testimony, for he follows it with the statement, when asked when he next whistled, that the next time he whistled was for the road crossing. The road crossing that he is referring to, he says, is 50 or 60 feet south of the signal station; says he whistled four times for the crossing, then the next time he whistled was for the "red board," he says, and when he had passed the tank he blew four whistles. Asked how far that is south of the road crossing, he said it was possibly 15 or 20 feet, maybe 20 feet. This is contradicted by the plat, which shows that the tank is about 190 feet north of the public road crossing, and located on the plat of the defendant as 820 feet north of the north end of the platform.) The next signal he gave, he says, was when he answered the board when they gave it to him; then he sounded two whistles; that was directly after the other. "All you can see ahead from the position of the engineer is straight ahead." Looks out through the front window; has a side window and a front window. Until they got on a straight line, could not see any distance ahead; saw Potter when he (the engineer) got on the straight line and sounded the whistle. When he sounded the whistle the train was run-

ning 35 miles an hour; that was when he whistled for the station and applied the air and slowed down to about 15 or 20 miles. They could slow the train down to that rate of speed without jarring the train too much in about 80 yards of run. In making the regular stop at Holland without an emergency, would make the same application that he did coming around the tank; they all did that around a curve, cutting it down to 15 or 20 miles an hour. On cross-examination he stated that the lighter a train is the harder it is to stop it. His engine was in first-class shape and condition, and had all modern appliances. Did not see Potter until his engine got to the street crossing, then applied the air; threw on the whole 70 pounds of it; if the train had been running 5 or 6 miles an hour, possibly could have stopped it, with all the pressure turned on, in 50 or 60 feet. It was not raining at time of accident, but it had been raining all day, just a sort of a spring shower. The street crossing where the locomotive was when he first saw Potter, he should say, was over 40 or 50 feet from the end of the platform, and that is where he applied the air pressure for the first time; had not seen Potter until just as the engine came by or onto the street. The engine was "right there by the street" when he saw Potter; had applied the air in coming around the curve to check for the curve; whistled all the signals at the crossings; had passed all the crossings when he whistled the danger signal; endeavored to stop the train before he whistled; endeavored to stop the train on the street crossing; saw Potter first when he (witness) got to the street crossing; right then and there endeavored to stop his train, and was then 40 or 50 feet north of the end of the depot platform where Potter was hurt. When he sounded the danger whistle was crossing the street, and when the whistle stopped was within 2 or 3 feet of Potter. In coming into the town that time, had whistled 16 or 18 times, but not at Potter. Witness was on the west side of his train; that is, the right side of the locomotive in running south, on the right-hand side. During the time he was coming from a mile north of town to the depot, was sitting on the right side of the locomotive in his usual place, with a window on his right hand and a window in front; could see to the right and in front; looked through the front window while approaching Holland; when approaching the water tank looked toward the water tank, looking out at the right-hand side; when he reached the road crossing was looking out in front, and, looking out that way, "you would be looking out behind the depot." When he signaled for the "red board," had not got to the road crossing. The "red board" stands right square in front of the depot, over the platform; doesn't reach to the track; it is a little to the west of the track as you go south, and

when he whistled for that he was north of the public road crossing; saw this "red board" by leaning out of his cab. When he looked for the "red board" was looking for anything else that might be in front; when he looked out for this "red board" was north of the public road crossing, just about at the public road crossing, and that is the time when he saw Potter; just as he (witness) was crossing the road crossing, and when he whistled, looking out to see the signboard he saw Potter; doesn't know how far the public road crossing is north of the street crossing. Had the distance from the public road crossing north of the depot down to the place where Potter was killed in which to check his train. At the rate he was running could have stopped the train in 100 feet. Asked by a juror if, at the speed he was running when he reversed the engine and put on the air, it would throw passengers out of their seats or jar the train, answered, that "they ought to all know it; that when you use the emergency brake it goes like in a collision, the train rebounds"; that is, when it comes to a stop it will surge back and forward two or three times. On redirect examination the engineer stated that when he whistled for the "red board" the engine was coming right up to the road crossing farthest north, and that right then, when he looked out to see the "red board" and whistle for it, that that is when he saw Potter, and that he then went to trying to stop, right then, and then is when he threw the air on; and he repeats that he "guesses" he was 40 or 50 feet north of the north end of the platform, and that that was where he whistled for the "red board." Asked if he could not give the distance, he said that if he knew what the distance of the crossing was he could tell, but that he didn't know the distance of the crossing; did not mean the crossing north of the platform, but meant the one above that; and then it was, while there, that he looked out and saw the "red board" and saw Potter on the track, and that just as he looked for the "red board" he saw Potter, and threw the air on and commenced whistling right there. (It might be said here that this testimony of the engineer is flatly contradicted by the fireman, as well as by other witnesses, who saw the approach of the train, and is inconsistent and irreconcilable with the physical facts of the case as disclosed by the plat in evidence.) Continuing, this witness said that he stopped the engine right in front of the little office in the depot. When he saw the "red board," he had passed out of the curve. "You cannot see the red board at all until you do that." On being recalled, the engineer repeated his statement that he saw Mr. Potter on the track at the time he looked for the "red board" and while he was looking out at the side window. When he looked for the "red board," to see if it had been turned, he saw Potter on the track,

but he (witness) was near the depot, down to the crossing; says he expects he was 100 feet or more from his usual stopping place when he looked to see if the "red board" was turned in answer to his signal, and was then about 60 or 70 feet north of the north end of the platform, and was then turning on the air; was setting the air brakes when he saw the "red board." On cross-examination, he said that he called for the "red board" under the company's rules, because he wanted them to turn on the white side as a signal that he could go ahead. Prior to the time he called for the "red board" he had not released the air theretofore applied for checking down the train for the regular stop; does not know what the crossings are called; there were two—one at the tank and one near the depot, between that and the depot; "didn't know which you call them. I was at the one nearest the depot."

The foregoing is the account given by the engineer and fireman of the train as to the coming of the train and the accident as they saw it. As against this testimony for the defendant, and as an example of the testimony of the plaintiff, the incident is described about in this way, following the testimony of one who was an eyewitness. This witness was on the platform, about one-third of the way between the depot building and the north end of the platform, the platform being 200 feet long. Mr. Potter entered upon the railroad track at the street crossing, and started toward the depot. He first started down through the middle of the track, and afterwards turned toward the west; that is, toward the side on which the depot platform is located. The east edge of the platform is just clear of the ends of the ties; there is about a step from the end of the ties to the first step of the platform. Potter walked very slowly; didn't appear to be able to walk very fast. When he got on the track, the train was just coming in sight of those at the depot. Potter raised his head when he came on the track; was coming with his head drooped down very low. When he got on the track, he raised his head up, "like he was looking over the town," and threw his head around before he turned to walk down the track, and then dropped his head on his breast and did not look back again. The first time that the train whistled was for the station, and it was then about half a mile from the station. The first whistle is sounded when it comes in sight of the station, then it whistles for the crossing north of town, which is close to the tank, and then whistles for the station, and then it usually calls for the signal—that is, gives four short whistles—and after they come in sight of the depot they usually answer the signal, which tells whether or not they shall stop for orders. This whistle is two blasts, and this is the one that is given about half a mile north of Holland. Four whistles were

for the crossing, one for the station, a long whistle, the four whistles for the crossing. They whistle for the station, and right after that they whistle for the road crossing. When they blow the whistle for the board—that is, for signal orders—sounding four whistles, they are about a quarter of a mile north of the depot; by the time they are through with the four short whistles they are getting in where they could see the board from the depot, and they answer that board with two short whistles immediately after the four whistles. The last whistles were sounded about the time that Potter came onto the track, and they were sounded when the train was about a quarter of a mile above the town. The four whistles are sounded fast, then there is a short interval, and they answer the board with two more; in the intervening time the train has run some little distance. They also had whistled for the road crossing north of the depot, which is about half a mile north of town. They did not whistle for the street crossing. At the time the train was at the street crossing, Potter was walking down the track. There was nothing to have prevented people on the engine or in the engine cab from seeing him. They could easily see the signal board. There was no reason why they could not see a man on the track, Potter being between them and this signal board, which latter is up in the air, and Potter walking on the track between the depot and the train. The whistle was not sounded between the road crossing north of town and the street crossing just north of the depot. The next time the whistle was sounded after blowing for the road crossing was just about the time they hit Potter; sounded possibly 40 feet north of the platform, and at that time Potter was between the engine and the platform, and they whistled when about 40 feet north of the platform. At most, they were 40 feet from Potter at the time they whistled. They were already at the street crossing when they whistled, and not over 30 or 40 feet from it, and then sounded something like three or four whistles. The time between the blowing of this whistle and striking Potter was very short; it could hardly be counted in seconds; it was hardly more than one second. At the time these three short whistles were sounded Potter was on the track—that is, was on the ends of the ties—and while the third or fourth blast was being sounded, the blasts being sounded very rapidly, the train hit him. "Of course, these blasts were sounded very fast," said witness, "came short and fast, and there were three or four of them." When these were sounded Potter was on the ends of the ties, preparing to step outside of the rails; was stepping from the ends of the ties to the platform. The pilot beam, as it is called, the heavy beam on the front of the locomotive, is what hit him. It struck him in the small

of the back, knocked him something like seven or eight feet upon the platform, threw him up across the platform, and he went some six, seven, or eight feet, and fell back off of the platform between the track and the platform. It was done so quickly that witness could hardly tell how it was done. Potter seemed to light on his face; it threw him on his stomach and face, and when "he lit, he lit rolling, went right over." He was on the end of the ties when these last whistles or blasts were sounding, walking toward the platform steps, evidently to get upon the platform. Witness did not notice any attempt to stop the train before it hit Potter. There was no more than the usual checking up of the train as it enters the station. Had measured the distance that the train ran after it struck Potter, and it was something like 190 feet from where the front end of it hit him to where it stopped. They commenced checking as they came around the curve, up some 200 yards north of the depot. At the time the three or four short blasts were given, and immediately before, Potter was struck, to the best judgment of the witness, the train was going at a rate of 5 or 6 miles an hour. If the wheels of the engine were reversed, witness said, he did not notice it, although he was looking at the train. They did not stop the engine before they hit Potter. The roadway or track curves slightly, but there were no obstructions on the curve or by reason of the curve to prevent any one on the engine seeing a man along the track when the observer was as high up as the engineer is in the cab, and nothing to prevent a man in the engine cab from seeing between the road crossing and the street crossing, that man being in the cab of the engine. "A man can stand anywhere along in the curve and see to the depot."

Without going further into the testimony than as above, it is sufficient to say that, as is usual in cases of this kind, there was more or less contradiction between the several witnesses as to the speed of the train, and exactly where it stopped, and as to the number of times the engineer had blown the whistle, where he had blown it, as to the ringing of the bell, and also as to the possibility of the engineer having stopped the train before, he seeing the imminent peril of the deceased. We think the synopsis we have given as above fairly presents both sides.

At the instance of the plaintiff the court gave 4 instructions, and out of 18 which were asked by the defendant it gave 16, also refusing an instruction in the nature of a demurrer to all the evidence. The two instructions refused were, first, that under the pleadings and evidence in the case, if the jury find the issues for plaintiff, they cannot assess her damages at more than the sum of \$2,000. The second instruction refused was to the effect that, although the jury may believe from the evidence that persons were in the habit of walking along the railroad

track from the road crossing to the station platform, this did not, under the facts in the case, impose upon the engineer any duty to exercise reasonable care and be on the lookout for persons on the track at that point, and that if they found from the evidence that after the engineer discovered the deceased was in a perilous position he had warned him by sounding the whistle or ringing the bell, or by both, and used all means to stop the train consistent with the safety of himself and the train, but could not do so in time to avoid injuring him, they should find for the defendant. When we enter upon the discussion of the case, we will take up the instructions given, on which error is assigned, as far as is necessary to understand the case. The jury returned a verdict in favor of plaintiff for \$3,000. After the interposition of a motion for new trial, which was overruled, an appeal was taken to this court by the defendant, exceptions being duly saved to the action of the court in giving and refusing instructions and overruling the motion for new trial.

Wm. F. Evans and Moses Whybark, for appellant. Ward & Collins, for respondent.

REYNOLDS, P. J. (after stating the facts as above). The principal errors relied upon for a reversal of the case, in the very earnest argument which was made before the court by one of the able counsel for the defendant, and which have been elaborately briefed, are the refusal of the court to direct a verdict in favor of the defendant at the conclusion of the case, and to giving the defendant's fourth instruction, after having given the first and second instructions at the instance of plaintiff; it being claimed that the first and second instructions given at the instance of plaintiff are in conflict with the fourth instruction given at the instance of defendant. It is claimed that these are reversible errors.

The first instruction refused, in which the court was asked to instruct the jury that if they found for plaintiff they could not assess her damages at more than the sum of \$2,000, is contended for on the ground that there was no evidence of wantonness or aggravation, but that all of the circumstances were mitigating, and that the jury, in cases of that kind, must consider the mitigating circumstances, and cannot, in their own discretion, and in the absence of a showing of aggravation or wantonness, impose anything more than the minimum penalty. There are two objections to this argument. In the first place the statute itself (Acts 1905, p. 136 [Ann. St. 1906, p. 1637]) fixes the penalty for cases in which death results from the fault or negligence of the defendant at the sum of not less than \$2,000 and not exceeding \$10,000, "in the discretion of the jury." We do not think that this changed the law as it existed before, any further than that, instead

of a fixed sum, as provided in section 2864, Rev. St. 1899 (Ann. St. 1906, p. 1637), before the amendment, the sum authorized by the amendment is a sliding or variable one; that sum left to the discretion of the jury, and the court is no more vested with power, by this section, to fix the amount at \$2,000 in any case than it is authorized to sustain a verdict for an amount in excess of \$10,000. Section 2864, as amended in 1905, remains as before, in that it imposes a penalty on one coming within its provisions, the only difference being that the penalty is any sum in the discretion of the jury, within the limits provided.

In the next place, if it is the law that the discretion of the jury, in the matter of damages, is to be controlled by the court by way of instructions, it was incumbent on the defendant, if it desired to have the jury controlled in the exercise of its discretion, to have asked for an instruction to that effect. No instruction as to the measure of damage was asked by defendant, other than this first instruction, and the only instruction as to the damages asked by the plaintiff, and given at her instance, was the fourth instruction, which told the jury that under the law, if they found for plaintiff, their verdict must be in a sum not less than \$2,000 and not more than \$10,000.

Our Supreme Court has determined that, where a party has neglected to ask for an instruction setting out the proper measure of damages, he cannot be heard to complain that the jury were not properly directed as to the amount or measure. *Wheeler v. Bowles*, 163 Mo. 898, loc. cit. 409, 63 S. W. 675; *Gelsmann v. Missouri-Edison Electric Co.*, 178 Mo. 654, loc. cit. 679, 73 S. W. 654. The instruction as to the measure of damages within the limits not having been asked, the propriety of an instruction of that kind, under this amendment to the section, is not before us. We do not express any opinion as to whether it is proper for the court, under the amendment to section 2864, to endeavor to control the jury as to the amount, any further than that they are to be kept within the limits fixed by that section as amended. It is, however, as much the law since the amendment, as it was before, that it is a defense to the recovery of any amount to prove that "the injury received was not the result of unskillfulness, negligence, or criminal intent." The act of 1905 made no change in this. The present action is under section 2864, not under section 2866.

Moreover, if we are at liberty to inquire into the amount of the award, our right to do which we are neither deciding or considering for the reasons before given, we are not at all impressed with the argument that \$3,000 was an excessive award, assuming that a verdict for plaintiff was proper. In a case of this kind, and under the testimony in it, if the jury found for plaintiff, before the amendment of 1905 to section 2864, she would

undoubtedly have been entitled to \$5,000 for the death of her husband. In this case the defendant itself brought out the fact that the husband was practically the sole support of his wife and three children, and we are all of the opinion that the defendant has no cause whatever to complain of the amount of this verdict. A careful consideration of the testimony of the engineer and firemen alone, discarding all testimony offered by plaintiff, in our judgment, shows such negligence as to closely border on criminal carelessness. The very fact that an old man was slowly walking along the track, head down, making for the outer rail, obviously unconscious of the approaching danger, ought to have put those in charge of the train on guard. Indeed, facts in this case, as disclosed by all the testimony, strike us as one so close to the borderland of criminal recklessness as to suggest a doubt whether the responsibility for it should not be lifted from the defendant and placed upon those responsible for the death of a human being. *Kinlen v. Met. St. Ry. Co.* (Missouri Supreme Court, December 23, 1908) not yet officially reported, but published 115 S. W. 523.

The first and second instructions given at the instance of plaintiff are claimed to be inconsistent with the fourth instruction given at the instance of the defendant. To fully appreciate this proposition, it will be necessary to set out these three instructions in full. Nos. 1 and 2 given at the instance of plaintiff are as follows:

"(1) The court instructs the jury that if you believe, from the evidence, that the engineer or fireman, or other employes in charge of the train which struck the deceased, saw the deceased on the track, and if you further believe that the deceased was unaware of his peril, and was proceeding along the railroad track unconscious of the approaching train, then it was the duty of such engineer or fireman, or other employes of defendant, so observing the deceased, to give him proper warning of the approaching train, and it was his duty to give such warning by such a signal as was within his power as could be likely heard, and would be likely heard by any person possessing in an ordinary degree the sense of hearing in the position the deceased occupied. And if such signal was given and unheeded, then it was the duty of such employe to stop said train, provided said train could be stopped with safety to those on board of the same; and unless, at the time of the injury, the employes of the defendant in charge of said train used the means at their command to provide for the safety of deceased, after they discovered his imminent peril, the jury may find a verdict for the plaintiff in this case, although you may believe the said Jonathan Potter was guilty of negligence in being upon the track of defendant and in permitting himself to be inattentive to the danger surrounding him.



"(2) The court instructs the jury that if you believe and find, from the evidence, that Jonathan Potter, at the time he was killed, was the husband of the plaintiff, and that this suit was brought within six months after his death, and shall further find from the evidence that the place of defendant's track where the deceased was struck by defendant's train was in the town of Holland and between a public street crossing of said railroad track and defendant's depot and railroad station, at which all of defendant's passenger trains made regular stops, and that the track at the time was in such a condition and position for a long distance northeast from the point of the catastrophe that a person walking thereon could have been seen by the persons in charge of said train by the use of ordinary care and diligence, and that said track at the place where Potter was killed and northeast up said track to the public street crossing, from the time said railroad was constructed, and was, up to and at the time said Potter was struck and killed, frequently used by pedestrians in going to and from said public street crossing and the depot and the railway station of defendant; and that said Jonathan Potter, while walking on defendant's track, became in imminent peril of being struck by defendant's train, and defendant's employees in charge of said train became aware of his peril of being struck in time to have enabled them, by the exercise of ordinary care, to have stopped said train and to have averted the injury to deceased, and they failed to exercise such care and stop said train, and that by reason of such failure to exercise such ordinary care and stop said train, and that by reason of such failure to exercise such ordinary care said train was not stopped, and said Potter was struck and killed by said train—then the jury must find for the plaintiff, though you may find that the deceased, Jonathan Potter, was guilty of negligence in walking on defendant's track at the time. And by ordinary care is meant such care as an ordinarily careful and prudent person would exercise under the same or similar circumstances."

The fourth instruction given at the instance of the defendant is as follows:

"(4) The court further instructs you that it was the duty of Jonathan Potter, plaintiff's deceased husband, to look in both ways and listen for the approach of the trains on the railroad track. And if, at any time before he was injured, he could, either by looking or listening, have known of the approach of the train in time to have got off of the track and avoided the accident, then plaintiff is not entitled to recover in this case, and your verdict must be for the defendant."

It is, possibly, necessary, even at the risk of being prolix, in passing on this fourth instruction, to notice as briefly as possible the remaining 15 instructions, which were

given at the instance of the very industrious counsel for defendant.

The first instruction told the jury that the burthen of proof in the case devolved on plaintiff; that she must establish her case by the preponderance of the evidence, and, unless she had done so, they must find for the defendant.

In the second instruction the jury were told that the fact that the unfortunate defendant was a corporation should make no difference in their consideration of the case.

The third instruction told the jury that, in determining the negligence of the defendant and the contributory negligence of the deceased, the jury were to take into consideration all the facts and circumstances detailed in the evidence, the interest of the witnesses in the result, the means that they had for observing the transaction as to which they testified, the attention they were paying to the transaction, and their capacity to receive correct impressions.

The fifth instruction told the jury that, if they believed that the deceased's hearing was impaired at the time of the injury, it was improper for him to go on the track and walk thereon at the point where he did, "without first ascertaining whether or not any train was approaching; and if you believe from the evidence that after he stepped on the track the engineer sounded the whistle and rang the bell, or did either, and thereupon the deceased walked as though he was going to leave the track, then the engineer was justified in believing that he was leaving the same and would go to a place of safety, and under the circumstances the engineer was not required to do anything more to avoid injuring him, even though you may further believe from the evidence that the deceased had not entirely got off the track, or, if he got off the track, he was not far enough away to be out of danger."

The sixth instruction told the jury that if they found that the deceased resided in the town of Holland, near the place where he was injured, was familiar with the track at that point, knew that trains and engines were passing daily thereon and was familiar with the time which the train which struck him would arrive, that he was hard of hearing, "and that there was no obstructions for some distance before he reached the railroad track, or after he got thereon, to prevent him from seeing the train approaching, if he had looked in that direction; and that he walked on the road and on the track and got in the way of the train, without looking to see if the train was approaching"; and that the engineer sounded the whistle and rang the bell, or did either, and that persons called on him to get out of the way of the train, and that he moved as though he was going to leave the track but did not get off of the track, or far enough away to avoid being struck—they should find for the defendant.

The seventh instruction told the jury that the engineer in charge of the train was not required to make an effort to stop the train to prevent injuring him until he had placed himself in imminent peril on the track, and if, after he had done so, it was too late for the engineer to stop in time to avoid the injury, plaintiff could not recover, and that no rate of speed in running the train was negligence on the part of the defendant under the issues in the case, "however fast the same may have been."

The eighth instruction told the jury that the engineer in charge of the train owed the deceased only that degree of care which an ordinarily careful and prudent man, engaged in the same business, would have exercised under like and similar circumstances, after he discovered, or by the exercise of ordinary care might have discovered, the perilous position of the deceased on the track, and if they believed that the engineer exercised that care they should find for the defendant.

The ninth instruction told the jury that if the engineer used ordinary care in the management of the train, and as soon as he saw the deceased in a perilous position on the track, or by the exercise of ordinary care might have seen that he was in a perilous position, he used such care and caution in stopping the train to avoid the injury to the deceased as a person of ordinary care and prudence would have exercised under like and similar circumstances, they should find for the defendant.

The tenth instruction told the jury that although they might believe from the evidence that the engineer in charge of the train saw Potter on the track in time to have stopped the train and avoid injuring him, and did not know Potter was hard of hearing, or deaf, or infirm in body, if those were facts, still the engineer had a right to presume that Potter would at once step off the track and avoid injury, and the engineer was not required to stop the train until he discovered that Potter was in a position of peril, and if, after discovering his perilous position, he warned him by sounding the whistle or ringing the bell, and used all means to stop the train consistent with the safety of himself and the train, but could not do so in time to avoid injuring him, they should find for the defendant.

The eleventh and twelfth instructions repeat this in a stronger form, if possible, in favor of defendant.

The thirteenth instruction was as to the weight to be given to the statements of two absent witnesses for defendant, the jury being told that they were to consider those statements as if the witnesses had been present and had sworn to them.

The fourteenth instruction told the jury that it was not negligence on the part of the employes of the defendant in running its train at the place where Potter was killed at

a high rate of speed, if they found that it was running at a high rate of speed, and that they could not find a verdict for plaintiff on account of the rate of speed at which the train was running.

The fifteenth instruction told the jury that even if they found that there was water alongside of the railroad dump, or that the ground was muddy, these facts, if they were found, did not excuse Potter from stepping off the track and out of the way of the train, if it was necessary for his safety.

The sixteenth instruction told the jury that if Potter was deaf, or his hearing was defective and his eyesight impaired, and he had bodily infirmities and was aged, this did not excuse him in going upon the railroad track (in the language of the instruction, "from going upon the railroad track") and exposing himself to the danger of being struck by the train, but that the law under such circumstances would require him to be more vigilant and prompt to employ all his faculties so as to compensate as far as possible for his lacking ones, in order that he might protect himself from danger.

We are unable to see where there is any real conflict between the fourth instruction given at the instance of the defendant and the first and second given at the instance of the plaintiff. It might have been, with a few verbal changes, incorporated into those instructions, without varying the law as set out in those instructions, although rather too harshly as against the plaintiff. The fourth instruction, as asked, involves a physical impossibility, if it is to be taken literally. It assumes that it is possible for a man, walking along a railroad track, or for that matter a public highway, to be looking both ways at once, and listening. The listening is practicable—to look in both ways at once while a man is walking along, would require a change in the human anatomy. Taken literally, the instruction was erroneous. As applied to the facts in this case, it was erroneous. It was an error of defendant, and one cannot invite error and then complain of that error. *Phelps v. City of Salisbury*, 161 Mo. 1, loc. cit. 14, 61 S. W. 582; *Wolfe v. Supreme Lodge*, 160 Mo. 675, loc. cit. 686, 61 S. W. 637. Over and above this, however, if there ever was a case in which a defendant had no right whatever to complain of the action of the court in giving instructions, this is one of them. Every proposition that by any possible theory it was entitled to have presented to the jury was covered by these instructions, and that, too, defendant's own view of the law as applied to the facts. They are so radically favorable to the defendant that we refuse to go on record as indorsing them, not because wrong in their statements of the law, but because entirely too favorable to defendant under the facts in this case. We are not obliged to go into an examination of them, however, any further

than we have, as the plaintiff, with all this burthen thrown upon her by these instructions, is not here complaining.

Complaint is made that a witness, not shown to have been an expert as to speed, was permitted to testify as to the speed of the train, and that on his estimate of the speed another witness, who was an expert but not an eyewitness of the accident, was, in answer to a hypothetical question, allowed to give his opinion as to the time in which a train going at that rate of speed could have been brought to a stop. It is not necessary, to qualify a witness to testify in regard to the speed of a train, that he be an expert; if he is familiar with trains and accustomed to seeing them run, that is sufficient. *Donaldson v. Railroad*, 128 Mo. App. 245, loc. cit. 247, 107 S. W. 36. That was shown to be the case with the witness who had testified to the speed at which this train was going when the accident occurred.

Complaint is made of allowing a lady passenger to testify that she felt no jar from any sudden stopping of this train. The engineer himself testified that the application of the air and the sudden stopping of the train would have resulted in as sharp a jar as in case of a collision. Surely the testimony of a lady passenger, sitting in the rear coach at the time of the accident, that she had felt no jar, was competent in determining the fact whether or not the engineer's testimony was true when he had sworn that he did apply the air and bring the train to a sudden stop.

Other points are made which we do not consider necessary to take up. None of them involve error to the manifest prejudice and hurt of the defendant. On careful consideration of the facts in evidence, of the rulings of the trial judge, of the instructions given, we are all of the opinion that this case comes distinctly within the decisions of this court and of the Supreme Court in the cases of *Klockenbrink v. Railroad*, 81 Mo. App. 351, approved in the same case by the Supreme Court in 172 Mo. 678, 72 S. W. 900, and of the case of *Barrie v. Transit Co.*, 119 Mo. App. 88, 96 S. W. 233. The doctrine adopted and announced in these cases, taken from *Shearman and Redfield on the Law of Negligence*, is the law of this state. We can do no better than to quote from that accepted authority this language, for it will bear reiteration in cases where human life has been lost: "It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to

use ordinary care for the purpose of avoiding injury to him. We know of no court of last resort in which this rule is any longer disputed; although the same rule, in substance, but inaccurately stated, has been made the subject of strenuous controversy. But, furthermore, the plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was more immediately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if, having sufficient notice to put a prudent man on the alert, he does not take such precautions as a prudent man would take under similar notice. This rule is almost universally accepted." Referring to the case of *Davies v. Mann*, 10 Mees. & W. 546, for the principle underlying the rule, the learned commentators continue: "That principle is that the party who has the last opportunity of avoiding accident is not excused by the negligence of any one else. His negligence, and not that of the one first in fault, is the sole proximate cause of the injury." 1 *Shearman and Redfield, Law of Negligence* (5th Ed.) § 99, top pp. 153 and 154.

The man in the case before us who had the last chance of avoiding the danger, the last opportunity of avoiding the accident, cannot be excused by the prior negligence of this unfortunate old man who met his death. The negligence of the servant and employé of the defendant, not that of this old man, was the direct, immediate, proximate cause of the injury. There was evidence in this case tending to prove that by the exercise of ordinary care the engineer could have seen the deceased on the track in time to have saved his life by the exercise of ordinary care thereafter, and, to repeat, in such cases, it is the settled law in this state that the plaintiff may recover. *McQuade v. Suburban Ry. Co.*, 200 Mo. 150, loc. cit. 158, 98 S. W. 552, and cases there cited. The last reference to the *Klockenbrink* Case by our Supreme Court which has come to our knowledge is in *Zander v. Transit Co.*, 206 Mo. 445, loc. cit. 463, 103 S. W. 1006, where it is cited approvingly.

We hold that the trial court was entirely right in overruling the demurrer interposed by the defendant at the close of the case, and that the verdict is a righteous verdict, under the facts in evidence, and the action of the trial court in refusing to set that verdict aside and grant a new trial is correct.

Its judgment is affirmed. All concur.

**HOBART-LEE TIE CO. v. STONE.**

(St. Louis Court of Appeals. Missouri. Jan. 23, 1909. Rehearing Denied March 23, 1909.)

**1. TRESPASS (§ 20\*) — POSSESSION OF PLAINTIFF.**

Trespass can be maintained on constructive possession, as well as on actual possession.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 39-42; Dec. Dig. § 20.\*]

**2. INJUNCTION (§ 48\*) — REPEATED TRESPASSES.**

Injunction is a proper remedy in case of repeated and continuous trespass.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 101; Dec. Dig. § 48.\*]

**3. BOUNDARIES (§ 15\*) — NAVIGABLE WATERS.**

The owner of land bounded by a navigable river owns to the water's edge at low-water mark.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 111; Dec. Dig. § 15.\*]

**4. NAVIGABLE WATERS (§ 39\*) — RIPARIAN RIGHTS.**

The owner of land bounded by a navigable river has the right of access to the navigable part of the river in front of his premises, and the right to use of the waters for all purposes not inconsistent with the public right of navigation therein.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 241, 243; Dec. Dig. § 39.\*]

**5. CARRIERS (§ 14\*) — DISCRIMINATION.**

A lease or license by a railroad company of its land between its tracks and a river, held and treated by it as part of its right of way or depot grounds, is not for a legitimate purpose, but constitutes a discrimination between shippers, in violation of Rev. St. 1890, § 1127 (Ann. St. 1906, p. 972); its effect, and presumably its intent, being to give one company engaged in floating ties down the river for shipment by the railroad an advantage over others in the same business, in getting them to the cars.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 29; Dec. Dig. § 14.\*]

Appeal from Circuit Court, Phelps County; L. B. Woodside, Judge.

Suit by the Hobart-Lee Tie Company against E. E. Stone. Decree for defendant. Plaintiff appeals. Affirmed.

A. P. Murphy, for appellant. Watson & Holmes, for respondent.

**REYNOLDS, P. J.** This suit was originally instituted in the circuit court of Phelps county, by filing a petition, sworn to by the attorney for plaintiff, in the office of the clerk of that court, on the 28th of May, 1907. On the filing of the petition, the circuit court of the county not being in session and the judge not then in that county, it was presented to the judge of the probate court, who on the same day ordered that a temporary writ issue, "enjoining the defendant, his servants, agents, and employes, from landing his rafts of ties and timber upon and from hauling out onto, upon, and across, or from piling upon and obstructing, and from obstructing the water course alongside of and on, and

from interfering in any manner with the possession of the plaintiff of, in and to the premises described (the description of the premises then being set out as in the original petition) until the further order of the court, upon plaintiff filing with the clerk of the circuit court a bond in the sum of \$250, conditioned as required by law." Copies of the petition and order as well as a summons were duly served returnable to the September term of the circuit court. At the September term, 1907, of the circuit court of Phelps county, plaintiff filed an amended petition, in which it avers: That it is a corporation, organized and existing under the laws of this state, engaged in buying and selling timber and railroad ties, and that at the times mentioned in the petition it was and still is doing business in Phelps county, "principally along the Gasconade river and the town of Jerome therein; that ties and timber purchased along the Gasconade river are conveyed by means of rafts down said river to plaintiff's landing near Jerome, removed from the water upon and then stored on its real property at and near Jerome and thence transported by rail, and in the carrying on of its business it is necessary to hold and use tracts of land for the purpose of drawing its timber and ties out of the water and for piling and storing its timber thereon until cars can be procured for loading the same for shipment." It is further averred that for that purpose plaintiff leased from the St. Louis & San Francisco Railroad Company, being the legal owner of the land, certain real estate in Phelps county, which is described as follows: "Beginning at a point on the west bank of the Gasconade river, at Jerome, Phelps county, Mo., 100 feet perpendicularly distant in a northeasterly direction from the center line of the St. Louis & San Francisco Railroad; thence westerly and northerly on a curve line parallel to and 100 feet from said center line, to a north line of section 24, township 37 N., range 10 W.; thence east on said north line of section 24 to the west bank of said Gasconade river; thence south meandering the west bank of said Gasconade river, to the place of beginning." It appears that this tract contains about 5 acres and has about 625 feet along the river front, according to the plat in evidence. We will hereafter refer to this place as the "river tract." Three other parcels of land, designated in the amended petition as parcels Nos. 1, 2, and 3, are then described, which are apparently on the line of the right of way of the St. Louis & San Francisco Railroad Company, near and around the station at Jerome. The first tract seems to run 510 feet along the right of way line, the second tract 830 feet along the right of way line, and the third tract 210 feet along the right of way line. As we understand the testi-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mony, these three parcels do not appear to be contiguous, but in the original petition and in the order granting a temporary injunction they are referred to as "a strip of land about 2,100 feet long and 50 feet in width along the right of way of the St. Louis & San Francisco Railroad adjoining and alongside of its sidetrack, in the town of Jerome." They will be referred to hereinafter as "the parcels," or by number.

It is then averred in the amended petition that the leases are for periods of five years, and that plaintiff entered into possession and is now and has for many years heretofore been in possession of the premises, using the land for the purpose of carrying on its business, "except as it is impeded and hindered by the defendant, as will fully appear as hereinafter stated. Plaintiff states for its proper use and enjoyment of the aforesaid premises and in the carrying on of its business, it is necessary that the same be free from trespassers, and that the waters of the Gasconade river alongside of the same be and remain unobstructed so that the plaintiff may land its rafts at and on its said property and remove the same from the water and store the same until it can be transported as aforesaid." It is then averred: That the defendant, "who is also engaged in buying and selling ties and timber, and well knowing the premises, and his servants and agents, over the objection of this plaintiff and to its detriment and irreparable injury, not susceptible in computation in damages, and without legal right or lawful authority, did on May 20, 1907, and divers other times, land his rafts of ties alongside of and on plaintiff's property, did haul the same out of the water and on and over, across, and onto plaintiff's land as above described, and piled the same thereon, and obstructed the plaintiff's property and the use of the same for three days, when he removed his said ties. That the plaintiff was unable to use portions of his premises for storing or piling ties and timber thereon, until it could procure cars for the shipment of the same. That by the defendant piling his ties on plaintiff's property, it was obstructed from the railroad tracks where the same could be loaded on the cars. Then on May 27, 1907, the defendant again landed a raft of ties alongside of and on the property of plaintiff as above described, and again, against the will of the plaintiff, hauled the same out of the water onto the plaintiff's land, and conveyed the same over, across, and onto and piled the same on plaintiff's premises, as aforesaid, and again used, obstructed, and damaged the property as aforesaid. That on or about June 6, June 25, June 28, July 10, August 6, and August 27, 1907, the defendant, his servants and agents, again and repeatedly trespassed upon the plaintiff's land as above described, in the same manner as aforesaid. Plaintiff states that the continued and threatened and wrongful use of

the plaintiff's property and premises, as aforesaid, is a permanent source of annoyance to it, and to its enjoyment in the exercise thereof, and the use of its property and an injury thereto, and to the title thereof, that the repeated and threatened continuance of the wrongs of the defendant in trespassing on plaintiff's property are of such a character that it cannot be adequately and fully compensated by an award of damages, even were such damages capable of computation, and by reason of the premise plaintiff is without an adequate remedy at law, and is remediless except by the interposition of a court of equity. Wherefore plaintiff prays that the defendant, his servants, agents, and employees, be restrained and enjoined from landing rafts or ties or timber upon the plaintiff's premises; from hauling his ties out, onto, and across the same; from piling his ties upon and obstructing the property of the plaintiff; from obstructing the water course alongside of and on plaintiff's premises; from interfering in any manner with the possession of the plaintiff of, in and to its said premises; and for such other and further relief as to the court shall seem meet and just."

This amended petition was also sworn to, and at this same September term the defendant filed his answer, in which he admits, in the first paragraph, the incorporation and organization of the plaintiff, as averred, and that defendant is the person and is engaged in the occupation as alleged in the petition, but denies all other allegations in the petition contained. The second paragraph of the answer is as follows: "Further answering, the defendant says that, if the plaintiff has from the St. Louis & San Francisco Railroad Company the leases on the lands as alleged in its petition, the same is wholly void and of no force and effect, for the reason that said railroad company is a corporation duly organized as a railroad company under the laws of the state of Missouri as a common carrier of passengers and freight for hire, and that the lands described in plaintiff's petition consist of and constitute said railroad company's grants and right of way in and about the public station of Jerome, in said Phelps county, Mo., which said grants and right of way it is the duty of said railroad company to keep open at all times to the public for the reception of passengers and freight offered to said company for shipment, and that, if said leases have been executed as alleged by the plaintiff, the same is beyond the powers of said railroad company so to do, and is an unwarranted attempt on the part of said company to exclude from its public station and right of way, the public, for the benefit of said plaintiff." The plaintiff filed a demurrer to this second paragraph, on the ground that it did not state facts sufficient to constitute a defense to the action, and because, "if the facts alleged in the petition are a public wrong, as alleged

in paragraph 2 of the answer, defendant has not the legal capacity to redress or set the same aside, and because plaintiff is a common carrier is not an issue in the case and constitutes no defense to the action." The demurrer was overruled, over the objection and exception of plaintiff, who declined to plead further to that paragraph.

The case coming on for trial, the court, after hearing the evidence, made a finding of facts substantially as follows: "That the tract of land in question is a tract of about five acres, lying between the Gasconade river, and the right of way and depot grounds of the St. Louis & San Francisco Railroad Company, at the station of Jerome, a station and shipping point of the said St. Louis & San Francisco Railroad." That this land was donated to the South Pacific Railroad Company in 1869. That the right of the South Pacific Railroad Company to the land passed with all the other property and franchises of that company to the St. Louis & San Francisco Railroad Company, by mesne conveyances, and that the St. Louis & San Francisco Railroad Company is now "operating a railroad at said point." "That at said point there has, for many years, been done a large business in floating ties down the said river, and landing them upon a gravel bar located on said tract, and from thence transmitting them across and over the said tract to the side track and depot grounds at said station of Jerome, to be there loaded upon the cars of said railroad company. That at the station where the said railroad crosses the river, there is no suitable and convenient place to land ties from the river for loading upon the cars of said railroad. That the effect of the lease read in evidence, made by the St. Louis & San Francisco Railroad Company to plaintiff, which covers the tract of land, would be to give the plaintiff company great advantages over other persons in landing ties from said river, and loading them at the station, and would practically prohibit all other persons from engaging at such business at said point. That the land was donated to the South Pacific Railroad Company and acquired by it for public use, in operating their railroad at that point, and has been so held by its successors. That the lease read in evidence dated May 24, 1907, from the St. Louis & San Francisco Railroad Company to plaintiff, shows upon its face that the said land is only to be used for the purpose of receiving, storing, and delivering of ties thereon, and 'to facilitate the convenient operation of the railroad at said point'; the terms of said lease being tantamount to a declaration by the said railroad company that the said ground was held by it for the purpose of facilitating the business of receiving and shipping ties at said station."

The court thereupon gave the following declarations of law: "The court declares the law to be that when a railroad company

chartered under the laws of this state acquires real estate, adjacent to its right of way, and depot grounds, for the purpose of facilitating the operation of said railroad, at such point, in the loading and storing of any particular commodity, and dedicates the same to such use, and where said real estate is the only place where such loading and storing can be reasonably and conveniently done, and where the granting of the exclusive use to the same to any particular person or corporation would give to the grantee great advantages over other persons desiring to engage in the same business, and which would practically prohibit others from engaging in such business, at said point, then a grant thereof by the said railroad company to the exclusive use of any particular person or corporation would be void, against public policy. A railroad company may lease a portion of its right of way, depot grounds, and lands adjacent thereto to persons for building elevators, storage houses, or for storing commodities for shipment; but it cannot lease to one person or corporation all of its ground suitable for such purpose, and thereby prevent others from engaging in the same occupation at said point." Whereupon the court entered judgment for respondent, dissolving the temporary injunction granted by the probate judge, and dismissed appellant's bill, from which action the appellant has taken its appeal to this court; exceptions being duly saved to all these rulings.

At the trial of the case before the court, it appeared by the evidence in the case that in the year 1868 Harrison and others conveyed to one P. Smith Williams certain lands in the northeast fractional quarter of section 23, "north of the Gasconade river and that portion of the north half of section 24 lying north and west of the Gasconade river," in township 37, range 10 W., in Phelps county, and containing 200 acres. In 1869 Williams and wife by their deed "granted, donated, bargained and sold and by these presents do grant, bargain and sell," 16.75 acres of this 200 acres to the South Pacific Railroad Company, for the consideration of \$1 in hand paid. These 16.75 acres are described as "the part of the north half of section 24, in township 37, range 10 west, beginning at the southwest corner of block 48, in the town of Jerome; running thence south 1,000 feet; thence east 700 feet, to the west bank of the Gasconade river; thence along the west bank of the river to the north line of section 24, in township 37, range 10; thence west on said section line 825 feet to the place of beginning." We will hereafter refer to these 16.75 acres as "the Williams tract." Afterwards the South Pacific Railroad Company conveyed all of its lands and other property to the Atlantic & Pacific Railroad Company, and the latter company, in 1891, by deed of quitclaim, conveyed all of its lands, town lots, and property, situate in certain counties in Missouri named, among

them Phelps county, to the St. Louis & San Francisco Railroad Company. On the 9th day of April, 1900, a contract was entered into between the St. Louis & San Francisco Railroad Company and the J. L. Lee Tie & Timber Company, in which it is set out that the railroad company had on that date "licensed unto J. L. Lee Tie & Timber Company, of Springfield, Greene county, Mo., party of the second part, the following described property, to wit: Commencing at a point on the west bank of the Gasconade river, at Jerome, Phelps county, Mo., 100 feet perpendicularly distant in a northeasterly direction from the center line of the St. Louis & San Francisco Railroad; thence westerly and northerly on a curved line parallel to and 100 feet from said center line, to the north line of section 24, township 37, range 10 W.; thence east on said north line of said section 24, to the west bank of the said Gasconade river; thence south meandering the west bank of the said Gasconade river to the place of beginning." It will be noticed that this is the same tract described in the petition and which we have designated as "the river tract." This license or lease was for a term of five years from the 9th day of April, 1900, and was in consideration of the sum of \$5, "payable in advance," and in further consideration of compliance with certain covenants and conditions contained in the contract on the part of the tie and timber company. The conditions, in substance, are: First, the premises "shall be used by said party of the second part solely and for the purpose of loading and unloading ties and timber"; second, a release on the part of the tie and timber company in favor of the railroad company from liability or damage by reason of destruction of the buildings, or of the fixtures, appurtenances, or any personal property on the premises by fire, originated or occasioned by sparks communicated from locomotives, etc.; third, that the tie and timber company agrees to indemnify the railroad company from payment of any liability or damage by reason of the injury or destruction of the buildings, etc., occasioned by fire, on the part of the tie and timber company. It is covenanted also: That the tie and timber company will not assign the license or underlet the premises without the written consent of the railroad company; that the railroad company shall have the right to terminate the license by giving the licensee 60 days' notice of its intention to do so; that at the termination of the license by limitation or notice, the tie and timber company will at once remove from the premises and deliver peaceable possession to the railroad company; that the tie and timber company will pay all taxes, etc., levied against the property; and that it will paint any building it may erect on the premises with box car mineral red paint, within 30 days from the completion of the building. This agreement, as given in evidence, appears to have

this heading: "Right of Way. License No. 1,006. License on right of way at Jerome, S. L. & S. F. C., for loading purposes." And it is indorsed: "License 1,006. J. L. Lee Tie & Timber Co., Jerome."

It appears by the testimony in the case that the J. L. Lee Tie & Timber Company consolidated with or was merged into a new corporation called "Hobart-Lee Tie Company," which latter company is the plaintiff and appellant in this suit. On the 20th of February, 1905, the St. Louis & San Francisco Railroad Company and the Hobart-Lee Tie Company, of Springfield, Mo., entered into an agreement, in which it is recited that the railroad company "has this 20th day of February, 1905, licensed unto Hobart-Lee Tie Company, of Springfield, Mo., party of the second part, the following described property"—describing the "River tract" as in the petition and in the lease of April 9, 1900, above quoted. It is recited in this agreement of February, 1905, that the railroad company has "licensed" the property to the tie and timber company "for a term of five years from the 9th day of April, 1905, for and in consideration of the sum of \$5 per annum, payable annually in advance, and in further consideration of compliance with the covenants and conditions hereinafter contained on the part of the party of the second part"; it being recited in the agreement that "this license is issued upon the following express conditions: First, said premises shall be used by said party of the second part solely and only for the purpose of loading and unloading ties and timber." The remaining provisions are similar to those in the agreement of April 9, 1900, above recited. This agreement of February 20, 1905, appears to have been marked in this way: "(Duplicate) Right of Way. Formerly in the name of J. L. Lee Tie and Lumber Company. (Renewal) License No. 1,006. License on right of way at Jerome, Hobart-Lee Tie Company, for loading purposes."

On the 24th of May, 1907, an agreement was entered into between the St. Louis & San Francisco Railroad Company and the Hobart-Lee Tie Company, which is headed, "Right of Way License No. 3,094," and recites that the railroad company has "licensed unto Hobart-Lee Tie Company, of Springfield, Mo.," three certain parcels of land described, which are the same as parcels Nos. 1, 2, and 3, described in the amended petition. These three parcels appear to be on the right of way of the railroad company, adjoining and around its station at Jerome, and, as before noted, it appears from the testimony in the case that they are detached parcels, not connected together, and all three of them appear to be on the west side of the railroad tracks, while the River tract, described in the agreement of April, 1900, and that of the 20th of February, 1905, is to the north and east of the railroad. It is in evidence that the 16.75 acres, which were deeded to the South Pa-

cific Railroad Company by Williams in 1869, and of which 16.75 acres this five acres are a part, is the tract through which the line of the railroad is constructed. The railroad crosses the Gasconade river about 280 feet from the southeast corner of the 16.75-acre, or Williams, tract by means of a bridge, the western abutments of which, and a considerable part of the track, after it crosses the Gasconade, being upon this Williams tract and, as will be seen by the description of the 5-acre tract, or the River land, as we have called it, is 100 feet in a perpendicular line to the center of the railroad track, northeast of that track, so that the point where the railroad crosses the river is 100 feet southwest of the southwest corner of the River tract, and from that point the railroad swings west and north in a curved line through nearly the center of the Williams tract to the north line of section 24. The south end of parcel 8, which is the southern of the three parcels, appears to be about 325 feet north and about 123 feet west of northwest corner of the River tract; that is, about 350 feet from it. From the plat in evidence, "Exhibit C," it appears that about 60 feet of the bridge pier and track extend about 60 feet over the east boundary of the 16.75 acres, the Williams tract. It does not clearly appear from the evidence whether this 16.75 acres were conveyed by Williams to the South Pacific Railroad Company before or after the road was constructed through it. The testimony, however, of witnesses, whose knowledge runs back to a period of 30 or 35 years, seems to show that the railroad has occupied its present position and crossed the Gasconade river on to this land all the time that any of them had known it.

In the brief of counsel for appellant, it is stated and argued that the Frisco Railroad Company and its grantors "have been in possession of the land below the bridge under color of title for more than 35 years, and in actual possession, for rails laid upon the roadbed and fastened there, so that engines and cars can pass over them become annexed to the land and cease to be personal property." When counsel is referring to the land below the bridge, he is referring to the "River tract" in controversy, as the Gasconade river, running almost due north past it, is bridged by the railroad directly south of the southeast corner of the 5-acre tract and, as we have seen, about 280 feet northeast of the southeast corner of the Williams tract. There are about 224 feet of river front of the Williams tract south and outside of the 5-acre or River tract. Testimony was introduced showing that a sand or gravel bank had formed in the river to the east of this 5-acre tract leased to the appellant, varying from 75 to over 200 feet in width. Some witnesses claimed that it was wider, and that it extended down the river practically the whole length of this 5-acre tract. It

appears from the evidence in the case that, when ties or logs are floated down the Big Piney and the Gasconade for loading on cars at Jerome, the rafts were tied up to the bank when the water was high, or when it was low, and this bar was exposed, to the outer edge of the bar, and were taken from there by teams across this River tract and thence over the main and side and loading tracks of the railroad to the station at Jerome, where they were piled up to await cars for loading.

The main contention in the case, on the part of plaintiff and appellant, is that, by virtue of the license or lease from the railroad company, it has an exclusive right to the use of this River tract as a landing place for its rafts of ties and timber and the exclusive right to haul its ties from the landing at the river across this River tract, and thence across the right of way proper to the three parcels, and there unload and stack them, awaiting loading on the cars, and the endeavor is to exclude defendant from all use of the River tract and these three parcels. On the other hand, it is contended on the part of the respondent (defendant below) that this River tract is a part of the right of way of the railroad company, and that he has an equal right to fasten his rafts opposite this tract and load his teams with the ties brought down in rafts, and then cross this River tract to a convenient loading place at the station and there stack them. The evidence is both ways and not very clear as to what actual interference, one with the other, has taken place, in this matter of the loading of ties at the station, nor does it very clearly appear as to what actual interference has taken place at the river landing. As a matter of course, two rafts cannot occupy the same place at the landing at the same time, if the rafts are longer than the river front, unless one is outside of the other, and it seems to be in evidence that rafts are usually about 1,500 feet long, so that two rafts of that length could hardly be accommodated at the same time at a strip only a little more than 600 feet in length along the river. There is also evidence to the effect that by going further down the river and landing in front of property owned by others than the railroad company there would not be much trouble in taking ties from the river over to the railroad station. There is evidence to the effect that what might be called the river bank proper is from 3 to 10 feet higher than the gravel bank in front of the River tract, and it seems that a road has been cut and graded through this bank to reach the higher ground. There is testimony for the respondent that this cut was in point of fact made for what they call the "Rolla and Springfield dirt road"; but the testimony as to this being a public road, within the meaning of our statute, is not very clear. It is in evidence, however, that parties desiring to cross the



Gasconade river from its east bank, with teams or horses, land at divers places along this tract, that is to say, there is no fixed or determined fording place; but parties crossing the river from the east to the west come out on the west bank at almost any given place on the gravel or sand bar and then appear to make for what defendant calls this "Rolla and Springfield road," cut through the bank of the river proper, and while this is claimed to be so by the respondent and some of his witnesses, witnesses on the part of the appellant claim that they themselves, within the past two or three years, cut out this road for their own convenience for hauling their ties from plaintiff's rafts to the station at Jerome.

The evidence as to the use of the three parcels to the west of the railroad track and around the station at Jerome leaves considerable field for speculation. The manager of the appellant said his company could use a great deal more space at the landing point than is covered by his company's license, and the respondent and his witnesses complain and testify that the appellant is in the habit of not confining itself to the use of the three parcels along and around the depot which, as before said, do not seem to be contiguous, but piles up its logs so as practically to take up all the intervening space between these various parcels, and there is no satisfactory evidence to show that respondent has in any way interfered with the use by the appellant of any one of these three parcels. In point of fact, the weight of the evidence, as we read it, tends to show that, if any one is a trespasser or a monopolist in the use of the lands around the station at Jerome, it is the appellant, and not the respondent. In the view we take, however, of this case, the controversy concerning these three parcels is not material. The whole controversy and the point actually in dispute and at issue is whether or not the railroad company had a right to execute the lease or license of May 24, 1907, to the appellant, and whether or not the appellant, under and by virtue of that license or lease, has the right and authority to exclude the defendant from the use of the 5-acre tract bordering on the river, here called the River tract, and described in the lease of February 20, 1905, for the purpose of landing and unloading his rafts or ties, and thence teaming them across this tract to a loading point at the station of the railroad at Jerome. That is the real question in this case and the determination of it depends on the question as to whether or not, by the execution of the lease or license in evidence, the railroad company has, in effect, given, or attempted to give, the appellant, as one shipper, a monopoly, in the handling of ties at this particular point, and, by so doing, has deprived the respondent, also a shipper, of equal facilities with appellant, in the transportation of freight.

The case has been briefed very fully and

with that brief counsel have submitted very elaborate printed arguments. We do not agree with the contention of counsel for respondent that the appellant could not maintain an action for trespass without actual possession at the time of the trespass. The very authorities cited by him from our state reports are against this position and distinctly hold that trespass may be maintained on either actual or constructive possession. There was beyond question not only constructive possession, by virtue of this license, in the appellant, but actual possession by its agents, so that that proposition advanced and so much insisted on by counsel for respondent is not tenable. Many of the points made by counsel for respondent have our support. Thus we agree with him that injunction is a proper remedy where there are acts of repeated and continuous trespass. This contention is well supported by very many cases, among others, *Turner v. Stewart*, 78 Mo. 480, and *State ex rel. Jump v. Louisiana*, etc., *Gravel Road Co. et al.*, 116 Mo. App. 175, 92 S. W. 153. In the latter case, in which an injunction issued on relation of the county attorney to prevent the recurrence of acts claimed to be a public nuisance, Judge Norton says, at page 199 of 116 Mo. App., at page 161 of 92 S. W., that a court of chancery will interfere by injunction "on the ground that it can afford a more complete and adequate remedy than a court of law can furnish, bound and tied down, as our courts of law are, to certain forms of remedies and procedure, which they are not capable of molding and adapting to the necessities of the particular case. This seems to be the controlling principle recognized by our Supreme Court in *Turner v. Stewart*, 78 Mo. 480, \* \* \* for it is obvious that it was one of trespass, and that a remedy at law for damages existed which brought it within the pale of the statute noted above. Section 3649, Rev. St. 1899 (Ann. St. 1906, p. 2055). Notwithstanding this fact, however, the court proceeded to administer the relief prayed for in the face of the existing remedy at law for damages on the theory that such remedy was not adequate. The principle recognized clearly was that the remedy by injunction could give more adequate and complete relief than could be obtained at law." See, also, *State ex rel. v. Scott County, etc., Road Co.*, 207 Mo. 54, loc. cit. 70, 71, 105 S. W. 752.

We also agree with the learned and very industrious counsel for appellant that the Gasconade river, being the western boundary of this 5-acre tract, as covered by the deed, constituted the railroad company a riparian owner, and as such, under the law of our state, as construed by our courts, owns to the water's edge at low water-mark, and that as such riparian owner it has the right of access to the navigable part of the river in front of its premises and to the use of waters for all purposes not inconsistent with the

public right of navigation therein. It is true, also, as claimed by that counsel, that riparian right is the result of that full dominion which every one has over his own land by which he is authorized to keep all others from coming upon it, except upon his own terms. It is true, also, as a general proposition, as claimed by that counsel, that a railroad company has a right to convey its surplus land—that is, land not essential to enable it to perform its duties—to substantially the same extent that a private business corporation has. It is also true, as a general proposition, that a quasi public corporation may dispose of or incumber its property; but, as said by counsel himself, and as sustained by the authorities to which he refers (1 Clark & Marshall, Private Corporations; 2 Purdy's Beach on Private Corporations), a quasi public corporation, as well as a private business corporation, has general power to convey or dispose of or incumber it, but this power is coupled with the provision that in conveying or disposing of it it has the right so to do "for any legitimate purpose." This latter qualification is the crux of the case; that is to say, was this lease or license "for a legitimate purpose," when confessedly its effect and presumably its intent was to exclude any one but the licensee from the use of this particular tract?

We can come to no conclusion, from a careful reading and consideration of all the testimony in the case, other than that the lease or license from the railroad company to the appellant conferred upon appellant an undue advantage as a shipper over the defendant, who was also a shipper of the same kind of freight at this same point, and effected a "discrimination \* \* \* in facilities in the transportation of freight \* \* \* between \* \* \* persons engaged in the transportation of freight, in favor of (appellant) by abatement, drawback or otherwise," contrary to section 1127, Rev. St. 1899 (Ann. St. 1906, p. 972). It is very clear to us, from the testimony in the case, that, from the time that it was first acquired down to the present, this particular "River tract" of five acres, as well as all of the remainder of the 16.75 acres acquired from Williams, was held and treated by the railroad company as part of its right of way. Possibly it would be more accurate to say that it was treated as part of its depot grounds. The whole tract of 16.75 acres was donated to the railroad company evidently for use as a railroad, and when the railroad company attempted to give the exclusive right of landing in front of what was practically part of its right of way, and of hauling over this tract to its station and loading point on its line of road, to one customer to the exclusion and serious disadvantage of another, we are of the opinion that it thereby unfairly and unjustly discriminated against the latter within the meaning of the section of the statute referred

to. Even if it were true that this particular form of preference is not within the letter of our laws concerning railroads, the spirit of these laws is all in support of the rule that all shippers shall have equal facilities in the transportation of freight over the railroads of this state. In the case of *Cravens v. Rodgers*, 101 Mo. 247, 14 S. W. 106, it is said, in passing on the right of a railroad company to give the owners of a hack line facilities for loading and unloading passengers, which placed all competitors in like business at a great disadvantage, that "monopolies are obnoxious to the spirit of our laws, and ought to be discouraged. This is the spirit of our constitutional provision which prohibits 'discrimination in charges, or facilities in transportation \* \* \* between transportation companies and individuals or in favor of either.' Article 12, § 23 (Ann. St. 1906, p. 309). And in this case we do not think the railroad company could give the plaintiffs the exclusive privilege of approach to nearly one-half of its platform, and that the most desirable and advantageous half for procuring passengers, and thereby deny it to the defendants; both being there for the same purpose and in the same business of forwarding the railroad's passengers to their places of destination from the point where the railroad company landed them." It is true that the section of the Constitution referred to in the above opinion covers transactions between carriers, but it is also true that section 1127 of our statutes, while repeating this constitutional provision, that no railway company, corporation, or association "shall hereafter make any discrimination in charges or facilities in the transportation of freight or passengers between transportation companies and individuals," goes further and includes a prohibition of discrimination or unequal facilities in the transportation of freight "between commission merchants or other persons engaged in the transportation of freight and individuals in favor of either by abatement, drawback or otherwise."

It seems to us that this statutory provision covers this case, as we are satisfied that the effect of the lease or license was to confer a decided and very great advantage to one shipper, the appellant here, over its competitor, the respondent. Both were engaged in the same line of business, floating ties from the Big Piney and Gasconade to this point on the Gasconade, for the purpose of having them transported by the St. Louis & San Francisco Railroad Company from the same station on the railroad to their destination, and for the railroad company to attempt to say to one shipper, "You may land your rafts at a certain part of our grounds and haul them from the river and across those grounds to our station and there load them," and to say to another intended shipper, "You cannot do this, but must go above or below our private property and there pay the tolls that

may be exacted of you for the privilege of reaching, by a roundabout way, our loading switch," is, to our minds, a clear case of discrimination in favor of one and against the other, and is a plain case of affording superior facilities for the transportation of freight to one shipper as against another, each of them then engaged in identically the same business. While we are of course not bound by the finding of the lower court, we in this case agree with it in so far as we have here quoted it.

The declarations of law given by the trial judge correctly state the law as applicable to the facts in the case, the decree was for the right party on all the evidence, and it is affirmed. All concur.

# EAU CLAIRE-ST. LOUIS LUMBER CO. v. BANKS et al.

(St. Louis Court of Appeals. Missouri. March 9, 1909.)

## 1. CONTRACTS (§ 187\*)—PARTIES—CONTRACT FOR BENEFIT OF THIRD PERSON—ENFORCEMENT BY THIRD PERSON.

A contract between two parties upon a valid consideration may be enforced by a third person, when entered into for his benefit, though he be not named in the contract and be not privy to the consideration, and it is sufficient to create the necessary privity that the promisee owes to the person to be benefited some obligation or duty, legal or equitable, which would give him a just claim.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 798; Dec. Dig. § 187.\*]

## 2. SCHOOLS AND SCHOOL DISTRICTS (§ 81\*)—CONTRACTS FOR PUBLIC BUILDINGS—POWER TO CONTRACT FOR PAYMENT FOR LABOR AND MATERIAL.

Municipal and public bodies, at common law, and school districts among other public quasi corporations, under the express provision of Rev. St. 1899, § 6761 (Ann. St. 1906, p. 3328), have power to contract for the payment of laborers and materialmen for labor and material furnished in constructing public buildings, and they may provide for it in the contractor's bond so that it inures to the benefit of third persons not named therein.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 81.\*]

## 3. BONDS (§ 52\*)—CONTRACTS FOR BENEFIT OF THIRD PERSONS—RIGHT OF RECOVERY OF THIRD PERSONS NOT NAMED.

Where a contract is made and bond executed for the benefit of third persons not named, to enable such third persons to sue on the bond, it must clearly appear by the terms of the contract or bond that they are of the class covered by the conditions of the bond.

[Ed. Note.—For other cases, see Bonds, Dec. Dig. § 52.\*]

## 4. PRINCIPAL AND SURETY (§ 59\*)—LIABILITY OF SURETY.

In an action on a bond for the performance of a contract, no intentment or presumptions outside those necessarily arising on the contract or bond are to be indulged in as against the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 103; Dec. Dig. § 59.\*]

## 5. SCHOOLS AND SCHOOL DISTRICTS (§ 81\*)—CONTRACTORS' BONDS—CONSTRUCTION—RIGHTS OF THIRD PERSONS.

The condition of a building contract between a school district and a contractor was that the school district agreed to pay the contractor at intervals the contract price of an addition to a schoolhouse, 5 per cent. to be retained and paid after acceptance of the building, provided the materials and work had been paid for by the contractor, and that the district might retain enough to pay claims for work and materials. The condition of the contractor's bond was that he would perform the contract and keep the district harmless from claims, liens, costs, etc., had against the district or building to be erected under the contract and would repay to the district all sums which it might pay to other persons for work or materials furnished for the building and would pay all damages it might sustain by reason of the nonperformance of the contract. Held, that the bond gave no cause of action to third persons to recover for work and materials furnished in constructing the building.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 81.\*]

## 6. SCHOOLS AND SCHOOL DISTRICTS (§ 81\*)—CONTRACTORS' BONDS—CONSTRUCTION.

The bond was not the bond prescribed by Rev. St. 1899, § 6761 (Ann. St. 1906, p. 3328), providing that school districts contracting for public work shall require the contractor to give bond, which shall be conditioned for the payment for all material used in such work and all labor performed thereon, etc.; the prescribed condition not being incorporated therein.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 81.\*]

## 7. SCHOOLS AND SCHOOL DISTRICTS (§ 81\*)—CONTRACTORS' BONDS—ACTIONS—PARTIES.

If the bond were the one contemplated by section 6761, Rev. St. 1899 (Ann. St. 1906, p. 3328), the suit thereon should have been in the name of the school district to the use of plaintiff, and not by plaintiff in his own name, under the express provisions of section 6762 (Ann. St. 1906, p. 3328).

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 81.\*]

## 8. PLEADING (§ 214\*)—DEMURRER—MATTERS ADMITTED.

Where a petition sets up the conditions of a bond and contract, together with averments by way of interpretation thereof that the bond was for the benefit of third persons, such averments are of legal conclusions, and their truth is not admitted by a demurrer to the petition which admits only matters well pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 526, 527; Dec. Dig. § 214.\*]

Appeal from St. Louis Circuit Court; John W. McElhinney, Judge.

Action by the Eau Claire-St. Louis Lumber Company against J. C. Banks and another. Judgment for defendants, and plaintiff appeals. Affirmed.

This is an action upon a bond given by respondent Banks, as principal, with the Trust Company of St. Louis County, also respondent, as surety, to the school district of Webster Groves, in St. Louis county, to secure the fulfillment of a building contract entered into by Banks with the school district for the erection of a public school building for the district. The substance of the

amended petition, as set out by counsel for appellant in his statement of the case, is as follows: "The amended petition of plaintiff, Eau Claire-St. Louis Lumber Company, after stating that about August 22, 1905, defendant J. C. Banks entered into a contract in writing with the school district of Webster Groves, a public corporation, for the construction by said Banks of an addition to the Tuxedo School, a public school building in the city of Webster, St. Louis county, alleges: That by the terms of said contract, Banks agreed, at his own cost and charges, to deliver and furnish all materials and labor and work for the complete execution of the contract. That the school district agreed to pay him \$4,375 therefor at certain intervals on certificates of the architect, 5 per cent. to be retained and to be paid one month after acceptance of the building by the district, provided that the materials and work had been paid for by Banks. That said district might retain from the moneys coming to Banks enough to pay and satisfy such claims for work and materials. That thus and by virtue of said contract Banks had agreed with the school district to pay and satisfy all claims and demands for labor and materials furnished in the construction of the building, it being a public school building, and especially to pay the claim of the plaintiff for lumber furnished by it as afterwards set out in the amended petition. The amended petition then goes on to state: That contemporaneously with and as consideration and part of said contract, the bond sued on was executed and delivered by Banks as principal and the Trust Company of St. Louis County as security, dated August 22, 1905; they binding themselves unto said school district in the penal sum of \$4,375, and conditioned, as follows: That if defendant Banks should well and truly perform and fulfill all and every one of the covenants, conditions, stipulations, and agreements mentioned in said contract of August 22, 1905, between him and said school district for the erection of said public school building, as called for in said contract, and should keep the said school district harmless and indemnified from and against all and every claim, demand, judgment, lien, and mechanic's lien, costs, and fees of every description incurred in suits or otherwise that might be had against said district, or against the buildings to be erected under said contract, and should repay the said district all sums of money which it might pay to other persons on account of work and labor done or materials furnished on or for said building, and should pay to said district all damages it might sustain and all forfeitures to which it might be entitled by reason of the nonperformance or malperformance on the part of defendant Banks of any of the covenants, conditions, stipulations, and agreements of said contract, then

said obligation should be void, otherwise the same should remain in full force and virtue. The amended petition then continues to state that the condition in said bond contained for the faithful performance and fulfillment on the part of defendant Banks of all and each of his covenants, conditions, stipulations, and agreements mentioned in said contract of August 22, 1905, was, in intentment of law, so made for the purpose and to the effect of protecting and for the use and benefit of all persons, who should do work upon or furnish materials under contract with defendant Banks for and upon the construction of said public school building, and the same inured to their use and benefit as parties and privies to said contract and bond, although not specially named therein.

\* \* \* The amended petition then further states that plaintiff, under contract with Banks, and relying and having the right to rely upon his contract and bond with the school district, furnished between August 25, 1905, and September, 1906, lumber which actually entered the construction of the school building of the reasonable value of \$637.83, of which \$200 had been paid; a balance of \$437.83 remaining due and unpaid, notwithstanding repeated demands of payment.

\* \* \* The amended petition assigns, as breach of the bond on the part of defendants, that defendant Banks has failed well and truly to perform and fulfill all and each of the covenants, conditions, stipulations, and agreements in said contract mentioned, to be by him performed and fulfilled, and has failed, at his own cost and charges, to provide and deliver all and every kind of materials necessary for the complete execution of his said contract, and has failed to pay and satisfy the persons furnishing materials to him for and on said building, and particularly has failed to pay plaintiff its said claim for \$437.83, and that said school district has likewise failed to pay plaintiff the said balance so due it and prays judgment against defendants."

The trust company filed its demurrer to the amended petition, assigning as grounds of demurrer: That the petition did not state facts sufficient to constitute a cause of action; that the bond declared on is a contract between defendants and the school district of Webster Groves only, and the plaintiff is neither party nor privy to the bond; that the bond declared on was made to secure the school district, and was not made to secure the plaintiff; and that the school district has sustained no loss by reason of the failure of the defendant Banks to pay the plaintiff's demand, and is not suing upon the bond. The demurrer was sustained, and, the plaintiff declining to plead further, judgment was entered in favor of the defendants, respondents here, and against the appellant. In due time appellant filed its affidavit for appeal, and, an appeal being

granted to this court, the cause is now here for adjudication.

R. Schulenburg, for appellant. T. K. Skinker, for respondents.

REYNOLDS, P. J. (after stating the facts as above). It is contended by the learned counsel for appellant that the contract contained an implied agreement on the part of the contractor Banks to pay plaintiff's demand, and the appellant accordingly contends that Banks having thus agreed by his contract to pay the demand of plaintiff, and having secured by his bond the performance of his contract, in all its several parts and agreements, including his agreement to pay plaintiff and the respondent St. Louis County Trust Company by its bond, which covered the contract of Banks, securing his agreement to pay plaintiff, "thereby and by operation of law the bond was executed for the use and benefit of this plaintiff (together with other third persons), and an action has accrued to plaintiff on such bond, although not named therein." A long line of decisions of our courts is then cited in support of the claim: That they establish the doctrine that a promise made to another for the benefit of a third person is to be deemed made to the third person, if adopted by him, though such third person was not privy to the consideration, was not named, and was not cognizant of the promise when made; that it is presumed that such third person accepts such promise made in his favor, and to overthrow this presumption a dissent must be shown; that such third person may sue in his own name without joining the direct promisee. It is thereupon claimed that, under the facts pleaded, the bond inured to and was executed for the benefit of plaintiff and others, for the reason that, the school district making a contract for the doing of public work, "the moral duty and obligation thus rested upon them to protect those who furnished work and materials upon such public work and improvement, and the bond, executed to the school district to secure its contract for public work, inured to the persons to whom it bore such moral duty and obligation, namely, the persons who furnished work and materials upon such public improvement." It is further argued that the contract made between Banks and the school district contained such provision, and that this provision is contained in these words: "In case Banks should fail to pay and satisfy all and every claim and demand against the building for work and materials furnished upon it, the school district might, if it deemed proper, retain from the moneys due Banks under the contract enough to pay and satisfy such claims and demands, and therewith pay such claims." It is argued that this provision was put in the contract evidently for the protection and benefit of third per-

sons furnishing labor and materials, and that to construe this to be for the benefit of the school district alone is meaningless, as third persons under the law have no lien upon public school buildings, and the bond, or this provision in the contract, did not give the school district additional protection. Hence it is argued that it is an irresistible supposition that this provision was made in favor and for the benefit of third persons, "from which the moral duty of the school district arose to see to the payment of the claim of these third persons." It is further argued that, aside from and in addition to the provision in the contract, the school district bore such moral duty and obligation to these third persons as to be sufficient to create the necessary privity to entitle them to sue. It is also urged by the same learned counsel that, the school district making a contract for the doing of public work, the legal duty and obligation rested upon it to protect those who did the work and furnished the material, and that the bond executed to the school district consequently inured to the benefit of the persons to whom the school board or district bore such legal duty and obligation.

Claiming that while under the laws of this state, and particularly under the mechanic's lien law, no distinction in terms is made as to their applicability to private or public buildings, counsel concedes that the almost uniform doctrine is that the mechanic's lien law, through considerations of public policy, does not apply to public buildings or improvements; but he claims that, following the legislation of Congress, whereby bonds for the doing of public work are expressly required to be for the protection of the laborer and materialman, the state of Missouri, by the act of 1895 (Laws 1895, p. 240), now section 6761 of the Revised Statutes of 1899 (Ann. St. 1906, p. 3328), in providing that: "All counties, cities, towns and school districts making contracts for public work of any kind to be done for such county, city, town or school district, shall require every contractor to execute a bond with good and sufficient securities, and such bond among other conditions shall be conditioned for the payment for all material used in such work, and all labor performed on such work, whether by subcontract or otherwise"—has followed the national legislation, and by this statute has imposed a moral duty and impliedly a legal obligation on the part of the school district to protect those who furnish material upon public work, and that the presumption is that the school district intended to perform its legal duty, although not specially expressed. It is therefore contended that the bond sued on, and the promises therein made, were for the benefit and use of third persons, including appellant, on the facts stated by it as to its contractual relation as materialman with Banks, the orig-

inal contractor and the principal in the bond sued on. We have stated very fully the position of the learned counsel for the appellant, as he puts it in the strongest and most forcible way possible. The authorities that he relies on for these propositions will be noted, when the report of this case is officially made in connection with his brief, so that it is not now necessary to set out those authorities in full, further than we may have occasion to refer to them hereafter.

That a contract between two parties upon a valid consideration may be enforced by a third party, when entered into for his benefit, and that this is so although such third party be not named in the contract, and although he was not privy to the consideration, is so thoroughly settled as the law of this state, by a long line of decisions, that it is not open to further discussion. It has further been held that it is sufficient in order to create the necessary privity, that the promisee owes to the party to be benefited some obligation or duty, legal or equitable, which would give him a just claim. That municipal and public bodies have power to contract for the payment of all claims which may be made for labor and material furnished in the construction of public buildings, and may cover that in the bond, so that it inures to the benefit of third parties not named, has also been thoroughly settled in this state by judicial decisions as well as by statutory enactment. Section 8761, Rev. St. 1899, expressly authorizes school districts, among other public quasi corporations, to provide, by contract and bond entered upon and given for public work, for the payment to the laborer or materialman, for material used in the work and all labor performed thereon whether by subcontract or otherwise, so that the power is expressly given to cover such claims so effectually as to give a right of action on the bond to the laborer and materialman. For illustration of these rules, in addition to the statute, it is only necessary to refer to *City of St. Louis v. O'Neil Lumber Co.*, 114 Mo. 74, 21 S. W. 484; *City of St. Louis, to Use of Glencoe L. & C. Co., v. Von Phul et al.*, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695; *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625; *School District of Kansas City ex rel. Koken Iron Works v. Livers et al.*, 147 Mo. 580, 49 S. W. 507; *Buffalo Forge Co. v. Cullen & Stock Mfg. Co.*, 105 Mo. App. 484, 79 S. W. 1024. But in all of the cases to which the attention of the court has been directed, it has been held that to enable third parties, not named in the bond or in the contract, to sue on the bond, it must clearly appear, by the terms of the contract or bond, that they are of the class covered by the conditions of the bond. When they are, they can sue, whether named in the bond or not; when they are not, they have no right of action on the bond. This distinction is very well drawn in the case last cited (*Buffalo Forge Co. v. Cullen & Stock Mfg. Co.*, supra), in which case

this court, distinguishing the bond before it from the bond which was before the court in the case of *State ex rel. v. Loomis*, 88 Mo. App. 500, said, referring to the *Loomis* Case, that the bond there under consideration contained this clause: "This bond is made for the use and benefit of all persons who may become entitled to liens under said contract according to the provisions of the law in such case made and provided, and may be sued upon by them as if executed to them in proper person." Construing this clause, this court held in that case that the clause designated the only persons, aside from the parties to the bond, who could sue on it, and that, inasmuch as the relator in the case had no lien, he therefore did not come within the designated class, and hence could not sue. This court further said, in the *Buffalo Forge Company Case*, supra, that while it was true the building was a public one, and the bond was probably drawn under a misapprehension of the law, or a blank form used with that clause left in it inadvertently, courts could only enforce contracts as they were made, and that it was for that reason the court had held in the *Loomis* Case that the relator had no right of action on the instrument. That is to say, it must appear that the party seeking to obtain the benefit of the contract and bond clearly falls within the terms and is included within the provisions of them, to be entitled to his action on the bond.

In the case before us the condition in the contract is that the school district agreed to pay Banks the contract price for the work, "at intervals on certificates of the architect, 5 per cent. to be retained and to be paid one month after acceptance of the building by the district, provided that the materials and work had been paid for by Banks, and that said district might retain from the moneys coming to Banks enough to pay and satisfy such claims for work and materials"; and the condition in the bond is that if defendant Banks "should well and truly perform and fulfill all and every one of the covenants, conditions, stipulations, and agreements mentioned in said contract of August 22, 1905, between him and said school district for the erection of said public school building, as called for in said contract, and should keep the said school district harmless and indemnified from and against all and every claim, demand, judgment, lien, and mechanic's lien, costs, and fees of every description incurred in suits or otherwise that might be had against said district, or against the buildings to be erected under said contract, and should repay the said district all sums of money which it might pay to other persons on account of work and labor done or materials furnished on or for said building, and should pay to said district all damages it might sustain and all forfeitures to which it might be entitled by reason of the nonperformance or malperformance on the part of defendant Banks of any of the cove-

nants, conditions, stipulations, and agreements of said contract, then said obligation should be void, otherwise the same should remain in full force and virtue." While this bond, in terms, requires Banks to perform all and every one of the covenants, etc., contained in his contract, and while the contract provided that the materials and work should be shown to have been paid for by Banks before he was entitled to the compensation provided for in the contract, and while it was provided in the contract that the district might retain from the moneys coming to Banks enough to pay and satisfy claims for work and material, there is nothing in the bond itself, which, by any construction of it, can be held to mean that, if Banks did not do this, a right of action accrued to a third party. In the cases referred to, there was either an express stipulation that the bond should be for the benefit of third parties not named and that the bond could be put in suit to their use, or the contract and bond were together of such a character as to imply that that was in contemplation of the parties; that is to say, not only in contemplation of the contractor and the party with whom the contract for the erection of the building or doing of the work was made, but it should have clearly been within the contract of the surety on the bond. It is to be remembered that this case is not against Banks alone, but is on the bond against Banks and his surety, and no indictment or presumptions outside of those necessarily arising on the contract and on the bond are ever indulged in as against the surety.

Nor does the bond come within the statute referred to (section 6761), for it does not contain the clause carrying the condition that it be "for the payment for all material used in such work, and all labor performed on such work, whether by subcontract or otherwise." Furthermore, if this section is relied upon, then the suit should have been in the name of the school district to the use of appellant (Rev. St. 1899, § 6762 [Ann. St. 1906, p. 3323]). While it may be said that there was no necessity for the school board to protect the building against liens (Press Brick Co. v. School District, 79 Mo. App. 665), the fact remains that this bond was drawn in such terms as to protect the school district alone, and not third parties. Conceding that there is no right of lien against the schoolhouse, counsel for appellant argues that if this bond is not for the protection of third parties, laborers and materialmen, it is meaningless. That may be true, but that fact surely cannot be held to extend the bond beyond its language and terms, or its necessarily implied obligation, at least that cannot be done as against the surety. It is true that the amended petition alleges that this bond is for the benefit of all parties furnishing labor and material, and that the petition is met by a demurrer;

but it needs no citation of authorities on the proposition that a demurrer only admits such matters as are well pleaded and, the plaintiff in this case having set up the conditions of the bond and of the contract, the averments by way of interpretation to be put upon them are merely pleading legal conclusions, the truth of which a demurrer does not admit.

Our conclusion upon the case is that, while recognizing the legal propositions advanced by the appellant as generally correct, we are compelled to hold that they do not apply to this bond, and, so holding, the judgment of the trial court, sustaining the demurrer to the petition, is affirmed. All concur.

### O'FARRELL v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri.  
March 1, 1909. Rehearing Denied  
March 29, 1909.)

#### STREET RAILROADS (§ 114\*) — COLLISION OF CAR WITH PEDESTRIAN—NEGLIGENCE—EVIDENCE.

Where plaintiff, running along the side of a street car to board it when it should stop on the other side of the street, was caught between it and another car, coming in the opposite direction and seen by him only just as he was struck, negligence of the motorman of the latter car authorizing recovery is not shown; there being only his testimony that, when he discovered plaintiff's danger, he was so close to him that he did not have time to stop his car to prevent the accident.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 243, 244; Dec. Dig. § 114.\*]

Appeal from Circuit Court, Jackson County; H. B. Middlebrook, Special Judge.

Action by Patrick O'Farrell against the Metropolitan Street Railway Company. Defendant was granted a new trial, and plaintiff appeals. Affirmed.

Boyle & Howell and Guthrie & Smith, for appellant. John Lucas and Ben Hardin, for respondent.

**BROADDUS, P. J.** This is a suit for damages for injuries sustained as the alleged result of the defendant's negligence.

The facts are as follows: On September 4, 1906, the plaintiff started in a southeasterly direction to cross the street and take passage on defendant's east-bound car at the usual stopping place of the defendant on Strong avenue, in the city of Argentine, Kan. While he was proceeding along between the east and west bound tracks of defendant, he was struck and injured. The plaintiff resided and did business as a grocer at the corner of King street and Strong avenue. At the time mentioned, the plaintiff, as he stepped out of his door, saw a car coming from the west which it was his purpose to board. As this car approached King street, he attempted to cross Strong avenue in front of it

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and go to the southeast corner, the usual stopping place, but by the time he got to the track the car was too far advanced for him to do so. Then being between the two tracks, he turned eastward in a run, keeping his eye on the motorman, and signaling him to stop the car. In this manner he passed over King street, a distance of 60 or 70 feet. While he was so proceeding, he saw a woman standing on the southeast corner waiting for a car, which caused him to believe that it would stop for her. He then changed his course to the west, still on the run, and, when he got about two-thirds of the distance of the length of the car, a car going west came up, and he was caught between the two and crushed. He did not see the car going west until it was nearly upon him. It was shown that the motorman could have seen him leaving his place of business in time to have stopped the car before it reached the place where the injury occurred. Such was the plaintiff's case.

The motorman of defendant testified that he saw plaintiff just as he came off the walk in front of his store; that he attempted to stop the car as soon as he saw plaintiff on the tracks in a run; that plaintiff crossed the track in front of his car, and was between the two tracks. The finding of the jury was for the plaintiff. The defendant moved to set aside the verdict of the jury and for a new trial. The court sustained the motion for the following reasons: "There was an absence of evidence to show the west-bound car could have been stopped in time to have prevented the injury after plaintiff's position became obviously perilous. The court erred in not sustaining the defendant's instruction \* \* \* constituting a demurrer to the evidence. The court erred in not giving defendant's instruction submitting the question of contributory negligence of plaintiff, and in giving plaintiff's instructions on the last-chance doctrine in the absence of evidence to show that the oncoming car could have been stopped in time to have avoided the injury after plaintiff's position became obviously perilous." The plaintiff appealed from this action of the court in setting aside the verdict and granting a new trial. The several reasons assigned by the court for its action may be resolved into one, viz., that the plaintiff failed to make out a case.

The plaintiff introduced no evidence whatever tending to show that the motorman saw or could have seen that plaintiff was in a condition of peril in time, by the exercise of ordinary care, to have avoided injuring him. All the light that we have on that question comes from the evidence of the motorman, which stands uncontradicted, that, when he discovered plaintiff's danger, he was so close to him that he did not have time to stop his car until the cars met and caught plaintiff between them. The plaintiff's testimony

in his behalf consisted alone of what he observed. All that he saw of the car going west was just a moment before his injury.

Affirmed. All concur.

#### T. CARRABINE & CO. v. COX.

(Kansas City Court of Appeals. Missouri. June 8, 1908. On Rehearing, March 1, 1909. Further Rehearing Denied March 29, 1909.)

#### 1. VENDOR AND PURCHASER (§ 140\*)—OPERATION OF CONTRACT—TIME OF PERFORMANCE—TIME AS ESSENCE.

A vendor contracted to sell land for \$4,800 and agreed to furnish an abstract showing a merchantable title, with a certain time in which to examine it, when the purchaser should return it, with his objections, after which the vendor should have a reasonable time in which to correct any defects in the title, and, should the title be not merchantable on October 12th, when the contract was to be closed, should have a sufficient time thereafter to correct defects, but in no event should the closing of the contract be delayed beyond that date because of any defect in the title, providing that the vendor then execute a bond in the sum of \$4,800 to indemnify the purchaser in case the vendor should fail to make the title merchantable. Time was expressly made of the essence of the contract. Held, that the vendor's failure to tender any abstract on or before October 12th was such a breach of his contract as would justify the purchaser's refusal to accept one tendered thereafter.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 140.\*]

#### 2. VENDOR AND PURCHASER (§ 140\*)—PERFORMANCE—SUFFICIENCY.

The vendor's offer to furnish an abstract if the vendee would pay two of the purchase-price notes then due and accept a bond for \$1,500 was not a compliance with the contract, even if made at the time designated therein.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 140.\*]

#### 3. VENDOR AND PURCHASER (§ 140\*)—OPERATION OF CONTRACT—CONDITIONS.

The vendor need not offer to give the \$4,800 bond in order to secure additional time after October 12th in which to perfect his title, but could either have closed the transaction by then giving the bond, with a reasonable time thereafter within which to furnish a good title, or, without giving the bond, could take a reasonable time thereafter to make his title good before closing; but he could not refuse to tender any abstract at all within that time.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 140.\*]

#### 4. CONTRACTS (§ 303\*)—RIGHT OF ACTION—DEFENSES—BREACH BY PARTY.

One cannot, after breaching his own contract so as to justify an abrogation by the other party, either recover damages for a breach by the other party, or enforce the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1411; Dec. Dig. § 303.\*]

Appeal from Circuit Court, Mercer County; George W. Wanamaker, Judge.

Action by T. Carrabine & Co., a copartnership, against J. D. Cox. From a judgment for defendant, plaintiff appeals. Affirmed.

Aleshire, Herrick & Gundlach, for appellant. Ira B. Hyde & Son, Orton & Orton, and S. H. Kesterson, for respondent.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



BROADDUS, P. J. The plaintiffs, T. Carrabine and James I. Goodell, constitute the partnership of Carrabine & Co., doing business in Kansas City, Mo. The plaintiffs sue defendant on three promissory notes of the aggregate sum of \$3,000: One executed on the 18th day of August, 1905, for \$300, payable on demand, bearing interest at the rate of 7 per cent. per annum; one for \$500 of the same date, due the 10th day of September, 1905, and bearing the same rate of interest; one for \$2,000 of the same date payable the 12th day of October, 1905, bearing the same rate of interest and all payable to the plaintiffs. The answer admits the execution of the notes and sets up as a defense a failure of consideration; that they were given as a part consideration for the purchase price of the following real estate, to wit, the west half of section 34, township 28, range 18, Kiowa county, state of Kansas; that plaintiff and defendant entered into a contract in writing for the sale of said land by plaintiffs to defendant for the price of \$4,800; that defendant paid to plaintiffs on the purchase price the sum of \$200, and executed the said notes and was to execute a note and mortgage for \$1,600 when said land was conveyed to him by good and sufficient warranty deed, together with abstract showing a good and merchantable title to said land. By the terms of the contract which is copied into the petition the notes in suit are described the consideration of the purchase price stated to be \$4,800, the acknowledgment of the receipt of \$200 paid, and a recitation that defendant was to execute a first mortgage on the land for \$1,600 evidenced by two notes of \$800 each due in five years from October 12, 1905.

It was a part of the agreement that plaintiffs were to furnish to defendant an abstract showing in them, or from whom the deed is to come a good and merchantable title, with 10 days in which to examine it, and providing that he shall return the same to plaintiffs with his objections in writing, and also providing that the plaintiffs shall have reasonable time thereafter in which to correct any defects or objections raised as to the title; the nature and kind of objections to be taken into consideration in the length of time to be given to the plaintiffs for correcting and remedying the same. And it was further agreed that, should the title to the land not be merchantable at the time mentioned for the closing of the contract, the plaintiffs shall have sufficient time thereafter to correct all such defects, either by suit to quiet title or otherwise; but in no event shall the closing of this contract be delayed beyond said date on account of any such defects of title, providing that plaintiffs at the same time and place execute to the defendant a bond in the penal sum of said purchase price to indemnify the defendant against all damages, should plaintiff fail to make the title merchantable. And

it is further provided that, if the title to the land cannot be procured, the plaintiffs are to return to defendant all money received, and the contract is to be considered null and void; and it is also provided that the contract is made subject to the approval of the owner, and that time shall be the essence of the agreement. The answer alleges that plaintiffs never had title to the land, have never conveyed it to defendant, and have never furnished an abstract showing a merchantable title, and that plaintiffs have wholly failed to comply with the terms of the contract. The answer further alleges that the owner of the land has never affirmed the said contract. Defendant prays judgment for the \$200 paid on the contract.

The plaintiffs filed a reply, in which they admitted the execution of said contract and set up other matters, among which are the following: That by a mistake there was a misdescription of the land sold to the defendant; that they furnished defendant with an abstract of the land so sold showing a good and merchantable title and tendered him a good and sufficient warranty deed to the land sold, but that defendant declined to receive the same; and that they have been at all times ready and willing to furnish defendant a good and sufficient deed and a sufficient abstract of title thereto, and that they now tender such to him. The owner of the land sold it to one G. B. Davis after the execution of the contract in suit, who mortgaged it to secure the sum of \$600, which was unsatisfied on the 12th day of October, 1905. In about three weeks thereafter plaintiffs, through their agent, offered to furnish a good abstract, if defendant would pay the \$300 and the \$500 note mentioned and tendered defendant a bond in the sum of \$1,500 to indemnify defendant against loss on account of the existence of said mortgage. The defendant declined the offer. Nothing was further done until the 3d day of February, 1906, when plaintiffs tendered an abstract which they allege was sufficient and offered to convey to defendant the land by warranty deed. The defendant refused this offer also.

Under the contract plaintiffs were given to the 12th day of October, 1905, to furnish to defendant an abstract showing a good and merchantable title to the land. They failed to tender any such abstract at that time. As the time was the essence of the contract, this failure on their part was a sufficient justification to the defendant to refuse to accept any other that should be offered after that time, and the offer to furnish an abstract if defendant would pay the two notes mentioned and accept the \$1,500 bond made three weeks after said date would not have been in compliance with the contract, even had it been made at the time designated.

We do not agree with defendant's contention that plaintiffs, if unable to furnish a proper abstract on the 12th of October, could

only have additional time in which to perfect it, by giving the \$4,800 bond mentioned. It was optional with them whether they would give it or not. Had they seen fit to do so, then the transaction would have been closed with leave to them to furnish a good title within a reasonable time. They had a right to waive giving the bond and take time if their abstract was not satisfactory to make it so, but they did not have the right to let the time pass without submitting to defendant their abstract and give him the right to accept, or make his objection to it if he had any, and plaintiffs had no right under their contract to avoid its terms by tendering a bond in the sum of \$1,500 to indemnify defendant against the defects of their title and then take further time to furnish an abstract and a good and sufficient deed. If they desired such further time, the contract provided how to obtain it.

Time being the essence of the contract, and plaintiffs having failed in every important particular to offer to perform at the time fixed for such performance, and defendant not having waived such condition, the plaintiffs are not entitled to recover, and the judgment of the court should be upheld. "Parties are bound by their contracts and cannot, after committing a breach justifying an abrogation of the contract, either recover damages for such breach or enforce the contract." *Sick v. Insurance Co.*, 79 Mo. App. 609.

Judgment affirmed. All concur.

#### On Rehearing.

PER CURIAM. Further investigation and consideration has been given this case on rehearing, which has resulted in the conclusion that the judgment should be affirmed on the opinion already rendered.

#### STATE ex rel. AMERICAN NAT. BANK OF LOUISVILLE, KY., v. FIDELITY & DEPOSIT CO.

(Kansas City Court of Appeals. Missouri. Feb. 1, 1909. Rehearing Denied March 29, 1909.)

#### 1. JUDGES (§ 15\*)—ELECTION OF SPECIAL JUDGES—STATUTORY AUTHORITY.

Where the judge of a division of a county circuit court did not request the judge of another division to hold court for him on account of illness, though authorized so to do by Laws 1901, p. 119 (Ann. St. 1906, § 1734), and Laws 1906, p. 123, § 7, it was proper to elect a special judge, as authorized by Rev. St. 1899, § 1679 (Ann. St. 1906, p. 1220).

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 15.\*]

#### 2. JUDGES (§ 18\*)—POWER TO CALL IN OTHER JUDGE.

The court record need not show the reason why a judge of a division of a county circuit court called in the judge of another division to hold court for him, as authorized by Laws 1901, p. 119 (Ann. St. 1906, § 1734), and Laws 1905,

p. 123, § 7, since the statutory cause will be presumed.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 63; Dec. Dig. § 18.\*]

#### 3. JUDGES (§ 16\*)—POWER TO CALL IN OTHER JUDGE.

A regular circuit judge who calls in another judge to hold court for him thereby terminates the authority of a special judge elected, as authorized by Rev. St. 1899, § 1679 (Ann. St. 1906, p. 1220).

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 16.\*]

#### 4. JUDGES (§ 25\*)—POWER TO CALL IN OTHER JUDGE.

A judge called in at the request of the regular judge to hold court has authority over a cause tried by him until the motions after the trial are disposed of, though the regular judge appears and holds court.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 100-104; Dec. Dig. § 25.\*]

#### 5. APPEAL AND ERROR (§ 345\*)—TIME WITHIN WHICH TO APPEAL.

A judge called in at the request of the regular judge tried a cause. A motion for new trial remained undisposed of at the time the court adjourned to the next regular term. At the next regular term the judge overruled the motion, and at a subsequent term the regular judge overruled the motion. *Held*, that the proper time within which to appeal the case was during the term at which the motion was first overruled.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 345.\*]

Appeal from Circuit Court, Jackson County; Hermann Brumback, Judge.

Action by the State, on the relation of the American National Bank of Louisville, Ky., against the Fidelity & Deposit Company. From a judgment for plaintiff, defendant appeals. Dismissed.

Karnes, New & Krauthoff, for appellant. Thos. T. Crittenden, Elijah Robinson, and Harris Robinson, for respondent.

ELLISON, J. This action was instituted on an attachment bond; the defendant, Fidelity & Deposit Company of Maryland, being surety. The judgment was for plaintiff in the trial court. Plaintiff has filed a motion to dismiss the appeal on the ground that it was not taken during the term at which the motion for new trial was overruled.

It appears that the Jackson county circuit court at the time of the trial was composed of five divisions; each division being presided over by a different judge. This cause was pending in division No. 2, of which Hermann Brumback was the judge. On November 12, 1906, during the October term, Judge Brumback, as the record shows, was unable to hold court on account of sickness. The record also showing that he had not procured another judge to hold the court, the clerk, under the statute, held an election by the bar, when Charles W. German, Esq., was elected. German held the court for about two weeks, when on the forty-fifth day of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the term, as the record recites, court met pursuant to adjournment, and was held by Judge Park "at the request of Judge Brumback, the regular judge of this division." Judge Park was the regular judge of division No. 1 of the Jackson county circuit court, and he held court under this request of Judge Brumback for near two weeks, when the latter resumed his duties, and Judge Park retired to his own division. During the time of Park holding the court for Brumback this case was tried. The trial having resulted in plaintiff's favor, the defendant surety company in due time filed its motion for a new trial. The motion was not disposed of, and afterwards the term was adjourned by Judge Brumback to the regular January term, 1907, which had the effect of continuing the case with the motion for new trial to that term. At the opening and during the January term Judge Brumback presided, until the fifty-third day, when he left the bench, and at his "request" Judge Park again presided, "while the following proceedings are had and made of record." A part of such proceedings was the motion for new trial in this case. It was argued before Judge Park and overruled by him on the fifty-third day of the January term (March 21, 1907), and no appeal was taken. On overruling the motion for new trial Judge Park retired, and Judge Brumback resumed the bench. At a subsequent term, more than a year thereafter, viz., on the 2d of April, 1908, Judge Brumback presiding, the motion for new trial was overruled by him, and at that term an appeal was taken, being the one now before us. The different divisions of the circuit court of Jackson county have been brought into existence by different acts of the Legislature which enactments were chiefly made necessary by the necessity which the Legislature saw for increasing the number of judges. Laws 1901, p. 119 (Ann. St. 1906, § 1734), and Laws 1905, p. 123, provided in section 7 that "whenever the judge of any division of said circuit court shall be sick, absent, or from any cause is unable to hold any term or part of term of court in such division at Kansas City or Independence, such term or part of term may, by request of such judge of such division, be held by a judge of any other division of said circuit court." The circuit court record, above referred to, showing that Judge Brumback was disqualified on account of sickness, and that he had not called in another judge, it became proper under the general statutes (section 1679, Rev. St. 1899 [Ann. St. 1906, p. 1220]) to elect a member of the bar, as was done here. It was not necessary for the record to show that an effort was made to secure some other judge. *State v. Punshon*, 133 Mo. 44, 34 S. W. 25. Mr. German entered upon his duties as already stated. So far there could not be, and is not, any question of authority or legal regularity. But,

beginning with Brumback's request to Park to hold the court and German's retiring and Judge Park entering upon the duties of judge and trying this case, questions of regularity and authority are presented. The record does not show that the "request" made of Park by Brumback, as authorized by Laws 1901 and Laws 1905, above quoted (which are practically same as general statutes), was accompanied by any reason or cause for making it. And we think that it was not necessary that the record should show the reason, since the statutory cause will be presumed. *State v. Newsum*, 129 Mo. 154, 31 S. W. 605.

This brings us to a consideration of the request for Judge Park to hold the court after Mr. German had been elected and was in the discharge of his duties. The Legislature, in the enactment of these laws, evidently contemplated that in keeping with a government by the people at large judges duly elected by the people should hold the circuit courts of the state unless prevented by exceptional conditions and situations for which provisions have been made. So the statute authorizing the election of a special judge by the members of the bar when the regular judge is under disability (section 1679, Rev. St. 1899) puts the authority for such election on the failure of the regular judge "to procure another judge to hold said term or part of a term." There was, at first, a failure in this instance to request another judge. But there is no reason why a failure at the beginning of the regular judge's disability, though resulting in the election of a special judge by the bar, should necessarily be a continuing failure throughout the term, which in the Jackson county circuit court might be a period of five months. The statute reads that if from "any cause" the judge "shall be unable to hold any term, or part of a term." The duration of an inability or a disability is ordinarily very uncertain. It may have appearance of long continuance, and yet quickly terminate, and we cannot believe the statute intended the mere election of a special judge by the bar, though not for a special case, should necessarily, under all situations, exclude the regular judge for the whole term. And we think that, where the regular judge calls in another judge, it ipso facto brings to an end the authority of the special judge over any other business of the court than that which the latter may have taken up and not concluded or determined. That condition of affairs may be likened to the situation where the regular judge, being under disability, has called in another judge, and thereafter, his disability having ceased, he appears. He, of course, may resume his duties, and the functions of the other judge as to matters not entered upon would cease. The latter situation is presented by the record in this case; for we have already seen that Judge Brumback became well

enough to resume his duties and did so, Judge Park retiring. This condition of affairs was raised in argument in *State ex rel. v. Ross*, 118 Mo. 23, 43, 23 S. W. 196, but the facts did not justify the court in deciding it and consequently no opinion was expressed. After proceeding with the business of the court from day to day, Judge Brumback adjourned it to the court in course, the January term, 1908. At the time Judge Park retired, the motion for new trial had not been determined, and it went over to the next term. During that term Judge Park was again "requested" by Judge Brumback to hold his court for a time. The record reads that "Judge Brumback, judge of this division, retires from the bench, and Honorable John G. Park, judge of Division No. 1 of this court, at request of Hermann Brumback, judge, presides, while the following proceedings are had and made of record, to wit:" Then follows action in this case in hearing and overruling the motion for new trial. Defendant builds much on the fact that no reason is given for requesting Judge Park to hold the court, and cites *Bank v. Graham*, 147 Mo. 250, 48 S. W. 910, and *Ladd v. Forsee*, 163 Mo. 506, 63 S. W. 831. But we have already seen that it is not necessary that the record state the reason for the request. It will be presumed to be for a legal reason, unless, as was the fact in the two cases just cited, the record shows the contrary. In those cases the record showed affirmatively that there was no reason. Those cases are not applicable to this case. While, as we shall proceed to show, the second request was not legally necessary, so far as authority to act on the motion for new trial is concerned, yet it was a very natural and proper thing to do. *Riggs v. Owen*, 120 Mo. 176, 182, 25 S. W. 356. Judge Park would have had the requisite legal authority to appear in Judge Brumback's division for the purpose of disposing of the motion for new trial without any further request than that made for him to hold the court in the first instance when he tried the case. Having tried it, his jurisdiction and authority over it continued until the motions consequent upon the trial were disposed of. *Voullaire v. Voullaire*, 45 Mo. 602; *State v. Moberly*, 121 Mo. 604, 26 S. W. 364; *State v. Hayes*, 88 Mo. 344; *State v. Sneed*, 91 Mo. 552, 4 S. W. 411; *State v. Davidson*, 69 Mo. 509; *Ex parte Clay*, 98 Mo. 578, 11 S. W. 998; *Naffzieger v. Reed*, 98 Mo. 87, 11 S. W. 315. The last case was questioned as to another point, but not in the respect here cited. In the case of *Voullaire*, first above cited, it was said that "it was the duty of the judge who tried the case to go through with it and entertain, and himself hear the motion (for new trial). It is one of those matters that peculiarly belongs to the original case itself." The cases

of *Ranney v. Hammond Packing Company*, 132 Mo. App. 324, 110 S. W. 613, and *Berry v. Leslie*, 131 Mo. App. 236, 110 S. W. 685, involved the question of the proper judge to sign a bill of exceptions, a matter governed by a different statute. In neither case did the regular judge appear after the election of a special judge.

The foregoing considerations show that the proper time for appealing the case was during the term when the motion for new trial was overruled by Judge Park; and, appellant not having done so, the overruling of the motion at a subsequent term was an idle proceeding, and the appeal thereon was without authority of law. It is therefore dismissed. All concur.

### STATE v. MUIR.

(St. Louis Court of Appeals. Missouri. March 9, 1909. Rehearing Denied March 23, 1909.)

#### 1. APPEAL AND ERROR (§ 714\*)—RECORD—MATTERS NOT APPARENT OF RECORD—STATEMENTS OF FACT IN BRIEF.

Statements of fact contained in appellant's brief, though probably true, cannot be considered if they do not appear to have been given in evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2962; Dec. Dig. § 714.\*]

#### 2. DEDICATION (§ 5\*)—COMMON-LAW METHOD OF CREATING HIGHWAYS.

The common law always upheld dedications by landowners and acceptance by the public as a valid method of creating highways, and this doctrine became, at an early date, part of the jurisprudence of this state.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 2; Dec. Dig. § 5.\*]

#### 3. DEDICATION (§ 37\*)—ACCEPTANCE BY PUBLIC—USING LAND FOR ROAD.

Continuous use by the public, as occasion arose, for a period of 12 years, of a dedicated strip along one side of a highway, is evidence of its acceptance; at least if it had continued so long and been so extensive that the public would be materially discommoded and private rights impaired by interrupting it.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 73-74; Dec. Dig. § 37.\*]

#### 4. DEDICATION (§ 37\*)—ACCEPTANCE BY PUBLIC—USING LAND FOR ROAD.

Rev. St. 1899, § 9472 (Ann. St. 1906, p. 4347), forbidding divesting the title of an owner by using without improving his land for a road, has no relevancy to the mode in which a voluntary dedication may be accepted by the public, but only to the mode in which an involuntary or prescriptive right may be acquired against the owner by adverse use.

[Ed. Note.—For other cases, see *Dedication*, Dec. Dig. § 37.\*]

Appeal from Circuit Court, Scotland County; Chas. D. Stewart, Judge.

Joseph Muir was convicted of obstructing a public road, and he appeals. Affirmed.

E. R. Bartlett, for appellant. Luther, for the State.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

GOODE, J. Appellant appealed from a conviction on an information filed against him for obstructing a public road. The points of law raised by appellant's counsel are too numerous and the discussion of them in the brief too wide ranging for us to follow the argument throughout its course. Five or six instructions were given for the state, fourteen for appellant, and seven asked by him were refused. All the adverse rulings on the requests for instructions and some rulings on the evidence are assigned for error, and various legal theories advanced to maintain the assignments. Notwithstanding this elaborate presentation of the appeal, the evidence is clear and uniform upon the questions which really call for decision; but many statements of fact are contained in appellant's brief which probably are true, but cannot be considered because they do not appear to have been given in evidence. In October, 1898, appellant purchased from Jane Tolbert some land lying immediately north of the strip of road in controversy. Immediately south of one 40-acre tract of the purchase, lay 40 acres which were owned by E. T. Small prior to 1868, and hence were known as the "Small tract," and from said year to 1896 belonged to John W. Muir, appellant's father, who conveyed to O. P. Muir, who in turn conveyed to Hamilton Moore, May 13, 1899. A public road extended east and west between the Tolbert and Small lands and had as far back as 1868. It opens into a north and south public road running on the east side of appellant's and Moore's lands. In 1892 Mrs. Tolbert, appellant's grantor, set her fence back north, thereby widening the road from 16 to 18 feet between herself and said John W. Muir, and intending to dedicate the strip thus excluded from her field to the public; the fence being moved for said purpose pursuant to an understanding and arrangement with John W. Muir. The road remained as widened until she sold her land to appellant. The old or main traveled portion of the road was miry in wet weather, and snow drifts would accumulate against an embankment four or five feet high on the north side, along which embankment ran the strip in controversy, and after it had been set out of her inclosure by Mrs. Tolbert, the travel would pass over it when it was the preferable route. As one witness said, "it was a kind of escape" from the mud and snow. Appellant insists there was no proof of travel on it except in five instances, but the evidence tends to show it was traveled for years when ever, from weather conditions, it afforded the better way; but in good weather the old part was used because it was level. One of the supposed five instances was that of a man who used it during a season in hauling wood. In late years telephone poles had been set along the strip to carry wires, no doubt un-

der the authority of section 1251, Rev. St. 1899 (Ann. St. 1906, p. 1027). In fine, the entire width of the land opened by Mrs. Tolbert for the use of the public was used more or less from the date her fence was set back until the fall of 1904, or six years after appellant had purchased the land, when he moved the fence again southward some nine or ten feet at the east end, but converging toward the west. The space he took in by the removal of the fence at the west end was perhaps not more than a foot wide, and the space inclosed was triangular. He took into his field some of the telephone poles and rendered it impossible to drive over the ground Mrs. Tolbert had opened for public use, for, though he did not include the whole of the dedication in his inclosure, he advanced his fence far enough south to prevent the use of the portion left outside, because the fence was set so close to the brow of the embankment a wagon and team had no room to pass between the fence and the brink.

The intention on the part of Mrs. Tolbert to open the strip in question for public use was proved beyond a doubt, and, if the strip thereby became in law part of the public highway, appellant committed an offense when he inclosed part of it; and really this is the only point of merit on the appeal. Appellant's counsel insists a complete scheme of legislation for the opening and widening of roads and highways, and the acquisition by the public of easements in them, is provided in chapter 151 of the Statutes, and no method of establishing or adding to any road is now allowed except by the methods therein prescribed. As a further premise he says the common-law mode of dedicating land for a highway has been abrogated by the statutes, and that, as Mrs. Tolbert's attempt to give the strip in question to widen the road could only operate as a common-law dedication, the attempt proved abortive, especially as evidence was lacking to prove the county authorities ever expended money or labor on the strip. Whatever force this reasoning has is derived from the last clause of section 9472, Rev. St. 1899 (Ann. St. 1906, p. 4347), which clause was enacted in 1887 (Laws 1887, p. 257), and says that in all other cases, except those enumerated in the preceding part of the section, "no lapse of time shall divest the owner of title to his land, unless, in addition to the use of the road by the public for a period of ten consecutive years, there shall have been public money and labor expended thereon for such period." The first paragraph says all roads that have been opened by an order of the county court and a plat thereof made and filed with the clerk of the court, and which have been used as public highways for 10 years or more, shall be deemed legally established notwithstanding irregularities in the proceedings to es-

tablish them, and that nonuser by the public for 10 years shall be deemed an abandonment of the same. The common law upheld immemorially dedications by landowners and acceptance by the public as a valid method of creating highways, and this doctrine became, at an early day, part of the jurisprudence of our state. *Rector v. Hartt*, 8 Mo. 448, 41 Am. Dec. 650. We find nothing in the cited section or in the chapter of the statutes concerning "Roads and Highways," which indicates a purpose on the part of the Legislature to abolish these common-law dedications for road purposes. The object of the particular section was to declare what period of travel over land that had been irregularly opened for a road by the county court would suffice, despite the irregularities, to constitute the land a public road, and what period of nonuser would constitute an abandonment of it as a road. The period fixed was 10 years, and a proviso was added to prevent the owner of land traveled over by the public from being deprived of his title in any instance not specified in the statutes, unless, besides 10 years of continuous travel, public money and labor had been expended on the land for the same period. The object of the latter clause was to prevent the creation of a public easement for highway purposes in land which there had been no attempt to condemn except by the public's using and also improving it for 10 years. The section as a whole is dealing with the creation of highway easements by adverse public use and does not refer to dedications, which, indeed, we find no mention of in the entire chapter.

As it is certain Mrs. Tolbert intended to donate the use of the strip in question to the public, the remaining question is whether there was evidence from which the jury might find the donation was accepted. It was not proved either money or labor had been expended by the county in improving the strip; but continuous use by the public, as occasion arose, during the period from 1892 to 1904, was evidence of acceptance—at least if it had continued so long and been so extensive that the public would be materially discommoded and private rights impaired by interrupting it. *Putnam v. Walker*, 37 Mo. 600; *Bauman v. Boeckeler*, 119 Mo. 189, 200, 24 S. W. 207; *Elliott, Roads & Streets* (2d Ed.) § 154. The jury might find a use of that extent and duration had prevailed. The proviso in section 9472 against divesting the title of an owner by using without improving his land for a road has no relevancy to the mode in which a voluntary dedication may be accepted by the public, but only to the mode in which an involuntary or prescriptive right may be acquired against the owner by adverse use. It may be that such use as we have here by

the public would not bind the county to keep the strip in repair, but nevertheless it sufficed to prove acceptance of the dedication. The evidence is persuasive that appellant knew when he purchased of Mrs. Tolbert she had set the strip in question outside her inclosure with the intention of devoting it to road purposes, and took the deed from her, which included the strip, with full knowledge of all the facts. The instructions on the issues of Mrs. Tolbert's intention to dedicate, whether she set the strip outside her inclosure by mistake, public acceptance of the dedication, appellant's intent to obstruct the road, and on all the other issues of fact, were favorable to him, and we find no reversible error in the record.

Therefore the judgment will be affirmed. All concur.

#### ELMER et al. v. CAMPBELL et al.

(St. Louis Court of Appeals. Missouri. March 9, 1909.)

#### 1. TRUSTS (§ 63½\*)—RESULTING TRUST—RECEIPT OF MONEY BELONGING TO ANOTHER—APPLICATION.

Sureties on a note released a mortgage indemnifying them under agreement that \$75 of the proceeds of a sale of the land be turned to them to be applied to the note. The purchaser gave a check for the \$75, which was delivered to one surety, B., by his co-sureties for delivery to the payee; but he deposited it in a company's safe, intending to pay it to the payee later. An officer of the company cashed it and credited the proceeds on a debt due the company from the maker of the note. *Held*, that the company received the check in trust, and not as part of its general assets.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 91; Dec. Dig. § 63½.\*]

#### 2. CONTRACTS (§ 54\*)—CONSIDERATION—SEVERAL PARTIES — CONSIDERATION MOVING FROM ALL.

Where a promise is made for the benefit of several persons, it is not essential to a recovery that each of them should have paid some consideration for the promise.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 233; Dec. Dig. § 54.\*]

#### 3. JOINT ADVENTURES (§ 7\*)—ANTECEDENT AGREEMENTS—LIABILITY OF MEMBERS.

Both the parties to a joint purchase of a stock of goods are bound by a promise of one of them, whereby the purchase was made possible, regardless of whether they were partners when it was made.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 8; Dec. Dig. § 7.\*]

#### 4. PRINCIPAL AND SURETY (§ 180\*)—PAYMENT OF MONEY—RIGHT TO RECOVER.

The right of such sureties to recover from a purchaser at a sale in bankruptcy of the property of the mercantile company on a promise to pay the amount of such check, does not depend upon payment of the note by them, since the note belonged to plaintiffs as between them and such purchaser.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 520; Dec. Dig. § 180.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Dent County; L. B. Woodside, Judge.

Action by William P. Elmer and others against Joseph Campbell and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Robert Lamar and A. J. Arthur, for appellants. W. P. Elmer and J. M. Stephens, for respondents.

GOODE, J. Plaintiffs J. R. Callahan and America Callahan were principals on a promissory note for \$200, executed and delivered to the Dent County Savings Bank, on which plaintiffs Elmer, Dye, and Collier were sureties, and were indemnified by a deed of trust on a tract of land. The Callahans sold and conveyed the land to J. A. Murray. The sureties on the note to the bank released the deed of trust given to indemnify them, on an agreement that \$75 of the purchase money should be turned over to the sureties to be applied on the note. Murray gave a check for this sum, which was turned over by the other sureties to Collier, to be by him delivered to the bank for credit on the note. Collier intended to do this, but for some reason deposited the check in the safe of the Dent County Mercantile Company. Powell, an officer of the company, took the check, cashed it, and credited it on an account which J. R. Callahan owed the company. The evidence is conflicting regarding how this came to be done. For the plaintiff it tends to prove Collier put the note in the mercantile company's safe, telling Powell it was not to go in payment of Callahan's account to the company, but was to be turned over to the bank. Powell testified Collier told him the check was "to be used in lieu of Callahan's account" until the note became due, but Callahan should have the right to withdraw it and pay the proceeds to the bank on the note; that maybe the note would be paid in some other way, and, if so, the account would remain settled; and that the money was to be refunded when Callahan asked for it. The check exceeded Callahan's indebtedness to the company by \$9, or more. After Powell had cashed the check and given Callahan credit, the mercantile company made an assignment for the benefit of creditors and subsequently was thrown into bankruptcy and the assets taken over by the United States District Court in St. Louis. Defendants Campbell and Tyrell desired to purchase the stock of merchandise from the trustee in bankruptcy under an order of said court, but could do so only by consent of the creditors of the mercantile company. Collier was a creditor for quite a large amount, and the company had appropriated \$75 belonging to plaintiffs. Hence plaintiffs had a demand against the company's assets to relinquish in aid of the scheme of defendants. The testimony conduces to prove Tyrell and Campbell agreed to pay the \$75, if Collier would accept 62½

cents on the dollar in settlement of his demand against the mercantile company and if plaintiffs' demand, whether it was \$75 or \$9.80, was released. Pursuant to that arrangement Campbell and Tyrell bought the stock, but afterwards refused to pay the \$75. This action was brought to recover it and resulted in a judgment in favor of plaintiffs.

Certain errors are assigned upon the pleadings and the rulings on requests for instructions. The only real issue of fact in the case was whether Campbell and Tyrell promised to pay the \$75. They denied making such a promise, but there is plenty of proof Campbell made it, and direct testimony that Tyrell assented to it. It is plain as can be, both on the testimony for plaintiffs and Powell, that the money was not turned in to the Dent County Mercantile Company to pay Callahan's account. Even according to Powell, the company was to use it no longer than it was called for to pay the note, whereupon it was to be refunded. In other words, it was in the hands of the company as a trust fund and not as part of its general assets. *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571. This case is not an attempt in equity to follow the trust fund, but an action on the alleged promise of Campbell and Tyrell, and we refer to the above facts because much is said about the mercantile company becoming a debtor to plaintiffs by its appropriation of the check. We do not see clearly that the result of the case should be different even if the company was converted into a debtor by said appropriation, but on Powell's version, as well as Collins' and Campbell's, it seems to have been a trustee. Defendants' counsel requested an instruction that, unless the jury found each of the plaintiffs had paid some consideration for the promise, there could be no recovery. We are apprised of no such law. It was of no moment to defendants, and does not signify legally, whether one or all the plaintiffs furnished the consideration for the undertaking to pay the money. There was a consideration, for Collier accepted 62½ per cent. of his demand against the mercantile company, and plaintiffs did everything they agreed toward enabling defendants to get the merchandise released from the bankruptcy proceedings. Much is said about the supposed error of holding Tyrell responsible on Campbell's promise when the two were not partners, but this matter was submitted by the court in an instruction which we think contained nothing to justify a reversal. The promise was given before Campbell and Tyrell had acquired possession of the goods, and necessarily so, because the arrangement with plaintiffs was a prerequisite to defendants' getting possession; but this circumstance is seized as proof defendants were not partners at the time Campbell promised, and it is contended he could not bind Tyrell by his (Campbell's) promise. The court advised

the jury, in substance, this: That if they found Campbell agreed to pay the sum in controversy, and when he did so he and Tyrell had agreed to buy the stock of goods at the bankruptcy sale and enter into a partnership for buying and selling them, and had further agreed with each other to make such arrangements as might be necessary to get the goods out of the bankruptcy court, such facts would make them copartners in the transaction with plaintiffs and render Tyrell liable on Campbell's agreement. Without saying, as the instruction does, the facts predicated made defendants partners as to plaintiffs, we do say those facts rendered both liable on Campbell's promise. The entire testimony, including Campbell's own, is that he and Tyrell were copartners to purchase the goods and had made an arrangement with all the creditors of the mercantile company, and among them Collier, in order to get the stock out of the hands of the bankruptcy officials. There can be no doubt, on defendants' own statements, their arrangement had advanced far enough to justify Campbell in agreeing in behalf of both to pay this money if it was necessary to do so in order to get the goods. The circumstances range the case squarely under the authority of *Lucas v. Cole*, 57 Mo. 143, wherein two parties intending a partnership were held liable for purchases made by one and on facts like we have here. Neither that decision nor this one violates the general rule that joint liability begins, generally speaking, with the formation of the contract of partnership. Story, Partnership (7th Ed.) § 146.

Another contention much insisted on is that, unless plaintiffs had paid the note to the bank, they could not recover in the present action. The testimony of every witness who knew anything about the circumstances under which the check for \$75 was deposited with the mercantile company, or in its safe, goes to prove it was left there by plaintiffs for no other purpose than to be paid on the note to the bank. Collier attended to the matter, but by the arrangement among the plaintiffs they were all interested in the proceeds of the check and in having them applied on the note. In other words, the check for money, which by agreement with the two Callahans was to be paid on the note in consideration of the sureties having released their indemnity, was either left in trust with the mercantile company, or put in its safe, and it makes no difference, for the purposes of this case, which was done, for, as between the company and these plaintiffs, the check belonged to the latter. This being true, we can see no reason why the note must have been paid before plaintiffs would be entitled to recover what belongs to them. Even Powell said the money was to be refunded whenever called for to pay the note, which clearly meant it was to be refunded prior

to payment, and not on condition payment already had occurred.

This appeal has been briefed on a scale out of proportion to the amount involved, and we do not care to pursue various technical points raised by appellants.

The judgment is just, and, as no reversible error is found, will be affirmed. All concur.

#### LYNCH v. SOUTHERN MINING, LAND & LUMBER CO. et al.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907. On Rehearing, Feb. 23, 1909. Further Rehearing Denied March 23, 1909.)

#### CORPORATIONS (§ 335\*)—OFFICERS—LIABILITY FOR FRAUD.

A mining corporation issued bonds secured by a deed of trust upon land it did not own, and the manager of the corporation issued a prospectus falsely representing the value of the properties. A director of the corporation voted for the resolution authorizing the mortgage and bonds, and the president of the corporation executed the mortgage in reliance on the statements of the manager. A person relying on the mortgage and prospectus purchased bonds, and subsequently the corporation became insolvent. Held, that the director and president were responsible for bringing about the condition of affairs by which the person buying the bonds was defrauded, authorizing a judgment against them for the loss sustained.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 335.\*]

Appeal from St. Louis Circuit Court; O'Neil Ryan, Judge.

Action by Robert J. Lynch against the Southern Mining, Land & Lumber Company and others. From a judgment for plaintiff, defendants G. A. Wurdeman and another appeal. Affirmed.

Jos. S. Laurie and Arthur Digby, for appellants. A. J. Haverstick and Jno. M. Dickson, for respondent.

BLAND, P. J. The defendant corporation was organized on December 19, 1902, with a capital stock of \$500,000, of which \$150,000 was preferred stock entitled to a perpetual dividend of 6 per cent. per annum. The par value of the shares of stock was \$1, and was subscribed for as follows:

#### Common Stock.

Names and Residence.	Number of Shares.
Herman D. Brandt, St. Louis, Mo.....	150,000
William C. Young, St. Louis, Mo.....	100,000
Henry W. Femmer, St. Louis, Mo.....	100,000

#### Preferred Stock.

Names and Residence.	Number of Shares.
Herman D. Brandt, St. Louis, Mo.....	50,000
William C. Young, St. Louis, Mo.....	50,000
Henry W. Femmer, St. Louis, Mo.....	50,000

The first board of directors consisted of the three incorporators. Young and Femmer surrendered their stock to the corporation and resigned as directors in 1903. Defendant Wurdeman and T. F. Sneed were elected to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



take their places, and Wurdeman was elected president of the company. The articles of incorporation stated that the capital stock had been "actually paid up in lawful money of the United States, and is in the custody of the persons hereinafter named as the first board of directors." The truth is, not a dollar in money was actually paid. The company was organized for the purpose of exploiting some mining properties in Jefferson county, Mo., upon which Thomas F. Sneed had mining leases, all of which, and some others acquired thereafter, were for the term of 10 years, and conveyed only the right to dig and search for minerals thereon, and were to become void unless an amount of money, ranging from \$300 to \$600 per annum, was expended by the lessees in searching for minerals. The rents to be paid were stipulated royalties on the minerals actually mined from the property. To each of these leases was superadded an option to purchase the land itself at a stipulated price, at any time during the life of the lease. These leases covered between four and five hundred acres of land, and were assigned to the corporation by T. F. Sneed in December, 1903. The corporation, through Sneed, expended some money in prospecting for minerals on some of the properties, but never took out any mineral. The properties were finally abandoned, and the corporation became defunct. After acquiring the leases and after the company was incorporated, Sneed promoted the incorporation of the St. Louis, Hillsboro & Southern Railroad Company, an electric road to run from Carondelet to Hillsboro, in Jefferson county. This line of road, as projected, was to run through some of the leased land and near the remainder. Defendant Wurdeman was Sneed's attorney in procuring the incorporation of the railroad company, and loaned him \$50 toward paying the incorporation tax, and also brought several condemnation suits, at his request, to acquire the right of way for the road. Wurdeman testified his services rendered Sneed in behalf of the railroad company were worth \$1,000, but he had never been paid. The railroad was never built. In the spring of 1903, Sneed and defendant Brandt went to New York City for the purpose of raising money on the stocks and bonds of the mining company, but failed in their endeavor. Sneed wrote Wurdeman the following letter:

"St. Louis, Mo. Jan. 9, 1903.

"Mr. G. A. Wurdeman, Webster Groves, Mo.

"Dear Sir: I herewith inclose you a certificate for \$10,000 of the full paid non-assessable stock in the above mining company. This is the one I spoke to you about several weeks ago and that I was going to place you in the board of directors. I also send you prospectus.

"I am about to arrange now to have 100,000 of this stock sold in New York. If you should happen to find anybody that wants

to invest in some of the preferred stock it would be appreciated, as I want to dispose of \$50,000 worth of that here.

"If Brandt gets back in time we in all probability will call on you some time Sunday afternoon to talk things over; in that case one of us will telephone you in advance.

"Yours truly, T. F. Sneed.

"You need not laugh, this will be worth par before the end of 1904."

The letter and certificate of stock for \$10,000 were received by Wurdeman, and he kept the stock. On July 17, 1903, Wurdeman, as president of defendant company, and in the name and for the company, signed, and on August 12th acknowledged, a deed of trust purporting to convey to the Missouri Trust Company of St. Louis, as trustee, 480 acres of land in Jefferson county (land upon which Sneed had procured mining leases), to secure the payment of \$300,000 worth of bonds of the Southern Mining, Land & Lumber Company, to be executed on the execution and delivery of the mortgage to the Missouri Trust Company. The mortgage purports to be executed in pursuance of a resolution passed by the unanimous vote of the board of directors, which resolution is copied in the mortgage. After the execution of the mortgage, Wurdeman also signed 3,000 30-year bonds of the denomination of \$100 each, secured by the mortgage, which he delivered to Sneed.

On August 5, 1903, the Southern Mining Company and the Missouri Trust Company entered into the following agreement:

"The Southern Mining, Land and Lumber Company, incorporated under the laws of Missouri, and the Missouri Trust Company of St. Louis, agree and covenant to and with each other in the manner following, that is to say:

"Said Southern Mining, Land and Lumber Company is desirous to procure from said Trust Company the certificates of said Trust Company, due in thirty years, for the aggregate sum of Fifty Thousand Dollars (\$50,000) to be issued in denominations of One Hundred Dollars each, and agrees to deposit with said Trust Company, for each certificate, at the time or before the same is issued, the sum of Forty-one Dollars and Twenty Cents (\$41.20) and to pay said Trust Company presently for entering into this contract, the sum of Two Hundred and Fifty Dollars (\$250).

"Said Trust Company agrees to accept said trust deposits, and to accumulate each of the same in thirty years, from Forty-one Dollars and Twenty Cents to the full amount of One Hundred Dollars. Any accumulation of said sum in excess of One Hundred Dollars, to be the sole property of said Trust Company; and in consideration of the premises, said Trust Company warrants the said sum shall be so accumulated by it as to amount to one hundred dollars in thirty years from the date

the deposit is made with it of Forty-one Dollars and Twenty Cents, and said Trust Company is not to charge for its services hereunder any other or extra fee than as aforesaid.

"Said Trust Company agrees, when and as such deposits are made, to issue its certificate therefor, substantially in the following form: \* \* \*

The bonus of \$250 was paid the trust company, and a few deposits of \$41.20 were made, for which the trust company issued certificates as it had agreed to do.

T. F. Sneed was the manager of the Southern Mining Company, and, after the execution of the mortgage and the signing of the bonds, issued a prospectus in which the following false statements were made:

#### "Lead and Zinc.

"One zinc mine will turn out five tons per day, at a cost of \$8 per ton; or \$40 per day. This ore will sell for \$40 per ton, or \$200 per day, leaving a net profit of \$160 per day.

"One lead mine will turn out two tons of lead ore per day at a cost of \$8 per ton, or \$16 per day. This ore will sell for \$50 per ton, or \$100 per day, leaving a net profit of \$84 per day.

"One lead mine will turn out four tons per day at a cost of \$8 per ton, or \$32 per day. At \$50 per ton will leave a net profit of \$168 per day.

#### "Ochre and Kaolin.

"One ochre bed will turn out sixteen carloads of ochre per day at a cost of \$30 per car, or \$480 per day. This ochre sells for \$60 per car, or \$960 per day, which leaves a net profit of \$480 per day.

"One kaolin bed will turn out one hundred and fifty tons per day at a cost of \$7 per ton, or \$1050 per day. This kaolin sells for \$10 per ton, or \$1500, per day, leaving a net profit of \$450.90 per day.

#### "Lead and Zinc Mining.

"The lead and zinc mines can be operated profitably with the present railroad facilities, and much cheaper when the electric railroad is completed.

"The foregoing estimate does not include all the mines owned and controlled by this company.

"The company owns and controls long term leases on over five hundred acres of productive mineral and clay lands in Jefferson county, Missouri, right in the heart of the richest mining district in the world, and has control of several tracts of mineral lands in Washington and Franklin counties. The company proposes to operate these mines on modern methods, guided by men of practical experience, which is the surest guarantee of success in any business.

"The company is now operating one zinc mine that runs sixteen tons of jack to the one hundred tons of rock taken out. This

ore-bearing rock is now eight feet in thickness and is still increasing in depth. Several shafts have been sunk on these tracts of land from ten to ninety feet in depth, and the very best grade of zinc has been found in every shaft, and developing has been done by individuals. No attempt has been made to sell bonds until the properties have been thoroughly developed, and the company does not hesitate now in placing the bonds on the market, fully realizing the value of these mines.

#### "Ore in Sight.

"The Southern Mining, Land and Lumber Company is now operating other zinc mines, and has removed tons of dine ore and ore-bearing rock out on the banks, and thousands of tons of it are in sight. It is the purpose of this company to operate all of its properties just as soon as proper machinery can be obtained and placed on the grounds, which will materially facilitate mining and handling the large bodies of ore, thereby placing its products at the lowest possible cost in the bonds ready for market."

After getting out this prospectus, Sneed employed two soliciting agents and sent them out with it to sell the bonds. By means of the prospectus, and by making such verbal representations as Sneed authorized them to make in respect to the mining property, the solicitors succeeded in selling bonds to plaintiffs. Sneed deposited funds with the trust company to pay the first interest coupons to fall due on the bonds sold to plaintiffs, and they were paid. When the second coupons became due, plaintiffs presented them to the Missouri Trust Company for payment, and on learning that no funds had been deposited for the purpose, that Sneed had gone to California, that the mining company had become defunct, leaving no assets, and that the mortgage covered lands never owned by the company, joined as plaintiffs in this suit, which is in equity to recover of defendants what they paid for their bonds.

The petition charged, in substance, that plaintiffs were induced to purchase the bonds by the false and fraudulent representations and statements of the defendants, which representations and statements they believed to be true, and, relying on them as true, purchased the bonds. The specific acts of fraud alleged in the petition are, in substance, first, that the representation in the articles of incorporation, that the capital stock of the company was fully paid up, was false and untrue; second, that the representation made in the mortgage, that the mining company owned the 480 acres of land therein described, was false and untrue; that, in truth and in fact, the company owned no land whatsoever in Jefferson county; and, third, that the representations and statements contained in the prospectus above set out were false and untrue.

The answer of the mining company was a general denial; that of defendants Wurde-

man. Brandt, and Young was also a general denial, and the following: "And, for further answer, defendants say that at the time the several plaintiffs herein acquired the said bonds, to wit, the \_\_\_\_\_ day of \_\_\_\_\_, 1903, they became stockholders in the defendant company, and as such had access to the books of the said company and were thereby charged with notice of its affairs. Notwithstanding this knowledge they have unnecessarily delayed the bringing of this action to the prejudice of these defendants. Wherefore defendants pray to be dismissed with their costs."

The other defendants were not served with process, and did not appear to the action. The issues were found against plaintiffs and in favor of defendant Young, and for the plaintiffs against the mining company, Wurdeman, and Brandt. Only Wurdeman and Brandt appealed.

No complaint is made by appellants that the judgment is excessive, or that each plaintiff is not entitled to recover what was awarded to him by the judgment, if plaintiffs are entitled to recover at all under the pleadings and the evidence. The evidence shows the mining company at no time owned any of the land described in the mortgage. Brandt was a director of the company from its organization, and he and T. F. Sneed were the most active members of the board of directors. Brandt and Wurdeman both denied they had anything to do with getting out the prospectus, or knew it had been gotten out until after this suit was begun, and did not know Sneed was selling any of the bonds until after they were sold. Wurdeman testified he never attended a meeting of the board of directors of the mining company; that all he knew about the property of the company was that Sneed, at some time, had shown him some leases which he glanced at; that he had never examined the stock book or the minute book, and did not know whether or not the board of directors passed a resolution to execute the mortgage and issue the \$300,000 in bonds; that he did not read the mortgage when he signed it, only "glanced at it," nor did he read it when he acknowledged it; that T. F. Sneed brought it to him to sign, and he "glanced at it," and signed it at Sneed's request, and then signed the 3,000 bonds and delivered them to Sneed; that it was contemplated the bonds should not be sold until the St. Louis, Hillsboro & Southern Railroad Company was completed. Witness also testified he did not know whether the \$300,000 of capital stock was paid up or not, and had never inquired; that he believed what Sneed told him. On this character of evidence, it is claimed by Wurdeman's counsel that he was

guilty of nothing more than mere negligence, and plaintiffs cannot recover against him on account of such negligence, for the reason the petition counts on actual and active fraud. The evidence shows Wurdeman had no hand in getting out the prospectus; that he knew nothing of its existence until the mischief complained of was done. There is nothing in the record to show that he, at any time, entertained a formed purpose to defraud any one by the sale of the bonds, yet, as president of the mining company, he executed the mortgage purporting to convey land to which he is chargeable with knowledge the company had no title. This was a false representation, though made unwittingly, and, as the mortgage was recorded, was made to the public at large. Judge Wurdeman cannot be exonerated from liability on the ground that he merely "glanced" at the instrument and did not read it. By relying implicitly on the statement of Sneed and failing to read the mortgage, and failing to ascertain whether or not the company owned the lands therein described, Wurdeman, as president of the company, was guilty of a legal, though unintentional, wrong. As president of the company, he made a solemn representation and statement that the company owned lands to which it had no title, and this representation, according to the evidence, was one of the inducements which influenced plaintiffs to purchase the bonds; and I think, upon clear principles of equity and justice, Wurdeman should be held responsible to plaintiffs for the loss which his act in part contributed to bring about. Defendant Brandt, as the evidence shows, was present and voted for the resolution of the board of directors, authorizing the execution of the mortgage and the bonds, and, like Wurdeman, is responsible for bringing about a condition of affairs by which plaintiffs were defrauded. The judgment is affirmed. All concur.

#### On Rehearing.

PER CURIAM. The foregoing opinion, prepared by the former Presiding Judge of this court, was concurred in by the other Judges and filed as the judgment of the court. A rehearing was granted, the appeal again heard, and we have perused the record anew without finding a reason to pronounce a different judgment. Incidents and circumstances are in evidence, but not related in the opinion, which tend to show appellants are liable on the grounds charged in the petition and support the finding below, which cannot be reversed or an affirmance put in a manner that would be more lenient to appellants. We adopt the result of the opinion.

The judgment is affirmed. All concur.

## SMITH v. YOUNG.

(St. Louis Court of Appeals. Missouri. March 9, 1909.)

1. GUARDIAN AND WARD (§ 8\*) — APPOINTMENT OF GUARDIAN—JURISDICTION—DOMICILE.

The jurisdiction of the probate court to appoint a guardian or curator for a minor is fixed by the domicile of the minor.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 13-18; Dec. Dig. § 8.\*]

2. DOMICILE (§ 5\*)—MINORS.

As a general proposition, the domicile of the parents is the domicile of the minor, except where both parents are dead and the child domiciled with the grandparents, who are next of kin and stand in loco parentis to the minor, in which case the domicile of the grandparents is the domicile of the minor.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 27-32; Dec. Dig. § 5.\*]

3. GUARDIAN AND WARD (§ 4\*)—NATURAL GUARDIAN.

Rev. St. 1899, § 3478 (Ann. St. 1906, p. 1991), declaring that the father while living, and after his death, or when there shall be no lawful father, then the mother, shall be the natural guardian and curator of the child, is merely declaratory of the common law.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 4, 5; Dec. Dig. § 4.\*]

4. DOMICILE (§ 5\*)—CHILDREN—REMOVAL OF CHILD.

In general, the removal of a child from one county to another by its guardian does not operate to change the domicile of the child, and this though both parents are dead, and the guardian is the child's grandfather.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 27-32; Dec. Dig. § 5.\*]

5. DOMICILE (§ 5\*)—MINORS.

Though the guardian of a minor, under 14 years of age may not change the domicile of the child by the mere fact of removing it to another county, if the guardian is the child's grandfather and next of kin, standing in loco parentis, his removal of the child from one county to another operates as a change of the child's domicile.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 27-32; Dec. Dig. § 5.\*]

6. PARENT AND CHILD (§ 2\*)—SURRENDER OF CUSTODY.

The father's agreement, on surrendering an infant child to its grandparents, that they should retain the child ever afterwards, was revocable at the will of the father, and would be revoked as a matter of law by the death of the father in case the mother survived.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. § 2.\*]

7. DOMICILE (§ 5\*)—CHILDREN—PERSONS IN LOCO PARENTIS.

On the death of the child's mother, it was given to its grandparents by the father, who died without revoking his promise that the grandparents should retain the custody of the child free from the father's interference. Held that on the father's death the grandparents, by operation of law, assumed the position of parent to the child, so that their domicile became the child's domicile.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 27-32; Dec. Dig. § 5.\*]

8. GUARDIAN AND WARD (§ 8\*) — APPOINTMENT—PROBATE COURT—JURISDICTION.

Probate courts are possessed of original and exclusive jurisdiction with respect to the mat-

ter of guardians and curators of minors; and their right to proceed, resting in part in pais, must be found as a fact by the court when proceeding to exercise its jurisdiction.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 13-18; Dec. Dig. § 8.\*]

9. JUDGMENT (§ 498\*)—COLLATERAL ATTACK—DETERMINATION AS TO JURISDICTION.

Where the jurisdiction of the probate court to appoint a curator for a minor depended on the minor's domicile, the determination of such fact in favor of the court's jurisdiction was conclusive, and could not be collaterally attacked.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 939; Dec. Dig. § 498.\*]

10. JUDGMENT (§ 521\*) — APPOINTMENT OF GUARDIAN—COLLATERAL ATTACK.

A proceeding in the probate court of L. county to set aside the judgment of that court given at a prior term, by which defendant was appointed curator of a minor under 14, alleged to have been domiciled in P. county, where plaintiff was appointed, constituted a collateral attack on the judgment of the probate court of L. county.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 964; Dec. Dig. § 521.\*]

11. JUDGMENT (§ 336\*)—DIRECT ATTACK.

A motion to vacate a judgment, filed at the term at which the judgment was entered, is a proper form of direct attack on the judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 336.\*]

12. JUDGMENT (§ 489\*) — VOID JUDGMENT—COLLATERAL ATTACK.

Where the record on its face shows that the court was not possessed of jurisdiction in the cause, the judgment is void, and may be assailed in a collateral proceeding, or set aside at a future term of the same court, but if it is fair on its face, it may not be assailed at all in a collateral proceeding, nor in any manner at a subsequent term other than a direct proceeding to that end.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 924, 925; Dec. Dig. § 489.\*]

13. GUARDIAN AND WARD (§ 13\*)—APPOINTMENT OF GUARDIAN—INVALIDITY—APPEAL.

An appeal will not lie from a probate order appointing a guardian, but will lie from the refusal of the court to vacate such appointment.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 50; Dec. Dig. § 13.\*]

14. JUDGMENT (§ 334\*)—WRIT OF ERROR CORAM NOBIS.

The writ of error coram nobis will lie only in cases where the court has proceeded on the assumption that a fact existed which was material to its right to proceed, when the fact did not exist at all, and has no application to a case where the court was required to and did find the fact conferring jurisdiction from extrinsic evidence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 638-646; Dec. Dig. § 334.\*]

15. AUDITA QUERELA (§ 1\*)—NATURE OF PROCEEDING.

The common-law writ of audita querela is one by which a proceeding may be had by a judgment defendant in the court wherein the record lies to review the judgment on account of some matter occurring after judgment amounting to a discharge of its obligation.

[Ed. Note.—For other cases, see Audita Querela, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 642, 643.]

Appeal from Circuit Court, Lincoln County; Jas. D. Barnett, Judge.

Proceeding by Charles H. Smith against William R. Young. From a circuit court judgment denying plaintiff relief on appeal from an order of the probate court refusing to vacate the appointment of defendant, Young, as curator of the estate of Etta Louise Jackson, a minor, plaintiff appeals. Affirmed.

This proceeding originated in the probate court of Lincoln county. It is sought thereby to have that court vacate and set aside its judgment given at a prior term, by which the defendant, Young, was appointed curator of the estate of Etta Louise Jackson, a minor under the age of 14 years. Plaintiff was appointed curator of the minor's estate by the probate court of Pike county, where it is claimed the minor was domiciled. Besides praying the probate court of Lincoln county to set aside the appointment of the defendant curator, Young, he prays that Young, the Lincoln county curator, be required to transfer the minor's estate to the plaintiff for administration, under the supervision of the probate court of Pike county. The probate court having denied the relief prayed for, plaintiff appealed to the circuit court. Upon a hearing in that court, the prayer of the plaintiff's petition was denied and the judgment of the probate court affirmed. By the refusal of certain instructions asked on the part of the plaintiff, it appears the circuit court declared the proceeding to be a collateral attack upon the judgment of the probate court of Lincoln county. From this judgment, plaintiff prosecutes an appeal to this court.

Under our statute, the probate court of the county in which the minor is domiciled is possessed of the power to appoint guardians and curators. Plaintiff insists that the minor, Etta Louise Jackson, was domiciled, after the death of her father, in the county of Pike, and that therefore he is the rightful curator of her estate, for the reason the probate court of Pike county alone was possessed of jurisdiction to make such appointment. On the other hand, the defendant insists that the minor's surviving parent, William A. Jackson, was a resident of the city of Troy, in Lincoln county, at the time of his death, and, even though the child was living at the time with its grandfather in Pike county, the probate court of Lincoln county was possessed of the power to appoint him curator, for the reason the domicile of the parent is the domicile of the child. On this question, much testimony was introduced in the circuit court. It seems that plaintiff insisted, first, that if the minor's father, William A. Jackson, had acquired a residence in Missouri at all, it was at Louisiana, in Pike county; and, second, that, whether he had acquired a residence or not, his child, Etta Louise, was actually domiciled in that county

with its grandfather after the death of her father, and that therefore the jurisdiction of the probate court of Pike county rightfully attached. On the other hand, the defendant insisted that the city of Troy, in Lincoln county, was the domicile of William A. Jackson, and that the child, Etta Louise, was residing temporarily only with her grandfather in Pike county. From a careful perusal of all the testimony in the record, it appears to greatly preponderate in favor of the proposition that William A. Jackson had acquired a residence and was domiciled at Troy, in Lincoln county. However this may be, it appears the child was at the time, and had been for a considerable period theretofore, residing with her grandfather at Louisiana, under a promise given by her father to the grandparents that he would never remove her therefrom. The mother of the little child had departed this life some time before her husband, and upon the death of William A. Jackson, the father, the grandfather, Charles H. Smith, with whom the child resided at Louisiana, was next of kin.

To recite the facts in the record, it appears that William A. Jackson, a most excellent citizen, had been reared at or near Troy, in Lincoln county. He was elected to and had served in the office of county clerk for that county. About that time he married Miss Smith, daughter of Charles H. Smith, of Pike county. After his marriage, he and his wife boarded for a time with the family of his friend, Senator Avery, of Troy. He then purchased a home in Troy, and kept house for a considerable period. His term of office as county clerk having expired, he removed to Texas and followed the vocation of traveling salesman. After this, he removed to England, Ark., and embarked in business. While residing at England, Ark., the little girl, Etta Louise, was born. Mrs. Jackson died the following day. Mr. Jackson brought her remains to her former home at Louisiana, Mo., where she was buried. It seems Mrs. Jackson had requested, before her death, that her child should be given into the keeping of her friend, Mrs. Avery, of Troy. Immediately after the burial of his wife, Mr. Jackson communicated her request to Senator Avery with respect to the child. Mrs. Avery's health was very poor at the time, and it seems one of her children was also ill. Senator Avery informed Mr. Jackson of these facts, and suggested that under the circumstances it would be impossible for Mrs. Avery to take upon herself the care of the infant. Mr. Jackson then called upon Mr. Charles H. Smith, his wife's father, at Louisiana, in Pike county, and Mrs. Smith, who was the stepmother of his wife, and requested them to take the child. They acceded to the request upon the condition that Mr. Jackson should not reclaim the child from them in future years. It was explained that they would necessarily become

greatly attached to the child, and they did not want to invite the pain and anguish which would result from severing these ties. It appears to be uncontroverted that Mr. Jackson agreed the child should always remain with them. The little girl was delivered into their keeping under this agreement when she was only three days old, and has remained there ever since. Having thus arranged a good home for his baby, Mr. Jackson returned to England, Ark. About this time his health began to fail, and within a very few months thereafter he disposed of his business in Arkansas and returned to Missouri. It appears he spent a considerable portion of his time at Troy, and also at Louisiana. While at Troy, he resided at the home of Mr. James A. Jackson, a cousin, who was engaged in the banking business there. While at Louisiana, in Pike county, he made his home at the residence of his wife's father, Mr. Charles H. Smith. The testimony on the part of the plaintiff tended to prove that Mr. Jackson talked about making his future home at Louisiana and residing with his wife's father in order to enjoy the society of his little girl. The testimony discloses that he thought somewhat of buying a home there, in which they should all reside; and, further, he considered the advisability of building an addition to the home of his wife's father and buying an interest in a drug store in the city of Louisiana. He did none of these things, however. It appears he was at Mr. Smith's residence a considerable portion of the time at different periods, and called it home, at least when talking to members of the Smith family. On the part of defendant, numerous witnesses, residents of Troy, gave testimony to the effect that Mr. Jackson had claimed that city to be his home, and that he contemplated going into business and spending the remainder of his life there. It appears he endeavored to purchase an interest in a drug store at Troy, and that he also proposed to a Mr. Hall to go into partnership with him in the stock business, saying that he preferred to engage in something which would give him outdoor exercise because of the poor condition of his health. It appears, also, that during the summer he attended two state conventions of the Democratic party, one at St. Joseph and one at Joplin, either as a delegate or as proxy for a delegate from Lincoln county. It seems that he desired to vote in the Democratic primary in Lincoln county, and upon some one saying he was not a qualified voter, for the reason he had not resided in the state a year next preceding the general election, he advised with Senator Avery as to his right to vote, and insisted that Troy, in Lincoln county, was his home. He purchased no property, however, and entered into no business. While in Troy during that summer, he took his meals at the hotel, and roomed at the home

of his cousin, Mr. James A. Jackson, which place he called home.

From these and other facts and circumstances in proof, it appears the evidence greatly preponderates in favor of the proposition that Mr. Jackson had acquired a domicile at Troy, and that such was his domicile at the time of his death. Being in poor health, about the middle of the summer, Mr. Jackson took a trip to visit his sister, Mrs. Hutt, in Texas. To those persons with whom he conversed while in Texas, he spoke of Troy, Mo., as his home. He died in August, 1904, while visiting his sister, Mrs. Hutt, at Terrell, Tex. It appears he had no children other than Etta Louise, and we gather from the testimony that his cousin, James A. Jackson, was his nearest living relative in Missouri. Prior to his death he executed a will, by the provisions of which he bequeathed his estate, consisting of some personal property and about \$5,000 in life insurance policies, then in the possession of his cousin, James A. Jackson, in the bank at Troy, to his little daughter. To this will he annexed a codicil, a few days before his death, by which he nominated his cousin, James A. Jackson, of Troy, executor of his estate and guardian of his daughter, Etta Louise. In this he also expressed a desire that his little daughter should continue to reside with her grandparents unless her guardian might otherwise direct, and that Mrs. Smith should receive ample compensation from his estate for the care and keep of the child. On September 6, 1904, James A. Jackson was appointed curator of the estate of the minor, Etta Louise, by the probate court of Lincoln county. The record of this appointment recites that Etta Louise Jackson, a minor 17 months of age, was then domiciled in Lincoln county, and that her father and mother were both dead. Mr. Jackson duly qualified as curator, and took charge of the minor's estate. On October 5th he was also appointed by the same court as executor of the last will of William A. Jackson, and duly qualified as such. It appears that on October 27, 1904, James A. Jackson, filed his statement in writing in the probate court of Lincoln county, by which he relinquished his right to act as testamentary guardian of the person of the minor, and that her grandfather, Charles H. Smith, was appointed by that court guardian of her person instead. Mr. Smith qualified and entered upon the discharge of his duties as such guardian. Afterwards it appears from the evidence that James A. Jackson, the curator, departed this life in the early part of the year 1905, and that on the 23d day of February, 1905, such fact having been made to appear in the probate court of Lincoln county, that court appointed the defendant, William R. Young, public administrator and ex-officio public guardian to take charge of such estate as curator in his

official capacity, etc. The defendant curator, Young, was discharging his duties as curator under order of the probate court of Lincoln county at the time of the institution of this suit. It appears that thereafter, on August 11, 1905, the probate court of Pike county appointed Dr. Parks L. Kabler as curator of the estate for the minor, Etta Louise Jackson, and that he immediately qualified as such. Almost a year thereafter, having been thus appointed by the probate court of Pike county, Dr. Kabler instituted this proceeding in the probate court of Lincoln county on July 24, 1906, by filing his petition reciting the facts pertaining to his appointment, and, further, that the minor was then and had been at all times domiciled in Pike county. The petition prays the probate court of Lincoln county to vacate and set aside its order and judgment appointing the defendant, William R. Young, curator of the estate of the minor. The jurisdiction of the probate court of Lincoln county is challenged thereby on the grounds that the minor was at all times, after the death of her father, domiciled in Pike county. The prayer of the petition is to the effect that the appointment of defendant Young be vacated and set aside, and the minor's estate be given into the possession of the plaintiff, and transferred for administration under his appointment in the probate court of Pike county. Since the appeal was perfected to this court, the death of Dr. Parks L. Kabler, the original plaintiff, has been suggested, and the cause now stands revived in the name of Charles H. Smith, the grandfather, who it appears was duly appointed on December 30, 1907, by the probate court of Pike county as curator of the minor's estate, and afterwards duly qualified as such.

Charles Martin and Lon O. Hocker, for appellant. Avery & Woolfolk, for respondent.

NORTONI, J. (after stating the facts as above). The jurisdiction of the probate court to appoint a guardian or curator for a minor is fixed by the domicile of the minor. *Lacy v. Williams*, 27 Mo. 280; *De Jarnett v. Harper*, 45 Mo. App. 415. And, as a general proposition, the domicile of the parents is the domicile of the minor. *Marheineke v. Grothaus*, 72 Mo. 204; *Garrison v. Lyle*, 38 Mo. App. 558. The domicile of the minor is a matter in pais, which the probate court must find as a fact to support its jurisdiction in proceedings of this character. *Cox v. Boyce*, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276. It seems, however, that the domicile of the parent may not necessarily always be the domicile of the minor for the purpose of determining the jurisdiction of the probate court, as in cases where both parents are dead and the child is domiciled with the grandparents, who are next of kin and stand in loco parentis to the minor, or

where the parents have wholly abandoned the child to the grandparents. In the case of *Cox v. Boyce*, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483, it appears the mother of the minor was dead, and the father had surrendered and committed the child to its grandfather, in Lincoln county. In that case, both father and grandfather resided in the same county. After the child was committed to his care, the grandfather was duly appointed curator of its estate by the probate court of Lincoln county. The grandfather afterwards removed to Howell county. He was never discharged as guardian and curator by the probate court of Lincoln county. After having resided several years in Howell county, the grandfather applied to and was appointed by the probate court of Howell county as guardian of the child and curator of its estate, although the child's father continued to reside in Lincoln county. In a collateral attack upon the judgment of the Howell county probate court, by which the grandfather was appointed curator, the Supreme Court expressed the opinion that, in view of the fact that the child's father had surrendered the minor to her grandfather, the latter stood in loco parentis toward her, and therefore his residence in Howell county was the domicile of the child, and thus served to confer jurisdiction upon the probate court of that county to appoint a curator. Our statute, Rev. St. 1899 § 3478 (Ann. St. 1906, p. 1991), declares the father, while living, and after his death, or when there shall be no lawful father, then the mother, to be the natural guardian and curator of their child. This is merely declaratory of the rule which obtained at common law. See 1 Blackstone's Com. 435; 2 Kent's Com. 220; *Lamar v. Micou*, 114 U. S. 218, 5 Sup. Ct. 857, 29 L. Ed. 94. As a general proposition, the removal of the child from one county to another by its guardian does not operate to change the domicile of the child; and this is true even though both parents are dead and the guardian be the grandfather of the child. Such was the case of *Marheineke v. Grothaus*, 72 Mo. 204. Upon a cursory reading, the doctrine of this case seems to conflict with the opinion expressed in *Cox v. Boyce*, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483. By a more careful scrutiny, the cases may be distinguished by the fact that in *Cox v. Boyce*, it appeared the father had surrendered the child to the grandfather, and, we conclude, abandoned it. The child's mother being dead, and the father having abandoned or surrendered it to the grandparent, the grandparent, of course, as next of kin, stood in loco parentis, and hence his removal of the child to Howell county was the removal of its domicile, for the reason that he, although its guardian, having assumed the position of parent, determined the domicile of the child. Now, in *Marheineke v. Grothaus*, 72 Mo. 204, it appears the domicile of the child was fixed by the late domicile

of its parents, who died in St. Louis. The grandfather, who was a resident of Franklin county, qualified as guardian and curator under an appointment of the probate court of St. Louis county. Having thus qualified, the grandfather removed the child, not as parent but as guardian, to his home in Franklin county. The guardian grandfather afterwards died, and the probate court of Franklin county appointed Koehring in his stead, while the probate court of St. Louis county appointed William Kelso as his successor. A contest having arisen between these curators appointed by the different courts, concerning certain property of the child, the Supreme Court upheld the jurisdiction of the probate court of St. Louis county upon the theory that the domicile of the minor was within the jurisdiction of that court at the time of the original appointment, and the domicile of the ward could not be changed by the act of the guardian in removing her to another county prior to attaining the age of 14 years, at which age the ward might choose for herself. The proposition of law to be deduced from the case is that the guardian may not change the domicile of a child under 14 years of age by the mere fact of removing it to another county. On the other hand, the proposition of law to be deduced from *Cox v. Boyce* is to the effect that if the guardian, who is the grandfather and next of kin, standing in loco parentis to the minor, removes the child from one county to another, it will operate to change the domicile of the child, even though he be its guardian as well as grandparent. Identically as in the case of a natural parent. The doctrine of this case is in accord with that which now quite generally obtains in the American courts to the effect that, after the death of both parents, infants who take up their residence at the home of the grandparents and next of kin, in another state or county, will acquire such grandparents' domicile. See *Lamar v. Micou*, 114 U. S. 218, 5 Sup. Ct. 857, 29 L. Ed. 94; *In re Benton*, 92 Iowa, 202, 60 N. W. 614, 54 Am. St. Rep. 546; *Schouler's Domestic Relations* (5th Ed.) § 303; 15 Amer. & Eng. Ency. Law (2d Ed.) 35.

Now, it appears that the minor in the present instance was placed in the home of her grandfather in Pike county when only three days of age, and this, too, under an agreement on the part of the father that the grandparents should retain her ever after. It is true this agreement was not obligatory on the part of the father as a matter of law. It was revocable at will on his part. In *re Scarritt*, 76 Mo. 565, 43 Am. Rep. 768. And there is no doubt, had the father died and the mother survived, the death of the father would have operated as a revocation of the promise, and, ipso facto, transferred the domicile of the infant to that of the surviving mother. *De Jarnett v. Harper*, 45 Mo. App. 415. The mother of the infant having departed this life prior to the arrangement, the death of

the father certainly would not operate to revoke it, so as to change the domicile of the child from that of the grandfather, who was next of kin. Our statute, Rev. St. 1899, § 3482 (Ann. St. 1906, p. 1992), authorizes the surviving parent to appoint a guardian for the minor by his last will, and we apprehend that William A. Jackson might have changed the domicile of the child from the home of its grandparents in Pike county to his former home in Troy by directions to the testamentary guardian to that effect in the will. He did not see fit to do this, however. On the contrary, he expressed his wishes to the effect that the child should continue to reside with its grandparents, unless the testamentary guardian, James A. Jackson, directed otherwise. James A. Jackson appeared in the probate court and declined to accept the trust of guardianship, and no change was made. It appeared the grandparents were most excellent people, and that it was conducive to the best interests of the child that it should remain in their custody. Now, under the circumstances of this case, the father having died without revoking his promise as to the future of the child, and it residing at the time with the grandparents, next of kin, we believe that, instantly upon the death of the father, the grandfather assumed the position of parent, and that his domicile became the domicile of the child. *Lamar v. Micou*, 114 U. S. 218, 5 Sup. Ct. 857, 29 L. Ed. 94; *In re Benton*, 92 Iowa, 202, 60 N. W. 614, 54 Am. St. Rep. 546; *Schouler's Domestic Relations* (5th Ed.) § 303; 15 Amer. & Eng. Ency. Law (2d Ed.) 35.

Now, assuming that the minor, Etta Louise Jackson, was domiciled in Pike instead of Lincoln county, and that the Pike county probate court was possessed of jurisdiction to appoint a curator for her estate in the first instance, the important question for decision in the case is: Can the judgment and order of the probate court of Lincoln county, by which the defendant Young was appointed, be vacated and set aside at a subsequent term in this proceeding? By the refusal of instructions, the circuit court indicated this to be a collateral attack upon the judgment of the probate court of Lincoln county. We concur in that view. The probate courts of this state are no longer treated as inferior tribunals with limited jurisdiction; but, on the contrary, they are regarded as courts exercising a general jurisdiction upon the matters committed to them by the statutes. Probate courts are possessed of original and exclusive jurisdiction with respect to the matter of guardians and curators of minors. In part, their right to proceed rests in pais, and must be found and determined as a matter of fact by the court when proceeding to exercise its jurisdiction on a given subject. The legislative authority has conferred power upon the probate court of a county in which a minor is domiciled to appoint a guardian for its person or a curator for its



estate. The rule is that, where the fact upon which the power of the court to act depends is referred by the lawmakers to be determined by the court, a determination of that fact by such court is conclusive, and cannot be questioned in other than a direct proceeding to that end. And this is true even though it found the fact erroneously. Such fact is *res adjudicata*. *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Hadley v. Bernero*, 103 Mo. App. 549, 78 S. W. 64; *Cox v. Boyce*, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483; *Grignon's Lessee v. Astor*, 2 How. 319, 11 L. Ed. 283; *Seafeld v. Bohne*, 169 Mo. 537, 69 S. W. 1051; 24 Ency. Pl. & Pr. 709, 717, 718, and 766. It appears that several cases have been entertained in this state in the form here presented. The question was not considered, however, in any of them as to whether or not the attack was direct or collateral. In *Lacy v. Williams*, 27 Mo. 280, the probate court of Polk county had appointed a curator for the estate of three minors who resided in Cedar county. Their mother came into the probate court of Polk county and moved the court to vacate its order to that effect, for the reason the court was without jurisdiction. The judgment was vacated in accordance therewith. It does not appear whether this motion was filed at the term at which the order of appointment was made, or at a subsequent term. Of course, a motion to vacate a judgment filed at the term at which the judgment was entered is one form of a direct attack on the judgment, and is always proper. 15 Ency. Pl. & Pr. 263. We must presume that *Lacy v. Williams* was a case of that character; that is, nothing appearing to the contrary in the opinion, the presumption is that the motion was filed at the same term at which the appointment of the curator was made, and it was therefore very properly sustained. This case has been referred to frequently as a direct attack upon a judgment. *Johnson v. Beazley*, and *Cox v. Boyce*, *supra*. However, the learned judge in *Lacy v. Williams* declared the judgment of the probate court void, and said it was subject to collateral attack.

From these remarks, it is to be presumed that there was something on the record of the probate court which showed that judgment to have been void. It may have been the record of the court in Polk county evincing that the minors resided in Cedar county. In such circumstances, of course, it appeared on the face of the record that the probate court of Polk county was without jurisdiction. Where the record shows on its face the court was not possessed of jurisdiction in the cause, the judgment is obviously void. In such cases, it may be assailed in a collateral proceeding or set aside at a future term by the same court. See *Pettus v. McClennahan*, 52 Ala. 55; *Kohn v. Haas*, 95 Ala. 478, 12 South. 577; 17 Amer. & Eng. Ency. Law, (2d Ed.) 825, 826; 15 Ency. Pl. & Pr. 237.

However, where the judgment is fair on its face, as in this case, it may not be thus assailed at all in a collateral proceeding (*Cox v. Boyce*, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483; *Hadley v. Bernero*, 103 Mo. App. 549, 78 S. W. 64; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Van Fleet, Col. Attacks*, § 3); nor in any manner at a subsequent term other than a direct proceeding to that end (15 Ency. Pl. & Pr. 216). In *De Jarnett v. Harper*, 45 Mo. App. 415, the probate court of Johnson county appointed a guardian for a minor whose domicile was in Bates county. The probate court of Bates county, in which the minor's domicile was as a matter of law, appointed another person guardian. The Bates county guardian instituted a proceeding in the probate court of Johnson county at a subsequent term, like the proceeding here, seeking to set aside the judgment and order of the probate court of Johnson county appointing the guardian. On appeal to the circuit court of Johnson county, the judgment of the Johnson county probate court was set aside as prayed, and, upon an appeal to the Kansas City Court of Appeals, that judgment was affirmed. The question as to whether or not the proceeding was a direct or collateral attack upon the judgment of the probate court of Johnson county was not considered. See, also, the case of *Garrison v. Lyle*, 38 Mo. App. 558, by the same court to the same effect. These cases may be pointed to as precedents for this proceeding. We are persuaded, however, that, had the question of direct or collateral attack been brought forward, the Court of Appeals would have declared the proceeding in each of those cases a collateral attack and given judgment accordingly. It is to be observed that, in the opinion in the *De Jarnett Case*, Judge Gill speaks of the judgment of the Johnson county probate court as void, and treats it accordingly. The court was no doubt misled by the remarks in *Lacy v. Williams* as to the judgment in that case being void and therefore subject to collateral attack. Now, it is highly important that proceedings had in the probate courts should be protected by the law, as titles and vast interests which frequently flow therefrom may be overthrown and destroyed if such judgments are not accorded the usual sanctity which obtains with respect to the judgments of courts of superior jurisdiction. Suppose, for instance, that this minor had owned valuable real estate in Lincoln county, and that it had been sold under an order of the probate court, as authorized by statute. In such circumstances, should parties be permitted to come into that court years after, and, by introducing new proof on a question of fact, overthrow the jurisdiction, vacate the prior proceedings, and destroy a title which emanates from a judgment fair on its face? We are inclined to the contrary. The courts should assume and maintain a firm position in such

cases, and countenance no proceeding which would tend to establish a precedent for such an unwonted invasion of the rights of property. Any proceeding authorized by law to vacate a judgment of a court of competent jurisdiction is a direct attack thereon (Van Fleet, Col. Attacks, § 2), while a collateral attack is an attempt to avoid, defeat, vacate, or deny the force and effect of a judgment in some manner not authorized by law (Van Fleet, Col. Attacks, § 3).

It is urged that as no appeal was allowable from the judgment of the probate court of Lincoln county appointing the defendant, Young, as curator, and that as this mode of direct attack was thereby precluded, the court should not treat the present proceeding as a collateral attack. It is said the question ought not be regarded as *res adjudicata*, as no appeal from the order of appointment could be had. To the proposition that an appeal is not allowable in such cases, *Looney v. Browning*, 112 Mo. App. 195, 86 S. W. 564, is cited. The case cited is certainly a sound exposition of the law. However that may be, it does not preclude the right of appeal from the refusal of the probate court to set aside its judgment. The statutes on appeal, touching the matter of guardians and curators, are in *pari materia* with like statutes touching appeals from probate courts under the administration law. Although an appeal will not lie from the order of a probate court appointing an administrator, it has been several times decided that an appeal will lie from the refusal of that court to revoke such appointment. See *Donaldson v. Lewis*, 7 Mo. App. 403; *Owens v. Link*, 48 Mo. App. 534. By analogy of reasoning, it is entirely clear that an appeal is allowable from a judgment of a probate court refusing to vacate the appointment of a curator. This opinion was expressed by this court heretofore. See *Looney v. Browning*, 112 Mo. App. 195, 199, 86 S. W. 564. Had the proper parties moved the probate court of Lincoln county to vacate its order appointing defendant, Young, during the term at which the appointment was made, and their motion been refused, an appeal would lie from that judgment. Indeed, the very case we are now considering is one where the appeal is prosecuted from a refusal of the probate court to set aside an order appointing a curator. The important fact, however, which precludes this proceeding from being a direct attack on that judgment is that it was filed at a subsequent term of the court instead of at the term at which the judgment was given. However, the judgment of a court of general jurisdiction is conclusive on all matters within the adjudication unless vacated by a competent proceeding. An appeal, of course, when authorized, is competent as a direct attack on the judgment. If no appeal is authorized, then it is presumed that the lawmakers intended none should be had, and that the judgment

should remain conclusive unless vacated by a direct attack in another competent form of proceeding. *Grignon's Lessee v. Astor*, 2 How. 319, 340, 11 L. Ed. 283.

Besides, an appeal prosecuted in due course and the several motions authorized by law and practice during the term, the only modes of direct attack at a subsequent term on a prior judgment for which authority may be found in our books in any manner resembling the proceeding in this instance, are writs of error *coram nobis*, the common-law *audita querela*, a motion to vacate for fraud in the act of procuring the judgment, and the bill to review on equitable grounds. The facts in judgment do not bring the matter within the scope of any of these remedies. The writ *coram nobis* will lie only in cases where the court has proceeded upon the assumption that a fact existed which was material to its right to proceed when the fact did not exist at all. See *Cross v. Gould*, 131 Mo. App. 585, 110 S. W. 672. No such case is presented here, because, instead of it being a proceeding where the court assumed the fact conferring jurisdiction existed, the matter of the minor's domicile was one in pais which it must find from extrinsic facts in evidence. Therefore, instead of it being a case reviewable by *coram nobis* at a subsequent term of the court in which the record lies, it is a case where the court, in the exercise of its jurisdiction, pronounced an erroneous conclusion of law on the facts, and is reviewable only as such. *Grignon's Lessee v. Astor*, 2 How. 319, 340, 11 L. Ed. 283; *Hadley v. Bernero*, 103 Mo. App. 549, 557, 558, 78 S. W. 64. Now the common-law writ of *audita querela* is one by which a proceeding may be had by a judgment defendant, in the court wherein the record lies, to review the judgment on account of some matter occurring after judgment amounting to a discharge of its obligation. *Bouvier's Law Dictionary*; *Fischer v. Johnson*, 74 Mo. App. 64. It is obvious the facts in judgment do not present a case within the scope of that ancient writ. There is no suggestion that the judgment was concocted or procured in fraud, and therefore the modern motion authorized by law to vacate such judgment at a subsequent term does not obtain. *Downing v. Still*, 43 Mo. 309; *Cross v. Gould*, 131 Mo. App. 585, 110 S. W. 672. Aside from the question as to whether or not the probate court is possessed of sufficient equity jurisdiction to entertain a bill in equity to review and vacate a judgment, it is sufficient to say that none of the grounds conferring equity jurisdiction, such as fraud, accident, mistake, or surprise, are present or relied upon here.

We therefore conclude that this proceeding, instituted at a subsequent term of the probate court, seeking to vacate and set aside its prior judgment, is not authorized by law, and is therefore a collateral, as distinguished from a direct, attack thereon.

Entertaining this view, the judgment will be affirmed. It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

### BUTZ v. MURCH BROS. CONST. CO.

(St. Louis Court of Appeals. Missouri. March 23, 1909. Rehearing Denied April 6, 1909.)

#### 1. APPEAL AND ERROR (§ 1097\*)—DECISION ON FORMER APPEAL—LAW OF THE CASE.

The determination of a question on a former appeal becomes the law of the case, and it is not open to further consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.\*]

#### 2. MASTER AND SERVANT (§ 121\*)—INJURIES TO SERVANT—SAFE PLACE IN WHICH TO WORK.

An ordinance requiring a person in charge of the construction of a building to cover the girders above the second floor so as to sufficiently protect workmen from falling through does not impose the duty of keeping the temporary flooring in place, though workmen are engaged in the upper part of the building, where to do so would interfere with the work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 121.\*]

#### 3. MASTER AND SERVANT (§ 208\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where a temporary floor is not removed until necessary to lay the permanent floor, and then only so much of the girders left uncovered as necessary, the company engaged in the construction of the building is not guilty of negligence, and is not answerable to an employé who falls through the girders, though he would not have fallen if the entire temporary floor had been left in place, for his injury is due to a usual hazard of his employment, of which he assumes the risk.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 208.\*]

#### 4. TRIAL (§ 296\*)—INSTRUCTIONS—CURE OF ONE INSTRUCTION BY ANOTHER.

Error in an instruction for plaintiff is not obviated by a correct conflicting instruction for defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 296.\*]

#### 5. MASTER AND SERVANT (§ 293\*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

An instruction in an action for injury to an employé engaged in the construction of a building that if defendant did not have the girders of the floor covered with suitable material, as the building progressed, "and at said time" so as to sufficiently protect plaintiff from falling through such girders, it would be liable, was erroneous as ignoring evidence that it was necessary to remove the temporary floor to lay the permanent one, in which event defendant would not be liable, and cannot be held to have allowed a recovery only on the contingency that the girders were not covered as the work progressed.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.\*]

#### 6. MASTER AND SERVANT (§ 293\*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

Even if the instruction should be construed to allow a recovery only on the contingency that the girders were not covered as the work progressed, it was then erroneous as submitting

an immaterial issue, for plaintiff would not be entitled to recover by reason of the girders not being floored as the work progressed, or unless the lack of flooring caused his fall.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.\*]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by Eugene W. Butz against the Murch Bros. Construction Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

See, also, 199 Mo. 279, 97 S. W. 895.

Seneca N. & S. C. Taylor and Percy Werner, for appellant. A. R. Taylor, for respondent.

GOODE, J. Plaintiff was hurt in a fall from the third story of a building which was being erected in the city of St. Louis. He was working on the building in the employ of defendant company, which was putting up the house. A temporary floor had been laid in the third story, and was there during the progress of the work; but the day before the accident, and on said day, part of this flooring—the evidence is conflicting as to how much—had been taken up to permit the permanent floor to be laid. Many expert witnesses said all the temporary floor had to be removed before the permanent one could be put down, and said, too, it was usual to do this in erecting a building. The tendency of the testimony for defendant company was to acquit it of negligence in respect of removing the floor first laid, and which had been put down for the protection of workmen in obedience to an ordinance of the city of St. Louis requiring any person having charge of the construction of a building to cover the joists or girders above the second floor with scaffold boards or other suitable material as the building progressed, so as to sufficiently protect workmen in the upper stories from falling through the joists or girders and the workmen below from the fall of loose material. Plaintiff was injured in this manner: A ladder ascended from the second floor to the third, and another ladder from the latter floor to the roof, and both were used by the employés engaged on the building. Part of the temporary floor had been left about the spot where the lower ladder emerged into the third story and the upper one arose toward the roof, forming a platform there, but the testimony varies regarding its dimensions, some witnesses saying it was 16 or 19 feet by 32 feet; whereas, others said it was much smaller. The floor was 50 feet wide by 80 feet long, and a portion of it had been stripped, but where stripped some loose boards lay across the girders in places. The girders which ran lengthwise of the building were 15 feet apart, and these were intersected by crosswise girders some 7 feet apart. They were from 12 to 14 inches wide, and might

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

be walked on by a workman, though there would be danger of a misstep or a slip. Plaintiff was at work upon the platform near the foot of the ladder leading to the roof, and his foreman was at work on the roof. The latter called to plaintiff to hand up some boards 12 feet long for use on the roof. Just where these boards were to be had is uncertain. Witnesses for defendant said a pile of boards lay near the foot of the ladder, and plaintiff would not have to step off the platform to reach them; but, according to plaintiff, he was compelled to go about the room, and gather them from where they had been left here and there. He had handed up two of the planks, and was walking, he said, toward the platform with a third, when he stepped on a plank 5 inches wide which lay across the girders, and this plank gave way with him—he did not say whether by breaking, slipping, or turning—letting him fall to the basement below, to his serious injury. He alleges defendant violated the city ordinance in failing to have the girders and joists sufficiently covered with boards while the work progressed to prevent him and the other workmen from falling through. In defense, the answer says the extent to which the joists and girders were covered and uncovered was plainly open, visible, and obvious to plaintiff, and he assumed the risk of injury in working and walking about the floor; further, that his injuries were sustained as the direct result of his own want of ordinary care in going on and walking over the uncovered portion of the floor. Plaintiff had judgment in the court below, and defendant appealed.

One of the principal assignments of error is the refusal of the court to direct a verdict for defendant. The argument for this assignment assumes the evidence shows, beyond inference to the contrary, defendant had kept the third floor covered with boards, so as to protect workmen, until it became necessary to remove the boards in order to lay the permanent floor. We agree with counsel for defendant the ordinance must not be construed to impose on defendant the duty of keeping the temporary flooring in place at all hazards as long as workmen were engaged in the upper part of the building, even though to do so would interfere with or prevent the laying of the permanent floor. The court below instructed on this theory, but submitted as an issue of fact the question of whether it had become necessary, before plaintiff fell, to uncover the girders to the extent the jury might find had been done. It is further argued a verdict for defendant should have been ordered because the evidence shows the uncovering of the floor had nothing to do with plaintiff's injury, since his own testimony proved he fell in consequence of stepping on a board only 5 inches wide, which lay loose across the girders, when he might have walked on the stanch 12-inch girders themselves, thereby

either doing a negligent act or assuming the risk of using an insecure footing in preference to a secure one. These questions were determined by the Supreme Court on a former appeal of the case, and we cannot, with propriety, discuss them on their merits. Counsel for defendant say the Supreme Court did not have the full facts of the case before it, and hence the decision it gave is not controlling. What is especially emphasized at this point is the supposed absence from the former record of proof that plaintiff might have walked on the broad joists and girders, instead of the precarious board. The Supreme Court did not say much about this circumstance in its opinion, but we know it was in proof, for in describing the condition of the building the opinion says: "The main girders for the floor, of yellow pine, 12 by 14 inches, running lengthways of the building, and from 14 to 16 feet apart, with cross-girders or joists about 7 feet apart, were in place without any covering over them or the spaces between them, except that here and there were some loose boards, at distances varying from 8 to 20 feet apart on the joists or girders and across the spaces between them." The opinion next relates the manner in which plaintiff was hurt, as we have related it. It thus appears the record the Supreme Court passed on contained the evidence to which defendant now attaches so much importance. At the first trial the court ordered a verdict for defendant, whereupon plaintiff took a nonsuit with leave, and afterwards appealed; the question for decision being whether or not the case should have been submitted to the jury and the ruling was it should have been. That judgment is the law of the case. *Butz v. Const. Co.*, 190 Mo. 279, 97 S. W. 895.

In the first instruction for plaintiff the jury were thus advised: If they found plaintiff was on June 9, 1903, in the service of defendant on the third floor of the building mentioned in the evidence, and defendant was in charge of the construction of the building, and it was part of plaintiff's duty to work on said floor, and further found "defendant did not have the joists or girders of said floor covered with scaffold boards or other suitable material, as the building progressed, and at said time, so as to sufficiently protect the workmen, including plaintiff, from falling through such joists or girders," and further found plaintiff, while at work on the third floor of said building on said day, fell through the joists or girders and was thereby injured, and that defendant's failure to have the third floor covered with scaffold boards or other suitable material so as to protect workmen, including plaintiff, from falling through the joists or girders, directly contributed to cause him to fall and sustain the injuries mentioned in the evidence, and plaintiff was exercising ordinary care at the time, then he was entitled to recover. We have italicised words which render the in-

struction erroneous. The effect of the charge was to permit a verdict for plaintiff if the jury found defendant did not have the floor covered on June 9th, the date of the accident, so as to protect workmen, including plaintiff, from falling. This part of the instruction ignored the evidence tending to prove it previously had become necessary to take up the temporary floor so as to lay the permanent one, which had been done in part the day before, and in part on the day of the accident. The same error appears, but less conspicuously, in the second instruction for plaintiff. The just interpretation of the ordinance adopted by the court in instruction No. 7 given for defendant allowed removal of the temporary floor whenever, and to the extent it became necessary to remove it in order that defendant might go on with the construction of the building. It was not the intention of the municipal authorities to require the safeguard to be maintained when to do so would stop construction work. If defendant did not remove the temporary floor until this had to be done to lay the permanent one, and then only left so much of the girders uncovered as was necessary, it was guilty of no negligence, and is not answerable for the accident to plaintiff, even though he would not have fallen if the entire covering had been left in place. In that event his injury was due to the usual hazards of his employment, of which he assumed the risk. *Blundell v. Manufacturing Co.*, 189 Mo. 552, 88 S. W. 103. Under the judgment given on the prior appeal, whether the temporary covering had been removed too soon or over too large a space was a question of fact. But the effect of the instruction we are reviewing was to lay defendant responsible if it did not keep the floor covered so as to protect the workmen, including plaintiff, down to the day of the accident, regardless of testimony that this could not be done without hindering work on the permanent floor. The instruction for defendant which presented the question in the proper light was in conflict with the one for plaintiff, and the two submitted the case on contrary conditions of recovery. On this account the judgment must be reversed. *Sheperd v. Transit Co.*, 189 Mo. 362, 87 S. W. 1007; *Flori v. St. Louis*, 69 Mo. 341, 33 Am. Rep. 504; *Flynn v. Bridge Co.*, 42 Mo. App. 529. Plaintiff's counsel insists his instruction allowed a recovery only on the contingency of the jury finding the joists were not covered as the work progressed. But this view leaves out of sight the words we have italicised, which indubitably point to the day of the accident as the time when the girders must be covered to exempt defendant from liability. Moreover, if we accept the argument for plaintiff, the cause was submitted on an immaterial issue; for plaintiff would not be entitled, of course, to a verdict by reason of the girders not being covered as the work progressed or unless the

lack of a covering caused him to fall. The case comes down to these issues: Whether they were covered sufficiently when he fell. If they were not, had defendant carelessly uncovered them? Did plaintiff negligently contribute to his injury?

The judgment is reversed, and the cause remanded. All concur.

GOOD SAMARITAN HOSPITAL et al. v. MISSISSIPPI VALLEY TRUST CO. et al.  
(St. Louis Court of Appeals. Missouri. March 23, 1909.)

1. WILLS (§ 734\*)—"INTEREST" ON LEGACIES.

Interest as used in connection with the payment of legacies is the compensation allowed by law for the deprivation of a legacy beyond the period when it is payable under the will or by statute.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847-1872; Dec. Dig. § 734.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3706-3709; vol. 8, p. 7691.]

2. WILLS (§ 734\*)—INTEREST ON LEGACIES—CONTEST OF WILL.

A legacy does not carry interest, pending a contest of the will, after one year from the original grant of letters testamentary, for, as the law, and not an act of the executor, suspends payment of the legacy until the determination of the contest, the administrator pendente lite appointed pursuant to Rev. St. 1899, § 13 (Ann. St. 1906, p. 342), having no power in the meantime to pay it over, the legacy itself does not fall due until capable of being paid by the executor.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1858, 1859; Dec. Dig. § 734.\*]

3. WILLS (§ 734\*)—INTEREST ON LEGACIES—DEMAND—NECESSITY.

No demand is necessary to cause interest to run on a legacy when due and payable.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1863; Dec. Dig. § 734.\*]

Appeal from St. Louis Circuit Court; Robt. M. Foster, Judge.

Motion in the probate court by the Good Samaritan Hospital and others, legatees under the will of Frederick Heman, deceased, to be allowed interest on their respective legacies after one year from the original grant of letters testamentary. The probate court allowed the interest and an appeal was taken to the circuit court by Minnie Hartman and others, where the interest was again allowed, and Minnie Hartman and such others appeal. Reversed and remanded, with directions.

T. J. Rowe, for appellant Hartman. Hickman P. Rodgers, for appellant Heman. Geo. W. Lubke and Geo. W. Lubke, Jr., for respondents.

REYNOLDS, P. J. By his will Frederick Heman, among other bequests, bequeathed to the Good Samaritan Hospital and the pastor of Zion's German Lutheran Church \$1,000 each, and to the German Protestant Orphans' Home \$3,000. The will was admitted to probate by the probate court

of the city of St. Louis, and letters testamentary granted thereon to the Mississippi Valley Trust Company January 21, 1902. On February 25, 1902, the executor named filed proof of publication of the letters. On March 22, 1902, John C. Heman, one of the sons of the testator, instituted an action in the circuit court of the city of St. Louis against his brothers and sisters and their descendants, as also against all the other legatees and devisees named in the will, or their representatives, including the representatives of the three institutions above named, contesting the will. On the 21st of April, 1902, notice of the contest was filed in the probate court, and the authority of the Mississippi Valley Trust Company, as executor, suspended; an administrator of the estate pendente lite being appointed. The trial of the contest over the will resulted in a verdict and judgment sustaining it, from which judgment the contestor, sole plaintiff in the contest, perfected an appeal to the Supreme Court, and on May 24, 1905, that court affirmed the judgment sustaining the will. A transcript of the judgment of the circuit court sustaining the will on its affirmance by the Supreme Court was filed in the clerk's office of the probate court July 22, 1905, and thereafter the Mississippi Valley Trust Company, executor, again took on the administration of the estate by virtue of its appointment under the will, and on the 26th day of January, 1906, paid to the pastor in charge of Zion's German Lutheran Church the legacy of \$1,000, to the representatives of the Good Samaritan Hospital the legacy of \$1,000, and to the German Protestant Orphans' Home the legacy of \$3,000. In accepting payment, however, these legatees in and by their receipts reserved the right to demand whatever interest they might be or were legally entitled to upon said legacies by reason of payment having been withheld from them.

The estate of the testator consisted of both real and personal property, and the value of the residue, after paying all specific legacies, satisfying all the specific legacies, satisfying all claims of creditors, devisees and other legatees, as well as all costs and expenses attendant upon the administration and settlement of the estate, was more than sufficient to pay the principal of these general legacies, as also to pay interest accruing on them between the expiration of one year after taking out of the letters and the date on which the principal of the legacies was paid. Upon the refusal of the executor to pay this interest, the three legatees named on March 8, 1906, filed in the probate court of the city of St. Louis a motion which, after reciting the fact of the payment of the principal of the legacies, averred that they have received no interest thereon, had received the payment of the principal of the legacies under protest and under an agreement that by the receipt of the principal they should not be prejudiced or affected in their claim to interest, and for ground of motion stated, first,

that their legacies became due and payable in one year after the original grant of the letters executory upon the estate of the testator, to wit, the 21st day of January, 1902, and that they had not contested the will of the testator; second, that they are entitled to interest on their several legacies from January 21, 1903, that being one year after the letters had been granted at 6 per cent per annum. They accordingly moved the probate court to enter up an order against the Mississippi Valley Trust Company as executor to pay them interest upon their several legacies at that rate from that date until date of payment. The motion was heard in the probate court on an agreed statement of facts, which, setting out the will in full, set out the other matters hereinbefore noted. The probate court sustained the motion and ordered payment of the interest on these legacies at the rate of 6 per cent per annum from January 21, 1903. An appeal from this action of the probate court was taken to the circuit court by Minnie Hartman, a daughter of Frederick Heman, deceased, who was a son of the testator, and by Lottie Heman, executrix of the estate of John Henry Heman, deceased, also a son of Frederick Heman, deceased. The trial in the circuit court resulted in like action as that had in the probate court; that is to say, the interest claimed from a year after the date of the original grant of letters was allowed in favor of the legatees named. From this action of the circuit court, after a motion for new trial had been duly filed and overruled and exception saved, the two Hartman ladies prosecuted an appeal to this court.

The able counsel for appellants and for respondents have filed briefs and arguments in support of their respective contentions which display an unusual amount of research on their part. As the report of the case in setting out these briefs will undoubtedly cover the points made and the authorities cited in support of them, we do not consider it necessary to burden this opinion with a repetition of them any further than necessary in announcing our conclusion, more particularly as a great many of them, in fact the most important ones, are cited and commented on in a very exhaustive opinion by Judge Gill in the case of *In re Estate of Catron*, 82 Mo. App. 416. Our statute provides: "If the validity of a will be contested \* \* \* letters of administration shall be granted during the time of such contest \* \* \* to some other person, who shall take charge of the property and administer the same according to law, under the direction of the court, and account for and pay and deliver all the money and property of the estate to the executor or regular administrator when qualified to act." This is now section 13 of the Revised Statutes of 1899 (Ann. St. 1906, p. 342), and it has been the law of our state for a great many years. It is the only section covering the powers and duties of an administrator

pendente lite. Construing this section, our Supreme Court held in *Union Trust Co. v. Soderer*, 171 Mo. 675, loc. cit. 679, 72 S. W. 499, that it is not contemplated that this administrator pendente lite, as he is called, will wind up and distribute the estate, but that he will collect it and hold it and make disbursements, if the court so orders.

In *Lamb, Adm'r. v. Helm, Adm'r.*, 56 Mo. 420, loc. cit. 433, it is said that administrators appointed pending a contest over the will occupy more nearly the position of a receiver who acts under the direction of the court than they do the position of a general administrator. Other cases not necessary to cite have followed in construing this provision of the statute in this way. In *State ex rel. v. Guinotte*, 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787, it was held that under this section, if the validity of a will is contested, the administrator so appointed should hold while the contest lasted, and that the contest lasted while the appeal from the circuit court in such case was pending, and that no bond was required to give the appeal the effect of a supersedeas. That case was decided by a divided court; one of the dissenting judges being Judge Valliant, who afterwards, however, in *Carroll v. Reid*, 158 Mo. 319, loc. cit. 321, 322, 59 S. W. 69, said that, while he had not concurred in that opinion, yet as it was concurred in by the majority of the court it is now the law on that subject. In the *Guinotte Case*, Judge Sherwood, who delivered the majority opinion of the court, said at page 525 of 156 Mo., at page 285 of 57 S. W. (50 L. R. A. 787): "That, in consequence of the result of the will contest not having been officially certified down from the circuit court to the probate court, it was impossible for the latter to acquire any jurisdiction over the matter appealed from, to wit, the validity of the will, and that, even had the result been properly certified, still the probate court could not have acquired jurisdiction by reason of the fact that the appeal taken from the circuit court carried the matter appealed from to this court (the Supreme Court), and the appeal itself, from the very nature and necessity of the case, carried its own supersedeas along with it." Hence pending the contest no one had authority to pay these legacies. Even the court could not have ordered payment. "Interest," says Judge Woerner in 2 *American Law of Administration* (2d Ed.) \*p. 1004, "in the sense in which the word is used in connection with the payment of legacies, is the compensation allowed by law for the deprivation of a legacy or distributive share beyond the period when it is payable according to the terms of a will or statute." He states as a general rule that interest is payable in some states at the end of a year after the death of the testator; in other states, as in this state, at the end of a year after the taking out of letters of administration. Rice in his work on *American Probate Law and Practice* (Ed. 1894) § 5,

pp. 373-377, after stating that the general rule is that legacies will carry interest after the expiration of a year from the death of the testator, states that the object of this limitation was only to allow a specified time to the executor or administrator, after taking out letters, to settle the estate, and it was not designed to affect or modify the rights of the parties interested in claims or legacies, and he states the general doctrine to be that interest on a legacy only begins to accrue when the legacy itself is payable; that until the legacy is payable there is no fund to produce interest.

In *State ex rel. Nichols v. Adams*, 71 Mo. 620, it is held that while the suit contesting the will was undetermined the executrix could not carry into effect the provisions of the will, and could not therefore be in default to the legatees; that interest should be allowed only from the time the suit to contest the will was dismissed, and not from the date of the first annual settlement. Practically this decision settles this case, as our attention has been called to no case holding to the contrary. It is said, however, of this case, that this rule is not applicable in the case at bar because in the *Adams Case* the claimant was the only one who had instituted the proceeding to contest the validity of the will, and that, therefore, that case, rightly interpreted, means that a different rule prevails in favor of those who have not only not contested the will, but have defended it. It is distinctly held, however, in this *Adams Case* that the fact that plaintiff in it had contested the will was no estoppel against her making the claim; that that was not one of the cases of estoppel in regard to wills mentioned in the books. This same case (*State ex rel. Nichols v. Adams*) was relied on in the case of *In re Estate of Catron*, 82 Mo. App. 416, and the doctrine recognized as the law of this state that the mere fact of the contesting of the will was not an estoppel one way or the other. This case of *In re Estate of Catron* is now relied on as authority for the claimants in the case at bar. The opinion in the case by Judge Gill is well worth careful reading, not only because he has examined and cited many of the cases relied on by counsel in the case at bar, but because of its accurate treatment of the subject. But the *Catron Case* has no application to the present case in so far as settling the right to this interest; it being interest claimed as due on a general legacy, bequeathing not the interest, as in the *Catron Case*, but a fixed and definite sum. In the *Catron Case* a certain sum was set apart and directed to be loaned by the trustee, in whose hands it was to be placed, that trustee to loan out the sum and pay over the interest to the legatee, hence the legacy itself, so far as the real beneficiary was concerned, was the interest. The testator established a fund, the interest on which was to go to the support of a daughter. Hence in *Cat-*

ron's Case it was held that the contest over the will tying up the estate so that the fund could not be deposited with the trustee, but placing it in the hands of the administrator pendente lite, the interest bequeathed could not be paid through or by the trustee, but that, when the estate was released by the end of the contest, the estate owed to the beneficiary that which was the very corpus of the bequest, namely, the interest, and that the legatee to whom this interest was due could not be deprived of it by the contest over the will, could not be deprived of the very thing bequeathed to her, namely, interest on the fund. Therefore the court, when the fund was released by the determination of the contest, holding that the beneficiary was entitled to receive this income from the fund, and that the fund having remained in the custody of the administrator pendente lite until the determination of the contest over the will, held that the estate was responsible to the beneficiary for this interest on it from the time that she would have received that interest if no contest had existed. That is a very different case from the case at bar. Here the bequest was direct to the legatees, of a specific sum, a general legacy of a certain sum, not by way of an annuity, but the bequest of a sum certain and fixed. It was not payable either under the will or the law until the contest over it was determined. The first probate was set aside in law by the contest as completely as if never made. The legal probate only occurred when the will was established by the decree, and, until established, no legacies were payable. As the law and not the act of the parties suspended the payment of the legacy until the determination of the contest over the will, the administrator pendente lite, of course, having no power in the meantime to pay it over, the legacy itself did not fall due in contemplation of law until it was capable of being paid out by the executor under the will, and no interest is due the legatees under circumstances of this kind

pending the contest. It makes no difference that these appellants, representatives of some of the residuary legatees, were not responsible for tying up the legacy, they not having contested, as urged by their counsel, for the respondents were also of those who sustained the will. The real point, as we see it, is that the testator charged his estate with a certain sum in favor of these three legatees, and there is no reason why the estate should be charged with a larger sum under the name of interest than that designated by the testator merely because the law, not the act of the executor of the will, suspended and forbade payment. All the authorities hold that no demand is necessary to cause interest to run when a legacy falls due and becomes payable. Therefore, in this case, as there are some six months intervening between the date when the certification of the action of the Supreme Court and of the circuit court in upholding the will was lodged with the probate court and the date of payment by the executor of these legacies, and as no reason is shown why they were not paid immediately upon the certification of the establishment of the will, all the interest that these parties are entitled to on their legacies, and we think they are entitled to that, is interest from the date of the certification of the establishment of the will to the date on which the legacy was actually paid over by the executor, according to the agreed statement of facts in the case; that is to say, interest at the rate of 6 per cent. from July 22, 1905, to January 26, 1906, the last date being the date of payment of the principal, together with interest on that amount of interest from January 26, 1906, to the date it shall be paid them at the rate of 6 per cent. per annum.

The case is reversed and remanded, with directions to enter up an order accordingly in favor of these respondents.

GOODE, J., concurs. NORTONI, J., not sitting.



## MILLER v. RANKIN.

(Kansas City Court of Appeals. Missouri.  
March 29, 1909.)

## 1. FRAUD (§ 13\*)—FALSE REPRESENTATION—KNOWLEDGE OF FALSITY.

Where one makes a representation when he has no knowledge whether it is true or false, he affirms its truth and is guilty of fraud if it be false.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 4, 5; Dec. Dig. § 13.\*]

## 2. FRAUD (§ 13\*)—FALSE REPRESENTATION—KNOWLEDGE OF FALSITY.

A person may be liable as for fraud for false representations, if he had good reason to believe the representations to be false, though he did not know to a certainty that they were false.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 4, 5; Dec. Dig. § 13.\*]

Appeal from Circuit Court, Atchison County; Wm. C. Ellison, Judge.

Action by Harry E. Miller against D. Clark Rankin. From an order granting plaintiff a new trial after verdict for defendant, defendant appeals. Affirmed.

W. R. Littell, L. J. Miles, J. W. Stokes, and J. P. Lewis, for appellant. Frank W. Stafford, Hunt & Bailey, and B. R. Martin, for respondent.

ELLISON, J. This is an action for fraud and deceit in the sale of hogs by defendant to plaintiff, which it is charged were infected with a fatal disease known as hog cholera. The verdict was for the defendant in the trial court. A motion for new trial was sustained, and defendant has appealed from that order.

The motion was sustained on the ground, stated by the court, that error had been committed in the omission of the words "or had good reason to believe" at the place where they appear in brackets in the following instructions given at the request of defendant:

"(2) Unless the jury believes from the evidence that, at the time of the sale of the hogs to plaintiff, they were diseased with cholera or some other disease and that defendant knew [or had good reason to believe] that they were diseased, and, knowing such fact, falsely represented to the plaintiff that they were sound and healthy, or free from disease, with a view to induce the plaintiff to buy such hogs, and unless the jury further believe that the plaintiff relied upon such representations, believing them to be true, and, so relying and believing, and not relying upon his own judgment, bought said hogs, and suffered loss on account of such disease, then in such case plaintiff cannot recover.

"(3) Before the plaintiff can recover on account of fraud and deceit charged as to soundness of hogs, as charged in his petition, he must show that the hogs purchased from defendant were, at the time of the purchase,

afflicted with a disease known as hog cholera, or some other infectious or contagious or other disease; that defendant had knowledge of such fact [or had good reason to believe it]; that the defendant, intending to deceive and defraud the plaintiff, falsely represented to plaintiff that such hogs were free from hog cholera, or other infectious or contagious or other disease; that plaintiff, not knowing that such hogs were diseased, relied upon such false representations, believing them to be true, and, so relying upon them, purchased said hog; and that he afterwards suffered damages from death of such hogs and other hogs because of such disease."

Plaintiff asked and obtained an instruction which contained those words, substantially; and the question is, did the court err in concluding that they should have been inserted in defendant's instructions which we have set out? The decisions on the subject of whether one shall not only have reason to believe, but shall actually know, his representations are false, appear on the surface to be out of harmony. This is mostly in appearance, and not reality. If one makes a representation when he has no knowledge whether it is true or false, he affirms its truth, and is guilty of fraud if it be false. This is well understood law. If he makes a representation and believes it to be false, he is really guiltier in degree than if he merely knew nothing about it. So if he makes a representation as a fact, when he has good reason to believe it is false, he cannot know it to be true, and in that instance, also, he is guilty of a fraud in asserting it was a fact. It is true that there might be a condition where a party would make a false representation which he believed to be true, and yet good reasons existed, though unknown to him, why he should not have believed it. In such case he would not be guilty of fraud in this sort of action. But if, when he makes the representation, there is then in his mind good reason to believe it is false, he is undoubtedly guilty of a fraud.

The latter condition or hypothesis is what the court rightly concluded should be in the instructions, by inserting the words if "he had good reason to believe." In such instance it is proper speech to say that if one knew, or had good reason to believe, his assertion to be false, he is liable to an action; and so we find that mode of stating the ground for an action is used in many of the decisions of our Supreme Court. *Dulaney v. Rogers*, 64 Mo. 201, 203; *Caldwell v. Henry*, 76 Mo. 254; *Hamlin v. Abell*, 120 Mo. 188, 200, 25 S. W. 516; *Western Cattle Brokerage Co. v. Gates*, 190 Mo. 391, 406, 89 S. W. 382; *Serrano v. Commission Co.*, 117 Mo. App. 185, 200, 93 S. W. 810. It is stated in *Cooley on Torts* at side page 500 (italics ours), that "there is no doubt that an action on the case will lie, founded on representa-

tions made by the defendant, whenever it can be made to appear that he believed, or *had reason to believe*, the representations were false, and that the plaintiff relied upon them, to his injury."

The cases cited by appellant are not opposed to what we have written. The point in controversy here was not involved or referred to. It was asserted in argument that *Halliwell v. Stewart*, 103 Mo. App. 182, 77 S. W. 124, announced that "had good reason to believe" the representation was false would not support the action. That was not the decision. The close of the opinion was intended merely as a criticism on an instruction as applied to the particular evidence in that case. The evidence there showed belief, if anything, and there was nothing upon which to base the idea of reason to believe.

The order or judgment granting the new trial will be affirmed. All concur.

#### BICK v. UMSTATTD et al.

(St. Louis Court of Appeals. Missouri. March 23, 1909.)

#### APPEAL AND ERROR (§ 78\*) — APPEALABLE JUDGMENT—DISMISSAL.

A judgment recited that plaintiff's motion to strike a part of the amended answer was sustained, and that the court, upon its own motion, ruled that the petition did not state a cause of action, wherefore plaintiff refused to plead further, and, on defendant's application, the cause was dismissed; but it did not appear that a demurrer was filed to the petition. *Held*, that the judgment was not a final, appealable judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 471; Dec. Dig. § 78.\*]

Appeal from Circuit Court, Monroe County; David H. Eby, Judge.

Action by J. J. Bick against Clara Umstattd and others. From a judgment of dismissal, plaintiff appeals. Appeal dismissed.

T. P. Bashaw, for appellant. Grant S. Watkins, for respondents.

REYNOLDS, P. J. This case comes to this court on an order or judgment in the following form: "Now, on this 2d day of September, 1905, come the parties herein by their respective attorneys, and the motion heretofore filed by the plaintiff herein to strike out part of the third amended separate answer filed herein by defendant William Davis is taken up, and is by the court sustained; and the court upon its own motion rules that the petition filed herein is insufficient, and does not state facts sufficient to constitute a cause of action against the defendants. Wherefore the plaintiff declines and refuses to plead further in this cause; and now, on application of defendants, this cause is by the court ordered dismissed." This is not a final judgment, authorizing an appeal. Nothing follows this entry but a statement that the

plaintiff files his application and affidavit for an appeal, and the court, "having seen and heard said application and affidavit, doth grant an appeal in this cause to the St. Louis Court of Appeals, and doth fix the bond in appeal herein at the sum of \$100, with leave to file the same within 10 days after the adjournment of this term of court, subject to the approval of the clerk of this court." It does not appear that a demurrer was filed by defendants to the petition; but the court, of its own motion, as will be seen by this order, "rules that the petition filed herein is insufficient, and does not state facts sufficient to constitute a cause of action against the defendants. Wherefore the plaintiff declines and refuses to plead further in this cause; and now, on application of defendants, this cause is by the court ordered dismissed." As has been held in many cases, this is not a final judgment or decree, from which an appeal lies. It is accordingly dismissed. See *Finkelnburg*, Missouri Appellate Practice (2d Ed.) p. 59 and following, and authorities collated in note on page 63; also *Lyons et al. v. Rollinson*, 109 Mo. App. 68, 82 S. W. 646, and cases there collated; *State ex rel. v. Turner*, 113 Mo. App. 53, 87 S. W. 464; *A. A. Cooper Wagon & B. Co. v. Cornell*, 131 Mo. App. 344, 111 S. W. 521.

Appeal dismissed. All concur.

#### LEET v. GRATZ.

(St. Louis Court of Appeals. Missouri. March 23, 1909.)

#### 1. COVENANTS (§ 121\*) — BREACH—JUDGMENT AS EVIDENCE OF PARAMOUNT RIGHT—CONCLUSIVENESS.

A grantor called in to defend when the grantee was sued in ejectment and failing to do so is bound by the judgment, and cannot go behind it when sued on his covenants, and try the question of title again on its merits.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 223; Dec. Dig. § 121.\*]

#### 2. COVENANTS (§ 121\*) — BREACH—JUDGMENT AGAINST COVENANTEE—CONCLUSIVENESS.

In an action for breach of covenant based on a judgment in ejectment against the grantee, a direct issue in the case was whether plaintiff notified defendant of the pendency of the ejectment suit and demanded that he defend it, and that he failed to do so. *Held*, that a judgment for plaintiff was an adjudication that defendant failed to make the defense, and was tantamount to an adjudication that he did not arrange for a defense, as was asserted by defendant that he did in defense to a subsequent action.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 223; Dec. Dig. § 121.\*]

#### 3. COVENANTS (§ 132\*) — DAMAGES FOR BREACH — RECOVERY OF ATTORNEY'S FEES.

In an action of covenant based on a judgment in ejectment against the grantee recovered by devisees of a certain person and a purchase by plaintiff of the interest of the adult devisees, plaintiff recovered for an attorney's fee paid in defending the ejectment suit. *Held*, that this did not preclude recovery in a subsequent action of an additional fee paid an attorney for

services rendered and necessary to procure the interests of the minor devisees which he was unable to secure before bringing the first suit.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 261; Dec. Dig. § 132.\*]

Appeal from Circuit Court, St. Louis County; Jno. W. McElhinney, Judge.

Action of covenant by Frank W. Leet against Anderson Gratz. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. & Davis Biggs, for appellant. Geo. L. Edwards, for respondent.

GOODE, J. This is another appeal in a case wherein an opinion of this court was pronounced heretofore. *Leet v. Gratz*, 124 Mo. App. 394, 101 S. W. 696. The findings of fact by the trial court at the first trial were copied as a just statement of the case in the report of our former decision, and sufficiently state the facts as they appear in the present record. We refer to said statement instead of reciting again the facts in full, but will repeat such as are needed to elucidate the principles on which we determine the points now raised for decision. This plaintiff Leet lost title to five-sixths interest in a tract of land in St. Louis county at the end of an ejectment suit instituted against him by the devisees of a remainder over under the will of Michael J. Gannon. To avoid being evicted under the judgment, he bought the interests of the three adult devisees, and attempted to buy the interests of two others who were minors, but, on account of irregularities in the proceeding to acquire the titles of the latter, failed to do so. Later he brought suit against defendant Gratz, his grantor, on covenants in the deed, to recover the money he paid for the title of the successful parties in the ejectment action and the expense to which he had been put in that litigation. He recovered judgment for what he had paid to get the interests of the adult devisees, but failed in his first action to recover what he had paid for the interests of the minors because he had failed to acquire those interests. The decision in the first action by Leet will be found in 92 Mo. App. 422. By a later purchase Leet procured the paramount titles of the two minor devisees, and then instituted the present action to recover from Gratz on the latter's covenants the expenses incident to the purchase. The first trial of the present case resulted in a judgment for Gratz, given on the ground that Leet had split his cause of action, and the judgment in the first action for reimbursement was a bar to the present one. This court took the opposite view, and held Leet's right to sue for what he was out in buying the interests of the adults was a distinct cause of action from his right to recover what he paid for the titles of the minor devisees. Our opinion said, *inter alia*: "Each successive purchase under the circumstances

stated operated a separate and successive breach of these continuing covenants of indemnity, for which separate causes of action arose, enforceable in successive suits." *Leet v. Gratz*, 124 Mo. App. 411, 101 S. W. 696. When the cause was remanded for a second trial, with this point ruled in favor of the plaintiff, two other defenses were attempted: Firstly, to show the title of the Gannon heirs to which Leet had yielded was not paramount to his own, and hence he was not entitled to what he had paid for said title to prevent eviction, inasmuch as his own was superior. As far as regards the validity of the title of the Gannon devisees, the Supreme Court first held it was the paramount and superior title and afterwards held it was not. *Gannon v. Pauk*, 183 Mo. 281, 83 S. W. 453; *Id.*, 200 Mo. 75; *Gannon v. Albright*, 183 Mo. 238, 81 S. W. 1162, 67 L. R. A. 97, 105 Am. St. Rep. 471. These decisions cut no figure in the present case. Leet defended the ejectment action in the circuit court, but submitted to the judgment of that court, and, to avoid an eviction under it, bought in the outstanding title which had been adjudged the paramount one. This was determined in the first suit brought by Leet for reimbursement, where it was also determined, as appears both by the report of the opinion given in said case and the findings of the court and the evidence in the present case, that, when Leet was sued in ejectment, he notified Gratz of the pendency of the action and called on him to defend it, but he did not. Hence it was held Gratz was bound by the judgment in ejectment, and, when sued on his covenants, could not go behind said judgment and try the question of title on its merits. We adhere to that ruling for the reasons and upon the authorities given in our opinion. 92 Mo. App. 422.

The other defense attempted in the present action was to prove an agreement was made by Leet, Gratz, and other parties when the Gannon devisees first sued, pursuant to which an attorney was employed to represent the defendants and covenantors who were interested in the several ejectment actions brought by said devisees; that the cases, if lost in the trial courts, were to be appealed to the Supreme Court and said attorney was employed and paid \$600 to represent the parties interested in the defense, including Leet and Gratz, in both the trial and the Supreme Courts; that, after this arrangement had been made, Gratz supposed it would be carried out, and gave no attention to the defense of the case against Leet, but the latter withdrew from the agreement, employed a different attorney, and did not carry the case by appeal to the Supreme Court, but submitted to the judgment of the circuit court. Evidence in support of this defense was objected to by the plaintiff and excluded by the court on the ground the matter had been adjudicat-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed in Leet's first suit on the covenants. 92 Mo. App. 422. Counsel for defendant say this ruling is erroneous because we determined on the prior appeal of the present case that this is a different cause of action from the one involved in said first case of Leet v. Gratz, and therefore the judgment in said case is not a bar to the defense attempted in this one. They invoke in support of the proposition the doctrine of Dickey v. Helm, 48 Mo. App. 114, that where a second action, though between the same parties, is on a different cause of action, the judgment in the first one is not conclusive of all matters which might have been litigated, but only of such points and questions as were actually put in issue and adjudicated. Both parties agree this is the law, but disagree regarding its application to the present case; plaintiff insisting the very defense now brought forward was determined in the first action, whereas defendant says it was not asserted before. In Leet's first action on the covenants he alleged he gave notice to defendant of the ejectment case, and demanded that defendant defend the title, which the latter failed and neglected to do, wherefore Leet himself defended it, but the court decided the Gannon title was paramount. Defendant filed an answer denying all the averments of the petition, thus joining issue on the averments of notice to defendant, and demand on him to defend the title. The matters and facts stated in the petition were adjudged to be true as alleged, and said judgment was afterwards affirmed by this court. Thus it appears a direct issue was made in the first case of Leet v. Gratz as to whether Leet notified Gratz of the pendency of the ejectment suit, and demanded of him to defend it, and Gratz failed and neglected to do so, whereupon Leet defended it himself. The defense to the present case is that Leet, Gratz, and other persons interested in the title employed an attorney to defend the various several ejectment actions through the Supreme Court if necessary; that Gratz agreed to pay one-half or one-third of the expenses of the defense, and gave no further attention to the ejectment action, supposing the agreement would be carried out, whereas it was prevented from being carried out in the case against Leet by the latter's own conduct. The judgment in the first case was an adjudication that Gratz failed and neglected to make defense, and was tantamount to an adjudication that he did not arrange for one to be made as is now asserted.

It was right to allow plaintiff the fee he paid an attorney for services rendered and necessary in order to procure the interests of the minors, provided said fee was not exorbitant. The position of defendant is that, as in the first case Leet recovered for an attorney's fee paid in defense of the ejectment

action of the adult devisees, this precludes a further recovery. If additional expense for legal services was necessarily incurred to protect plaintiff from an eviction by the minor devisees, he is entitled to be repaid. 2 Sutherland, Damages (3d Ed.) § 617, and citations in note 1, p. 1770.

The judgment is affirmed. All concur.

#### MILEM v. FREEMAN.

(St. Louis Court of Appeals. Missouri. March 9, 1909.)

#### 1. APPEAL AND ERROR (§ 597\*)—TRANSCRIPT—DATE OF FILING PETITION.

The date of filing the petition, where material, should appear in the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2627; Dec. Dig. § 597.\*]

#### 2. FORCIBLE ENTRY AND DETAINER (§ 9\*) — POSSESSION.

The mere surveying of land, without any acts indicating it was made, or without showing that it is brought to the attention of one in possession, is not possession, interrupting that of the one in possession, so as to authorize an action of forcible entry and detainer against him.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 140; Dec. Dig. § 9.\*]

#### 3. FORCIBLE ENTRY AND DETAINER (§ 20\*) — POSSESSION—EVIDENCE.

Proof of possession by H., interrupting that of defendant in forcible entry and detainer, so as to authorize the action, is not made by mere testimony that H. was recognized and considered as the owner and considered to be in possession.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 140; Dec. Dig. § 29.\*]

#### 4. FORCIBLE ENTRY AND DETAINER (§ 29\*) — POSSESSION—EVIDENCE.

Evidence in forcible entry and detainer that defendant's possession for three years before commencement of the action had been interrupted, so as to authorize the action, held insufficient to go to the jury.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 140; Dec. Dig. § 29.\*]

#### 5. APPEAL AND ERROR (§ 1001\*)—REVIEW OF VERDICT—SUFFICIENCY OF EVIDENCE.

It is the right and duty of the Court of Appeals to reverse for lack of substantial evidence, considering all of it, to sustain the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3923; Dec. Dig. § 1001.\*]

Appeal from Circuit Court, Scott County; Henry C. Riley, Judge.

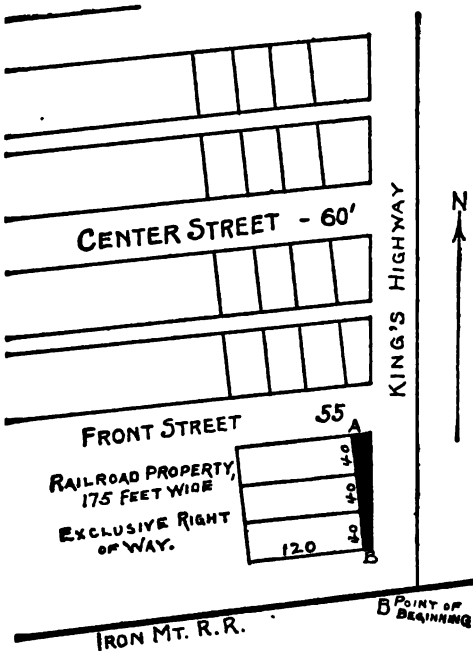
Action by J. A. Milem against C. C. Freeman. Judgment for plaintiff. Defendant appeals. Reversed.

Moore & Parsons, for appellant. M. O. Gresham, for respondent.

REYNOLDS, P. J. Action under section 3321, Rev. St. 1899 (Ann. St. 1903, p. 1890), for unlawful detainer of a strip of ground within the limits of the city of Sikeston, in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Scott county. As described in the petition filed with the justice and on which the case was tried in the circuit court, the parcel is 12.75 feet along the south line of Front street, then 120.67 feet along the west line of King street to the intersection of the west line of King street with the north line of the right of way of the Iron Mountain Railway, then along the right of way .07 of a foot to the southeast corner of block 7, in Sikeston, and thence along the east line of block 7, 120 feet, to the place of beginning. This description shows practically a triangular piece; the base being 12.75 feet, one side 120.67, the other 120 feet, and the lower end, .07 of a foot, being practically a point about  $\frac{1}{8}$  of an inch. The location will be better understood by reference to part of the plat of Sikeston which is reproduced in the brief of counsel for respondent, which we have changed only by adding in the name "Front street," where we understood it to be, and have marked the piece in dispute in black. That plat, as far as necessary to explain the situation, is as follows:



TRIANGLE IN BLACK IS STRIP IN DISPUTE.

It is described in the petition as being a part of United States survey No. 625, and it might be inferred from the description in the petition that it is not within the limits of the city of Sikeston, which gives rise to some question as to whether it is within the jurisdiction of the justice of the peace; but, as no suggestion of that kind is made, we pass that by. The description, however, placing the tract in survey No. 625 and not within the limits of Sikeston, was not an accident, but

was of purpose, as we will hereafter note. The petition charges that on or about October 6, 1906, the plaintiff, respondent here, purchased this strip from Mrs. Catherine Handy, and was preparing and had arranged "to build a house on the premises," and that defendant, "on or about the — day of October, 1906, did wrongfully and unlawfully seize and enter into the possession of the above-described premises and incumbered a part of the same with a house and a wire fence, and continues in the possession of the same adversely to the plaintiff, after demand has been made by the plaintiff to the defendant in writing for the possession of the premises." Averring that he is entitled to the immediate possession of the above-described premises, and has been damaged by the unlawful seizure and detention in the amount of \$25, plaintiff prays judgment of restitution and for damages and the value of the rents and profits of the premises. His petition was sworn to on the 4th of February and was served on the defendant the same day, so that it was undoubtedly filed with the justice on the 4th of February, 1907, although the date of filing does not appear in the transcript, which it should always do in actions where time is at all material, as it is in cases of this character. A trial before the justice resulted in a verdict for plaintiff, and defendant appealed to the circuit court. At the close of plaintiff's evidence, the defendant asked for an instruction in the nature of a demurrer to the evidence, which was overruled; defendant duly excepting. Defendant thereupon proceeded with his testimony, and plaintiff introduced testimony in rebuttal. At the conclusion of the trial, the court having given several instructions for both parties, the jury returned into court a verdict in the following form: "We, the jury, find that the plaintiff, J. A. Milem, is entitled to the possession of the strip of ground sued for." On this verdict the court entered judgment for restitution of the premises and for costs and ordered execution to issue accordingly. After unsuccessful motions for new trial and in arrest, exception being duly saved to the action of the court in overruling them, defendant prosecuted his appeal to this court, assigning here, as he did in his motion for new trial, among other grounds, that there is no substantial evidence in the case warranting the jury to return a verdict in favor of plaintiff. We have consequently read all the testimony contained in the transcript, not being satisfied to rest our action upon the abstracts furnished by counsel for the respective parties, and have reached the conclusion that there is no substantial evidence in the case warranting its submission to the jury.

The facts developed on the trial are substantially these: What is claimed to be this strip of ground in controversy lies to the east of the lots in block 7. In the city of Sikeston. In the plat above copied, it is the piece color-

ed black, adjacent to the lots in block 7. These lots are not numbered on the plat used, so that we cannot say whether lots 2 and 3, which defendant claims to occupy, are the two south or two north lots in the block. The city of Sikeston was laid off and platted by John Sikes in 1860; Sikes then being the owner of United States survey No. 625, and the townsite being platted as within that survey. There seems to have been some change or correction of the lines of the original town when the city of Sikeston was organized, and the city authorities of the new town appear to have adopted and approved a plat of the city with its new boundaries. The plat furnished us by counsel for respondent, however, shows that the strip in controversy is within the limits of the city of Sikeston, and all the testimony in the case bounds it on the north by Front street and on the east by King's Highway (also a street in that city), and there is no suggestion that it was not within the limits of the town of Sikeston as originally platted and laid off in 1860 by John Sikes. Mrs. Sikes, now Mrs. Handy, appears to have been the owner of survey No. 625, and while it is stated in the petition that she sold this strip as being part of that tract to the plaintiff, on the 6th of October, 1906, there is no testimony whatever in the record fixing this date; the only testimony being that her son, Need Sikes, had acted for his mother in selling it to the plaintiff at some time prior to the institution of the suit, but the date of the sale not appearing anywhere. If it was on the 6th of October, 1906, as averred in the declaration, then it was just four months before the institution of this action. The question of the date of the sale and conveyance, however, or the fact of a conveyance, has no bearing on this case, any further than that plaintiff claims the benefit of the acts of Mrs. Handy, as showing her possession, and, of course, to do that he must show some privity, either as grantee, tenant, or agent, to enable him to do so. Beyond the statement that he did purchase of her and the testimony of her son that, acting for his mother, he had sold this strip to plaintiff, this is not shown.

The case technically, then, should turn on the fact of possession in plaintiff himself. As no point is made on this, however, we treat the case as if it had been in evidence that plaintiff is owner by deed from Mrs. Handy, and give him the benefit of her acts of possession if she did any. It appears from the testimony in the case that the defendant was the owner of lots 1 and 2 in this block 7. As before noted, whether 1 and 2 are the north lots or the south lots in block 7 is not shown by the testimony. It is not very material, however, to determine what is the position of the two lots he owns, as in any event what is claimed as this strip runs along all three of the lots in this block, as will be seen by the plat. These lots, as shown in the plat, have a front of 40 feet and a depth of 120

feet. The defendant claims, however, that the description in his deed, which deed is not in evidence, carries his lots across and over this strip. Of course, in an action of this kind, whether defendant has title by deed to the premises in dispute is not material; the question being one of actual occupancy or possession. It is sufficient to say that defendant claims not only that his lots run back to King's Highway and so take in all that part of them colored black on the plat, lying between the line drawn through them, which we have marked A, B, and King's Highway; but he also claims that he and those under whom he claims have exercised acts of ownership and been in actual possession of the property clear through to King's Highway, under the claim that the west line of that street is the eastern boundary of his lots. The case of the plaintiff in this case rests on the claim that he and his grantor, Mrs. Handy, formerly Mrs. Sikes, have been in the actual possession of this strip for more than three years continuously, immediately before the institution of this suit, and, necessarily, it is claimed by plaintiff that the defendant was not in possession of it during that period; that claim also necessarily resting on the further proposition that defendant had within that period unlawfully entered upon and taken possession and dispossessed plaintiff. Several witnesses testified that Mrs. Sikes, or Mrs. Handy, had been "considered in possession" for many years prior to the institution of the action, regarding it as part of United States survey 625; but when brought to the test of fact, and not of opinion, the only act in evidence that can be pretended to be an act of possession is that some time in July, 1906, Need Sikes, son of Mrs. Handy, formerly Mrs. Sikes, had Mr. Warner, a surveyor, survey this strip. The mere fact of a survey accompanied by no other act, was no act of possession or assertion of ownership, although it appears from the testimony of her son that nobody objected to the survey being made. Whether they objected or not is utterly immaterial, unless it is shown that the defendant was present at the time of the survey and saw it and made no objection to it or assented to it, or that in some way a knowledge of the fact of the survey was brought home to him, and he made no objection. That was not done in this case. Neither Sikes nor Warner, the surveyor, pretend to have put up any monuments, marks, corners, or other visible sign of occupancy or possession.

It is claimed by the learned counsel for the respondent that this court has decided, in the case of *School District v. Holmes*, 53 Mo. App. 487, that the act of surveying is an act sufficient to constitute actual possession. That decision does not so hold. What is held by Judge Biggs, who delivered the opinion in the case, is that a survey, accompanied by the planting of corner stakes, were acts of posses-

sion. After referring to the cases of *De Graw v. Prior*, 53 Mo. 313, *Bartlett v. Draper*, 23 Mo. 407, *Miller v. Northup*, 49 Mo. 397, and *Bradley v. West*, 60 Mo. 59, Judge Biggs says: "Under these decisions it would seem that the survey and the establishment of the corners by the directors were sufficient to constitute actual possession of the entire acre in plaintiff." When we examine the facts in the case of *School District v. Holmes*, supra, we find them materially different from the facts in the case at bar. As appears by the statement of Judge Biggs in that case, the directors of the district "went upon the land, and surveyed and marked off a square acre with the schoolhouse in the center. Corner stakes were planted to show the boundaries. Previous to this nothing had been done by the officers of the district to indicate the extent of their holding, beyond the ground actually covered by the house." In the *De Graw Case*, the plaintiff entered upon and plowed up an acre and a half of the ground. In the *Bartlett Case*, plaintiff had planted fence posts on three sides of the lot. In the *Miller Case*, the plaintiff had established the corners and cut hay upon the land. In the *Bradley Case*, plaintiff had traced out the boundaries, threw up mounds at the corners of part of the land, and when defendant came upon the land he ordered him off, asserting that the land belonged to him. This case, therefore, presenting the fact of a mere survey, unaccompanied by any acts indicating that it had been made, is in no manner parallel to any of these cases. For anything that appears to the contrary, young Sikes and the surveyor may have gone on the land at night. They left no indicia of their survey, established no corners, set up no marks, and left no trace whatever of their presence. For all that appears, their going on and surveying were the acts of casual trespassers. That was not a visible act of possession—was not an act which would have notified defendant, or any one else, that his possession, if he had it, was being interrupted and interfered with.

The testimony of Need Sikes and others that his mother claimed this strip by virtue of her ownership of United States survey No. 625, and that it was a part of that survey, and always considered her property, is without probative value on the fact of possession. In the first place, the claim that it was a part of survey 625 cannot stand. When John Sikes, in 1860, laid off and platted the town of Sikeston, he separated all the land within the boundaries of the town from the survey, and it thereafter became or belonged to Sikes, not as a part of survey No. 625, but as a part of his property within the boundaries of the new town of Sikeston, and if this particular strip remained unsold and undisposed of from the time of the platting of that town down to the selling of the strip to Dr. Milem, the plaintiff in the case, it be-

longed to the Sikes estate, not as part of the survey, but as part of the town, so that the claim of ownership by virtue of being owner of survey 625 is untenable. In the next place, the mere statement of witnesses that Mrs. Handy, or Mrs. Sikes, was recognized as the owner and considered the owner, and considered to be in possession, amounts to nothing whatever and has no probative force in a case of this kind, for titles to land, or the right of possession or the fact of possession, are not determined by public rumor or presumptions or claims of this character. The fact of possession, in a case of this kind, is the very fact for determination by the jury, and that fact must be determined by the jury on evidence of acts, by proof of physical facts, and not on supposition or ideas or thoughts. When we consider this claim of possession by Mrs. Handy of this strip by virtue of her possession of survey 625, we can understand why the strip is described in the petition as part of the survey, instead of as a parcel in the city of Sikeston.

The only act of possession claimed to have been exercised by the plaintiff himself, after he purchased the lot from Mrs. Handy, is that he caused a couple of loads of dirt to be dumped upon the land some time in December, 1906. The plaintiff testifies that he did this the day the defendant moved his chicken house around onto the strip, and after he had seen him doing that, and he said that this was all the work he had ever done on the strip. The point of this reference to the act of moving this chicken house is that it appears that when the question came up as to the right to this strip, and the attention of the defendant was called to the fact that the plaintiff claimed it, but before these loads of dirt were dumped, as plaintiff himself admits, defendant ran a wire fence around it, a fence made out of ordinary netting wire, such as is ordinarily used for inclosing chicken yards and the like, of course a mere temporary structure, evidently put up for the express purpose of marking defendant's claim of possession, and also moved or turned onto the strip a chicken house which was on or adjoining what is claimed as the west line of this strip, so that the taking possession of this strip by the plaintiff, evidenced by dumping the two or three loads of dirt, was after the controversy had arisen and after plaintiff saw that trouble was likely to arise. It was done for the express purpose of and in an effort to create the possession in plaintiff. Plaintiff, testifying to what other act he had done as indicating possession, says that, two or three days before defendant switched his chicken house around and put up this wire netting, he (plaintiff) had been consulting with a carpenter about erecting a building on this strip, and he produced the carpenter as a witness to corroborate this rather remarka-

ble intention. What sort of a building could be erected on a strip  $12\frac{1}{4}$  feet wide and running back 120 feet, to a point scarcely measurable on land,  $\frac{1}{8}$  of an inch, "running to a point," as plaintiff himself said, might cast a doubt on the good faith of the expressed intention; but intention, whether entertained or not, is not an act of possession. We are therefore led to the conclusion that plaintiff's evidence did not prove possession by himself or those under whom he claimed. On the contrary, the testimony of plaintiff's own witnesses shows that for more than three years preceding the institution of this action, "for many years," said plaintiff, the defendant, and those under whom he claims had driven over this strip to get to the buildings on the lots in this block 7. They would have to drive over it when they hauled coal to the buildings. Asked if the occupants of the buildings would not have to haul over this strip to get anything to them, he said, "Well, it was all hauled there." There was a platform extending back onto the strip from one of the buildings of defendant, a loading platform, that had been there certainly for more than three years prior to the institution of this action. Mr. Sikes, a witness for plaintiff, testified that for over three years a building extending onto this strip, east of defendant's buildings, had been used for a tinshop and other purposes. Mr. Norrid, another witness for plaintiff, testified: That this strip had been at times covered by an outhouse, part of the time by a platform; that the superstructions on it were controlled by the owners of lots 2 and 3, under whom defendant held; and that the strip had been used as a passageway ever since he had known it, which was from about 1901. All these witnesses testify that the strip was used for ingress and egress by the owners of lots 2 and 3, for receiving and delivering merchandise at and from the stores and buildings situated on these lots. These constitute visible acts of possession; were acts indicating possession, actual, visible, tangible acts evidencing possession, and extending over a period of more than three years.

Our conclusion on the whole case is that there is no substantial testimony warranting a verdict for the plaintiff. The instruction to that effect, at the close of plaintiff's case, should have been given by the trial judge, and presented to us as it is, both by the motion for new trial and in the assignment of error, we have no hesitancy whatever in saying that it should have been sustained. It is true that, after the demurrer was overruled, defendant put in his evidence. We have therefore determined the question as to the propriety of the refusal of this demurrer in the light of all the evidence, that offered by plaintiff as well as by defendant. *Klockenbrink v. Railroad*, 172 Mo. 678, loc. cit. 683, 72 S. W. 900. The right, no less

than the duty, of this court to reverse for lack of substantial evidence in the case, considering all of it, to sustain a verdict, is beyond question. *Finkelnburg, Missouri Appellate Pr.* (2d Ed.) p. 158 et seq.; *Buck v. Endicott*, 103 Mo. App. 248, 77 S. W. 85; *Dowling v. Wheeler*, 117 Mo. App. 169, loc. cit. 182, 93 S. W. 924; *Casey v. Transit Co.*, 186 Mo. 229, loc. cit. 232, 85 S. W. 357; *Weller v. Wagner*, 181 Mo. 151, loc. cit. 159, 79 S. W. 941. A verdict must have substantial support. *Blanton v. Dold*, 109 Mo. 64, loc. cit. 69, 18 S. W. 1149. Furthermore, in this case the verdict of the jury is so entirely contrary to the testimony of the witnesses in the case, even those of the plaintiff himself, that it tends strongly to the suspicion that it disregarded all of the testimony, and that the result was brought about, not by a consideration of the law and of the evidence, but from prejudice, passion, or some occult reason not appearing in the record. We say this, in no manner denying the undoubted right of a jury to determine on the credibility of witnesses, and the almost unlimited power lodged in the trial court to pass on the weight of the testimony; but an appellate court has the power, as it is its duty, to interfere when it appears that injustice has been done. *Bank v. Wood*, 124 Mo. 72, loc. cit. 77, 27 S. W. 554, and citation there made of *Iron Mountain Bank v. Armstrong*, 92 Mo. 265, loc. cit. 280, 4 S. W. 720. While we are strongly inclined to the belief that this is a case in which we would be justified in so doing, we do not place our judgment here on that ground, however, nor in the exercise of that power, but place it on the proposition that that verdict is unsupported by any substantial evidence in the case, and is unwarranted under the law. Reaching the conclusion we have, it is unnecessary to review, examine, or criticize rulings made during the progress of the trial, or the action of the learned trial judge in giving or refusing instructions other than that for a verdict for defendant on the evidence.

The judgment of the circuit court of Scott county is reversed. All concur.

#### STATE v. ST. CLAIR.

(St. Louis Court of Appeals. Missouri. March 23, 1909.)

1. CRIMINAL LAW (§ 1144\*)—APPEAL—REVIEW—PRESUMPTIONS—QUALIFICATION OF JUDGE.  
The special judge who heard a criminal case will be presumed, on appeal, to have duly qualified, in the absence of a contrary showing in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3020; Dec. Dig. § 1144.\*]

2. TRADE-MARKS AND TRADE-NAMES (§ 51\*)—UNION LABELS—UNLAWFUL USE—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of unlawfully using a trade union label, in viola-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



tion of Rev. St. 1899, § 10,367 (Ann. St. 1906, p. 4683).

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 51.\*]

Appeal from St. Louis Court of Criminal Correction.

Albert St. Clair was convicted of unlawfully using a union label, and he appeals. Affirmed.

F. W. Imslepin, for appellant. E. P. Johnson, Frank Ryan, and Phillips W. Moss, for the State.

GOODE, J. This defendant was convicted under section 10,367 of the Revised Statutes of 1899 (Ann. St. 1906, p. 4683), on an information charging him with having in his possession and using a certain trade-mark, label, or device of the International Typographical Union of North America, designed for and intended to be used by the Allied Printing Trades Council of Missouri, and the Modern View Printing Company; that defendant had this label or device in his possession with the intention to defraud said Typographical Union, the Allied Trades Council of Missouri, the Modern View Printing Company, and divers other persons, and defendant fraudulently and wrongfully used said device or trade-mark by selling and delivering to one Howard E. Lindsay 3,000 advertising cards stamped with said device, with the intention of passing off said cards so impressed with said label by defendant as the genuine and original cards printed by an association of union working men to whom the label and stamp belonged. The regular judge of the St. Louis court of criminal correction having been disqualified by the affidavit of defendant, the record says, the honorable H. C. Dyer, a duly licensed attorney and member of the bar, was duly elected to try said cause. The case was continued to March 2, 1906, when the trial occurred before the court without a jury, and resulted in a verdict and judgment against defendant on the second count of the indictment and the imposition of a fine of \$100. Defendant appealed.

There was registered in the office of the Secretary of State a certain trade-mark or device of the International Typographical Union of North America, a union of working men engaged in the art of printing and allied arts. The registered device was intended to be used by the members of said union to distinguish any goods, wares, and merchandise manufactured or prepared by any member or members of the union who complied with certain rules of the organization and entered into a contract with the union through the Allied Printing Trades Council in the particular city where the label was to be used—in the present case the Allied Trades Council of the City of St. Louis. Defendant, who is not a member of the union, conducted a printing establishment in said city, as the

evidence tends to show, and in 1905 there were turned out from said establishment 3,000 cardboards announcing the candidacy of Howard E. Lindsay for the office of house of delegates for the Twenty-Second ward on the ticket of the Socialist party. On these cards the union label of the International Typographical Union of North America appeared, thereby indicating they had been printed by union workmen; whereas, in truth, union workmen were not employed in said printing establishment, and the establishment had no right to use the label. The particular label stamped on those cards bore the number "85," which indicated the printing office to which the label belonged, to wit, the Modern View Printing Company, which employed union workmen. Lindsay testified: He ordered the cards from defendant personally and paid him for them. That defendant had worked for him for six years. The union label was on all work turned out by defendant, and Lindsay supposed he operated a union shop. That when he got the cards they had the union label numbered 85 on them. An employé in the shop said he was working for St. Clair at the time and printed the cards under the latter's direction, that he ran the cards through the press, and the union label was among the type, and the number of it was stamped on the cards when they were printed. It was admitted defendant never had made application for the use of the label of the Typographical Union of North America, or any other subordinate order. He testified he never owned or had possession of it. He further testified he had no interest in the shop where said cards were printed at that time, but as to this the evidence would support a contrary conclusion. Defendant testified: He set up the type for the other printed matter on the card, except the label; that it was afterwards changed by an employé in the office, so as to leave room for the union label to be printed, but defendant did not order this and did not know it had been done; that the label was not used in his office, and the cards were not printed with it. Suffice to say on this question, the testimony of defendant, if believed, proved he was no party to the use of the label, did not know it was in his office, and did not have possession of it; but there was also evidence the other way.

A point is raised against the competency of the special judge to sit in the case, because he did not qualify by taking the oath of office. As to this the record says nothing, and as no point was made about it below, the presumption that he duly qualified should be indulged. *Green v. Walker*, 99 Mo. 68, 12 S. W. 353.

The brief for defendant complains of a supposed declaration of law given by the court, but we find no declaration in the record.

The law of this case is settled by that of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

State v. Bishop, 128 Mo. 373, 31 S. W. 9, 29 L. R. A. 200, 49 Am. St. Rep. 569. The information and trial conformed to the statutes as construed in said decision, and there was abundant evidence tending to prove a corrupt use of the union label by defendant in order to cause the work he was doing for Lindsay to appear to have been done by union workmen.

The judgment will be affirmed. All concur.

### BICK v. YATES et al.

(St. Louis Court of Appeals. Missouri. March 23, 1909.)

#### 1. BILLS AND NOTES (§ 475\*) — ACTIONS — PLEADING—UNVERIFIED PLEA OF NON EST FACTUM.

In an action on a note, an unverified plea of non est factum admits the execution of the note as alleged in the petition.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1516; Dec. Dig. § 475.\*]

#### 2. BILLS AND NOTES (§ 30\*)—EXECUTION—IMPLIED OBLIGATION—"FOR VALUE RECEIVED."

The execution of a note "for value received" implies an obligation to pay.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 60; Dec. Dig. § 30.\*]

For other definitions, see Words and Phrases, vol. 8, p. 7281.]

#### 3. BILLS AND NOTES (§ 462\*) — ACTIONS — PLEADING—EXPRESS PROMISE TO PAY—NECESSITY FOR AVERMENT.

Under the Code, it is not necessary in an action on a note to aver an express promise of defendant to pay.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1455; Dec. Dig. § 462.\*]

Appeal from Circuit Court, Monroe County; David H. Eby, Judge.

Action by J. J. Bick against J. T. Yates and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

The petition in this case is as follows: "Plaintiff for cause of action against defendant states that the defendants made, executed, signed, and delivered, for value received, their promissory negotiable note, dated December 23, 1898, for one hundred and twenty-eight and fifty one-hundredths dollars (\$128.50), due in twelve (12) months from the date thereof with eight per cent. interest, due and payable annually, and, if not so paid, to become as principal and bear the same rate of interest which said note bears in addition thereto the following clause: 'If this note is not paid when due, we agree to pay all reasonable costs of collection, including attorneys' fees and also consent that judgment may be entered for these amounts.'" This petition is signed by the plaintiff himself, and concludes with the averment that he is the owner of the note, and he demands judgment on it for \$200, the amount unpaid, and for 8 per cent. interest, to be compounded an-

nually and for costs. The note referred to was attached to the petition, but, as has been often decided by our court, attaching an exhibit to a petition or even referring to it does not make it a part of the petition. One of the three defendants made default. The other two filed answers denying the execution of the note and denying the assignments and transfers, and deny that they are indebted to plaintiff; the answers, however, not being sworn to. On the cause being called for trial, plaintiff having been sworn as a witness in his own behalf, counsel for defendants objected to the introduction of any evidence in the case for the reason that the petition did not state facts sufficient to constitute a cause of action, in that it is not alleged that by the execution of the note the defendants promised to pay any one anything. The objection was sustained, and plaintiff, duly excepting and refusing to plead further, filed a motion for new trial which was also overruled, and plaintiff excepting to this action, the case is now here on his appeal.

J. J. Bick (Peter T. Barrett and Abe Lowenhaupt, of counsel), for appellant. J. P. Boyd, for respondents.

REYNOLDS, P. J. (after stating the facts as above). We are unable to concur with the conclusion of the learned trial judge, that by the omission of the averment "that by their note the defendants promised to pay," the petition failed to state a cause of action. By failure to verify their plea of non est factum the execution of the note was admitted. The execution of the note, "for value received," as set out in the petition, implied an obligation to pay. Our appellate courts have specifically decided that, however it may have been under the rules of common-law pleadings, under our system of Code pleading, the action being on a note, it is not necessary to aver an express promise on the part of the defendant to pay. *Kansas City National Bank v. Landis et al.*, 34 Mo. App. 433, and authorities there cited. See, also, *Hammett et al. v. Trueworthy*, 51 Mo. App. 281, loc. cit. 284.

As the case will have to be retried, we suggest that all possible question can be avoided by amending the petition to conform to the note itself, which, as we have seen, begins thus: "Twelve months after date, for value received, we promise to pay," etc. It is so obvious to us that the plaintiff had it within his power to meet the objection of the court by a very slight concession to the views of the court, involving no sacrifice of any substantial right, that if we could do so consistently with the law, and not thereby make a bad precedent, we would affirm this case for the obstinacy of the plaintiff. Cases are not to be managed in any such manner by parties or counsel. It is due the counsel whose names appear on the brief here filed along with plaintiff himself to say that those

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gentlemen do not appear to have been associated with plaintiff in the management of the case in the trial court.

The judgment of the lower court is reversed, and the cause remanded for proceedings in accordance with this opinion. All concur.

# In re O'SULLIVAN.

(St. Louis Court of Appeals. Missouri. March 23, 1909.)

## 1. ALIENS (§ 69\*)—RECORD—NATURALIZATION—CORRECTION.

Where a naturalization record of the Court of Appeals purported to record the naturalization of "Mike O'Sullivan" on a specified date, an alleged certified copy of the record under the seal of the court and signed by its clerk showing the naturalization of "Miles O'Sullivan" on that date was inadmissible to correct the record as to the name; there being no record or court entry to sustain the certificate.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 149; Dec. Dig. § 69.\*]

## 2. ALIENS (§ 69\*)—RECORD—NATURALIZATION—RECORD—CORRECTION.

The naturalization record of an alien was not subject to correction as to the name of the alien which was claimed to be erroneous, in the absence of any entry or memorandum among the files of the court or in the office of the clerk establishing the alleged error.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 69.\*]

## 3. JUDGMENT (§ 70\*) — NATURALIZATION DECREE—CORRECTION.

A proceeding for the naturalization of an alien being generally regarded as a proceeding in rem, when granted has the effect of a judgment for all purposes, and cannot be corrected at a subsequent term, nor attacked, except in the manner and for the causes for which judgments of a court of record may be assailed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 151; Dec. Dig. § 70.\*]

Application by Miles O'Sullivan for the correction of the record of the St. Louis Court of Appeals alleged to relate to petitioner's naturalization as a citizen. Application denied.

Dyer & Davis, for applicant.

REYNOLDS, P. J. This is an application by Miles O'Sullivan for a correction of the record of this court made on the 6th of October, 1902. It is stated in the application: That Miles O'Sullivan appeared before the judges of this court at a regular session thereof, with two competent witnesses, citizens of the United States, who had known that the said Miles O'Sullivan arrived in the United States before he had attained the age of 18 years, and that for the last two years prior to the said 6th of October, 1902, it had been bona fide his intention to become a citizen of the United States, where he had resided at least five years prior to the 6th of October, 1902, and in the state of Missouri at least one year immediately preceding the said October 6, 1902, during all of which time

he had conducted himself as a man of good moral character attached to the principles of the Constitution of the United States. That Miles O'Sullivan and his said witnesses were duly sworn before the court, and, the court being satisfied that said Miles O'Sullivan had taken the preparatory steps required by the laws of the United States concerning the naturalization of foreigners, that he had declared in open court upon oath that he would support the Constitution of the United States and entirely renounce all allegiance to any foreign power, etc., particularly the King of England (Great Britain), of whom he was at that time a subject, this court had admitted him to be a citizen of the United States, and ordered that the records of this court show that he was on the 6th of October, 1902, duly admitted as a citizen of the United States. It is then averred that the clerk of this court issued to Miles O'Sullivan what purported to be a certified copy of the record of the St. Louis Court of Appeals naturalizing said Miles O'Sullivan on that date; that he, Miles O'Sullivan, had recently discovered that this certificate of citizenship or naturalization is not a correct copy of the record of this court as spread on its records, but that the record of this court shows that one "Mike O'Sullivan" was naturalized on that date, whereas in truth and in fact, as he avers, that record should show that he, Miles O'Sullivan, was duly naturalized upon that date. He therefore prays this court to correct the court record to read accordingly, so as to show that it was Miles O'Sullivan who was naturalized and admitted to citizenship on that date by this court. Accompanying the application is what purports to be a certified copy, under the seal of this court and signed by its clerk, of the certificate showing the naturalization of Miles O'Sullivan on that date; that is to say, we are asked to correct the record by this certificate.

This cannot be done. This certificate is not sustained by any record or entry of the court, and is therefore a nullity, and cannot be used to correct the record. Nor is there entry or memoranda among the files of the court or in the office of the clerk by which the record can be corrected, and, these lacking, we are without power to correct the record. We have nothing before us from which we can make the correction desired. Furthermore, a decree granting naturalization is like any other judgment of the court. While not required to be of any particular form, when granted, an order admitting to citizenship has all the effect of a judgment. The proceeding is generally regarded as a proceeding in rem. When granted, the order or judgment granting it cannot be corrected at a subsequent term to that at which it was rendered, nor attacked except in the manner and for the causes for which judgments of a court of record can be assailed. If at-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tacked in a proper proceeding, it might for cause be annulled, set aside, or parties enjoined from claiming under it. But we know of no case in which, following a vacation of judgment, a new one has ever been entered in lieu thereof.

Motion denied. All concur.

### RIFE v. REYNOLDS.

(St. Louis Court of Appeals. Missouri. March 23, 1909.)

#### 1. APPEAL AND ERROR (§ 713\*) — RECORD — MATTERS NOT APPARENT OF RECORD—MATTERS IMPROPERLY INCLUDED.

A motion for new trial overruled must be shown in the printed abstract of the record proper filed in the appellate court as required by Rev. St. 1899, § 813 (Ann. St. 1906, p. 783), and the omission of this matter from the abstract cannot be supplied by recitals in the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2957; Dec. Dig. § 713.\*]

#### 2. APPEAL AND ERROR (§ 835\*)—RECORD—DEFECTS—EFFECT OF OMISSIONS.

Where the printed abstract of the record proper filed in the appellate court fails to show a motion for new trial, the merits cannot be examined, and the judgment will be affirmed if the record proper is sufficient to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2781; Dec. Dig. § 635.\*]

#### 3. LANDLORD AND TENANT (§ 166\*)—PREMISES—INJURIES TO TENANT'S PROPERTY—FAILURE TO REPAIR.

A landlord, who has covenanted to keep the demised premises in repair, is liable for injuries to the tenant's property caused by breach of the covenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 649; Dec. Dig. § 166.\*]

Appeal from Circuit Court, Butler County; J. C. Sheppard, Judge.

Action by Mary M. Rife against Jesse Reynolds. From a judgment for plaintiff, defendant appeals. Affirmed.

L. R. Thomason, for appellant. D. W. Hill and Thos. F. Lane, for respondent.

**NORTONI, J.** In this case plaintiff recovered in the circuit court, and defendant prosecutes the appeal. The appeal is on the short form provided for by section 813, Rev. St. 1899 (Ann. St. 1906, p. 783). The original transcript exemplifies only the judgment and order granting the appeal. Defendant's printed abstract of the record contains only the petition, answer, and reply. Then follows the bill of exceptions printed in full. It does not appear at any place in the printed abstract that a motion for new trial was filed or overruled. These matters should appear in the abstract of the record. Our statute requires the filing and overruling of the motion for new trial to be entered of record. The facts that such motion was filed, and that it was afterwards overruled,

are therefore essentially matters of record, and they should be shown in the abstract of the record. It is true the bill of exceptions recites that such motion was filed and overruled. That is insufficient, however, as the bill of exceptions is not the proper repository thereof. It has been decided many times by the Supreme and appellate courts of this state that, unless it appears from the abstract of the record proper the motion for new trial was filed and overruled, the appellate court is not permitted to review any matter touching the merits of the case. A few of the more recent cases are as follows: *Hill v. Butler County*, 195 Mo. 511, 94 S. W. 518; *Stark v. Zehnder*, 204 Mo. 442, 102 S. W. 992; *Harding v. Bedoll*, 202 Mo. 625, 100 S. W. 638; *Crossland v. Admire*, 149 Mo. 650, 51 S. W. 463; *Hill v. Combs*, 92 Mo. App. 242; *Bradbury v. Kerns*, 115 Mo. App. 99, 91 S. W. 437; *Greenwood v. Parlin et al.*, 98 Mo. App. 407, 72 S. W. 138; *Turney v. Ewins*, 97 Mo. App. 620, 71 S. W. 543.

Where it fails to appear in the record proper that the trial court was invited to review its rulings on the merits of the cause, by motion for new trial, the only question open for consideration on appeal is the sufficiency of the record proper to support the judgment. We have examined the record, and find that the petition sets forth a cause of action in damages for the defendant's breach of a contractual duty to repair certain premises plaintiff had leased from him for a hotel. It is averred that, because of a defective roof which the defendant had agreed and covenanted to repair, her household furnishings were greatly damaged by water, etc. Although it may be true as a general proposition that a landlord is not bound to keep leased premises in repair, and that he is not responsible in damages for injury to the property of his tenant resulting from a failure to repair, it is certainly true that where he has, in leasing the premises, assumed the obligation to repair the roof of the building by contracting to do so, as charged in the petition in this case, and fails to keep his agreement, entailing damages upon the tenant thereby, the law will require him to respond. *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738, 10 L. R. A. 147, 20 Am. St. Rep. 650.

We find the petition states a cause of action, and the record proper is sufficient to support the judgment given thereon.

In view of the fact that plaintiff's counsel insists upon the advantage afforded by the defects appearing in the abstract of the record, the judgment will be affirmed, without examining the merits of the cause.

It is so ordered.

**REYNOLDS, P. J., and GOODE, J., concur.**

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

STATE ex rel. RIFE v. REYNOLDS et al.  
(St. Louis Court of Appeals, Missouri, March 23, 1909.)

**1. ATTACHMENT (§ 349\*) — LIABILITIES ON BOND—ACTIONS—PLEADING.**

A petition, in an action for breach of an attachment bond, conditioned for the payment of damages as provided by Rev. St. 1899, § 372 (Ann. St. 1906, p. 482), which fails to aver the nonpayment of the damages sustained, is bad on demurrer.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 349.\*]

**2. PLEADING (§ 34\*) — DEFECTS AND OBJECTIONS—CONSTRUCTION.**

The sufficiency of a petition, challenged by oral objection at the trial on the ground that it fails to state a cause of action, is determined by the rules which obtain as to such a question after verdict and judgment, and, although general averments are omitted, all matters will be allowed in aid of the petition as intended by the pleader, which may be implied by reasonable construction of the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66-75; Dec. Dig. § 34.\*]

**3. PLEADING (§ 433\*) — DEFECTS AND OBJECTIONS—AIDED BY VERDICT—DEFECTS IN PETITION.**

Where there is no demurrer to a petition in a suit on an attachment bond for plaintiff's failure to aver nonpayment of damages sustained, but the sufficiency of the pleading is challenged by objection at the trial on the ground that it fails to state a cause of action, the omission of the averment is cured by the verdict under the statute of jeofails (Rev. St. 1899, § 672 [Ann. St. 1906, p. 686]), commanding that no judgment shall be reversed for the omission of an averment for which a demurrer could have been maintained, or without proof of which the verdict could not have been given.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1460, 1461; Dec. Dig. § 433.\*]

**4. ATTACHMENT (§ 353\*) — LIABILITIES ON BONDS—JUDGMENT.**

The judgment in an action on an attachment bond should be for the penalty of the bond to be satisfied by the payment of the damages assessed, with interest thereon from the date of the judgment and costs.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 353.\*]

**5. APPEAL AND ERROR (§ 1170\*)—DETERMINATION OF CAUSE—REVERSAL—TECHNICAL DEFECTS.**

A judgment for the amount of damages assessed in an action on an attachment bond, instead of a judgment by the penalty of the bond, to be satisfied by the payment of the damages assessed, is irregular; but the irregularity can be corrected by the appellate court under Rev. St. 1899, §§ 865, 866 (Ann. St. 1906, pp. 812, 815), commanding that a judgment shall not be reversed except for error materially affecting the merits, and authorizing the judgment to be given on appeal as it should have been in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540, 4541; Dec. Dig. § 1170.\*]

Appeal from Circuit Court, Butler County; J. C. Sheppard, Judge.

Action by the State, on the relation of Mary M. Rife, against Jesse Reynolds and others. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

L. R. Thomason, for appellants. Thos. F. Lane, N. C. Whaley, and D. W. Hill, for respondent.

**NORTONI, J.** This is a suit on an attachment bond. Plaintiff recovered, and the defendant appeals.

During the progress of the trial, the suit was dismissed as to the surety and the cause proceeded to judgment against the defendant, who is the principal obligor in the bond. It appears the defendant instituted an attachment suit in which the present plaintiff was made defendant, and the attachment writ was levied upon a considerable amount of property owned by her. Plaintiff employed counsel and defended the attachment in the circuit court, in which action she prevailed, and judgment was given therein in her favor. She paid her counsel about \$300 attorney's fees in defending the attachment suit. Having defeated the attachment suit, plaintiff instituted this action on the bond given by defendant, who was plaintiff in the attachment, to recover the amount expended by her in defending the attachment. The attachment bond is in the penal sum of \$300. In conformity with section 372, Rev. St. 1899 (Ann. St. 1906, p. 482), it is conditioned, among other things, that the plaintiff shall prosecute his action without delay and with effect, and pay all damages and costs that may accrue to any defendant by reason of the attachment, or any process or proceeding in the suit, or by any judgment or process thereon. Although a portion of the evidence seems to be preserved and before us in the bill of exceptions, all of the arguments advanced for a reversal of the judgment pertain to matters appearing on the face of the record proper.

The evidence is ample to support the judgment. The first and principal argument advanced for a reversal is leveled against the sufficiency of the petition. It is said it fails to state a cause of action for the reason that it does not pointedly allege nonpayment of the damages accrued to the plaintiff herein. The petition recites the facts pertaining to the institution of the attachment suit by the present defendant in which the present plaintiff was made defendant, and recites the execution of the bond in suit, in aid of the attachment therein sued out. The obligation and statutory conditions of the bond are then copied in the petition in *hæc verba*, and it is alleged that there have been several breaches of said bond, in that the plaintiff failed to prosecute said attachment suit with effect; the same having been finally determined in favor of the present plaintiff in the circuit court. It is averred therein that the defendant caused to be attached under such attachment suit plaintiff's separate personal property of the value of \$3,500, and that therefore it became necessary for her to

employ attorneys and defend against the same in the circuit court of Butler county, and that to make her defense thereto plaintiff was compelled to and did pay her attorneys \$300, whereby it is alleged "plaintiff has been damaged in the sum of \$300," after which follows a prayer that a judgment be given plaintiff and against the defendant for the penalty of the bond, etc., and that execution issue to satisfy the same. It is very true there is no formal allegation to be found in the petition by which the plaintiff alleges nonpayment of the damages alleged to have accrued to her by virtue of the attachment proceeding, and there is no doubt, had this question been presented by demurrer to the petition, it would have been well taken. That is to say, the plaintiff, in suing on a breach of the obligation of the bond to pay such damages as may accrue, ought to allege, of course, their nonpayment in order to state facts constituting a breach of this condition. Mr. Drake, in his valuable work on Attachments, in speaking of a suit on an attachment bond, says: "A declaration, which fails to aver the nonpayment of the damages sustained, is bad on demurrer." See Drake on Attachments (7th Ed.) § 168. See, also, Pinney v. Hershfield, 1 Mont. 367; Ryder v. Thomas, 32 Iowa, 56; Horner v. Harrison, 37 Iowa, 378; Michael v. Thomas, 27 Ind. 501. There are other cases asserting the doctrine that, in suits on attachment bonds for nonpayment of damages alleged to have accrued, the nonpayment is the breach of the covenant proceeded upon and must be alleged. It is said, nonpayment being the breach, it is of the substance of the action, and must be alleged in the petition, or otherwise the allegations are fatally defective after verdict. Morgan v. Menzies, 60 Cal. 341; Church v. Campbell, 7 Wash. 547, 35 Pac. 381; Cunningham v. Jacobs, 120 Ind. 306, 313, 22 N. E. 335. Without taking account of the distinction which obtains with respect to the sufficiency of averment when challenged by demurrer and after judgment, under the influence of the statute of jeofail, Mr. Shinn, in his work on Attachment, says: "A declaration or complaint, in an action for a breach of condition in an attachment bond, must aver that the damages sued for are unpaid." 1 Shinn on Attachments, § 187. In this connection, see, also, Hencke v. Johnson, 62 Iowa, 555, 558, 17 N. W. 766, which almost, if not quite, extends the doctrine which rightfully obtains on demurrer, as the rule for the determination of the sufficiency of the petition after judgment. However it may be with the authorities last above referred to, we are persuaded that they are without influence in this state in view of the provisions of our statute of jeofail. Section 672, Rev. St. 1899; section 672, Ann. St. Mo. 1906. There was no demurrer lodged against the sufficiency of the petition. The matter was brought to the attention of the court by oral objection at the threshold of the trial to the effect that the

petition failed to state facts sufficient to constitute a cause of action. The practice of challenging the sufficiency of an averment in this manner does not obtain with the same effect as a demurrer. Indeed, on such objection, the sufficiency of the petition is determined under the rules which obtain after verdict and judgment. State ex rel. v. Delaney, 122 Mo. App. 239, 99 S. W. 1; Haseltine v. Smith, 154 Mo. 404, 55 S. W. 633; Goldsmith v. Candy Co., 85 Mo. App. 595. Although formal averments are omitted from the petition, after verdict and judgment, all matters will be allowed in aid thereof as intended by the pleader, which may be implied by a reasonable construction of the pleadings. Hurst v. Ash Grove, 96 Mo. 168, 9 S. W. 631; Grove v. Kansas City, 75 Mo. 672; Lycett v. Wolf, 45 Mo. App. 489; Munchow v. Munchow, 96 Mo. App. 553, 70 S. W. 386.

It is suggested the mere averment that the plaintiff was damaged in the sum of \$300 by reason of the facts theretofore alleged in petition, together with her prayer for judgment, does not necessarily imply nonpayment of the damages, and that in truth nonpayment may not be inferred from what appears. This argument may be sound. We will not consider it for the reason the principal matter in judgment falls within the very words of our statute of jeofail. Section 672. By that statute we are commanded that no judgment shall be reversed for the want of any allegation or averment on account of which omission a demurrer could have been maintained, or for omitting any allegation or averment without proving which the triers of the issue ought not to have given such a verdict. Now it is certain to reverse this judgment for the defect mentioned would violate both the letter and the spirit of the statute quoted: First, for the reason it is the omission of an averment for which a demurrer would lie in the first place; and, second, it would be a reversal for the omission of an averment of fact without proof of which the verdict could not have been given for the plaintiff. It is clear the averment of nonpayment is cured by the verdict. So reads the statute. Section 672.

Plaintiff recovered a verdict for \$200. The judgment entered thereon is not precisely as it should be, in that instead of being for the penal sum of the bond, to be satisfied by the payment of \$200 and costs, it recites generally that the plaintiff have and recover of the defendant the sum of \$200 with costs, etc. It seems that judgments have been reversed in this state for such irregularities. See State, to Use of Gates, v. Fitzpatrick, 64 Mo. 185; State ex rel. Cochran v. Cooper, 79 Mo. 464. Section 865, Rev. St. 1899 (section 865, Ann. St. Mo. 1906), commands that judgments shall not be reversed unless it appears error was committed against the appellant materially affecting the merits of the action. In view of this legislative command, it seems that the judgment in this case ought not to

be reversed and the cause remanded on such a technical pretext, when it is apparent that the irregularity does not materially affect the merits of the case. Section 866 provides that the Court of Appeals "shall examine the record and award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given, as to them shall seem agreeable to law." This section clearly confers authority upon the appellate court to give a proper judgment when there is a mere irregularity, without reversing the case. In view of the statute above referred to commanding that a judgment shall not be reversed except for error materially affecting the merits of the cause, the statute authorizing judgment to be given here as it should have been in the circuit court should certainly be adhered to in every instance where the ends of substantial justice may be attained thereby. The more recent decisions of our Supreme Court have been in conformity to this view, and we believe them to be sound and just. See *Jackson v. Hardin*, 83 Mo. 175; *Scott, Force Hat Co. v. Hombs*, 127 Mo. 392, 402, 30 S. W. 183. In a case similar to this, where the judgment was irregular, as in this case, this court heretofore expressed the opinion that such irregularity could be properly corrected here. *State, to Use of Heye, v. Frank*, 22 Mo. App. 46, 48.

The trial court should modify its judgment by an entry to the effect that the plaintiff have judgment for the penalty of the bond, to be satisfied by the payment of \$200 and interest thereon from date of judgment, together with costs of suit, for which execution issue. Thus modified, the judgment will be affirmed.

It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

#### STATE ex rel. GUNN v. CORDELL et al.

(St. Louis Court of Appeals. Missouri.  
March 23, 1909.)

#### TIME (§ 9\*)—LOCAL OPTION—ELECTIONS—NOTICE—SUFFICIENCY.

There must be 4 weeks' or 28 days' notice of a local option election to be computed by excluding the first day of publication and including election day; and hence an election held January 31st was sufficiently noticed by publications on the 10th, 17th, 24th, and 31st.

[Ed. Note.—For other cases, see *Time*, Cent. Dig. §§ 11-32; Dec. Dig. § 9; \* *Intoxicating Liquors*, Cent. Dig. § 41.]

Appeal from Circuit Court, Howell County; W. N. Evans, Judge.

Mandamus proceeding by the State, on the relation of John A. Gunn, against W. C. Cordell and others. From a judgment for respondents, plaintiff appeals. Affirmed.

R. S. Hogan and Jas. B. Delaney, for appellant. Green & Green and Livingston & Livingston, for respondents.

GOODE, J. The board of aldermen of the city of West Plains ordered a special local option election to be held in said city January 31, 1907. Pursuant to an order of the court, the notice of said election was published in the *Howell County Gazette*, a weekly newspaper of said city, in the issues of said paper January 3d, 10th, 17th, 24th, and 31st. The election was duly held pursuant to the notice and resulted in a vote against the sale of intoxicating liquors in said city, and publication of the result was made as required by law. Afterwards relator applied to the county court of Howell county for a license to keep a dramshop in the city of West Plains, and was refused, whereupon he instituted this action for the writ of mandamus to compel the county court to grant the license, and the members of said court returned as ground for their refusal of the license that, by virtue of said election under the local option law, intoxicating liquors could not lawfully be sold in the city of West Plains. Relator filed a motion for judgment on the return, contending the publication of the notice for the election was insufficient, and hence the election itself was void. There must be given 4 weeks' or 28 days' notice of an election under the local option law. *State v. Tucker*, 32 Mo. App. 620; *Bean v. County Court*, 33 Mo. App. 635; *State v. Kaufman*, 45 Mo. App. 659; *State v. Brown*, 130 Mo. App. 214, 109 S. W. 99; *Young v. Downey*, 150 Mo. 330, 51 S. W. 751. Whether this was done is to be determined by excluding the first day of publication, and including the day of the election. *State v. Tucker*. Notice for 28 days or 4 full weeks was given in the present case, according to the method of computation laid down in the decisions, *supra*, and the case of *State v. Dobbins*, 110 Mo. App. 29, 92 S. W. 136, as far as the point in judgment is concerned, is not in conflict with this ruling. There were five publications here in as many weeks, but we have excluded the day of January 3d from the count. In the *Tucker*, *Kaufman*, and *Bean* Cases the publications of notice plainly fell short of giving 28 days' notice.

The judgment is affirmed. All concur.

#### AKIN v. RICE et al.

(St. Louis Court of Appeals. Missouri. March 23, 1909. Rehearing Denied April 6, 1909.)

#### 1. INJUNCTION (§ 186\*)—DISSOLUTION—DAMAGES.

Damages are only allowed on dissolution of an injunction for services rendered in securing the dissolution, but the fact that it is impossible to exactly separate the value of services rendered in securing a dissolution from that of

services rendered in examining the case on its merits will not preclude recovery for services in connection with the dissolution, where the best estimate possible is made.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 402-404; Dec. Dig. § 186.\*]

## 2. INJUNCTION (§ 148\*)—BOND—SCOPE.

The bond required by Rev. St. 1899, § 3637 (Ann. St. 1906, p. 2050), providing that no injunction, unless on final hearing or judgment, shall issue except in suits by the state until plaintiff or some responsible person for him shall give bond to the other party conditioned that plaintiff will abide the decision to be made thereon and pay damages and costs adjudged against him if the injunction shall be dissolved, covers an order restraining defendants from acts complained of which was in force until it was dissolved and a further injunction refused on hearing of a motion to make it of force until final hearing, though the order was called a "temporary restraining order" by the court, instead of a "temporary injunction."

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 323; Dec. Dig. § 148.\*]

## 3. PRINCIPAL AND SURETY (§ 59\*) — STRICT CONSTRUCTION—AS AGAINST PRINCIPAL.

The rule that in actions on bonds a strict construction of the bond is to be indulged in, in favor of the obligors, is enforced only in favor of sureties, and has no application where the action was dismissed as to the surety and prosecuted against the principal alone.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 103; Dec. Dig. § 59.\*]

Appeal from St. Louis Circuit Court; Walter B. Douglas, Judge.

Bill by Thomas Akin against Joseph P. Rice and others for an injunction. The bill was dismissed by plaintiff, and defendants moved for an assessment of damages sustained by them in securing dissolution of a temporary injunction, etc. There was a judgment for damages, and plaintiff appeals. Affirmed.

The case out of which the present controversy grows was an action commenced May 5, 1905, by the filing in the circuit court of a petition against Jos. P. Rice et al., as the board of railroad and warehouse commissioners of this state, and the Merchants' Exchange of St. Louis. The Merchants' Exchange is a corporation organized, not for pecuniary profit, but for the purpose of facilitating in every way the transaction of all legitimate business between its members and others. Plaintiff, Akin, is a member of the exchange, and for himself and certain of his customers had entered into various contracts on the exchange, calling for the delivery to plaintiff and his customers, in May, 1905, of a large quantity of No. 2 Red Winter wheat. The board of railroad and warehouse commissioners of this state is by law required to inspect and grade wheat received in and issued out of the public warehouses in the state and has the power and is charged with the duty of fixing and determining the classification and grading of wheat. To determine and fix this the board acts through grain inspectors. It is a rule of the Merchants' Exchange that warehouse

certificates, transferable by indorsement and issued by a public elevator or warehouse company in this state and specifying the classification and grade of wheat stored in an elevator or warehouse, shall govern contracts made on the exchange so far as concerns quality, quantity, and grade of wheat represented therein.

Plaintiff charges, among other things in his petition: That at the time of filing it there was a scarcity of No. 2 Red Winter wheat on this market; that, to supply the demand and enable the parties with whom plaintiff had contracts to comply therewith, a large quantity of wheat grown on the Pacific coast, known as "Red Russian wheat," "was being hurried to the warehouse companies from various cities where it could not be graded as No. 2 Red Winter wheat; that by a secret arrangement between the board of railroad and warehouse commissioners this wheat was to be graded and classified as No. 2 Red, and thereby, under and by virtue of the rule of the exchange, plaintiff and his customers would be compelled to accept said Red Russian wheat, which was inferior in quality and grade to No. 2 Red, in satisfaction of their contracts to their great loss." It is also averred that the contracts of the plaintiff and other members of the exchange are governed by such receipts and certificates, "in so far as the quality, quantity, and grade of wheat so contracted for are concerned, and unless defendant Merchants' Exchange is restrained and enjoined from enforcing said rules and regulations, plaintiff and those from whom he has contracted as aforesaid will be required to accept, on their May contracts for No. 2 Red Winter wheat, said inferior Red Russian wheat, to his and their great and irreparable damage." It is further charged: "That there is now being shipped to the St. Louis market, from Milwaukee and Chicago, large quantities of Red Russian wheat, which plaintiff and his customers will be required to accept in satisfaction of their contract for Red Winter wheat, unless the board of railroad and warehouse commissioners be enjoined from so grading and classifying it, and unless the Merchants' Exchange be restrained and enjoined from enforcing its rules and regulations aforesaid, relating to said certificate or receipt"—referring to the warehouse and elevator receipts.

The prayer is: "That defendants board of railroad and warehouse commissioners \* \* \* be restrained and enjoined from grading or causing, suffering, or permitting to be graded, in this state, any and all Red Russian wheat arriving in store from and after this date in any of said public warehouses or elevators as Native No. 2 Red Winter wheat, or as any other grade of Native Red Winter wheat, and that they, and each of them, be restrained and enjoined

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



from taking any steps or doing anything whatever which will, in any wise, cause or permit Red Russian wheat, or any wheat of a grade or quality below or different from Red Winter wheat, as now established and designated, so arriving in said warehouses and elevators to be inspected, graded, or certified as such;" that the board be required to rescind and revoke its orders authorizing its grain inspectors to grade and classify Red Russian wheat as No. 2 Red Winter wheat; "that defendant Merchants' Exchange, its officers, agents, servants, and employes, be restrained and enjoined from enforcing such of its rules and regulations as require plaintiff, under his contract as aforesaid, for No. 2 Red Winter wheat, deliverable in May, 1905, to be bound by such warehouse certificates or receipts as to the standard and grade of wheat so arriving in said warehouses and elevators to be received under said contract; and that upon a hearing hereof the temporary restraining order be made permanent, and for such other and further orders and relief as may be meet and proper in the premises."

Along with this petition plaintiff filed a bond, with himself as principal and Corwin H. Spencer as surety, obligating themselves to the members of the board of railroad and warehouse commissioners and their grain inspectors, naming them, and to the Merchants' Exchange of St. Louis, in the sum of \$2,000, in which it is recited that: "Whereas, upon the application of the above bounden, the circuit court of the city of St. Louis has granted a temporary injunction against Jos P. Rice [naming also the other members of the board and its grain inspectors] and the Merchants' Exchange of St. Louis, as by the record of said circuit court will fully appear: Now, therefore, if said Thos. J. Akin shall and will abide the decision which shall be made in the case wherein said injunction was granted, and pay all sums of money, damages, and costs that shall be adjudged against him, if the said injunction shall be dissolved, then this obligation shall be void, otherwise to remain in full force and effect." The bond was signed by plaintiff and Spencer and approved by a judge of the circuit court on the same day the petition was filed with the clerk; that is, May 5, 1905. Upon the filing of the petition in the clerk's office of the circuit court, on the same day—that is, May 5th—the following order was issued: "Now, at this day, it appearing to the undersigned that plaintiff has filed in the office of the clerk of this court his petition, setting forth his cause of action against the defendants, and it further appearing therefrom that the plaintiff, upon the facts stated in said petition, is entitled to the relief prayed for, it is therefore ordered: That a temporary restraining order be granted herein, and such restraining order is hereby granted, restraining and enjoining the defendants board of

railroad and warehouse commissioners, and the officers and agents of the grain inspection department of this state, who are made parties defendant in this suit, and their several agents, servants, and employes, from grading, or causing, suffering, or permitting to be graded, into store in this state, Red Russian wheat as Native No. 2 Red Winter wheat, or as any other grade of Native Red Winter wheat, and further restraining said defendants, and each of them, from taking any steps or doing anything whatever which will in any wise cause or permit Red Russian wheat, or any wheat of a grade or quality below or different from Red Winter wheat, as now established and designated, to be inspected, graded, or certified as such; and that defendants Merchants' Exchange, its officers, agents, servants, and employes, be, and they hereby are, restrained and enjoined from enforcing such of its rules and regulations as require plaintiff, under his contracts, as specified in the petition for No. 2 Red Winter wheat, deliverable in May, 1905, to be bound by public warehouse certificates or receipts as to the standard and grade of wheat to be received under said contract, until the further order of this court, upon plaintiff filing with the clerk of this court a bond in the sum of \$2,000 conditioned as required by law, with Corwin H. Spencer as surety, which bond is approved by the undersigned and filed. Defendants are ordered to appear in division No. 6 of this court on the 15th day of May, 1905, at 10 o'clock a. m., to show cause why temporary injunction should not be granted."

On the return day—that is, May 15th—all of the defendants, except the Merchants' Exchange, filed their return to this order to show cause, and on the same day the respondent filed its separate return and answer. It is not necessary to notice this answer any further than to say that it set up the purpose of the corporation very fully; set up the duties of the board of railroad and warehouse commissioners; denied that it has any rules governing the inspection of grain upon going into or out of elevators, but averred that all grain upon so going into or out of elevators must be inspected according to the laws of the state and the rules of inspection established by the board of railroad and warehouse commissioners, and that all such rules are well known among grain merchants and commission merchants dealing in grain in the St. Louis market; denied that it has anything to do with the establishment of the grades, but averred that all the contracts for May delivery of No. 2 Red Winter wheat, to which reference is made in the petition, were made by the plaintiff and the respective parties with reference to the public classification of grades and the public inspection by the official inspectors thereunder and the rules and regulations made in conformity therewith, and the only duty of this defendant in relation to such contracts is in providing for

the enforcement of the same in accordance with the rules and regulations of the exchange and subject to the laws of the state as above set forth; denied there is any equity in the bill; denied the jurisdiction of the court to review the action of the railroad and warehouse commissioners in fixing and establishing the grades of wheat; denied that it (the exchange) has any interest in the controversy of plaintiff with relation to the proper construction and application of the official classification of the board, or in the contracts made by plaintiff and others as to the delivery of No. 2 Red Winter wheat; and averred "that plaintiff is a member of the defendant Merchants' Exchange of St. Louis, that he makes no complaint in his petition that any of the rules and regulations made by the exchange are unreasonable or invalid for any reason, and defendant therefore submits that plaintiff has no ground of injunction against this defendant from enforcing its said rules and regulations requiring plaintiff to perform his contracts heretofore made with reference thereto, subject to the said rules and regulations of the said Merchants' Exchange. Wherefore defendant asks that the restraining order heretofore entered be dissolved as to this defendant, and that it be hence discharged with its costs." A reply was filed to this answer, denying generally the allegations contained in it.

On May 27, 1905, the following order was entered in the case: "Now at this day, this cause coming on for hearing upon the restraining order, an order to show cause made herein, on May 5, 1905, and the return and answer submitted to same, and the court having heard and duly considered the same, and being fully advised in the premises, doth order that said restraining order be and is hereby vacated and the preliminary injunction be and the same is hereby denied." Afterwards the Merchants' Exchange filed its motion for an allowance of \$1,000 for its trouble and expense "in securing the dissolution of the restraining order or temporary injunction granted herein against it, and in and about its defense to plaintiff's petition for a permanent injunction, and in the employment of counsel to prepare its return and to appear and represent it at the hearing for said injunction," placing its damage at the \$1,000, which it asked be assessed against the plaintiff in the cause and judgment entered for amount in its favor. At the December, 1905, term of the court, plaintiff voluntarily dismissed his case. At the June term, 1906, of the court, the motion for assessment of damages against Akin came on for hearing; the motion having been dismissed as against the surety, Corwin H. Spencer. A jury was waived, and during the December term, 1906, the motion coming on for hearing, it was sustained, the damages assessed at the sum of \$750, and judgment entered in that amount. A motion for new trial was duly filed, overruled, exceptions saved, and an appeal taken to this court.

Boyle & Priest, E. T. Miller, and Morton Jourdan, for appellant. R. T. Walker, Judson & Green, and Rassieur, Schnurmacher & Rassieur, for respondents.

REYNOLDS, P. J. (after stating the facts as above). There are two questions presented by the appeal and briefed by counsel. It is claimed by the appellant: First, that, no temporary injunction ever having been issued in the case, the obligation of the bond has not been forfeited; and, in the second place, that the amount awarded is too large and is grossly excessive. Taking up the latter proposition first, the ground of this contention is that the court, in awarding these damages, and the attorneys who testified as to the value of the services, had improperly taken into consideration, in estimating the damages, the services of the attorneys for the Merchants' Exchange in connection, not only with the dissolution of the injunction or temporary restraining order, as it is insisted upon the order is, but also with their services in the defense of the case on its merits, or, more correctly, an examination of the case on its merits. We cannot agree to this view. We are satisfied from the evidence in the case that the court and witnesses made proper discrimination, as far as it was possible to do so. In point of fact, it is very difficult, in view of the averments in the petition, to understand how one could be separated from the other. Any conscientious lawyer, competent to attend to such a case, would necessarily have to go into all the allegations of the petition in order to advise himself and his client on the proper steps to be taken to vacate the restraining order issued, the continuance of which in force was the very gist of the controversy. So true was that in this case that when the court determined that it would not continue the restraining order in force pending final hearing of the case, and when the continuance of the restraining order until final hearing was denied, the plaintiff, recognizing the futility of a further prosecution of the case, voluntarily dismissed it. The dissolution of this temporary restraining order was practically the end of the case. The question of whether it should be dissolved undoubtedly and necessarily turned upon the consideration of the allegations in the petition. Damages are only allowed, on dissolution of an injunction, for services rendered in securing the dissolution. We cannot conceive of any way by which even the most astute legal mind could, in this case, accurately divide one from the other; but because they could not do so to a hair is no reason why services rendered in securing the dissolution should not be paid for, and their value assessed on the bond. It was the duty of the court and witnesses to make the best estimate possible of the value of the services in connection with the dissolution of the injunction. The court evidently did that. So did the attorneys who testified. While the latter varied in their estimate from \$1,000 to \$2,000,

no one went below \$1,000; all saying that they would consider \$1,000 as a very low fee. The court allowed \$750. We see no reason to hold that this award was excessive.

The second proposition turns entirely upon an effort to draw a distinction between a "temporary restraining order" and a "temporary injunction." This is a contention over names more than over substance. The temporary restraining order was issued upon the distinct condition that the plaintiff file with the clerk of the court a bond in the sum of \$2,000, as required by law. This order was entered on the 5th of May. The bond in question was filed on that day and was approved on the same day by the judge of the court. Under our statute, the court had no power whatever to issue any kind of a restraining order in the nature of an injunction without the exaction and the execution of a bond. Section 3637, Rev. St. 1899 (Ann. St. 1906, p. 2050), specifically provides: "No injunction, unless on final hearing or judgment, shall issue in any case, except in suits instituted by the state in its own behalf, until the plaintiff, or some responsible person for him, shall have executed a bond with sufficient surety or sureties to the other party, in such sum as the court or judge shall deem sufficient to secure the amount or other matter to be enjoined, and all damages that may be occasioned by such injunction to the parties enjoined, \* \* \* conditioned that the plaintiff will abide the decision which shall be made thereon, and pay all sums of money, damages and costs that shall be adjudged against him if the injunction shall be dissolved." The authority of the courts of this state to issue injunction is coupled with the obligation to exact a bond. The statute is not to be evaded or frittered away by calling that which is an injunction by any other name. The restraining order in this case was of force against all of the defendants until it was dissolved and a further injunction refused on hearing of the motion to make it of force until final hearing. Who can doubt that a disregard of it would have subjected those against whom it was leveled, and who were bound by it, to punishment for contempt, exactly as absolutely as if it had been termed a "temporary injunction"? It would have been treated exactly as any other injunction. We decline to follow the refinements of the very able, industrious, and learned counsel for the appellant in their attempt to draw a distinction between such a temporary restraining order and an injunction.

The point is made that this is an action on a bond, and that in actions of that kind a strict construction is to be indulged in, in favor of the obligors. That is true, but it does not apply to this case. That rule is always enforced for the protection of sureties. In

the case at bar the action was dismissed as to the surety, and the award is against the principal in the bond. We know of no case, and have been referred to none, that extends this doctrine or presumption to the principal.

A consideration of the whole case leads us to the conclusion that, whether called a "temporary injunction" or a "restraining order," the bond covered it, and that the amount assessed is reasonable, and the judgment of the court correct.

Its action is affirmed. All concur.

### LIBBY et al. v. ST. LOUIS, I. M. & S. RY. CO.

(St. Louis Court of Appeals. Missouri. March 23, 1909. Rehearing Denied April 6, 1909.)

#### 1. CARRIERS (§ 228\*) — CARRIAGE OF LIVE STOCK—NEGLIGENCE.

Where a carrier took 31 hours to transport stock which usually required but 8 or 10 hours, and the stock suffered shrinkage and arrived too late to be placed on the market, which declined; one of the animals being so crippled as to be practically valueless, a prima facie case of negligence was made out.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957, 958; Dec. Dig. § 228.\*]

#### 2. CARRIERS (§ 230\*) — CARRIAGE OF LIVE STOCK—DELAY—QUESTION FOR JURY.

A carrier of live stock must transport the same within a reasonable time, and where unreasonable delays occur without just cause the question of the carrier's negligence is for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. § 230.\*]

#### 3. CARRIERS (§ 213\*) — CARRIAGE OF LIVE STOCK—DELAY.

A shipper of live stock suffering loss by reason of the decline in the market and shrinkage of his cattle, occasioned by the carrier's negligent delay in the transportation, is entitled to recover the loss sustained.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 922; Dec. Dig. § 213.\*]

#### 4. CARRIERS (§ 215\*)—CARRIAGE OF LIVE STOCK—LOSS OR INJURY—LIABILITY.

A carrier of live stock is an insurer against loss or injury to the stock, except such loss as occurs through the intervention of an act of God, the public enemy, the proper vice of the animals, or the act of the owner.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 923; Dec. Dig. § 215.\*]

#### 5. CARRIERS (§ 228\*) — CARRIAGE OF LIVE STOCK—INJURIES—BURDEN OF PROOF.

A shipper of live stock has the burden of proving that an animal received by the carrier in good condition, and delivered at the point of destination in an injured condition, received its injuries through some cause other than the animals' proper vice, and very slight proof of the negligence of the carrier is sufficient to require the carrier to show its freedom from negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 958; Dec. Dig. § 228.\*]

#### 6. CARRIERS (§ 228\*) — CARRIAGE OF LIVE STOCK—INJURIES—EVIDENCE.

The cause of an injury to live stock during transportation may be established from col-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lateral facts affording a reasonable inference of negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. § 228.\*]

**7. ACTION (§ 27\*)—TORT OR CONTRACT—ACTION AGAINST CARRIER.**

A shipper may sue the carrier either in tort on the obligation raised by law or on the contract of carriage, and the mere fact that the contract limits the obligations of the carrier does not require the shipper to sue on the contract.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 177, 178; Dec. Dig. § 27.\*]

**8. CARRIERS (§ 218\*)—CONTRACT OF CARRIAGE—NOTICE OF LOSS.**

A contract for the transportation of live stock, which requires notice of loss or injury to the stock, only requires notice touching loss or injury to the stock, and does not require the shipper to give notice of his loss resulting from the decline in the market price of cattle suffered because of the delay of the carrier in transporting the cattle.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 947; Dec. Dig. § 218.\*]

**9. CARRIERS (§ 218\*)—ACTIONS IN TORT—LIMITATION OF LIABILITY—EFFECT.**

A shipper of live stock, who sues the carrier in tort, makes out his case by showing that the carrier received the stock in good condition, that it negligently delayed the transportation thereof, and by proving negligent injury to the stock and decline in the market, though the stock was shipped under a contract requiring notice of loss within a specified time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 947; Dec. Dig. § 218.\*]

**10. CARRIERS (§ 150\*)—LIMITATION OF LIABILITY—NEGLIGENCE.**

A carrier cannot contract against its negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 654; Dec. Dig. § 150.\*]

**11. CARRIERS (§ 154\*)—LIMITATION OF LIABILITY—CONSIDERATION.**

A stipulation in a shipping contract that the carrier shall not be liable for injury unless notice thereof is given within a specified time operates as a limitation on the common-law liability of the carrier, and to be valid it must be supported by an independent consideration.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 643; Dec. Dig. § 154.\*]

**12. CARRIERS (§ 227\*)—ACTIONS FOR INJURIES TO STOCK—PLEADING LIMITATIONS OF LIABILITY.**

Under Rev. St. 1899, § 604 (Ann. St. 1906, p. 631), authorizing a general or specific denial and requiring the statement of any new matter constituting a defense, a carrier, when sued in tort by a shipper of live stock, must affirmatively plead the contract of carriage requiring the giving of notice of loss or injury to the stock.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 954; Dec. Dig. § 227.\*]

**13. CARRIERS (§ 218\*)—CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY—ACTION IN TORT.**

The mere fact that the action against a carrier of live stock sounds in tort does not avoid the effect of the special contract of carriage, if properly pleaded.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 940-949; Dec. Dig. § 218.\*]

Appeal from Circuit Court, Wayne County; Jos. J. Williams, Judge.

Action by G. W. Libby and others against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

Munger & Hay, for appellants. James F. Green, for respondent.

**NORTONI, J.** This is a suit for damages alleged to have accrued to the plaintiffs because of the defendant's breach of duty in respect of its obligation as a common carrier. At the conclusion of all the evidence, the court directed a verdict for the defendant, and plaintiffs prosecute the appeal.

The petition is in two counts. The first count alleges, substantially: That plaintiffs delivered to the defendant 30 head of steers at Williamsville, Mo., in good condition, for the purpose of transportation over the defendant's railroad to the National Stock Yards at East St. Louis, Ill.; that the defendant accepted the consignment for the purpose of transportation in due time and with proper care; that being unmindful of its obligation in that behalf, defendant negligently delayed the transportation so as to consume 31 hours therefor, when 8 or 10 hours was a reasonable time; that by reason of the defendant's negligent and unreasonable delay, the cattle were not placed upon the market on the day they should have been, and were greatly depreciated in weight and appearance by the long delay without food or water. It is averred the market, on the character of cattle involved, was considerably lower on the day on which the defendant delivered the cattle than the day prior, on which they should have been delivered in due course. In the second count of the petition, it is stated, substantially: That plaintiffs delivered the 30 head of cattle referred to in good condition to the defendant at Williamsville, for transportation to the National Stock Yards at East St. Louis, Ill.; that the defendant accepted the consignment, and thereby assumed the obligation to safely transport and deliver the cattle in good condition at the place of destination; that wholly disregarding its duty in that behalf, and in violation of the law, defendant so carelessly and recklessly transported the cattle as to maim, skin, bruise, wound, and injure all of them, and especially cripple and injure one of said steers so as to materially depreciate the value of all. The answer was a general denial.

On the part of plaintiffs, the evidence tended to prove that plaintiffs delivered the cattle referred to to the defendant, and defendant accepted the shipment for transportation from Williamsville, Mo., to the National Stock Yards at East St. Louis, Ill.; the consignment being in care of E. C. White & Co., a commission firm located at East St. Louis,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

III. The cattle were all in good condition at the time of the consignment. The testimony is to the effect that 8 or 10 hours is the usual and a reasonable time for like shipments from Williamsville to the National Stock Yards at East St. Louis, Ill. It appears in this particular instance the defendant delayed the shipment several hours at Piedmont, Mo., and again for several hours at De Soto, and again at St. Louis, Mo., with the result that they did not reach their destination for the market on the day intended. The time consumed in the transportation was 31 hours, instead of the usual 8 or 10 hours. The delay was such as to preclude the cattle from reaching the market on the day after their shipment, as was anticipated by the plaintiffs. They actually reached the stockyards about 8 o'clock that night, too late for the market of that day, and plaintiffs were therefore compelled to place and sell them upon the market of the following day. The market on the following day, or the day on which the cattle were sold, ranged considerably lower on this class of cattle than on the day previous. This fact induced considerable loss to the plaintiffs on the shipment. It is also shown that the cattle were greatly gaunted and suffered considerable shrinkage from the long time in transit without food and water. There is no evidence whatever tending to support the averments in the second count of the petition with respect to all the cattle being maimed, skinned, bruised, etc. It appears, however, that one of the steers referred to in the second count was so maimed, bruised, and crippled in some manner during the transit as to practically destroy its value; that is to say, instead of selling at its reasonable value of \$40 or \$50, it was depreciated because of its crippled condition so that it was sold for \$5, which amount was its reasonable value after being crippled. These facts certainly made a prima facie case for the plaintiffs. Under the law it was the duty of the defendant to transport the stock within a reasonable time, and where it appears unreasonable delays occurred without just cause therefor, as in this case, the question of defendant's negligence in respect of its obligation to transport the stock within a reasonable time should be referred to the jury. *Sloop v. Wabash R. R. Co.*, 93 Mo. App. 605, 67 S. W. 956; *Leonard v. C. & A. Ry. Co.*, 54 Mo. App. 293; 5 Am. & Eng. Enc. Law (2d Ed.) 450. If the plaintiffs suffered a loss by reason of the decline in the market and shrinkage of their cattle, and this loss was induced because of the defendant's negligent delay in the transportation, it is a loss for which the defendant should make compensation. *Sloop v. Wabash R. R. Co.*, supra.

Now touching the matter of the one steer which was so crippled as to depreciate its value; that is to say, the crippled steer which the plaintiffs sold for \$5 because of its

injuries. It is a general rule that carriers of live stock are liable, like other common carriers, as insurers for loss or injury to the stock intrusted to them for transportation, with the exception that they are not liable for injuries occurring through the "proper vice" of the animal being carried, and not through any negligence on the part of the carrier. 5 Am. & Eng. Enc. Law (2d Ed.) 448; *Cash v. Wabash Railroad Company*, 81 Mo. App. 109; *Hance v. Pacific Express Company*, 48 Mo. App. 179. It appears the crippled steer was in good condition when received by the defendant at Williamsville. Defendant's obligation of insurer imposed upon it the duty to deliver it in good condition at the point of destination, unless its injuries were inflicted through its own proper vice or inherent vicious propensities, or other exceptional causes. In view of the exception to the defendant's obligation as insurer with respect to the proper vice of the animal, the burden of proof is upon the plaintiffs to show that the steer received its injuries through the defendant's negligence. It has been said the burden is upon the plaintiff to show the animal was injured through some human agency. *Hance v. Pacific Express Co.*, 48 Mo. App. 179. And this statement seems to be approvingly quoted in *Cash v. Wabash R. R. Co.*, 81 Mo. App. 109, 114. We believe such to be an inaccurate statement of the law, for the reason the defendant's obligation of insurer imposed upon it the duty to deliver the animal in good condition at destination, excepting for the intervention of an act of God, the public enemy, the proper vice of the animal, or the act or fault of the owner. 5 Am. & Eng. Enc. Law (2d Ed.) 233, 234, 235, 243. This being true, it is immaterial whether the animal was injured by a human agency or otherwise, for if it were not injured as a result of the act of God, the public enemy, its proper vice, or the fault of the owner, the carrier is liable. Those risks, and those only, are taken by the shipper. To illustrate: Suppose, while in possession of the carrier for transportation, the animal was killed by the onslaught of a lion or panther which had escaped from a menagerie. In such case we apprehend no one would deny the liability of the carrier under its obligation as insurer to make compensation for the loss thus entailed by the beast and entirely without the intervention of any human agency whatever. Therefore, in view of the exception as to proper vice, the true rule is that the burden rests with the plaintiff to show prima facie the animal received its injuries through some cause other than its proper vice, and on this score very slight proof of negligence is sufficient to transfer to the carrier the duty of coming forward with evidence to the contrary. 5 Am. & Eng. Enc. Law (2d Ed.) 469, 472. And it is not necessary to show such fact by express and positive testimony. The cause of the injury may be established from col-

lateral facts and circumstances affording a reasonable inference of negligence, identically as other facts may be established in a suit at law. *Cash v. Wabash R. R. Co.*, 81 Mo. App. 109; *Hance v. Pacific Express Co.*, 48 Mo. App. 179. There is no direct testimony whatever as to how the crippled steer was injured. It appears to have been in good condition when delivered to the defendant and severely bruised, skinned, and otherwise crippled when arriving at the point of destination. When these facts are considered together with the fact that 31 hours were consumed in transit for a shipment which should have been made in 8 or 10 hours, and that such injuries were unusual, or at least not usually incident to a shipment with due care, we believe the question of how the steer was injured should be referred to the jury; that is to say, the facts above referred to are sufficient for a prima facie showing that the steer received its injuries from an agency other than its proper vice, and it may be through the negligence of the defendant. This view has been heretofore expressed by both this court and the Kansas City Court of Appeals. *Hance v. Pacific Express Co.*, 48 Mo. App. 179; *Cash v. Wabash R. R. Co.*, 81 Mo. App. 109. Of course, the defendant may rebut this prima facie showing on the part of the plaintiffs by giving evidence tending to prove the animal received its injuries as a result of its inherent vicious propensities, and not from negligent or careless conduct on the part of the defendant. However, by showing the facts above referred to, the plaintiffs satisfy the law with a prima facie case, and it then becomes the duty of the defendant to come forward with its evidence to overcome such prima facie showing. From what has been said, it appears the facts given in evidence made a case for the plaintiffs, and that the court erred in directing the jury to find for the defendant.

The record discloses that there was a special contract between the parties with respect to the shipment in question. The provisions of this contract were not invoked in the answer. The suit does not predicate on the contract. Instead, it is bottomed upon the defendant's unrestricted liability at common law; that is, an action in tort on the obligation raised by law. During the progress of the trial, and while the plaintiffs were giving their evidence, something was said concerning the special contract. The court thereupon remarked that, if there was a special contract between the parties, then plaintiffs could not recover in this action *ex delicto* for a breach of the obligation of the common carrier imposed by law. Plaintiffs did not introduce the contract. After the defendant had introduced the same in evidence, the court directed a verdict for it. This direction of a verdict may have been on account of the view expressed by the court to the effect that plaintiffs could not recover in this action sounding in tort when

it appeared an express contract existed. This expression indicated an erroneous view of the case, for the shipper is always at liberty to exercise his option and sue either *ex delicto* upon the obligation of the carrier raised by law, or declare upon the special contract between the parties, as he may choose. The mere fact that he has taken a stipulation assuring the obligation which the law imposes does not compel the shipper to pursue the contract. He may pursue either remedy. *Clark v. Railway*, 64 Mo. 440, 446; *Wernick v. Railway*, 131 Mo. App. 37, 109 S. W. 1027; 3 Enc. Pl. & Pr. 813. It may be the court directed a verdict for defendant for the reason that it did not appear notice of the plaintiffs' claim had been presented in accordance with a stipulation in the special contract. One of the provisions of the special contract is to the effect that, as a condition precedent to any damages for loss or injury to live stock, the shipper will give notice in writing of the claim therefor to some agent of the carrier, etc., within a time therein limited. It does not appear in the record whether any such notice was given, nor does it appear that it was not given. There is nothing tending to show a waiver of the stipulation referred to. In fact, the evidence is entirely silent as to whether this provision of the contract was complied with, or whether it was waived. The judgment of the trial court in directing a verdict is sought to be sustained here upon this stipulation contained in the shipping contract. It is clear the judgment cannot be sustained on this ground. The stipulation requires notice of loss or injury "to live stock." These words do not comprehend such damages as the plaintiffs may have sustained from the decline in the market price of cattle. On a fair construction of the words employed, notice is required only touching loss or injury to the cattle. In this case the words include no more than the injury to the cattle and the shrinkage they suffered. See *Leonard v. Railway*, 54 Mo. App. 293, 302, 303; *Klass Com. Co. v. Wabash R. R. Co.*, 80 Mo. App. 164, 169. It is argued the stipulation referred to is a condition precedent to the plaintiffs' right to recover, at least in so far as the loss or injury to the cattle is concerned, and that notice of the claim should have been given in accordance therewith. In this connection it is said that it devolved upon the plaintiffs to show either that the notice was given, or that its requirement was waived. Therefore, nothing whatever appearing in the record on the question, the judgment of the trial court should be affirmed. The question as to whether or not it devolves upon the plaintiffs to prove the notice had been given or waived, as a condition precedent to their right of recovery, is to be determined by reference to the nature of the action. It is true the authorities usually speak of such stipulations as conditions precedent, and it

is no doubt true, when the suit is on the special contract, the burden is on the plaintiffs to show that the notice required was either given or waived. This is in keeping with the rule of law generally on such questions, to the effect that one declaring upon a contract must show full performance of its conditions on his part. However this may be, when the action is in tort, as here, plaintiffs make out their case by showing the shipment in good condition, unreasonable and negligent delay, and the negligent injury to the stock and decline of the market. In an action *ex delicto*, such as this one, plaintiff is not required to introduce the bill of lading, but may and must prove a breach of the carrier's obligation imposed by law. Therefore he is not required to prove either that he gave the notice mentioned, or that it was waived. *Brown v. St. L. & S. F. Ry. Co.* (decided by this court at the last term, but not yet officially reported) 117 S. W. 112; *McNichol v. Express Co.*, 12 Mo. App. 401; 1 *Hutchinson on Carriers* (3d Ed.) § 447. See, also, 3 *Hutchinson on Carriers* (3d Ed.) § 1332. At any rate, in this character of action, it is certainly not essential for the plaintiffs to show they had given the notice, unless the stipulation is pleaded or otherwise interposed by the defendant in such a manner as to indicate a nonobservance of it is relied upon as a defense. *The Westminster* (D. C.) 116 Fed. 123; *Nordlinger v. U. S.*, 127 Fed. 683, 62 C. C. A. 409; *Hatch v. Railway*, 15 N. D. 490, 107 N. W. 1087. It therefore appears, as the special contract was not relied upon by the plaintiffs for a recovery, it was not incumbent on them to show that notice was either given or waived.

In view of the fact that the cause will probably be retried under an amended answer invoking this stipulation of the special contract, it may not be out of place to comment upon a question suggested by the record; that is, as to the competency of enforcing the stipulation at all on the facts in proof, in view of the recent decision of our Supreme Court in *George v. C. & R. I. etc., Ry. Co.*, 113 S. W. 1099, 1100. From what appears it is obvious that, if plaintiffs recover at all, they must recover for the consequence of the defendant's negligence. It is certainly true, as a general proposition, that the courts will not enforce any kind of a stipulation which operates to limit the common-law liability of a common carrier to answer for the negligence of itself or its servants; and this is true even though such stipulation be supported by a separate consideration, independent of that given for the transportation. A common carrier is not permitted to contract against its negligence. To permit it to thus escape from the consequence of its negligence is against the policy of the law, for the reason it encourages lax attention to duty. *McFadden v. Mo. Pac. R. R. Co.*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; *Dawson v. C. & A. Ry. Co.*, 79 Mo. 296; 4 *Elliott on Rail-*

*roads* (2d Ed.) §§ 1498, 1500; 5 Am. & Eng. Enc. Law (2d Ed.) 308. However this may be, the books are replete with cases elsewhere, and in this state too, for that matter, following *Rice v. Railway*, 63 Mo. 314, and *Dawson v. Railway*, 76 Mo. 514, in which stipulations of the character here invoked have been enforced, notwithstanding the loss or damages sued for resulted solely from the carrier's negligence. It appears the courts have sustained and enforced such stipulations in cases where the damages sued for resulted from negligence, on the ground that such stipulations do not operate as a limitation upon the common-law liability of the carrier. The authorities argue that, instead of being a limitation upon the liability at common law, such stipulation amounts to no more than a reasonable regulation touching the shipper's right or a regulation going to the remedy, and as such they are enforced even in negligence cases, if otherwise reasonable and just in the particular circumstances of the case. *Rice v. Railway*, 63 Mo. 314, 319; *Dawson v. Railway*, 76 Mo. 514; *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556; *Hatch v. Railway Co.*, 15 N. D. 490, 107 N. W. 1087; 4 *Elliott on Railroads* (2d Ed.) § 1512; 5 Am. & Eng. Enc. Law (2d Ed.) 321, and note, also, 325. On the same theory—that is, on the theory that such stipulations do not operate a limitation upon the common-law liability of the carrier—the authorities generally declare and sustain the proposition that no separate consideration, independent of that given for the transportation, is essential to render the stipulation valid. Those and many other authorities assert the doctrine that, notwithstanding the carrier's duty to receive and transport, it is reasonable and just that it should be allowed to interpose such stipulation in regulation of the shipper's right, to the end that the shipper should be required to present his claim before the avenues of investigation are foreclosed. It is said it prevents the great injustice which may be perpetrated by the practice of presenting stale demands. Thus viewed, it is a reasonable regulation only on the shipper and does not operate to limit the liability of the carrier, for the carrier is liable to respond in the full measure required by law if the shipper has asserted his claim in due time, as required by the stipulation. On this reasoning of the law, it is said no independent consideration is essential to its validity. *Hatch v. Railway Co.*, 15 N. D. 490, 107 N. W. 1087; *Crow v. C. & A. Ry. Co.*, 57 Mo. App. 135, 142; 5 Am. & Eng. Enc. Law (2d Ed.) 300; *Moore on Carriers*, 305. For reasons from which such conclusion may be deduced, see, also, *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556; *Rice v. Railway*, 63 Mo. 314; *Wabash R. R. Co. v. Black*, 11 Ill. App. 465.

However all of this may be, our own Supreme Court has recently decided (see *George*

v. Railway Co., 113 S. W. 1099, 1101) that such stipulation operates as a limitation upon the common-law liability of the common carrier, and that it is invalid unless supported by a separate consideration, independent of that given for the transportation. In that case, so far as pertinent here, the matter under consideration was a stipulation requiring notice of the claim to be given within a certain time, as in this case. The question stated by the court, and to which the learned judge addressed the reasoning of the opinion, is: "We understand the proposition of the counsel now to be that no consideration is necessary to support such a contract; in other words, the railroad company may charge the full tariff rate and yet limit its common-law liability in the manner now claimed." After reasoning thereon, the judgment of the court was given contrary to the proposition stated. The propositions of law to be deduced from the opinion and the judgment of the Supreme Court given upon the question in decision as above stated are two: First, that such stipulation operates as a limitation on the common-law liability of the common carrier; and, second, that such stipulation must be supported by an independent consideration for the reason it is a limitation upon the carrier's common-law liability. With the doctrine that such stipulation operates a limitation of the common-law liability thus affirmed and established by the Supreme Court of the state, a grave question essentially arises for future consideration as to the force and effect to be accorded such stipulations, even though supported by a sufficient consideration in those cases, such as this one, where the loss or damage results from the negligence of the carrier, against the result of which it is said the carrier may not contract upon any consideration. Now we are not unmindful of the multitude of cases sustaining such stipulations where the loss occurred through the negligence of the carrier. In fact, we have pointed out some of them in the opinion *supra*. But what we are mindful of at this time is that no common carrier is permitted to limit its liability to respond for the consequences of its negligence, and that such stipulations are to be treated henceforth by our Supreme Court as limiting the common-law liability of the common carrier. Without deciding the question, we may suggest it would seem that, if such stipulation operates as a limitation upon the common-law liability of the carrier, then it may not be enforced at all in those cases where the cause of action accrues through the carrier's negligence, for the reason the carrier is not permitted to relieve itself from such consequences by contract, even on a separate and independent consideration. We offer these suggestions to counsel for their consideration during the interim. The court reserves judgment on the question for the reason it is unnecessary to pronounce it in this case.

We have considered the contract thus far

for the reason that the judgment of the trial court is sought to be sustained thereon. However, we are of the opinion that this contract was not properly in the case, for the reason it was not invoked in the answer. As stated before, the answer was merely a general denial. This being true, the contract was erroneously admitted in evidence over the objection and exception of plaintiffs' counsel. Our statute (section 604, Rev. St. 1899 [Ann. St. 1906, p. 631]) authorizes a general or specific denial of the material allegations of the petition, and requires, second, the statement of any new matter constituting a defense thereto. There can be no doubt that the stipulation of the contract respecting notice introduced new matter into the case which should have been pleaded in the answer. Under the general denial, the defendant can show such facts only as disprove the facts alleged in the petition. If the defendant relies upon matters in confession and avoidance of the action, they should be brought forward by a competent plea in the answer. 3 Ency. Pl. & Pr. 858. If the defendant rests its defense upon any fact which is not included in the allegations necessary to support plaintiffs' case, it must set out such facts in its answer, according to the statute, in plain and concise language; otherwise it will be precluded from giving evidence of it at the trial. *Northrup v. Miss. Valley Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337; *State ex rel. Demuth v. Williams*, 48 Mo. 210; *Nelson v. Wallace*, 48 Mo. App. 193; 3 Enc. Pl. & Pr. 558. In keeping with the doctrine of the Code last referred to, it has been frequently declared that noncompliance with the stipulation of a shipping contract requiring notice, as in this case, is a matter of defense to be affirmatively pleaded in the answer. *Hatch v. Railway Co.*, 15 N. D. 490, 107 N. W. 1087; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *Central Vermont, etc., Ry. Co. v. Soper*, 59 Fed. 879, 8 C. C. A. 341. See, also, *The Westminster*, 127 Fed. 680, 62 C. C. A. 406; 3 *Hutchinson on Carriers* (3d Ed.) §§ 1345, 1332. The defendant not having invoked in its answer the stipulation of the special contract touching the matter of notice, it was not competent to consider it in evidence over plaintiffs' objection and exception. The mere fact the action sounds in tort does not render the special contract incompetent as a defense. If properly pleaded, it is entirely competent to be considered for what it is worth. *Oxley v. St. L., K. C. & N. Ry. Co.*, 65 Mo. 629.

For the reason the special contract is not properly in the case, its validity, and such other provisions as are sought to be invoked, will not be further noticed.

The judgment will be reversed, and the cause remanded.

It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.



## LANG v. MURPHY.

(St. Louis Court of Appeals. Missouri. March 23, 1909.)

**1. DEEDS (§ 181\*)—DESTRUCTION—CURE OF DEFECT.**

Where the original deed in a vendor's chain of title has been destroyed in a fire which destroyed the county records, the defect in the title is cured by a quitclaim executed by his grantor and wife.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 181.\*]

**2. VENDOR AND PURCHASER (§ 350\*)—SUFFICIENCY OF TITLE—COMPETENCY OF EVIDENCE.**

Where, in an action wherein it was sought to compel complete performance of a contract by a purchaser, the testimony showed vendor was to furnish abstract of the title, and if good title in vendor were shown thereby the sale was to be completed, and letters of the purchaser show that he had the abstracts, or one of them, examined and criticised by a title examiner, the abstracts were competent evidence to determine whether vendor furnished abstracts showing good titles as agreed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 350.\*]

**3. VENDOR AND PURCHASER (§ 334\*)—PAYMENT MADE ON VERBAL CONTRACT—RIGHT TO RECOVER.**

A purchaser, who has paid money on property on a verbal contract for the purchase of land, cannot sue to recover the same if vendor is willing to execute the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 334.\*]

Appeal from Circuit Court, Oregon County; W. N. Evans, Judge.

Action by A. J. Lang against William Murphy. From a judgment for defendant, plaintiff appeals. Affirmed.

Green & Green, C. E. Elmore, and E. P. Johnson, for appellant. S. M. Meeks and Geo. M. Miley, for respondent.

GOODE, J. Plaintiff sued defendant on an account for four barrels of whisky sold for \$369 and for interest and drayage, which ran the amount up to \$405.38. The goods were sold by S. J. Lang & Son, but the account was afterwards assigned to plaintiff A. J. Lang. Defendant filed an answer in the nature of a cross-bill, setting up an agreement between him and plaintiff's assignors S. J. Lang & Son, whom plaintiff represented in the transaction, which agreement was as follows: In November, 1905, defendant was the owner and in possession of a piece of land in the city of Hardy, in Sharpe county, Ark. During said month plaintiff purchased this land from defendant, promising to pay \$750 for it and deliver to defendant the whisky sued for in the petition as part of said price. Thereafter plaintiff delivered the goods to defendant in payment on the price of the real estate, promising to pay the balance in cash. Before the balance was paid or a deed for the land had been executed to plaintiff, a new and distinct contract regarding the

transaction was entered into between the parties. Defendant owned and was in possession of two other parcels of real estate, to wit, a lot in the town of Mammoth Spring, Fulton county, Ark., and a lot in Boyce City, Oregon county, Mo. These two lots are described in the answer, and it is averred that, by mutual agreement between plaintiff and defendant, their original contract, whereby plaintiff was to purchase from defendant a lot in the city of Hardy, Ark., was rescinded, and instead it was agreed between them plaintiff should purchase from defendant the two parcels of land last described, should pay \$1,000 for the Missouri lot and \$200 for the Arkansas lot, or \$1,200 in all, and the price of the whisky in controversy should go as a credit on said sum and plaintiff pay defendant the balance of \$830.50 in cash. We have stated these matters according to the clear intention of the answer, though two clerical errors occurred in giving the prices of the properties; but the mistakes are so obvious they cut no figure. It was further averred plaintiff had not paid defendant the sum of \$830.50, or any part thereof, though defendant had performed all the conditions of the contract on his part and stood ready and willing, and is still, to convey to plaintiff, by a good warranty deed, the two parcels of ground and deliver possession of them, and that defendant had offered to deliver them on payment of the purchase price, but plaintiff had refused to accept the deed or pay the balance of the price. It is further averred defendant had executed a sufficient warranty deed conveying the title to the property to plaintiff and had brought the same into court and tendered it to plaintiff. Wherefore defendant prayed for an order and decree directing plaintiff to accept the deed and pay the balance of the purchase money. In reply plaintiff denied he had ever entered into any contract or agreement with defendant to purchase the lands mentioned, and alleged that, if any such agreement was ever made between the parties, it was not reduced to writing, but was a verbal contract and void under the statute of frauds.

Plaintiff and defendant testified in contradiction of each other regarding the alleged contracts for the purchase of real estate. The testimony of defendant is positive in favor of both contracts. He swore the first one for the sale of property in Hardy, Ark., was made in November, 1905, and was rescinded at plaintiff's instance in June, 1906, and the other contract for the sale and purchase of the lots in Mammoth Spring, Ark., and Boyce City, Mo., substituted in lieu of it. The testimony indicates plaintiff, who was a wholesale dealer in liquors, desired to obtain the lot in Boyce City, Mo., which had a building on it, to have a saloon conducted there where his liquors would be sold; that, before the transaction was consummated, a local op-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion election was held in the county and resulted in prohibiting the sale of intoxicating liquors therein, and then plaintiff did not care to obtain the property. Plaintiff himself denied he ever made a contract for the purchase of either parcel of real estate, though he said he and defendant contemplated a deal for the lot in Hardy, but the abstract of the title furnished by defendant was not satisfactory. He swore positively he never agreed to take any other property from defendant. Letters written by plaintiff were introduced in evidence which, to our minds, prove he did agree to take the other two parcels. These letters show defendant had furnished an abstract to said two parcels of land subsequent to the agreement about the Hardy property, and further show plaintiff objected to the chain of title in one of said abstracts, saying the title was good from the United States down to a man named Deadrick; but there was no conveyance shown from Deadrick to Mrs. Richle, who was the next grantor.

As it was admitted Deadrick's name did not appear in the chain of title to the Hardy property, it is clear plaintiff had the titles to the other two pieces under advisement. The original deed executed by Deadrick had been burnt in a fire which destroyed the records of Fulton county, Ark., but the defect was cured by a quitclaim deed executed by Deadrick and wife to defendant. In our opinion the abstracts of the titles to the two parcels of property, taken in connection with this quitclaim deed, showed good titles to both tracts were vested in defendant at the time he tendered a warranty deed to plaintiff. It is said these abstracts were not competent evidence. The testimony shows defendant was to furnish plaintiff with abstracts of the titles, and if good titles in defendant were shown thereby, the transaction was to be completed. Plaintiff's own letters prove he had the abstracts, or one of them at least, examined and criticised by a title examiner. Under these circumstances the abstracts were competent in order that the court might determine whether or not defendant had complied with his contract to furnish abstracts showing good titles. We may say, too, that in one of his letters plaintiff offered to pay defendant \$75 to sell the lots so as to get plaintiff's money out of them (this is the expression used). The weight of the evidence was with defendant, and on it the court found the facts in his favor, and further found defendant had been able, willing, and ready to perform his part of the contract, but plaintiff had refused to perform. Therefore plaintiff was denied a recovery on his account and was given the option to complete the purchase of the land within 30 days from the date of the decree by paying to defendant the balance due on the price, or \$830.50, and from this judgment plaintiff appealed.

We are not called on to determine whether the letters written by plaintiff constitute sufficient memoranda of the contracts for the purchase of the two parcels of land to satisfy the statute of frauds. The decree did not compel plaintiff to take the land, but only allowed him the option to do so. Therefore the contract was not specifically enforced. The question for decision is regarding plaintiff's right to judgment for the price of the whisky which was delivered as part payment of the price of the lots, in view of his refusal to carry out the contract. Plaintiff is to blame for the agreement remaining unexecuted and cannot in justice compel defendant to pay money for the whisky which was to go in payment for the lots. In *Galway v. Shields*, 66 Mo. 313, 27 Am. Rep. 351, the Supreme Court, on a review of the authorities, held a person who had paid money or property on a verbal contract for the purchase of land could not maintain an action to recover back the money or the value of the property so paid, if the vendor of the land was willing to execute the contract. The action was identical with the case at bar, being for the value of goods sold and delivered pursuant to a verbal contract by which the goods were to be paid for in real estate. The owner of the real estate had tendered a proper deed, but the seller of the goods refused to accept it. That decision is conclusive of this appeal.

The judgment is affirmed. All concur.

#### VETTE v. J. S. MERRELL DRUG CO.

(St. Louis Court of Appeals. Missouri. March 23, 1909. Rehearing Denied April 6, 1909.)

##### 1. SALES (§ 456\*)—CONDITIONAL SALES—DISTINGUISHED FROM LEASE.

The owner of a drug store in a lease of storeroom executed an instrument purporting, in its first part, to be a lease of the storeroom, fixtures, and stock of goods to second parties for a fixed period in consideration of a certain sum to be paid in monthly installments. Second parties were permitted to cancel the contract prior to its agreed termination by giving notice, in which event the stock was to be turned over in the same condition as received, and they agreed not to sublet the premises, to repair damage to fixtures, and to surrender possession at the expiration of the term. The second part of the instrument was in the form of a proposal by second parties, accepted by the owner, to purchase the stock, fixtures, and good will of the establishment and to take a sublease of the storeroom for a term to end at the same date as the owner's lease and for the same rental. It was further agreed: That a certain sum should be paid in addition to the "rental"; that second parties should make a certain deposit, which if the agreement was carried out should be credited on the price; that they should execute a chattel mortgage; that they should have no right to purchase until they had paid the full amount under the first part of the agreement; that if they failed to carry out the agreement as a whole, the sum deposited should be forfeited; and that if they abandoned it during the period of the purported lease, they should lose what they paid under it and also the deposit. *Held*,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the first portion of the instrument was not, as it purported on its face to be, a lease, and the second part an option to purchase at the end of the term, but that the instrument as a whole was a conditional sale executed in the form it was to evade the statute regarding conditional sales.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 456.\*]

## 2. SALES (§ 472\*)—CONDITIONAL SALES—RECORDING.

Though a contract, in reality a contract of conditional sale, was drawn in part in the form of a lease to evade Rev. St. 1899, § 3412 (Ann. St. 1906, p. 1945), requiring a contract of conditional sale to be in writing and recorded as against creditors and purchasers, a person who is neither a creditor of, nor a purchaser from, the buyer, and who was apprised of the arrangement with the seller and a party to it, is not within the protection of the statute.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1370; Dec. Dig. § 472.\*]

## 3. SALES (§ 479\*)—CONDITIONAL SALES—REMEDIES OF SELLER.

Rev. St. 1899, § 3413 (Ann. St. 1906, p. 1947), providing that it shall be unlawful for the owner to take possession of property conditionally sold without refunding what has been paid on the price after deducting reasonable compensation for the use of the property and allowing for reasonable breakage and damage, does not compel the owner to reclaim the property and tender back part of the price, but only prevents him from taking the property without a tender.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 479.\*]

## 4. GUARANTY (§ 70\*)—DISCHARGE OF GUARANTOR—NEGLECT TO ACT.

It is no defense to a guaranty of performance of a conditional sale of a stock of goods by the buyer that the seller did not take possession and tender back what had been paid less reasonable compensation for the use of the property, where it was intended by all the parties that the goods should be sold by the buyer and were practically all so sold, for the seller had no title to the replenishments or any right to take them with or without the tender.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 70.\*]

## 5. JUDGMENT (§ 891\*)—SEVERAL. OBLIGORS—SATISFACTION.

The obligee of a contract to which there are several obligors may have different judgments against them for a breach, but can only have one satisfaction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1703; Dec. Dig. § 891.\*]

## 6. BANKRUPTCY (§ 364\*)—PROOF OF CLAIM—EFFECT ON SECURITY.

The fact that the assignee of one who conditionally sold a stock of goods filed a demand before the referee in bankruptcy proceedings against the buyer does not preclude him from suing on a guaranty of performance of the contract of sale by the buyer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 504; Dec. Dig. § 364.\*]

Appeal from St. Louis Circuit Court; Robert M. Foster, Judge.

Action by John H. Vette against the J. S. Merrell Drug Company on a guaranty. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Prior to the facts to be related, William V. Glascock was the proprietor of a drug store

at No. 307 North Twelfth street in a room which he had leased from the Star Building Company. The building of which the room was a part was known as the "Star Building," and Glascock's establishment as the "Star Pharmacy." His lease of the room would expire April 30, 1909. On October 1, 1904, he entered into a contract with Philip C. Wise and Leo K. Solomon, which will be copied infra. Defendant, the J. S. Merrell Drug Company, guaranteed the fulfillment of a portion of said contract as will appear, and this action is against said company on its guaranty; said Solomon & Wise having failed to perform that portion of the contract with Glascock which the drug company had guaranteed. Vette is the plaintiff under an assignment of the contract to him by Glascock. The whole contract between Glascock and Solomon & Wise, the guaranty of defendant to a part of it, the assignment to Vette, and that portion of the contract between Glascock and Solomon & Wise, which looks like an appendix to the instrument as originally drawn, but purports to have been executed on the same day, are as follows:

"This article of agreement made and entered into this 1st day of October, 1904, by and between William V. Glascock, of the city of St. Louis, Mo., party of the first part, and Philip C. Wise and L. K. Solomon, also of the city of St. Louis, Mo., parties of the second part, witnesseth: That the said party of the first part has this day leased to the said parties of the second part the certain store-room known as No. 307 North Twelfth street, in the city of St. Louis, Mo., together with all fixtures, soda fountain, cash register and the stock of fresh, up-to-date drugs, sundries, cigars, candles, etc., to the value of \$800, for the period of eight months from the 1st day of October, 1904, on the following terms, to wit: For the use and rent thereof the said parties of the second part hereby promise to pay to the said party of the first part, or to his order, the sum of \$1,800, for the whole time above stated, and to pay the same in equal monthly installments of \$225 per month, on the last day of each month (not in advance); the first payment to be made on the 31st day of October, 1904. It is especially agreed and understood that the said parties of the second part reserve the right to cancel this lease at any time before the termination as above stated, by giving to the said party of the first part a written notice of their intention to do so at least 10 days before the expiration of the current month of their tenancy, and upon giving said notice they shall be released from all liabilities on account of rents, except for the current month. It is also specially understood and agreed that at the time the said parties of the second part shall turn over to the said party of the first part said store with all

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fixtures and stock therein contained that there shall be at least \$800, at wholesale value, of the stock, drugs, cigars, sundries, etc., and the said stock of drugs, etc., shall be fresh and up to date, the same as now contained in said store. The said parties of the second part agree not to sublet said premises, nor allow any other tenant to come in with or under them, without the written consent of said party of the first part, and that they will replace or repair all injuries or damages to the fixtures by them during their occupancy, or shall pay for the same, at the expiration of this lease they will quit and surrender up to the said party of the first part the peaceable possession thereof. It is hereby understood that all expenses for light, telephone, etc., shall be paid by the said parties of the second part. In witness whereof the parties have set their hands to three copies, one copy to be retained by the said party of the first part, one copy to be held by said L. K. Solomon, and one copy to be held by the J. S. Merrell Drug Co., a corporation. W. V. Glascock. Philip C. Wise. Leo K. Solomon.

"In consideration of the execution of the above lease and the sum of one dollar to us in hand paid, we hereby guarantee the fulfillment of the covenants of the above lease, subject to privilege of cancellation as herein stated. O. L. Bieser. J. S. Merrell Drug Co., by Henry Stolle, Treas.

"Referring to the above lease, it is proposed by the parties, Philip C. Wise, L. K. Solomon, and William V. Glascock, that they, the said Philip C. Wise and Leo K. Solomon will buy from the said William V. Glascock, and the said William V. Glascock will sell to Philip C. Wise and Leo K. Solomon at the expiration of this lease (and after they, the first-named parties, have paid in the full amount of \$1,800), the entire contents of said drug store, and they, the said Leo K. Solomon and Philip C. Wise, hereby agree to pay for such stock and fixtures and good will the full sum of three thousand and sixty (\$3,060) dollars (in addition to the above \$1,800 rental), and they hereby deposit with the said William V. Glascock the sum of two hundred (\$200) dollars, as earnest money, to be applied in part payment for the above-named business, and they hereby agree to execute their note, secured by chattel mortgage, on the entire contents of the drug store at No. 307 North Twelfth street, in the city of St. Louis, Mo., in the sum of \$2,860, with interest from June 1, 1905, at the rate of 6 per cent. per annum, said note to be paid in monthly installments of \$150 each, first payment to be made on the 1st day of July, 1905, and in the event that the said Solomon and Wise should fail to pay in the full amount of \$1,800 as hereinbefore stated, or in case they fail to execute said chattel mortgage as above stated, then the said \$200 hereby deposited shall revert to the said Glascock

as liquidated damages. It is specially understood that the said chattel mortgage to be executed shall include all stock and fixtures contained in said drug store, and all stock and fixtures that may be added to said drug store from time to time, and the said Solomon and Wise shall guarantee that the stock shall not be less than \$800 in case the stock and fixtures are turned back to William V. Glascock. In case the said Solomon and Wise should fully comply with the conditions of the lease of the store, stock, and fixtures as hereinbefore agreed, the said W. V. Glascock promises and agrees to give a good, sufficient and clear bill of sale to the said Wise and Solomon, free from all liens of every class and character covering the above-described stock and fixtures, except a chattel mortgage on soda fountain for a balance of \$750 that will be due on purchase price, which amount may be assumed by said Solomon and Wise and deducted from note for \$2,860 to be executed for balance of purchase price and he will deliver to them a sublease for a period ending April 30, 1909, at the same annual rental he is charged, and the said Solomon and Wise hereby agree that they will execute with the said W. V. Glascock a lease on the said premises for the above period at a rental not exceeding \$125 per month, payable in advance, and it is agreed that a clause shall be inserted in the chattel mortgage to be executed by said Solomon and Wise, under which the stock and fixtures shall be held as security for the payment of the above rent as well as for the payment of the aforementioned \$2,860. Philip C. Wise. Leo K. Solomon.

"I hereby accept the above proposition, and further agree that I will pay to said Solomon and Wise the sum of one thousand dollars as liquidated damages, in case I should fail to make the bill of sale and lease as above provided. W. V. Glascock.

"St. Louis, Mo., Dec. 20, 1904. For value received, I hereby assign and sell to John H. Vette, all my right, title, and interest in and to the contract hereto attached, and all my interest in drug store known as Star Pharmacy in Star Building, St. Louis, Mo. W. V. Glascock.

"It is understood between the parties to the within lease that in case of the total or partial destruction by fire of the premises leased, including the stock and fixtures therein described, then the same shall be restored within a reasonable time by the lessor at his expense, and the rent shall abate for the period during which the premises, stock, and fixtures are being put in a tenantable condition. It being further understood between the parties that the lessor in case of loss or partial loss by fire shall replace the stock with at least \$800 worth of fresh and merchantable drugs as selected by the lessees, and the fixtures with others of the value of \$2,950, to be selected by the lessees. This

clause to be signed in triplicate and pasted to and made a part of a lease made this 1st day of October, 1904, between William V. Glascock, lessor, and Philip C. Wise and Leo K. Solomon, lessees. W. V. Glascock, Philip C. Wise, Leo K. Solomon."

Pursuant to their undertaking as evidenced in the foregoing instrument, Solomon & Wise paid Glascock installments of money, as follows: \$225 on the last days of October, November, and December, 1904, and as Glascock had assigned to Vette on December 20th, they afterwards paid Vette two installments on the last days of January and February, 1905. They did not pay an installment in March, but on April 4th paid \$125 on the March installment, leaving \$100 unpaid. Plaintiff says they also paid \$63 on the debt for the soda fountain mentioned in the agreement, and they testified to paying the Star Building Company \$250 for rent for May and June, and the May rent, if paid, should go as a credit on the contract between them and Glascock, for the eight months ending May 31st. This would leave the rent for April unpaid and make the total payments of Solomon & Wise, on the stipulation to pay \$1,800, \$1,438.60, leaving a balance of \$361.40; whereas, if the May rent was not paid, the total payments were \$1,313.60, leaving a balance of \$486.40. When they found themselves unable to pay the full installments, Vette said to pay \$125, due as the monthly rental of the room under the lease held by Glascock from the Star Building Company, and he (Vette) would wait for the remainder of the installments. The evidence goes to show demands by Vette in April and July for the possession of the premises, including the stock of merchandise. In the latter month and on the 6th day of it, a petition in bankruptcy was filed in the federal court against Solomon & Wise, and on July 7th they turned over the keys of the room to the agent of the building company. During the latter part of July they were adjudged bankrupts, and their property, including the fixtures and goods in question, was placed in charge of a trustee pursuant to the bankruptcy act. Vette filed a petition before the referee in bankruptcy, claiming the fixtures and goods as owner, and the referee ordered the fixtures turned over to him, but refused the petition regarding the merchandise. The federal District Court affirmed this ruling of the referee in regard to the merchandise; the matter having been certified to said court. Afterwards Vette presented a demand against the bankrupt estate for \$1,350, the amount for which he sues in this case and composed of the same items, which demand was allowed by the referee. On December 17, 1906, plaintiff instituted the present action against the Merrell Drug Company on its guaranty. The petition alleges the trustee in bankruptcy had been discharged from his trust, and insufficient funds had come into

his hands to pay any of the demands allowed against the bankrupt estate of Solomon & Wise, and that plaintiff never has received anything on account of said bankruptcy proceeding, though Solomon & Wise have been discharged from all their liabilities by the decree of the federal court. Other facts are stated in the petition substantially as we have set them out, and it is charged the drug company is indebted to plaintiff by reason of the facts alleged in the sum of \$1,350, composed of the following items: Rent of storeroom for the months of March, April, and May, \$225 a month, or \$675, and for the stock of goods turned over to Solomon & Wise under their contract with Glascock and not returned by them in accordance with the contract, \$800, or a total of \$1,475, less a credit for \$125 paid April 4th on the March installment. Wherefore plaintiff prayed judgment for \$1,350 against the drug company. The answer admitted the execution of the instrument declared on and averred it was one entire contract between Solomon & Wise and Glascock, though it appeared to consist of two contracts. The answer further admitted the bankruptcy proceeding against Solomon & Wise, surrender of the fixtures and furniture in the storeroom to plaintiff, refusal of the officials in bankruptcy to turn over the stock of merchandise to him, failure of the estate to pay a dividend, and discharge of the bankrupts. It was averred Solomon & Wise had paid Glascock and plaintiff on the contract sums of money amounting in the aggregate to \$1,763.60; further, that when the contract was arranged all the parties to it contemplated the stock of merchandise should be sold in the usual course of retail trade by Solomon & Wise, and said firm had sold nearly all of the original stock prior to their bankruptcy. It is further averred that, if plaintiff ever had any right to the possession of the goods, he failed and neglected to enforce his right in a reasonable time, or until after Solomon & Wise had been adjudged bankrupts, and took no appeal from the refusal of the referee to turn over the goods to him, or from the order of the District Court affirming the decision of the referee. Wherefore defendant was relieved of liability under its guaranty. The court, after passing on requested declarations of law, entered judgment for defendant, and plaintiff appealed.

Jamison & Thomas, for appellant. Grant & Kennedy, for respondent.

GOODE, J. (after stating the facts as above). Defendant's counsel insist the contract between Glascock, on one part, and Solomon & Wise, on the other, was of such a nature that their client was exonerated from liability on it in consequence of plaintiff's procuring an allowance by the referee in bankruptcy of the present demand against Solomon & Wise. They say Vette, by de-

manding and getting the furniture and fixtures and demanding also the goods, elected to rescind the entire contract, and hence released defendant as guarantor for the performance of any part of it. Plaintiff's counsel insist there was a contract of letting which was independent of the one for the sale of the property, and that defendant guaranteed performance of it whether a sale was consummated under the other contract or not. It is conceded defendant and its co-guarantor, Bleser, guaranteed fulfillment only of those promises made by Solomon & Wise which preceded their signatures, and this preceding matter purported to be a lease of the storeroom, furniture, fixtures, and stock of goods for the eight months from October 1, 1904, to June 1, 1905, upon certain terms, to wit: The parties of the second part (Solomon & Wise) were to pay Glascock \$1,800 for the whole term in monthly installments of \$225 on the last day of each month. The middle paragraph of the so-called lease permitted Solomon & Wise to cancel the contract at any time prior to its termination by giving Glascock written notice of their intention to do so 10 days before the expiration of the current month; further providing that, upon giving said notice, Solomon & Wise should be released from all liability for rent except for the month. This paragraph stipulated that if Solomon & Wise turned over the premises, fixtures, and merchandise to Glascock pursuant to the right accorded them to do so, there should be at least \$800 of merchandise at wholesale on hand, and the same should be fresh and up to date as it was at the date of the contract. The next paragraph bound Solomon & Wise not to sublet the premises without the consent of Glascock, to replace and repair all breakage and damage to fixtures during their occupancy or pay for same, and quit and surrender possession to Glascock at the expiration of the term; also required the parties of the second part to bear the expense of telephone and lights. Part of the undertakings of Solomon & Wise were to be secured by a guaranty, and part by a chattel mortgage, the instrument provides, and those stipulations we have mentioned were what defendant guaranteed. The stipulation that the stock should be of the value of \$800, if it was returned to Glascock, refers to a return of it upon the cancellation of the alleged lease by Solomon & Wise before the end of the term. There was no stipulation for redelivery of the merchandise to Glascock or his order after the eight months had expired, for we think such is not the effect of the following language: "It is specially understood that the said chattel mortgage to be executed shall include all stock and fixtures contained in said drug store, and all stock and fixtures that may be added to said drug store from time to time; and the said Solomon & Wise shall guarantee that the stock shall not be less than \$800 in case the stock and fixtures

are turned back to William V. Glascock." That clause refers only to the value of the stock if turned back inside of eight months as previously provided. As Solomon & Wise never attempted to terminate the alleged tenancy, but remained in occupancy until July, 1905, or more than a month after the term had expired, neither Glascock nor plaintiff, as assignee, became entitled by virtue of said proviso of the contract to a return. Whether return might be demanded under our statute will be determined later. But defendant bound itself, *inter alia*, for the payment by Solomon & Wise of \$1,800 for the entire term. The whole sum has not been paid, and defendant would be liable for the balance if the covenants it guaranteed were contained in a separate contract of lease. If the whole contract was simply one for the conditional sale of the property, defendant's liability must be discussed from another point of view.

The second part of the agreement between Glascock, on one side, and Solomon & Wise, on the other, was in the form of a proposal by the latter, accepted by Glascock, to purchase the stock, fixtures, furniture, and good will of the establishment, and to execute to them a sublease of the room for a term to end April 30, 1909, the same date Glascock's lease ended, and for the same rental he paid; that the price should be \$3,060 in addition to the \$1,800 "rental"; that a chattel mortgage should be executed by Solomon & Wise to secure the payment of \$2,060 in monthly installments of \$150 each, and for the deposit with Glascock of \$200 which, if the agreement was all carried out, should be credited on the purchase price, and when, added to the \$2,860, would make up the \$3,060, or the amount of the purchase price above the \$1,800 "rental," which "rental" the agreement assumed would have been paid during the prior eight months.

Several things stand in relief on this agreement: Firstly, that Solomon & Wise had no right to purchase the property until they had carried out the first stipulation by paying the full \$1,800 for which defendant stood sponsor; secondly, if they failed to carry out the agreement as a whole, and all the terms of it, the \$200 put up with Glascock should go as liquidated damages to him; thirdly, if they abandoned the enterprise during the first eight months and turned the stock back to Glascock, they would lose it, what they had paid on it, and also the \$200. Was the first portion of the contract what it purports on its face to be, to wit, a demise of Glascock's leasehold, fixtures, and merchandise, and the second part a contract giving Solomon & Wise an option to purchase the property at the end of the term, or was the contract as a whole a conditional sale of the leasehold, executed in a peculiar form to evade our statutes regarding conditional sales? We think the latter is the correct conclusion. All parts of the contract pur-

port to have been executed on the same day, including the appendix to provide what should be done in the event the property was burnt, the receipt of Glascock for \$200, expressed to be "earnest money as per contract October 1, 1904," and the recital in the contract that said sum was "to be applied in part payment for the above-named business." The monthly installments called for in the first part of the agreement were made up of the rental due the Star Building Company for the storeroom, or \$125, plus \$100 on the price of the stock; that is, \$1,000 of the \$1,800 to be paid by Solomon & Wise was for room rent and \$800 went toward paying for the furniture, fixtures, and merchandise. They were to pay \$3,060 more under the second portion of the agreement, and were then to take a lease of the room for the balance of Glascock's term at the same rental he paid. It was in testimony the parties in negotiating the transaction put an estimate on the stock approximating its value at \$800, and the concluding portion of the contract shows the fixtures were valued at \$2,950. These figures show a discrepancy of \$110 as compared with the purchase price, but that circumstance is slight in comparison with others. The parties regarded and treated the arrangement between them as one contract. Their stipulations were put in a single instrument, and in his written assignment to Vette, Glascock spoke of what he assigned as a "contract," using the singular instead of the plural number. The oral testimony shows, too, the parties contemplated a sale from the beginning of their negotiation. It seems impossible to hold the first portion to be a lease, though leases of personal property are not unknown to the law. 1 McAdam, L. & T. (3d Ed.) 258. The delivery of a stock of merchandise by its owner to another person, to be disposed of in the ordinary course of retail trade, is an act incompatible with a demise, because incompatible with retention of a reversion in the property to vest in the owner at the end of the term. 1 McAdam, 127. The contract looks like a conditional sale which was to become absolute on the execution of a chattel mortgage and the performance of other promises by Solomon & Wise, including the taking of a lease. If so, as the matter never was consummated as agreed, it remained in its first form.

Treating it therefore as a conditional sale, it is not clear how this conclusion affects the liability of defendant upon its guaranty. Our statutes require sales, leases, rentings, hirings, and other deliveries of personal property by the owner to another, on condition that the title shall not vest in the transferee until a certain sum is paid, to be evidenced by a writing, executed, acknowledged, and recorded as provided in cases of mortgages of personal property, and declare if this is not done the condition regarding the title remaining in the original owner is void as to creditors of the transferee and

purchasers from him in good faith. Rev. St. 1899, § 3412 (Ann. St. 1906, p. 1945). The instrument in question, with its first part in the form of a lease, likely was drawn in evasion of this statute; but defendant is neither a purchaser nor a creditor of Solomon & Wise and, moreover, was apprised of their arrangement with Glascock and a party to it. Therefore it is not within the protection of the statute. Section 3413 (Ann. St. 1906, p. 1947) says whenever property is sold, leased, rented, hired, or delivered in the manner provided in section 3412 (i. e., so as to retain the title in the owner until payment), it shall be unlawful for the owner to take possession of the property without refunding to the transferee, or any one receiving the property from him, what has been paid on the price, after deducting reasonable compensation for the use of the property, not to exceed 25 per cent. of the amount paid, and allowing for reasonable breakage and damage done while the property was out of the possession of the owner. Said statute is invoked in defense of the present action, in connection with the fact that Vette never offered to pay either Solomon & Wise or the trustee in bankruptcy 75 per cent. of what had been paid by the former. This proposition has no relevancy to the liability of defendant. The statute does not compel the owner of property to reclaim it and tender back part of the purchase price, but only prevents him from reclaiming without a tender. We cannot understand why Vette should lose the benefit of the guaranty, which was taken as additional security for performance by Solomon & Wise, because he did not choose to avail himself of the statutory remedy. Moreover, this decisive fact remains: Practically the whole stock of goods had been sold by Solomon & Wise, and it was intended from the first by all parties concerned, including defendant, they should be. Neither Glascock nor Vette had any title to the replenishments or any right under the statute to take them with or without a tender.

Vette procured an allowance of the demand before the referee in bankruptcy, and it is argued his doing so precludes him from using the present remedy. The idea is this: By proceeding in bankruptcy for an allowance and for the return of the furniture and fixtures, he elected to rescind the contract with Solomon & Wise thereby releasing defendant from its guaranty of performance of the contract. This argument is weak. As far as the allowance of the referee is concerned, it covered part of what Vette is entitled to judgment for in the present case, but the obligee of a contract to which there are several obligors may have different judgments against them for a breach, but can have only one satisfaction. *Carroll v. Campbell*, 110 Mo. 557, 19 S. W. 800. If defendant and Solomon & Wise were co-promisors, plaintiff might obtain separate judgments

against them, and certainly he is not precluded from a judgment against defendant, which bound itself in a distinct contract, by the fruitless allowance against the bankrupts. On what theory the referee in bankruptcy ordered the furniture and fixtures turned over to Vette, and the United States District Court affirmed the order, we are not apprised. It may be because the instrument executed by Solomon & Wise and Glascock was construed to be both a contract of lease and an option to purchase. The fact that the right of other creditors to take advantage of the nonrecording of the contract, if it was a sale on condition, was not enforced, indicates this theory was followed. Missouri, etc., *Plow Co. v. Spilman* (D. C.) 117 Fed. 746; *Parlin, etc., Co. v. Hord*, 78 Mo. App. 279; *Oyler v. Renfro*, 86 Mo. App. 231. But said right may not have been asserted for the reason that the amount paid by Solomon & Wise, even if the transaction was regarded as a sale, was less than the value of the goods and the rent of the room while they occupied it. The contract shows the parties grouped together the rent for eight months and the stock, in arranging the price, placing the former at \$1,000 and the latter at \$800; whereas, the furniture and fixtures were priced at about \$3,000. Now though the payments made by Solomon & Wise were, legally speaking, on the whole purchase price, they were regarded by the parties as having been made on the rent and stock only, and may have been so treated in the bankruptcy case, thereby leaving the price of the fixtures wholly unpaid, so that Vette could reclaim them without tendering any sum. It can be shown by a computation, which we will not introduce into the opinion, that on the theory of a conditional sale, if we remember Vette could get back no part of the merchandise, the federal tribunals secured what was equivalent to substantial compliance with section 3413 when they relinquished the furniture and fixtures to him without a tender. Those matters are conjectural and immaterial. According to our view, the sale of the furniture and fixtures fell, as to creditors, within the provisions of section 3412, and after the sale the property so far belonged to Solomon & Wise that in strictness of law they could not be reclaimed by Vette without complying with section 3413. But that they were relinquished to him without compliance with said section is a matter which touches the rights of Solomon & Wise and their creditors, not the liability of defendant on its guaranty. If the creditors and the bankruptcy officials chose to waive the statute, this redounded to Vette's benefit, but nothing he did in the bankruptcy proceeding estops him now. As defendant bound itself for the payment of \$1,800 by Solomon & Wise, who are utterly insolvent, and this

debt has not been paid in full, defendant must respond for the remainder.

The judgment is reversed, and the cause remanded. All concur.

# LIEBER v. FOURTH NAT. BANK OF ST. LOUIS.

(St. Louis Court of Appeals. Missouri. March 23, 1909.)

## 1. BANKS AND BANKING (§ 119\*)—TRANSACTION WITH DEPOSITOR—NATURE.

A transaction between a bank and a depositor arising from a check on the deposit is a debit and credit account, the depositor being creditor, and the bank debtor.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 289; Dec. Dig. § 119.\*]

## 2. ACCOUNT STATED (§ 1\*)—CHECKS—PAYMENT ON FORGED INDORSEMENT—RIGHTS OF DRAWER.

The receipt and retention without objection by a depositor of his passbook, balanced after charge against him of certain checks, did not constitute an account stated, so as to preclude him from suing the bank at law to recover the amount of the checks on discovering that they were paid on forged indorsement, and to require him to sue in equity.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. § 2; Dec. Dig. § 1; \* *Banks and Banking*, Cent. Dig. § 345.]

## 3. BANKS AND BANKING (§ 148\*)—CHECKS—FORGED INDORSEMENT—DRAWER NOT NEGLIGENT.

On July 5, 1900, and August 26, 1902, respectively, plaintiff sent checks to his loan agent payable to supposed borrowers, and receiving notes and deeds of trust purporting to be signed by the borrowers and covering the loans. The agent, by forging the borrowers' names, obtained the proceeds, but until his suicide sent money to plaintiff covering the interest due on the notes. He was reputed to be honest up to his death. On having cause to suspect forgery, plaintiff acted promptly and notified the bank. Held, that plaintiff was not negligent so as to preclude recovery from the bank of the amount of the checks.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 442-444; Dec. Dig. § 148.\*]

## 4. WITNESSES (§ 144\*)—COMPETENCY—TRANSACTIONS WITH DECEDENTS—FORGERY.

In an action by a depositor against a bank to recover the amount of checks sent by him to his loan agent to be delivered to supposed borrowers, and forged by the agent, who afterwards committed suicide, the payees were not incompetent witnesses on the ground that they were privies in contract with the deceased agent.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 631; Dec. Dig. § 144.\*]

## 5. BILLS AND NOTES (§ 296\*)—INDORSEMENT—GENUINENESS—GUARANTY.

Every indorser of commercial paper, including bank checks, guarantees the genuineness of preceding indorsements.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 673; Dec. Dig. § 296.\*]

## 6. BANKS AND BANKING (§ 148\*)—PAYMENT OF CHECKS—RIGHTS OF DRAWER.

Payment of a check by the drawee bank was an assurance to the drawer, that the bank

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



had assured itself of the genuineness of preceding indorsements.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 440, 451; Dec. Dig. § 148.\*]

#### 7. BANKS AND BANKING (§ 148\*)—PAYMENT OF CHECKS—RIGHTS OF DRAWER.

The drawer of a check was not as much bound as the drawee bank to know that the first of several indorsements was forged.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 440-444; Dec. Dig. § 148.\*]

#### 8. APPEAL AND ERROR (§ 1039\*)—HARMLESS ERROR—PLEADING.

In an action by the drawer of checks to recover from the drawee the amount thereof, they having been paid on a forged indorsement, omission of the petition to allege demand for payment and tender of the checks was not reversible error, where the evidence showed that plaintiff's attorney called on the drawer to secure repayment and was ready and willing to turn the checks over, and that a formal demand would have been useless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075, 4077; Dec. Dig. § 1039.\*]

#### 9. APPEAL AND ERROR (§ 1008\*)—FINDINGS BY LOWER COURT—EFFECT.

On appeal a trial court's finding is entitled to the effect of a general or special verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955; Dec. Dig. § 1008.\*]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by Arthur Lieber against the Fourth National Bank of St. Louis. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff in this action, respondent here, brought suit against the defendant, now appellant, to recover the sum of \$2,000, paid out by defendant on checks of \$1,000 each, drawn by plaintiff, it being averred that the signatures of the payees had been forged. There is practically no controversy over the facts, either as stated in the pleadings or developed by the testimony.

It appears that on the 5th day of July, 1900, the plaintiff transmitted by mail to one J. R. Penn, at Fulton, Mo., a check drawn by plaintiff on the Fourth National Bank for \$1,000, to the order of one G. W. Hawkins. On the 9th of July, 1900, the check was paid by the defendant, the Fourth National Bank, to the last indorsee and then holder, the National Bank of Commerce, at St. Louis, and the amount charged to plaintiff, who was a depositor and customer of defendant. This check, with its successive indorsements, is as follows:

"No. 235. St. Louis, July 5th, 1900. Fourth National Bank of St. Louis. Cor. 4th & Olive Sts. Pay to the order of G. W. Hawkins, One Thousand  $\frac{00}{100}$  Dollars. \$1000.00. Arthur Lieber."

Indorsed as follows:

"G. W. Hawkins." "Penn & Sallee." "Pay National Bank of Commerce, St. Louis, Mo.,

or order. Commercial Bank of Fulton, P. S. Adams, Cashier." "St. Louis Clearing House, National Bank of Commerce in St. Louis, July 9, 1900."

Afterwards, on August 26th, plaintiff mailed to the same man, J. R. Penn, at Fulton, another check drawn by him on the defendant bank, to the order of one Robert L. Bedford, which was paid by the defendant on the 4th of September, 1902, and the amount of it charged against the plaintiff in his account with the bank. That check, with its successive indorsements, is as follows:

"No. 332. St. Louis, Aug. 26th, 1902. Fourth National Bank of St. Louis. Cor. 4th & Olive Sts. Pay to the order of Robt. L. Bedford, One Thousand  $\frac{00}{100}$  Dollars. \$1000.00. Arthur Lieber."

Indorsed as follows: "Pay to order of J. R. Penn. Robt. L. Bedford." "J. R. Penn." "Pay to the order of The Mechanics' National Bank, St. Louis, Mo. The Callaway Bank, Fulton, Mo., E. W. Grant, Cashier." "Sept. 4, 1902. The Mechanics' National Bank, St. Louis Clearing House."

It thus appears that the check for \$1,000 to the order of G. W. Hawkins, purporting to have the indorsement of G. W. Hawkins, followed by the indorsement of Penn & Sallee, had either been deposited with the Commercial Bank of Fulton by Penn or Penn & Sallee, or cashed by that bank on the indorsement of Penn & Sallee, and that after indorsement of the Commercial Bank of Fulton to the order of the National Bank of Commerce, in St. Louis, had been put through the clearing house at St. Louis, for account of the National Bank of Commerce, in St. Louis, and taken up through the clearing house by the Fourth National Bank. The check of August 26th, it appears, was indorsed and deposited or cashed by Penn after the purported indorsement of Bedford, in the Callaway Bank, at Fulton, indorsed by that bank to the order of the Mechanics' National Bank at St. Louis, Mo., and put through the clearing house at St. Louis by the latter bank to the account of the Fourth National Bank, by which it was taken up. At the time these two checks were paid, plaintiff had ample funds to meet them on deposit with the defendant bank. From the time of the payment of the first check, in July, 1900, down to June 11, 1905, the defendant bank had balanced plaintiff's account with it on his passbook, and in due course, and in accordance with the usual practice between banks and their customers, had returned to plaintiff the checks with which his account had been charged, along with the balanced passbook. Thus, through the year 1901, plaintiff's account was balanced down to four different dates, in 1902 to five different dates, in 1903 to four different dates, in 1904 to four different

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dates, generally to January, March, or April, June or August, September or November, and in 1905 it was balanced down to April 8th and June 11th. On each occasion the passbook showed a balance to the credit of plaintiff, and in 1901, as well as in 1902, that balance struck covered the amount called for by these two checks, showing that they had been paid, and these two checks were returned to plaintiff at the time the account was balanced, along with his other checks paid during the same period.

It appears from the evidence in the case that this J. R. Penn, with one Sallee, was carrying on an abstract, insurance, and real estate loan and sale business at Fulton, in Callaway county, during these periods, and had been doing so for some years prior to 1900, he and Sallee doing business as partners under the name of Penn & Sallee. The plaintiff in the case, a pianist and organist at one of the churches in St. Louis, had been in the occupation of a music teacher, pianist, and organist for about 18 years, in the course of which occupation he had saved up some money, which he was desirous of loaning out on farms. His attention being called to Penn as a reliable man, he wrote to Penn, inquiring whether he could make loans for him in that part of the country. Plaintiff had no personal acquaintance with him nor any transactions with him other than by correspondence, and the letters from Penn to plaintiff are in evidence. When Penn informed Lieber that he had secured opportunities to place loans, and Lieber accepted, Penn sent him by mail what purported to be an abstract of the title to the land on which the loan was proposed to be made, bringing the abstract down to cover the proposed deed of trust securing the loan, sending with the abstract the note and deed of trust. These abstracts were certified by Penn. Upon receiving the abstract, plaintiff transmitted to Penn the check for the amount of the loan. The first one in the case, it will be remembered, was dated July 5, 1900, payable to the order of G. W. Hawkins; the second one dated August 28, 1902, to the order of Robt. L. Bedford. We have said that the notes and deeds of trust were transmitted to plaintiff before he sent the checks. It is not very clear, however, whether the transmittal of the checks preceded or followed the receipt of the notes and deeds of trust, and is not very material. At all events, plaintiff received the deeds of trust and the notes, along with the abstracts purporting to show the recording of the deeds of trust. One of the notes purported to be signed by Hawkins, one by Bedford; the deeds of trust purporting to be signed and acknowledged by the parties and their wives, Penn certifying to the acknowledgments. Thereafter Lieber received \$35 interest on each loan every six months—the loans bearing 7 per cent. interest—regularly until July 5, 1905. Whether this interest

came to him through J. R. Penn or Penn & Sallee is not clear. On the 4th of July, 1905, plaintiff saw an account in the newspaper of the suicide of Penn, who died by his own act on the 3d day of that month. Apparently the notice made such reference to Penn's transactions as to excite the suspicion of Lieber. Thereupon he sent his attorney, Mr. Lee Sale, to Fulton, to inquire into the matter of the suicide of Penn and the reports as to its cause, and the attorney appears to have then learned of the reports which were current, and of his having committed suicide on account of the exposure of forgeries which seem to have come to light about that time. On the return of Mr. Sale from Fulton, he went to the defendant bank, and, in a conversation with the president of the bank, informed the latter that Penn had committed suicide, showed him four checks which he had, including the two checks in suit, informed the president of defendant that he had been to Fulton, had just returned, had examined the records there, and, while he found the seal of the recorder to be genuine on the deeds of trust, had found that the deeds of trust were not recorded in the books at the pages mentioned on the backs of the deeds of trust, told him he had investigated this matter in Fulton, had spoken to people there, had showed them the signatures, and was satisfied from what he had heard there and his investigations that the deeds of trust and the notes and indorsement of the names of the payees on the checks were forgeries, and that his client, Lieber, would look to the bank for payment, and would probably have to sue the bank; to which the president of the defendant bank said that it would not be necessary to sue, all that would be necessary for Lieber to do would be to get affidavits that these signatures were forgeries, and under the rules of the clearing house the bank must refund the money. The attorneys for plaintiff assumed and acted on the belief that the five-year statute of limitation ran in an action of this kind. That being so, the five-year statute would have run against the Hawkins check on the 9th of July, 1907, and acting on this impression they accordingly commenced this suit for Lieber on the 8th of July, although not having then received the affidavits demanded. When the affidavit was received from Hawkins, denying that he had indorsed the check, and before an affidavit had been procured from Bedford, the five-year statute would have run against the Hawkins check. At any rate, plaintiff or his attorney did not receive the affidavit of Hawkins until late in July, and did not procure that of Bedford until some time afterwards. When he received the latter he presented it to the president of defendant, who said that they had concluded to contest the matter. This was after the action had been commenced.

The answer of the defendant set up the

fact of the balancing of the passbook, its return, accompanied by the checks on the several periods during the intervening years from 1901 down to 1905, to plaintiff, and claimed that the effect of the return of the passbook with the account balanced and of all the checks to plaintiff constituted an account stated. The reply was a general denial.

At the trial the plaintiff testified that all his relations and transactions with Penn were by letter. He produced and introduced such letters as he had, also the deeds of trust, abstracts, notes, and checks. The depositions of Hawkins and Bedford were taken and read in evidence for plaintiff. Each of them swore in the most positive manner that they had had no transactions whatever with Penn, had never borrowed this money through him, had never known or heard of plaintiff, had never signed the notes or deeds of trust, never acknowledged them, never saw or indorsed the checks, nor authorized any one to do so for them. There was some slight evidence by other parties to the effect that the signatures of Hawkins and Bedford on the checks resembled the handwriting of Penn.

On its own behalf the principal, practically the only, testimony offered by defendant, outside of the passbooks—these, however, it being stipulated and agreed, having been received at each balancing date—was to the effect that prior to his suicide on July 3, 1905, J. R. Penn was in good credit financially, according to reputation was amply able to have paid these two checks, if repayment had been demanded of him, either out of his own means or from money that his credit would have enabled him to raise from friends or from banks in Fulton, and that, while some rumors had started directly prior to his suicide, his general reputation in the community immediately preceding his suicide, and, for that matter, through his whole life, was of the very highest character.

At the trial defendant raised the point that plaintiff was precluded from opening up the account in an action at law, and could only do so in a suit in equity. Objection was also made to plaintiff or Hawkins and Bedford testifying, on the ground that J. R. Penn was a party to the contract, and, being dead, these witnesses being also parties to it were under the disabilities of the statute and barred from testifying. Due and proper objections were made throughout the trial to the admission of testimony contrary to these contentions; the point also being made that no demand for repayment of the money evidenced by the checks having been averred, and no averment made of a tender of the checks to the bank, that not only no testimony could be received to that effect, but that the petition, in failing to aver a demand of payment and of a tender of the checks, stated no cause

of action. At the close of the trial the defendant asked a peremptory instruction that plaintiff was not entitled to recover, which was refused, and exception duly saved. Defendant then asked the court to give seven declarations of law, all of which the court refused, and to which refusal exception was duly saved. One or more of the declarations of law asked and refused were substantially to the effect that if, on the 30th of August and the 1st of November, 1902, the defendant had balanced plaintiff's account, returning to him his passbook, showing what sums had theretofore been paid out and charged to his account, and showing a balance in his favor, arrived at by deducting these checks, and had returned these checks to him, in that case the account became an account stated, and plaintiff could not maintain the action at law, and the judgment should be for the defendant. Another declaration of law asked and refused was to the effect that if the defendant returned plaintiff's checks to him, among them being the checks sued on, and that with the checks were returned plaintiff's passbook with defendant bank, showing what balances he had at the time his checks were returned to him, and plaintiff kept his checks and passbooks for two years, "without making any objection to the same, that his account with the bank became an account stated." Another of the refused declarations was to the effect that before plaintiff could recover herein he must have delivered or tendered the checks in question to the defendant, and such delivery or tender must have been pleaded by plaintiff in his petition. Another was that, before he could recover, plaintiff must have delivered or tendered the checks in question back to the defendant. Another declaration asked and refused was that the plaintiff is disqualified as a witness to testify in the case to any conversations or communications which he had with or had sent to Penn. Finally, a declaration was asked to the effect that plaintiff is an interested party, and, Penn being dead, he is disqualified as a witness to testify in the case. The requests for these declarations were all refused, and exception duly saved.

At the request of the defendant the court made a special finding of facts which substantially followed the pleadings and testimony as set out above. The court also finds that plaintiff tendered to defendant the checks, and demanded payment of the sum of \$1,000 on each of them, being the amount of each of these checks. The court further found that the National Bank of Commerce and the Mechanics' National Bank, to which banks the checks had been paid by defendant, now are, and at all the times mentioned were, solvent; that the defendant has not been damaged by plaintiff's failure to discover prior to July 5, 1905, the fact that the indorsements were not the indorsements of Hawkins and Bedford.

There was a separate finding as to the facts connected with each of these two checks, but we have put them together here, as they are practically the same in each case, save as to names and dates and the bank through which payment was made. The court in conclusion found in favor of plaintiff, and assessed his damage at the sum of \$2,290 and costs, being the principal in the several notes, with interest thereon from July 8, 1905, the date when the suit was instituted. Exception was saved to this finding, and a motion for new trial filed within due time, overruled, and exception saved. An appeal was duly prayed to this court, a bond being waived by the plaintiff.

Barclay & Fauntleroy, for appellant. Lee W. Sale, for respondent.

REYNOLDS, P. J. (after stating the facts as above). In spite of the multitude of reasons assigned why a motion for new trial should have been granted, 38 such grounds being set forth in the motion, and these grounds for new trial being repeated under 9 headings in the assignment of error in this court, these 9 assignments being subdivided into numerous subassignments, the propositions involved in it are really very simple and very few. The first proposition involved is, the passbook having been returned at stated periods, showing the balance of the account in favor of plaintiff on the books of the bank at those dates, whether its receipt and retention by plaintiff, together with the checks charged against him, without objection, constituted the rendering and acceptance of an account stated, and whether the nonaction of plaintiff thereon for several years after receiving this balanced account, which included the two checks in controversy, as well as the checks, presented such a state of facts as, making it an account stated, would drive plaintiff into a court of equity to open it up, or compel plaintiff, the account stated having been set up in the answer as a defense, to meet that defense, not by a general denial in his reply, but by setting up his equitable defense to the account stated by way of reply, if he desired to open up the account on any grounds upon which an account stated can be attacked. In brief, it is claimed that the court, sitting as in the trial of an action at law, is precluded from opening up that account. It is true that the authorities treat this transaction between the bank and its customer as a debit and credit account; its customer the creditor, the bank the debtor. In very many cases these passbooks and checks returned to the depositor by the bank with the account balanced are treated as accounts stated, the depositor not making timely objection; but we have found no case, and have been referred to none, in which, in a case such as the one at bar, the party has been thrown out of

the law court and driven to chancery to recover payment of a check carried into the passbook account and covered by the passbook. The case so frequently referred to and much relied on by the very learned counsel for appellant, of *Kenneth Investment Co. v. Bank*, 96 Mo. App. 125, 70 S. W. 173, as holding that the receipt and retention without objection for a considerable time of the balanced passbook and canceled checks constitutes an account stated, is a case in which, while this court held that these accounts between the bank and its customer so rendered constitute accounts stated, when retained without objection to the account as rendered, still the court permitted that same account to be attacked and its untruthfulness shown and its error corrected in an action at law. It is true that no point appears to have been made that the case was on the wrong side of the court, but it is apparent that it was tried as an action at law. It is true that after defendant set up the rendition of the account—that is, the return of the passbook with the account balanced and of the checks canceled—plaintiff replied that the balances were incorrect, in that defendant had incorrectly charged plaintiff with amounts drawn out on forged checks. But that did not appear to change it into a suit in equity to open up and set aside an account for fraud; it was proceeded upon as an ordinary action at law, not tried before the court, it is true, but before a referee in the first instance, as in any other action at law. The necessity of such a reply as in the *Kenneth Investment Company Case* was obviated in the case at bar by the amended petition, which distinctly sets up the fact of the payment of these forged checks, charges they were forged, and, averring that they were wrongfully charged to plaintiff, demands judgment for them. That is practically all that the reply in the *Kenneth Case* did—beyond a general denial, which was also interposed in the reply in this case. So that *Kenneth Investment Co. v. Bank* is no authority for the proposition that in the case at bar plaintiff should, by way of reply, attack the balanced passbook as an account stated, and go into equity to open up the account. We hold that under the pleadings in this case it was open to plaintiff to challenge the payment of these checks, without being driven to the equity side of the court to do so.

A feature which does distinguish the *Kenneth Case* from the case at bar is that it was a case in which a clerk of plaintiff, one of its confidential agents, was the one who, by the means of forged checks, concealed by him from the company (plaintiff), had drawn a large amount of money on account of the plaintiff from the bank. He was the one through whose hands the passbook and the returned checks came from the bank to the plaintiff in the case. That is not the fact in this case. The question we are here to de-

termine is, was it such negligence on the part of plaintiff in failing to discover the forgery of the signatures of the payees on the checks as to throw on him, and not the bank, the ensuing loss? We think not. The case of *Wind v. Bank*, 39 Mo. App. 72, and the *Kenneth Investment Company Case*, supra, set out the law of this state as fully and as clearly as any others, and they are recognized as correct announcements of our law. Without quoting either at length, it is sufficient to say that they hold that estoppel founded on negligence should not work injury to the depositor, unless it appears that his negligence has occasioned special damage to the bank. That, of course, assumes there was negligence. In the case at bar the trial court found there was no negligence, and we concur in that view.

Counsel for appellant call our attention to the case of *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811, and say that they hope the court will read that at length, if not already familiar with it. Following the suggestion of counsel, a reading of that case and a consideration of it shows us that it is not very sharply in point or authority in a case of this kind. The facts there as to the relationship of the parties are not as in this case. The forger in that case was the confidential clerk of plaintiff. The passbook and the checks went through his hands to plaintiff. Furthermore, its doctrine on the point here at issue is expressly rejected by our court in the *Kenneth Investment Company Case*. See 96 Mo. App., loc. cit. 146, 70 S. W. 180. Reading the *Morgan Case*, however, we find it refers to the case of *Bank v. Whitman*, 94 U. S. 343, 24 L. Ed. 229. Turning to this latter case, we find that it is almost parallel in its facts with the case at bar. In the *Whitman Case* the Supreme Court of the United States states the question to be this: "Can the payee of a check, whose indorsement has been forged or made without authority, and when payment has been made by the bank on which it was drawn upon such unauthorized indorsement, maintain a suit against the bank to recover the amount of the check?" It will be observed that this practically states the question before us for adjudication in this suit. Further along in the case it is recited that the testimony in it is to the effect that the bank, after the payment of the check on which the indorsement was forged, made its weekly statement to its customer of deposits received and payments made, returning among the checks the one on which the indorsement of the payee was either forged or unauthorized, as having been paid on the 22d of the month prior to the turning in of the statement of the balance for the month, and showing that in this statement the amount of this draft was entered to the credit of the bank and charged to the depositor. The customer or de-

positor in this *Whitman Case* was a Mr. Spinner, and the person to whose order the draft was made and whose name had been either forged or affixed without authority was a Mrs. Kimbro. We give these names so that, in quoting hereafter, it will be understood what position the parties occupied in the transaction. The court states that there is no suggestion in the evidence that either the bank or the depositor, its customer, knew that the indorsement of the payee was unauthorized. We are to assume, says the court, that the bank would not knowingly subject itself to the dangers and liabilities resulting from making payment to one not authorized to receive payment. We assume, also, said the court, that the bank would not ask the depositor to give it credit for a payment that the bank knew to have been illegally made, and that the bank would not attempt to deceive its depositor into the belief that the pretended indorsement was a real one. "It comes to this, then," says Mr. Justice Hunt, who delivered the opinion, "that, upon a settlement of accounts between them, a credit was by mistake allowed to the bank to which it was not entitled. The law is that neither party is to be benefited or to be injured by the mistake. The bank must refund the amount by handing over the sum, or by crediting the same to Mr. Spinner in his next account. Mistakes in bank accounts are not uncommon. They occur both by unauthorized or pretended payments, as well as by the omission to give credits for sums deposited. When discovered, the mistake must be rectified, and an ordinary writing up of a bankbook, with a return of vouchers or a statement of accounts, precludes no one from ascertaining the truth and claiming its benefit. Story, Eq. Pl. §§ 799-801; Story, Eq. Jur. §§ 523, 527; *Bucklin v. Chapin*, 1 Lans. (N. Y.) 443; *Bruen v. Hone*, 2 Barb. (N. Y.) 586; *Bullock v. Boyd*, 2 Edw. Ch. (N. Y.) 293. We cannot perceive that such a mistaken recognition of the validity of the payment of this check can create an additional or different contract between the bank and the owner of the draft." Continuing, the opinion disposes of another proposition, as to who are the real parties in interest, also presented in this case, under the contention against permitting *Hawkins, Bedford*, and plaintiff to testify, and its discussion on this is so illuminative that we trust we will be pardoned for quoting at some length. Mr. Justice Hunt says: "It is further contended that such an acceptance of the check as creates a privity between the payee and the bank is established by the payment of the amount of this check in the manner described. This argument is based upon the erroneous assumption that the bank has paid this check. If this were true, it would have discharged all of its duty, and there would be an end of the claim against it. The bank supposed it had paid the

check; but this was an error. The money it paid was upon a pretended, and not a real, indorsement of the name of the payee. The real indorsement of the payee was as necessary to a valid payment as the real signature of the drawer; and in law the check remains unpaid. Its pretended payment did not diminish the funds of the drawer in the bank, or put money in the pocket of the person entitled to the payment. The state of the account was the same after the pretended payment as it was before. We cannot recognize the argument that the payment of the amount of a check or sight draft under such circumstances amounts to an acceptance, creating a privity of contract with the real owner."

It will be seen how thoroughly this case is in line with *Kenneth Investment Co. v. Bank*, 96 Mo. App. 125, 70 S. W. 173, heretofore referred to, and how aptly it fits the facts in this case in disposing of two of the propositions made: First, the proposition that the plaintiff is estopped from claiming credit for the amount represented in these two checks by reason of their having been paid on forged indorsements; and of the other proposition made, that by the payment of the checks on a forged indorsement the man who committed the forgery and indorsed his name on the check became a party to it, and was therefore a party to the contract involved in this action, and that his death had shut off the other parties, the real drawer and payees of the checks, from testifying. Incidentally it, as well as *Bank v. Morgan*, is in point on the propositions advanced by defendant, that the receipt of the balanced passbook and checks, and their retention without objection drove plaintiff over to the equity side of the court, if he desired to open up that so-called "stated account." The strictness with which the national courts preserve and enforce the distinction between actions at law and suits in equity renders it impossible to suppose that the Supreme Court of the United States would have tolerated, much less decided on elaborate discussion, an action brought at law, which should have been relegated to the chancery side of its courts.

Taking up the question of the competency of witnesses, it is to be noted that in this case at bar Penn at no time was a party to the transaction. His effort to make himself so by his forgery, which has been proven in this case, as we have seen, does not make him so, and the effort to shut out the testimony of the real payees of the checks on the ground that they were privies in contract with Penn under circumstances of this kind is so far-fetched that we are somewhat surprised that it is advanced by counsel of the eminence of those in this case. Neither Hawkins nor Bedford are parties to this action; nor are they parties to any contract whatever with Penn. The forging of their names by Penn surely did not make them

co-contractors. *Bank v. Whitman*, *supra*. Plaintiff stands on a somewhat different footing. Some of his transactions were with Penn; he loaned through him, and sent him the checks. But we can, as the trial court probably did, discard all of his testimony as to dealings with Penn and not affect the result.

The claim is made that it was negligence on the part of plaintiff to lie by for nearly five years before making any demand on the bank for correction of the account by crediting back to him the money which had been drawn out on the two checks. With hardly an exception the cases cited by counsel for defendant in support of their argument are those in which the forgery was committed and the fraud covered up by an employé of the depositor or customer of the bank, either by a secretary or confidential clerk, or an officer, or other agent, in case of a corporation. In such cases, an examination of the checks returned and of the entries made would have disclosed to the depositor the error in his account with the bank. Negligence was imputed in such cases, sufficient to bar recovery. This case, however, is entirely different. The return of the checks to the plaintiff carried no information to him whatever that the signatures of the payees of the check were forged; on the contrary, he had no reason whatever to suppose that they were other than genuine signatures of the payees. It is a fundamental law of commercial paper, including bank checks, that every indorser guarantees the genuineness of the preceding indorsements. The very fact that the defendant paid these checks was an assurance on which the plaintiff had a right to rely that the defendant bank had assured itself of the genuineness of every one of the preceding indorsements before it paid the check. To hold otherwise would sap the very foundation of the law of negotiable paper. The check came into the hands of this plaintiff with the signature of the payee indorsed on it; under that was the signature of Penn, or of the firm of Penn & Sallee; that guaranteed the signatures of the payee; under that the signature by indorsement of the Bank of Callaway County, at Fulton, by its presence, guaranteed the genuineness of both of the preceding indorsements. This was followed in one check by the indorsement of the National Bank of Commerce of St. Louis, and in the others by that of the Mechanics' National Bank of St. Louis, and following that was the acceptance of these indorsements as genuine by the defendant bank itself. So that there was nothing whatever to put any prudent man on inquiry as to the genuineness of the first indorsement or any succeeding one and the plaintiff was no more bound to know that the first indorsement was genuine than was the defendant bank; in fact, not as much so, for the bank defendant was the final party, the one on whom the check

was drawn. More than that, counsel for defendant themselves took the testimony of very many witnesses, resident and evidently prominent citizens of Fulton, every one of whom testified that down to the very day of his suicide the reputation of Penn in that community was of the very highest character, not only as a good citizen, but as a man of pecuniary responsibility, so that, if plaintiff had gone to Fulton and inquired into the character of Mr. Penn, every word that he would probably have heard or would have tended to have thrown plaintiff off his guard, and would have led him to believe that the indorsement guaranteed by Penn was a genuine one made by the payee of the check. Defendant introduced this class of testimony for the purpose of proving, as its counsel stated, that any inquiry on the part of plaintiff would have shown him the forgery, and that it was his duty to have gone to the payee and ascertained from him whether or not the indorsement was genuine, as also to have gone to the records to see if his deeds were of record. Not only do we decline to take this view of it, but the effect of the testimony on us is exactly opposite. In the first place, plaintiff was under no obligation to hunt up these men; he had abstracts, certified to by Penn, showing that they had title to the land on which the loans were made, and that his deeds were of record. He had the originals of the deeds of trust stamped as having been duly filed and recorded; he had the notes, all transmitted to him by a man, who, according to the testimony brought out by the defendant itself, occupied a position of high social and business standing in his community. There was, therefore, nothing whatever to put him or any prudent man on his guard, or to suggest to him that the indorsements on these checks were false and fraudulent and forgeries. To our minds the testimony introduced by defendant, instead of helping defendant, is directly against it, and makes for

the plaintiff in furnishing him the very fullest and most complete possible reason for not making further inquiry, or any inquiry for that matter, as to the genuineness of the indorsements of the payees of the checks. So that with the account balanced in the book and these checks returned to him, the signatures of all the indorsers on the checks guaranteed by three banks and by a man of the highest standing in his community, plaintiff cannot be charged with any negligence whatever in not discovering the fraud perpetrated upon him and the bank sooner than he did. As soon as he had any cause for suspicion of the honesty of Penn, he took the most prompt and vigorous steps to put the bank (defendant) in possession of the facts which had come to his knowledge, and to put the bank in a condition where, at that time, it could have amply protected itself against any loss by a resort to the preceding indorsers.

The point made as to the petition failing to aver demand or tender of the notes may be technically correct, but its omission is not sufficient cause for reversal. There was testimony from which a demand and tender may be inferred. Moreover, filing the suit was in itself a demand. The interviews of Mr. Sale with the president of the defendant bank had no purpose other than to advise him that he was there ready and willing to turn over the checks, which he then had with him; his interview was solely directed to secure repayment; the conduct of the president was enough to show that a formal demand would then have been unavailable—and no one is required to do a useless thing.

On consideration of the whole case, we see no reason to disturb the finding of the trial judge, which is entitled, at least in a case of this kind, to the same consideration that we give to a general or special verdict of a jury. Finding no reversible error in the case, and believing the judgment is for the right party, that judgment is affirmed. All concur.

## STATE v. COX.

(Kansas City Court of Appeals. Missouri.  
March 29, 1909.)

## 1. INTOXICATING LIQUORS (§ 236\*)—CRIMINAL PROSECUTIONS—EVIDENCE—SUFFICIENCY.

Evidence held to sufficiently show a sale to witness by defendant, a druggist, at his place of business within the county, within one year prior to the indictment.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 236.\*]

## 2. CRIMINAL LAW (§ 302\*)—NOLLE PROSEQUI—FAILURE TO ENTER.

It was not error to submit to the jury one count of an indictment, without first disposing of the other counts by entry of a nolle prosequi or order of discontinuance.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 302.\*]

Appeal from Circuit Court, Holt County; Wm. C. Ellison, Judge.

E. G. Cox was convicted of a sale of liquor in violation of the dramshop act, and he appeals. Affirmed.

John W. Stokes and R. B. Bridgeman, for appellant. H. T. Alkire and Frank Petree, for the State.

BROADDUS, P. J. The defendant was indicted for the illegal sale of intoxicating liquors. The indictment contains 12 counts. The first, fourth, seventh, and tenth counts charge him with a violation of the druggists and pharmacists act. The second, fifth, eighth, and eleventh counts charge him with the offense of permitting liquors to be drunk on his premises. The third, sixth, ninth, and twelfth counts charge him with illegal sales under the dramshop act. The evidence introduced at the trial was that of one witness, who testified that in July, 1906, the defendant was engaged in the business of a druggist in Holt county, Mo. He was questioned as follows: "Have you had any business transactions with Mr. Cox—that is, at any time within one year prior to May 4, 1907? A. Why, I bought a half a pint of whisky in there. Q. You bought a half a pint of whisky in there? A. Yes, sir. Q. What did you pay for it? A. I believe it was a quarter." This was all the testimony in the case. The court submitted the case to the jury on the third count of the indictment, charging defendant with the illegal sale of intoxicating liquors. The jury returned a verdict of guilty, and assessed defendant's punishment at a fine of \$150. There was no nolle prosequi entered, nor any order of dismissal, of the remaining 11 counts. The defendant appealed from the judgment.

Defendant insists upon a reversal of the judgment for two causes, viz.: First, because the evidence was not sufficient to prove that defendant committed the offenses; second, because it was error in the failure of the state to discontinue the remaining counts

before the case was submitted to the jury.

We think it was sufficiently shown by the questions and answers of the witness to them that he bought liquor of defendant at his place of business in Holt county, Mo., within one year prior to the finding of the indictment. No other reasonable inference can be drawn from the evidence.

As to the second point, it is held: "Where the court instructs only on one of two counts in an indictment, the other count will be presumed to have been abandoned." State v. Clark, 147 Mo. 20, 47 S. W. 886. And it is held that on a trial under an indictment containing three counts, when defendant was found guilty on two of the counts, the failure to make any finding on the remaining count, there being no evidence to sustain it, was equivalent to an acquittal on such remaining count. State v. McAnally, 105 Mo. App. 333, 79 S. W. 990.

Under these authorities, there was no error in the action of the court in submitting the case to the jury on the one count of the indictment, without having disposed of the other counts by the entering of a nolle prosequi or submitting them to the jury under instructions.

Finding no error, the cause is affirmed. All concur.

## PORTER et ux. v. ILLINOIS SOUTHERN RY. CO.

(St. Louis Court of Appeals. Missouri. March 23, 1909.)

## 1. PLEADING (§ 433\*) — DEFECTS — AIDED BY VERDICT.

Under Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), requiring railroad companies to fence their rights of way through cultivated fields and to maintain cattle guards, and making them liable for damages caused by stock coming upon the fields through failure to comply with the requirement, a petition for such damage was not insufficient after verdict for failing to allege that the stock came into plaintiff's fields where the railroad passed through a cultivated field, where it alleged that defendant operated a road through plaintiff's farm containing cultivated fields, that defendant failed to fence the right of way and to maintain cattle guards, and that animals came into the field through such failure.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 433.\*]

## 2. PLEADING (§ 428\*)—PETITION—DEFECTS—METHODS OF ATTACK.

The practice of challenging the sufficiency of a petition on oral objection to the introduction of evidence is not favored, and is available only when the petition is fatally defective after verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1433-1436; Dec. Dig. § 428.\*]

## 3. PLEADING (§ 433\*)—PETITION—DEFECTS—CURE BY VERDICT.

Rev. St. 1899, § 672 (Ann. St. 1906, p. 686), providing that no judgment shall be reversed

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



for omission from the statement of the cause of action of any averment without proving which there could have been no recovery, is merely declaratory of the common-law rule that a verdict will add a cause of action defectively stated.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451–1477; Dec. Dig. § 433.\*]

**4. RAILROADS (§ 103\*)—FENCES AND CATTLE GUARDS—DUTY TO MAINTAIN.**

Under Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), requiring companies "operating" railroads to maintain fences and cattle guards, it is immaterial who owns the road.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 103.\*]

**5. RAILROADS (§ 104\*) — FENCES — MAINTENANCE — RIGHTS OF ADJOINING OWNERS.**

A landowner may waive Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), requiring railroad companies to fence their roads and estop himself to claim damages arising from a company's failure to do so by contracting for a consideration to fence for the company.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 104.\*]

Appeal from Circuit Court, St. Francois County; J. C. Sheppard, Judge.

Action by E. W. Porter and wife against the Illinois Southern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

C. J. Stanton and W. S. Anthony, for appellant. D. L. Rivers and R. C. Tucker, for respondents.

**NORTONI, J.** This is a suit for damages alleged to have accrued to the plaintiffs by reason of animals escaping from the unfenced railroad right of way of defendant into the plaintiffs' fields and destroying their crops. Plaintiffs recovered, and the defendant appealed.

The first point for consideration relates to the sufficiency of the statement of the cause of action. The cause originated before a justice of the peace, and the petition is somewhat informal, as is usual in those courts. Notwithstanding the informalities, we are of opinion that it contains averments of material facts sufficient to constitute a cause of action under the statute. Section 1105, Rev. St. 1899 (Ann. St. 1906, p. 945). No demurrer was interposed, and the only question with which we are concerned is the sufficiency of the cause of action stated, after verdict. After averring the defendant is a corporation operating a railroad, the petition alleges, substantially: That at the time of the grievances complained of plaintiffs occupied a farm in Randolph township in St. Francois county, through which farm defendant's railroad passed, and at the time plaintiffs had on said farm growing and standing crops of corn, wheat, hay, etc.; that defendant, although operating its railroad through their farm, neglected to erect and maintain lawful fences on the sides of

its said railroad where the same ran through plaintiffs' fields on said farm in Randolph township aforesaid; and that by reason of the defendant's failure to erect and maintain fences and cattle guards along and across its said railroad, as required by the statute, horses, mules, cattle, and other animals came into and upon the fields and inclosed lands of the plaintiffs and destroyed various and sundry crops there growing and standing. The crops alleged to have been destroyed were wheat and corn in the fields, and hay and grain in the stack. The point made against the sufficiency of the statement is, if we understand it, that it is insufficient for the reason it does not formally allege the "animals came upon the plaintiffs' fields at a place where the railroad passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands."

We do not concur in the view that the formal allegation referred to is absolutely essential to the statement of a cause of action, under the statute, for the loss of crops by the invasion of animals from the railroad right of way because of the railroad's failure to erect and maintain sufficient fences. Section 1105 of our statutes (Rev. St. 1899), in so far as pertinent here, provides that: "Every corporation \* \* \* operating any railroad in this state, shall erect and maintain lawful fences on the sides of the road where the same passes through \* \* \* cultivated fields \* \* \* and also construct and maintain cattle guards, where fences are required, sufficient to prevent horses, cattle, mules and other animals from getting on the railroad; and until fences \* \* \* and cattle guards as aforesaid shall be made and maintained, such corporation shall be liable in double the amount of all damages which shall be done \* \* \* by reason of any horses, cattle, mules, or other animals \* \* \* coming upon said fields \* \* \* occasioned by the failure to construct or maintain such fences or cattle guards." The statement of the cause of action sets forth the material facts: First, that the defendant was operating the railroad which passed through the plaintiffs' farm; and, second, the farm appears to have been cultivated fields, within the meaning of the statute. In these fields there were growing cultivated crops of corn and wheat. Besides, there were hay and grain in the stack. It avers, too, that the defendant had failed and neglected to erect and maintain fences along the sides of its railroad passing through the fields, as required by statute, and had also failed to erect and maintain a cattle guard thereat, and that the animals came into plaintiffs' fields and destroyed his crops by reason of the defendant's failure to erect and maintain the fences and cattle guards mentioned. This allegation necessarily im-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plies, after verdict at least, that the animals came from the defendant's right of way, for it is averred that they came into the fields because of the failure of defendant to erect fences along the sides of its road where it passed through the same. The allegation of the complaint is somewhat defective in its averment that the animals came into the fields from the railroad right of way, and might possibly have been so adjudged on demurrer. The attack on its sufficiency is not raised by demurrer, however. The objection was made ore tenus to the introduction of evidence on the ground the petition did not state facts sufficient to constitute a cause of action. This practice of challenging the sufficiency of the statement of a cause of action by oral objection is only tolerated by the law. It is successful only in those cases where the petition is fatally defective after verdict. *State ex rel. v. Delaney*, 122 Mo. App. 239, 99 S. W. 1; *Hazeltine v. Smith*, 154 Mo. 404, 55 S. W. 633. There is no defect here in the cause of action. If there be any, it is a defect in the statement of a good cause of action; that is, a good cause of action defectively stated. In such circumstances, the averments of the petition are aided with all reasonable implications and intendments, by the verdict. Our statute of Jeoffail (section 672, Rev. St. 1899 [Ann. St. 1906, p. 686]) provides that no judgment shall be reversed because there was omitted from the statement of the cause of action any averment or allegation without proving which the triers of the issue ought not to have given such a verdict. Indeed, this provision of our statute is only declaratory of the common law, to the effect that a verdict will aid a cause of action defectively stated, but not a defective cause of action. *Welch v. Bryan*, 28 Mo. 30. Although the complaint does not pointedly aver the animals came from the railroad right of way into plaintiffs' fields, it does aver that the defendant had failed to erect and maintain fences along the sides of the road where it passed through plaintiffs' fields, and that the cattle came into the fields because of the defendant's failure to erect and maintain such fences. It is essentially implied from this allegation that the cattle came from the right of way into the fields. This was a fact which it was necessary for the plaintiffs to prove before a verdict could be given for them. The presumption and intendment of the law is to the effect that the plaintiffs did prove this fact, and thus supplied the defective allegation of the petition. When it appears, though the petition be defective, a verdict could not have been given without proof of the matter omitted to be stated, the defect is cured by the statute, and the judgment will not be reversed therefor. *Richardson v. Farmer*, 36 Mo. 35, 88 Am. Dec. 129. The statement is certainly sufficient after verdict, and the assignment will be overruled.

The evidence tended to prove that plain-

tiffs occupied a farm in Randolph township, St. Francois county. The farm consisted of cultivated fields, on which plaintiffs had growing crops of corn, wheat, hay, etc. They also had hay and grain in the stack thereon, not far distant from the railroad right of way. It appears the railroad passed through the farm for about a quarter of a mile. The railroad had recently been constructed and was wholly unfenced. Just who or what company had constructed the road or owned the same does not appear in the record; nor does it appear how the defendant came into possession, whether by lease, purchase, or otherwise. It does conclusively appear, however, that the defendant company took possession of the road on August 15th and operated it from that day thereafter, that it neglected to erect fences on either side of the road where the same passed through the plaintiff's cultivated fields, and had also neglected for several months to install a cattle guard at the public road crossing adjoining plaintiffs' farm. As defendant was operating the road, liability attached to it for failure to fence by the express words of the statute. It was immaterial who owned the road. Section 1105, Rev. St. 1899. Several witnesses gave testimony to the effect that cattle were seen to pass from the public road down the railroad right of way and over the point where the law imposed upon the defendant the duty to install and maintain a cattle guard. Having thus entered upon the defendant's right of way because of its failure to install the cattle guard, the animals passed from the right of way into plaintiffs' fields because of the defendant's failure to erect fences along the sides of its road. It seems the plaintiffs suffered considerable loss by the animals destroying the hay and grain in the stack and their crops standing in the fields. All of which occurred after August 15th and prior to the following January 1st. The evidence discloses plaintiffs made several complaints to the defendant's civil engineer in charge of the construction of the road as to the frequent invasions of cattle, and insisted upon fences and cattle guards being erected at once. Finally the civil engineer suggested that the plaintiffs might erect a temporary fence or gate across the railroad track adjoining the public road crossing, and thereby prevent cattle from going upon the right of way at that point. It does not appear, however, that plaintiff contracted to erect such fence or gate, nor that he even agreed to do so. Although he was licensed by the civil engineer to erect a temporary structure across the track for that purpose, the evidence falls short of showing that he assumed any obligation in that behalf. A few days thereafter, plaintiffs visited the point mentioned and began the construction of a temporary gate across the track. About the time operations were commenced in that behalf, the defendant's road master appeared,

and, after learning what the plaintiffs were about to do, forbade them to proceed further with the work. The road master assured plaintiffs that he would have a cattle guard erected immediately at the point in question, and told them not to construct a gate or fence across the tracks. It seems, too, trains commenced running about this time, and, under these circumstances, of course it would have been impossible to maintain a fence across the track.

On this testimony, it is argued by the defendant that the plaintiffs waived their right to recover for damages accrued because of the defendant's failure to erect a fence or cattle guard. It is no doubt true that it is competent for a landowner to waive his right in this respect, and, where, one contracts with a railroad and assumes the obligation for a consideration to erect the fence for the railroad company along his land at a point where the law affixes the obligation on the railroad to fence, he may be estopped thereby from asserting his right for damages accrued on account of a failure to fence. In such circumstances plaintiff having assumed the obligation to erect the fence, of course his injury results from his own default, and not from that of the railroad company. *Ells v. Pacific R. R. Co.*, 48 Mo. 231; *Thomas v. Han. & St. Joe Ry. Co.*, 82 Mo. 538. However, the principle of those cases is without influence here, for the reason it does not appear that the plaintiffs had contracted or assumed any obligation whatever in respect of erecting a fence across the track at the point where the law imposed the duty on the defendant to install a cattle guard. The only evidence given on the subject was that of one of the plaintiffs, which was to the effect that he had merely received permission to construct a temporary fence across the track in order to protect his crops, as his efforts to induce the railroad to discharge its duty in that behalf had been unavailing. Upon commencing to erect the temporary fence, his license was revoked by the road master, who certainly had authority to forbid obstructions about to be erected upon the roadway.

The appeal is wholly devoid of merit, and the judgment should be affirmed.

It is so ordered.

REYNOLDS, J. P., and GOODE, J., concur.

### MINGUS v. BANK OF ETHEL

(Kansas City Court of Appeals. Missouri.  
March 29, 1909.)

#### 1. PARTNERSHIP (§ 29\*)—INTENT TO CREATE.

The question of partnership is to be determined from the intention of the parties as disclosed, not by particular expressions, but by the nature and effect of the whole contract.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 20.\*]

#### 2. PARTNERSHIP (§ 30\*)—CREATION—SHARING PROFITS.

An agreement between a live stock buyer and another that the latter should receive, for his services in buying and shipping stock, one-half of the net profits, if any, does not indicate an intent to form a partnership, but that such other should receive a share of the profits merely as compensation for his services.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 43; Dec. Dig. § 30.\*]

#### 3. PARTNERSHIP (§ 55\*) — CREATION — EVIDENCE.

That a person was required to show, on checks drawn on another's account in payment for live stock, the kind and number purchased, goes to show that he was merely an employé of such other, and to rebut any presumption of partnership between them.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 55.\*]

#### 4. PARTIES (§ 75\*) — DEFECT OF PARTIES — WAIVER.

Failure to object, either by demurrer or answer, to the omission of a necessary party, is a waiver thereof under Rev. St. 1899, § 602 (Ann. St. 1906, p. 623).

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 115; Dec. Dig. § 75.\*]

#### 5. BANKS AND BANKING (§ 134\*)—APPLICATION OF DEPOSITOR'S FUNDS TO INDEBTEDNESS.

The rule that the funds of a depositor may be applied to discharge his indebtedness to the bank has no application where the bank did not acquire the funds as a deposit in the course of business with the depositor, but through a mistake, which both the depositor and the true owner of the funds asked the bank to correct.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. § 134.\*]

#### 6. BANKS AND BANKING (§ 129\*)—FUNDS—EQUITIES.

A bank obtaining possession of funds by mistake, and not for value, cannot be said to have any equitable claim thereto, and no injustice is done in compelling it to surrender the same to the true owner.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 129.\*]

#### 7. BANKS AND BANKING (§ 154\*)—DEPOSITS—ACTIONS—VARIANCE.

A variance in an action for money had and received against a bank, in that the petition alleged that the mistake in sending the proceeds of a sale of hogs to the bank in the name of an agent of plaintiff was made by a commission company, whereas the evidence showed that the mistake, if any, was made by the railroad in shipping the hogs in the name of plaintiff's agent, was not prejudicial to the bank, where other evidence showed the manner in which the hogs were shipped and the reason why the proceeds of the sale thereof were sent to the bank in the name of the agent.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 154.\*]

Appeal from Circuit Court, Macon County; Nat M. Shelton, Judge.

Action by William A. Mingus against the Bank of Ethel. Judgment for plaintiff, and defendant appeals. Affirmed.

Dysart & Mitchell, Robt. W. Barrow, and Nat M. Lacy, for appellant. Guthrie & Franklin, for respondent.

**BROADDUS, P. J.** This is a suit for money had and received. The facts are: That in the early part of the year 1907 the plaintiff, Mingus, was engaged in the business of buying and shipping stock to the Chicago market. He had in his employ in the business W. J. Windle, and also one Ed Bailey. The financial part of his business was transacted through the Citizens' National Bank at Ethel, Mo., where he lived. When stock was purchased by either one of his agents, the name of the agent was signed to the check in payment for the stock purchased, and the agent was required to mark on the check the number of the stock paid for and their kind. These checks, by an arrangement with said bank, were honored and charged to the account of plaintiff. Neither Bailey nor Windle furnished any money for that purpose. Windle was paid for his services one-half of the profits, if any, realized on each shipment. If there were no profits, he received nothing. All loss in the business was borne by plaintiff. However, prior to this arrangement, the agents named had been doing business on a different arrangement, during which Windle had become indebted to the defendant, for which he had executed his note for the sum of \$850, dated July 10, 1906. Just prior to April 25, 1907, plaintiff, through the agent of the Santa Fé Railroad at Ethel, ordered a car to transport a load of hogs to Chicago, which were to be shipped in his name. By the time they got the hogs ready, the train whistled for the station, and the agent, in making up the contract of shipment and waybill, inserted the name of Windle as owner, instead of that of the plaintiff; but at the bottom of the contract plaintiff's name also appears as the owner of the stock. The evidence conclusively showed that the hogs were the property of plaintiff, and that it was the purpose to ship them to Chicago in his name as such owner, and that by mistake they were shipped as stated. The hogs were consigned to the commission firm of Alexander, Ward & Conover at Chicago and by them sold, and the net amount realized, \$1,029.49, was remitted to the defendant bank in the name of Windle. The defendant applied enough of the proceeds to extinguish the debt of Windle, which left a surplus of \$140.44, for which he was given credit on the books of the bank. Soon thereafter, Windle, failing to get return for the hogs through the Citizens' Bank, made inquiry of the bank of defendant, when he was informed that the remittance had arrived. Windle informed the cashier that the hogs shipped belonged to plaintiff, and that the proceeds therefor belonged to him. The plaintiff also claimed the proceeds, but defendant denied his right thereto. The judgment was for the plaintiff, from which defendant appealed.

It is the contention of defendant that the evidence showed that plaintiff and Windle

were partners; therefore plaintiff could not recover in the present form of action. It is said: "As a community of losses is a necessary corollary of a participation in the profits, a partnership may as well be predicated of an agreement to share net profits as an agreement to share the profits and losses, and the same rule applies. Hence, 'participation in the profits of a business raises the presumption of the existence of a partnership. This presumption is not conclusive, but if not rebutted is sufficient to establish a partnership.' \* \* \* Where one party contributes the capital and the other the labor, skill, or experience for carrying on a joint enterprise, such a combination constitutes a partnership, unless something appears to indicate the absence of a joint ownership of the business and profits. Such absence of joint ownership is indicated when from the whole contract it appears that the party contributing his services is to receive a share of the profits merely as compensation for his services." *Torbert v. Jeffrey*, 161 Mo., loc. cit. 655, 61 S. W. 825. "An agreement between the owner of a farm and another, by which the latter and his wife in conjunction with the owner shall work together on the farm, the proceeds of their joint work and labor to be shared together, is a contract of partnership. It is not a contract for hire and wages and cannot be sued on as such." *Plummer v. Trost*, 81 Mo. 425. Where plaintiff was an employé for a compensation of \$50 per month and one-half of the net profits of the business, it is held that a sharing of the profits did not under the facts in the case constitute him a partner. *Glore v. Dawson*, 106 Mo. App. 107, 80 S. W. 55.

Under the foregoing decisions, which seem to be in accord with the general ruling in this state, the question of partnership is to be determined from the "intention of the parties as disclosed, not by particular expressions, but by the nature and effect of the whole contract." *Torbert v. Jeffrey*, supra. We are of the opinion that the contract itself fairly rebuts the presumption of a partnership between plaintiff and Windle. The language of the agreement between plaintiff and Windle that the latter was to receive for his services in buying and shipping stock to market one-half of the net profits to be derived from the business, if any, did not indicate an intention of the parties to form a partnership, but indicated an intention that Windle was to receive a share of the profits merely as compensation for his services. And the further agreement that Windle should show on checks to be drawn on plaintiff's bank account, in payment for stock to be bought, the kind and number purchased, goes to show that Windle was merely an employé of the plaintiff, and thus to rebut any presumption of a partnership if it existed. And the defense that plaintiff and Windle were partners,

and as such entitled to the deposit, cannot avail defendant for the reason that, if the latter was a necessary party to the proceeding, defendant should have availed itself of that defense in the manner pointed out by the Code, by either filing a demurrer to the petition or answer setting forth such partnership. The defendant having done neither, the objection was waived. Section 602, Rev. St. 1899 (Ann. St. 1906, p. 628).

Defendant invokes the rule "that where a depositor is indebted to the bank by bill, note, or other indebtedness, the bank has the right to apply so much of the funds of the depositor to the payment of his matured indebtedness as may be necessary to discharge the same," and that "all funds of the depositor which the bank has at the date of the maturity of the discounted note, or afterwards acquired in the course of business with him, may be applied to the discharge of his indebtedness." *Sparrow v. State Exchange Bank*, 103 Mo. App. 338, 77 S. W. 168. And so it is held in *Bank v. Carson*, 32 Mo. 191, and other Missouri cases. The rule has no application to the facts of this case, for the reason that defendant did not acquire the check as a deposit "in the course of business" with Windle. Windle did not make or authorize the deposit with defendant. It was the result of a mistake, which both Windle and plaintiff asked its cashier to correct.

The plaintiff calls to our attention the following: "The action for money had and received is one favored in law, and the tendency is to widen its scope. It is a flexible form of action, levying tribute on equitable, as well as strictly legal, doctrines. It has become axiomatic that the action runs where defendant has received or obtained possession of the money of plaintiff which in equity and good conscience he ought to pay over to plaintiff." *Clifford Banking Co. v. Donovan Com. Co.*, 195 Mo. 262, 94 S. W. 527. In that case it was held that the money on deposit was the property of plaintiff, and, unless defendant received it with clean hands, it is liable to plaintiff for the proceeds. And the court further said: "The principle, 'Where one of two innocent parties must suffer, the loss must fall on him who afforded the opportunity for the wrong,' is applicable to negotiable instruments. And in any case the party invoking it must be an innocent party; that is, a party who holds the paper bona fide and for value." The defendant, having obtained possession of the funds by mistake, and not for value, cannot be said to have any equitable claim to such funds. In other words, its hands are not clean. No injustice is done defendant in compelling it to surrender the deposit, as it parted with nothing in the transaction.

Defendant insists that, as the petition alleges the mistake in sending the proceeds of

the sale of the hogs to defendant was made by the commission company at Chicago, plaintiff is not entitled to recover on his evidence that the mistake, if any, was made by the railroad in shipping the hogs in the name of Windle. This contention is only of a technical nature and does not go to the merits of the controversy. As the evidence went to show the facts as to the manner in which the hogs were shipped and the reason why the funds realized from the sale of the hogs were sent to defendant in the name of Windle, it does not seem that defendant was prejudiced in the least by the variance between the allegations of the petition and the proof.

The judgment was for the right party, and ought to be affirmed, and it is so ordered. All concur.

#### STANLEY et al. v. SEDALIA TRANSIT CO.

(Kansas City Court of Appeals. Missouri.

March 29, 1909.)

CORPORATIONS (§ 507\*) — CORPORATE LIABILITIES — CIVIL ACTIONS — PROCESS — "CHIEF OFFICER."

A return on a summons against a corporation that the president was absent from the county, and that the officer served was "the secretary and treasurer, and chief officer in charge of the business," without reciting that the service was made at defendant's business office, as required by Rev. St. 1899, §§ 995, 996 (Ann. St. 1906, pp. 876, 878), when the president or other chief officer cannot be found, does not show on its face that the writ was served in the manner prescribed by the statute, because the inference is that the service was not made at the office; and this recital in the return is essential, although it states that the secretary and treasurer is the chief officer, which is a mere conclusion of the sheriff; a "chief officer" of a corporation being one who has charge and control of its business, and not one who is charged with the performance of other and subordinate duties.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 507.\*]

Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Action by R. A. Stanley and W. O. Stanley, doing business under the firm name of the R. A. Stanley Coal Company, against the Sedalia Transit Company. From an order on a motion under Rev. St. 1899, § 983 (Ann. St. 1906, p. 870), for an execution against H. S. Rumsey, a stockholder, he appeals. Reversed.

Stewart, Elliot, Chaplin & Blayney and Montgomery & Montgomery, for appellant. Sangree & Bohling and Barnett & Barnett, for respondents.

JOHNSON, J. Plaintiffs recovered a judgment by default in the circuit court of Pettis county against the Sedalia Transit Company, a domestic corporation, and had execution issued and delivered to the sheriff, who

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

returned it unsatisfied. Plaintiffs then filed a motion as provided in section 985, Rev. St. 1899 (Ann. St. 1906, p. 870), for an execution against H. S. Rumsey, a stockholder in the corporation, whose stock was not fully paid. Notice of this motion was duly served on Rumsey, and he appeared. The court sustained the motion and ordered the execution as prayed. Rumsey appealed. It is conceded by both parties that the action of the court in sustaining the motion was a proper one if the judgment by default rendered against the corporation was valid. Appellant contends that the judgment is void because the return of the summons shows on its face that the writ was not served in the manner provided by law. The return reads as follows: "Served the within summons by delivering to W. H. Powell, who is the secretary and treasurer and chief officer in charge of the business of the within named the Sedalia Transit Company of Sedalia, Missouri, a copy of the same together with a certified copy of the petition as furnished to me by the clerk of the circuit court of Pettis county, Missouri, being first served on the 31st day of August, 1906. I further certify that the president of the Sedalia Transit Company is absent from my said county. All done in Pettis county, Missouri. I. N. Sprecher, Sheriff of Pettis County, Missouri, by M. T. Henderson, Deputy."

We quote the statutes relating to the service of summons: Section 995 (page 876): "When any such summons shall be issued against any incorporated company, service on the president or other chief officer of such company, or, in his absence, by leaving a copy thereof at any business office of said company, with the person having charge thereof, shall be deemed a sufficient service; and if the corporation have no business office in the county where suit is brought, or if no person shall be found in charge thereof, and the president or chief officer cannot be found in such county, a summons shall be issued, directed to the sheriff of any county in this state where the president or chief officer of such company may reside or be found, or where any office or place of business may be kept of such company, and the service thereof shall be the same as above." Section 996 (page 878): "On the return of such summons, served as aforesaid, the officer serving the same shall express in his return on whom, how and when the same had been executed, and if not on the chief officer, he shall express the absence of such officer, or that he cannot be found." When the president or other chief officer of the corporation is in the county, the summons should be served on him, and it is not essential that it be served at a business office of the company, but, if the president or other chief officer be absent from the county, the service then should be made at a business office of the company on the person in charge thereof. The return before

us does not recite that service was made at a business office of the defendant, and we must assume that it was not made at such office. The return by an officer of a writ of this character must be strictly construed. "It is fair to infer everything against the return which its departure from the statute will warrant." *Blanton v. Jamison*, 3 Mo. 52; *Holtzschneider v. Railroad*, 107 Mo. App., loc. cit. 385, 81 S. W. 489; *Heath v. Railway*, 83 Mo., loc. cit. 625. Since the service was not made at a business office of the company, it remains to be seen whether or not the return shows on its face that a chief officer of the corporation was served. The rule is fairly established that "the return of a sheriff on process regular on its face and showing the fact and mode of the service is conclusive upon the parties to the suit. Its truth can be controverted only in a direct action against the sheriff for false return." *Smoot v. Judd*, 184 Mo., loc. cit. 518, 83 S. W. 481, and cases cited. Therefore, if the return shows affirmatively that the service was on a chief officer, we must accept the statement of that fact as conclusive. It recites that the president was absent from the county, and that the officer served was the secretary and treasurer of the corporation. "The secretary of a corporation is not an officer of general power or authority. He is the keeper of the seal and books of the corporation and the general organ for communication with the public." *Hardware Company v. Grocer Company*, 64 Mo. App. 677; *Clothing Co. v. Iron Works*, 51 Mo. App. 66. As he is not a chief officer, service on him as secretary is not good except it be made at a business office and he is stated to be the person in charge of the office. *Electric Co. v. Corby*, 61 Mo. App. 630; *Land Co. v. Land Co.*, 187 Mo., loc. cit. 433, 86 S. W. 145. Obviously, if the secretary is not a chief officer, neither is the treasurer.

The return under consideration differs from those appearing in the cases cited in this respect: It contains the statement of the officer that the secretary and treasurer was the chief officer in charge of the business of the company. But that recital should not be treated as the statement of a fact, and therefore as conclusive, but should be regarded as a mere conclusion of the officer. The facts stated were that the person served was the secretary and treasurer, and that the president was absent from the county. From these facts the inference is drawn by the officer that, since the person served was the highest officer of the corporation in the county, he was a chief officer, but this was not so. A chief officer of a private corporation is one who has charge and control of its business, is its managing officer, and is not one who is charged with the performance of other and subordinate duties. The mere fact that the managing officer may absent himself from the county does not cause his mantle to fall on a subordinate officer. It is clear the sheriff in

his zeal attempted to elevate the secretary and treasurer into a higher office. The service was bad, and the judgment against the corporation cannot stand.

It follows that the judgment against the appealing stockholder must be reversed. All concur.

**MORRIS v. MISSOURI PAC. RY. CO.**  
(Kansas City Court of Appeals. Missouri.  
March 29, 1909.)

**1. WATERS AND WATER COURSES (§ 76\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.**

In an action for injury to land by the discharge of sewage in a creek which ran through the land, evidence held to sustain a finding that the land possessed a value for building purposes greatly in excess of its value for agriculture, which value the sewage destroyed, to plaintiff's damage of not less than \$100 per acre.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 76.\*]

**2. APPEAL AND ERROR (§ 979\*)—DISCRETION OF TRIAL COURT—NEW TRIAL.**

The appellate court will not interfere with the trial court's exercise of its discretion in granting a new trial on the ground that the verdict is against the evidence, unless that discretion is clearly abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3871; Dec. Dig. § 979.\*]

**3. NEW TRIAL (§ 75\*) — GROUNDS — VERDICT CONTRARY TO EVIDENCE — INADEQUATE DAMAGES.**

A verdict is conclusive upon the amount of damages in actions for personal wrongs where there is no definite measure of damages, and the trial court cannot set it aside on the ground of inadequate damages unless the amount awarded is so inadequate as to shock the understanding, and show that the verdict resulted from prejudice or passion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 151, 152; Dec. Dig. § 75.\*]

**4. NEW TRIAL (§ 75\*) — GROUNDS — VERDICT AGAINST EVIDENCE — INADEQUATE DAMAGES.**

Where there is a definite measure of damages, whether in a contract or tort action, the trial court must set aside the verdict if it is satisfied that the damages awarded are inadequate under the clear weight of the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 151, 152; Dec. Dig. § 75.\*]

**5. WATERS AND WATER COURSES (§ 76\*) — MEASURE OF DAMAGES — INJURY TO PROPERTY — LAND.**

In an action for damages for injury to land by the discharge of sewage in a creek which ran through it, the measure of damages would be the depreciation in the market value of the land caused by the injury.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 76.\*]

**6. NEW TRIAL (§ 75\*) — GROUNDS — INADEQUACY OF DAMAGES — INJURY TO PROPERTY.**

In an action for damages for injury to a 54-acre tract by the discharge of sewage in a stream running through it, the evidence showed that the value of the land was destroyed thereby, except for tillage, and that other land in the immediate neighborhood had sold at greatly increased prices for building purposes, so as to make plaintiff's damage by reason of the sewage at least \$100 an acre. Plaintiff recovered a verdict for \$1,000. Held, that the

case was one in which the trial court had a discretion in reviewing the damages awarded, and that the verdict was properly set aside for inadequacy of damages.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 151; Dec. Dig. § 75.\*]

Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Action by Melvin H. Morris against the Missouri Pacific Railway Company. From an order granting a new trial after verdict for plaintiff, defendant appeals. Affirmed.

Roy D. Williams and C. D. Corum, for appellant. George F. Longan and Charles E. Yeater, for respondent.

**JOHNSON, J.** This suit is for damages alleged to have been caused by the discharge by defendant of sewage from its machine shops at Sedalia into a natural water course which flows through land of plaintiff in the vicinity of the shops. The trial resulted in a verdict for plaintiff in the sum of \$1,000. Afterward the court granted plaintiff a new trial on the following grounds stated in his motion:

"(4) Because the court erred in not more severely reprimanding counsel for defendant in his argument to the jury when such counsel discussed a proposition he had made in open court to have the jury go and inspect the water course on plaintiff's land and the sewage flowing thereon, which was not accepted by plaintiff, and when he further discussed the plan of the defendant and its intention to change the route of the sewer, so that the same would be removed from plaintiff's land and no longer flow over the same, notwithstanding the defendant's offer to prove such plan and intention was refused by the court during the trial, whereby the jury received an erroneous impression as to the extent of the plaintiff's damages, and have rendered a verdict influenced by the aforesaid intention and plan of defendant to remove the flow of said sewage across the plaintiff's land, which may or may not be done.

"(5) Because the verdict is against the weight of the evidence as to the amount thereof, which said amount is so grossly inadequate and unfair and contrary to the evidence as to be plainly the result of prejudice and passion.

"(6) Because four of the jurymen went in person during the trial and examined the plaintiff's land and the status and conditions thereof, with reference to the flow of sewage across the same, while the trial thereof was in progress."

Defendant appealed from the order granting a new trial.

We have reached the conclusion that, in sustaining the motion on the fifth ground, the court acted within its authority and did not abuse the discretion, with which it was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

invested by law. In 1904 and 1905 defendant erected and began the operation of extensive machine shops near Sedalia, which were provided with a sewer system. The waste oils and offensive matter discharged from the water-closets were emptied into a sewer, which terminated on defendant's land and emptied its contents into a natural water course. Plaintiff owned 54 acres of land near the shops. The tract is bisected by the water course, and the evidence strongly supports the contention of plaintiff that the pollution of the stream was so great and so offensive that the whole tract was rendered unfit for any but agricultural uses. About 800 men were employed at the shops, and the water-closets provided for their use were all emptied into this sewer. The shops had capacity for the employment of from 2,000 to 2,200 workmen. All of the evidence of plaintiff is to the effect that the tract, owing to its location, possessed a value for residence purposes greatly in excess of its value for agriculture. The great mass of the expert evidence introduced by plaintiff fixes the market value of the land for residence lots at \$300 per acre just before the installation of the sewer and at \$100 per acre immediately after that event. The lowest estimate of any witness offered by plaintiff placed the damage at \$100 per acre. All agreed that the land possessed no value for residence purposes with the offensive discharge from the sewer running across it. In addition to this opinion evidence, it appears that about the time in question land on three sides of plaintiff's land was sold at prices ranging from \$250 to \$500 per acre. The evidence introduced by defendant tends to show that the offensive matter was so diluted with water when emptied into the sewer that before it reached the land of plaintiff it had disintegrated and resolved into a greatly diluted, odorless, and not unsanitary solution. The expert evidence of defendant varies as to the amount of damage plaintiff has sustained from the sewage. One witness stated that the land was not appreciably damaged; others say that \$10 or \$12 per acre would cover the damage. We regard the evidence of defendant as substantial, but perceive no reason for criticizing the conclusion of the learned trial judge that the great weight of the evidence supports the contentions of plaintiff, first, that his land possessed a value greatly exceeding its value for agriculture; second, that the sewage entirely destroyed that value; and, third, that the quantum of the damage was not less than \$100 per acre. If the law vested the court with any exercise of discretion to review and correct the verdict of the jury on the issue of the amount of the damages, we are convinced such discretion was exercised wisely in the present instance.

The question of law for our determination is whether the trial court possessed authority to exercise such discretion. The rule thus

stated by the Supreme Court in *Hoepper v. Hotel Co.*, 142 Mo., loc. cit. 387, 44 S. W. 259, has repeatedly received recognition: "The presumption is always in favor of the correctness of the rulings of the circuit court. It has committed to it much discretion in the matter of granting new trials, and this court should not interfere unless its discretion has clearly been abused. It is therefore uniformly held that an appellate court will not interfere with the discretion of the circuit court in granting a new trial on the ground that the verdict is against the weight of the evidence. The proceedings are all in the presence of the court, and it can better judge of the fairness of the trial than the appellate court, which has before it the cold record only." An exception to this rule has been founded in actions *ex delicto*, where the damages cannot be measured by any accurate rule, and are not susceptible of direct proof. Speaking of such cases, we said in *Edwards v. Railway*, 82 Mo. App., loc. cit. 485: "They admit of no other test than the intelligence of the jury, governed by a sense of justice. To the jury, therefore, as a favorite and almost sacred tribunal, is committed, by unanimous consent, the exclusive task of examining the facts and circumstances and valuing the injury, and awarding the compensation in damages. The law that confers upon them this power and exacts of them the performance of this solemn trust favors the presumption that they are actuated by pure motives, and it is not until the result of the deliberation appears in form calculated to shock the understanding and impress no dubious conviction of their prejudice and passion that courts have found themselves compelled to interpose." The exception applies to actions for personal wrongs such as personal injuries, slander, malicious prosecution, and the like; but, where the reason for the exception does not obtain, the general rule applies. It is immaterial whether the action be *ex contractu* or *ex delicto*. If the damages may be measured by a definite rule and under that rule may be ascertained with a fair degree of certainty, it not only is the right, but the duty, of the trial judge to supervise the verdict, and to set it aside when satisfied that it is against the clear weight of the evidence.

In *Bayliss on New Trials and Appeals*, p. 505, the author says: "Where the law itself prescribes the rule of damages to which alone the plaintiff is entitled if he recover, a disregard of the law and an award of a sum not warranted by the rule is such evidence of passion or prejudice, or, more frequently, of mistake or misapprehension as will render it the duty of the court to set aside the verdict." In *Watson v. Harmon*, 85 Mo., loc. cit. 447, the Supreme Court in recognizing the exception to the general rule observed: "But in cases of breach of contract and injury to property which have fixed standards of value, if there appears glaring deficiency



in the verdict, justice demands a reversion." Very clear and to the point is what was said by the Court of Appeals in the following excerpts from the opinion in *McDonald v. Walter*, 40 N. Y. 551: "Nevertheless it would be strange, if true, that no instance should occur in which, through a misapplication of the law to the facts which they find proved, or through prejudice or passion or mistake, injustice is done, which it became the duty of the court to correct. While the general rule should be preserved, it would not be safe to assert the uncontrollable supremacy of the jury. Both in England and in this country, therefore, the court has always exercised the power of reviewing the evidence on a case made for the purpose, and of granting a new trial, whereupon a cool and deliberate examination the ends of justice seemed to require it. And this is always the plain duty of the court where the verdict is palpably against the law applied to the facts found. It is upon these principles that verdicts for an excessive and extravagant amount of damages are set aside, and, where the law itself prescribes the rule of damages to which alone the plaintiff is entitled, if he recover, a disregard of the law and an award of a sum not warranted by the rule is such evidence of passion, prejudice, or more frequently of mistake, or misapprehension, that the verdict of the jury ought not and will not be permitted to stand. It would be a discredit to the administration of justice if this were not so. A verdict for a grossly inadequate amount stands upon no higher ground in legal principle, nor in the rules of law or justice, than a verdict for an excessive or extravagant amount. It is doubtless true that instances of the former occur less frequently, because it is less frequently possible to make it clearly appear that the jury have grossly erred. But, when the case does plainly show such a result, justice as plainly forbids that the plaintiff should be denied what is his due as that the defendant should pay what he ought not to be charged. The power of the court to award a new trial when dissatisfied with the verdict on this ground is, I think, not open to question, and whether because the verdict is too large or too small the principle is precisely the same. And in practice it has been customary heretofore to grant a new trial in either case."

In the present case the damages are to be ascertained by a fixed and definite rule; i. e., the depreciation in the market value of the land caused by the injury. The amount of the damages under this rule is a matter susceptible of proof. The trial judge in his capacity as a trier of fact was not bound to rely on opinion evidence. He had before him evidence of the fact that the injury had destroyed the value of the land except for tillage, and the sales of other lands

in the immediate neighborhood, together with evidence from which the values of the lands sold might be accurately compared with that of plaintiff's land, afforded him facts—not merely opinions—on which to predicate his conclusion that the verdict was so palpably inadequate as to indicate the presence of passion or prejudice on the part of the jury. In granting a new trial on this ground, we think the court acted within the scope of his duty. Since the case must be retried, and it is not likely that the subjects of the fourth and sixth grounds of the motion for a new trial will arise again, we shall not burden this opinion with a discussion of them.

The judgment is affirmed. All concur.

### RICHMOND v. ASHCRAFT.

(St. Louis Court of Appeals. Missouri. March 23, 1909.)

#### 1. WORDS AND PHRASES—"GOOD FAITH" AND "NOTICE."

The terms "good faith" and "notice" are intimately related in jurisprudence, but are not of uniform meaning; the former retaining in some measure the popular sense of honest belief, but its technical significance depends largely on the doctrine of notice as developed in equity. Considered respecting and as influenced by notice, "good faith" has several legal meanings according to the subject-matter of the litigation in which it is used.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3117-3121; vol. 8, p. 7672.]

#### 2. IMPROVEMENTS (§ 4\*)—GOOD FAITH—HOW IMPEACHABLE.

Constructive notice of adverse title afforded by records will not impeach the good faith of an occupant of land in making improvements, it being essential that he have actual notice of the successful title when the improvements were made; but he may be found to have had actual notice of the adverse title from proof that he knew other facts which, if followed up, would have led to notice.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. § 15; Dec. Dig. § 4.\*]

#### 3. NOTICE (§ 6\*)—EQUITY RULE.

In equity one who takes with notice of an adverse claim takes subject thereto, and to constitute such notice direct or positive information is unnecessary; anything tending to put a prudent man on the alert being sufficient.

[Ed. Note.—For other cases, see Notice, Cent. Dig. §§ 4-7; Dec. Dig. § 6.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4839-4844; vol. 8, p. 7733.]

#### 4. IMPROVEMENTS (§ 4\*)—GOOD FAITH.

Notice of a title adversely held is incompatible with the good faith required of an occupant to sustain his claim for improvements, regardless of his opinion concerning the validity of such title.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. §§ 7, 14, 15; Dec. Dig. § 4.\*]

#### 5. IMPROVEMENTS (§ 4\*)—GOOD FAITH.

Rev. St. 1890, § 3080 (Ann. St. 1906, p. 1768), permitting one who claims land in another's possession to bar the occupant from compensation for betterments by notifying him in writing of the claim and its nature, does not make an exception in favor of an occupant who

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

believes the hostile title to be bad and makes betterments regardless of such notice.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. §§ 7, 14, 15; Dec. Dig. § 4.\*]

**6. IMPROVEMENTS (§ 4\*)—GOOD FAITH.**

An occupant's claim for betterments is not defeated merely because his title proves to be bad.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. § 13; Dec. Dig. § 4.\*]

**7. IMPROVEMENTS (§ 4\*)—PROCEEDING TO RECOVER FOR—INSTRUCTIONS.**

An instruction that, if an ousted occupant of land made improvements in good faith believing he owned the land, he could recover therefor, was erroneous for ignoring the effect of notice of defendant's claims, which he deemed inferior to him.

[Ed. Note.—For other cases, see Improvements, Dec. Dig. § 4.\*]

**8. IMPROVEMENTS (§ 4\*)—GOOD FAITH—ESTOPPEL.**

One is not estopped to dispute an ousted occupant's claim for betterments because the occupant offered to convey to him if he would pay what the occupant was out, nor because of an omission to sue for the land until the occupant sought to quiet his title; but an occupant who makes improvements in good faith, on assurances by the holder of an outstanding title that it will not be vitalized, can recover therefor on ouster.

[Ed. Note.—For other cases, see Improvements, Dec. Dig. § 4.\*]

Appeal from Circuit Court, Ripley County; J. C. Sheppard, Judge.

Action by E. T. Richmond against Elizabeth C. Ashcraft. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Plaintiff instituted an action against defendant to quiet the title to a tract of land, containing 160 acres, in Ripley county. The answer was an action of ejectment against plaintiff for possession of the land, which action culminated in a judgment declaring the title in fee simple to be in defendant, awarding her possession and \$200 damages, and assessing the value of the yearly rents and profits of the land at \$35. Thereafter plaintiff began this proceeding on the statute to recover compensation for betterments alleged to have been made by him on the land in good faith and without notice of defendant's title. The jury awarded plaintiff damages in the sum of \$600, and thereupon the court rendered judgment that he have and recover said sum from defendant, less the amount of the judgment for damages recovered against him in the ejectment action, and the amount of the rents and profits which would accrue between the date of the judgment in said action and the date of payment to plaintiff of the assessed value of his improvements and enjoined defendant from taking possession meanwhile. The present appeal was prosecuted from the award of damages for the value of the betterments.

The facts which led up to the litigation between the parties are these: A. J. Ashcraft, who was defendant's husband, but is

now dead, owned the land until October 17, 1893, when it was sold by the sheriff of Ripley county under an execution against him in favor of S. M. Chapman and conveyed to the latter by a sheriff's deed. Chapman afterwards either sold and conveyed to defendant, Mrs. Ashcraft, or arranged to do so; the facts regarding the transaction being in dispute and not really material in the present case, except as bearing on the good faith of plaintiff. She obtained possession of a deed executed by Chapman October 21, 1896, and filed it for record October 17, 1898, which deed purported to convey the land to her. Chapman testified he had agreed to sell her the land for \$390, and, as he lived in another part of the country, sent the deed by mail to a man named Patterson, with an order to deliver it to Mrs. Ashcraft on payment of the purchase money, and that she obtained the deed without paying the price, either by purloining it or in some other unlawful mode. Mrs. Ashcraft had held the deed for some years prior to the circumstances to be related next, and was shown by the deed records of the county to be the owner of the land after October 17, 1898. While the title was in this condition, she rented the premises for two years to plaintiff, Richmond, who is her nephew. Richmond entered into occupancy as her tenant some time in 1900, perhaps in the fall of that year. Shortly afterwards, though just when we have been unable to ascertain from the record, he was evicted by the sheriff acting for Chapman, and was immediately put in possession again pursuant to a contract for the purchase of the land by him from Chapman. A month later, in April, there was an attempt to sell the property under a judgment for taxes against defendant and Chapman, and at the sale the latter was the buyer, but got no title because the tract was misdescribed in the proceedings. The record is obscure regarding the eviction of plaintiff. Chapman testified: He obtained judgment against Mrs. Ashcraft alone, or jointly with her husband. He did not say explicitly the judgment was for the unpaid purchase money defendant owed him under the contract to sell to her for \$390, and pursuant to which he had put in escrow the deed dated October 21, 1896, that he testified was never delivered, or that the sheriff acted under any judgment in putting plaintiff, as tenant of Mrs. Ashcraft, out of possession. There is nothing to show whether the sheriff was executing a writ, or, if so, what it was, or on what judgment issued. Plaintiff himself testified the deed made by Chapman to Mrs. Ashcraft had not been set aside.

Whatever its form and foundation, this ouster occurred, we believe, in the early part of 1901, and on March 2d of said year Chapman conveyed the premises to plaintiff.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The deed by which he did so is not in the record, nor is the nature or effect of it stated. Two days later, on March 4th, Mrs. Ashcraft signed and acknowledged a quitclaim deed to plaintiff for the recited consideration of \$15, purporting to convey the land to him, and his testimony shows he intended, when he bought from Chapman, to obtain a deed from her also; but he said he undertook to buy from Mrs. Ashcraft, not because he believed she held any interest in or title to the land, but to prevent hard feelings between relatives and get the business settled satisfactorily to all parties. A brother of Mrs. Ashcraft, R. B. Rogers, claimed to own the tract at the same time; but on what his claim was based we do not know, except as indicated by his statement that Mrs. Ashcraft had been dispossessed of the land by Chapman, and he (Rogers) claimed title for Chapman. The evidence is very confused and incomplete along this part of the case and fails to show clearly the facts. Mrs. Ashcraft refused to deliver to plaintiff the quitclaim deed she had signed and acknowledged, plaintiff says, because Rogers told her the land was worth more than the \$25 plaintiff testified he was to pay, though the deed recites \$15. The upshot of the negotiation was the deed remained undelivered, and Mrs. Ashcraft still retained whatever title she owned. Plaintiff afterwards made the improvements for which he recovered the judgment appealed from, treating the land as his own, and believing, he says, his title was perfect, which belief he cherished until 1907, when he attempted to borrow some money on it and could not procure the loan because the deed from Chapman to Mrs. Ashcraft appeared to vest the title in her. Hence his disastrous suit to quiet the title. Plaintiff admitted he knew of the conveyance to Mrs. Ashcraft when he bought, but was told by Chapman, who is a lawyer, she never had paid for the land and was not entitled to the deed, and by her that she had not paid for it. By reason of these circumstances, a declaration made by defendant, and to be stated infra, and also because he supposed the sheriff's deed of April 3, 1901, based on the judgment for delinquent taxes against her and Chapman had passed the entire interest to Chapman, plaintiff considered his title good. He offered to turn the place over to defendant, who had received some pension money, if she would reimburse him what he had been out, whereupon, to quote him, she said: "She did not want it (i. e., the land) would not work it if she had it, did not work it when she did have it, and would not work it now." This occurred before plaintiff put on the improvements, and he testified he made them afterwards, believing his title was good, and that for six years he put all his labor and earnings into the betterments.

The court refused to instruct for a verdict for defendant, and submitted the case to the

jury on the following instructions, of which the first was given for plaintiff and the other three of the court's own motion:

"The court instructs the jury that if you believe and find from the testimony that plaintiff, E. T. Richmond, went into possession of the land in controversy and made the improvements testified about, in good faith, believing at the time that he had title to the land, then your verdict should be for the plaintiff, E. T. Richmond, for such sum as you may find from the evidence said improvements were reasonably worth.

"(1) The court instructs the jury that if they believe and find from the evidence in this cause that the plaintiff, Richmond, had actual notice of the adverse claim of defendant, Ashcraft, to the land involved in this suit, prior to the time of making said improvements, if you find any improvements to have been made, then your finding must be for defendant, Ashcraft, unless you shall further find and believe from the evidence in this cause that Richmond had reasonable and strong grounds for believing the adverse claim of Ashcraft, if you believe he knew of her adverse claim, to have been destitute of any legal foundation.

"(2) The court instructs the jury that if they believe and find from the evidence in this case that plaintiff, Richmond, had any information of defendant's adverse claim of ownership to the land involved in this suit, which would put an ordinarily prudent man on inquiry, prior to the time of making said improvements, if you find any improvements to have been made, then he had actual notice within the meaning of this term as used in instruction No. 1.

"(3) The court instructs the jury that by 'good faith,' as used in these instructions, is meant an honest belief on the part of the occupant of the land that he has secured a good title to the land in question and is the rightful owner, and for this belief there must be such reasonable grounds as would lead a man of ordinary prudence to entertain it."

These instructions were requested by defendant and refused:

"(1) The court instructs the jury that if they believe and find from the evidence in this cause that the plaintiff, Richmond, had actual notice of the adverse claim of defendant, Ashcraft, to the land involved in this suit, prior to the time of making said improvements, if you find any improvements to have been made, then your finding must be for the defendant, Ashcraft.

"(2) The court instructs the jury that if they believe and find from the evidence in this cause that the plaintiff, Richmond, had any information of defendant's adverse claim of ownership to the land involved in this suit which would put an ordinarily prudent man on inquiry, prior to the time of making said improvements, if you find any

improvements to have been made, then your finding must be for the defendant, Ashcraft."

John M. Atkinson and Thos. Mabrey, for appellant.

GOODE, J. (after stating the facts as above). In passing on this appeal we have not been helped by brief or argument for plaintiff, as we were entitled to be, considering the difficult points of law involved and the authorities arrayed by defendant's counsel in support of their propositions. They insist a verdict should have been directed for their client because plaintiff's own testimony demonstrates he made the improvements in controversy with full knowledge of her claim and title, and therefore not in good faith or prior to notice.

The statute on which the action was brought reads thus: "If a judgment or decree of disposssession shall be given in an action for the recovery of possession of premises, or in any real action in favor of a person having a better title thereto, against a person in the possession, held by himself or by his tenant, of any lands, tenements or hereditaments, such person may recover, in a court of competent jurisdiction, compensation for all improvements made by him in good faith on such lands, tenements or hereditaments, prior to his having had notice of such adverse title." Rev. St. 1899, § 3072 (Ann. St. 1906, p. 1766). Said statute allows compensation to a defeated occupant for betterments only in the contingency of their having been made in good faith and before he had notice of the title which prevailed against him. The legislation on this subject varies considerably in the different states, and hence the adjudications on the question of what circumstances will justify a judgment for compensation vary too with the diverse language of the statutes and, in some measure, in consequence of judicial disagreements regarding the equitable principles applicable to the subject. We cite *infra* those cases we have found wherein the courts held more or less pointedly in favor of the occupant's good faith and claim for compensation, even though he improved with knowledge or notice of the hostile title, if he believed, on reasonable grounds, it was worthless in law. Most, or all, of these cases dealt with statutes unlike our own, in that they required less explicitly than do ours, not only good faith on the part of the occupant, but absence of prior notice of the adverse title, as conditions prerequisite to recovery. *Petit v. Railroad*, 119 Mich. 492, 78 N. W. 554, 75 Am. St. Rep. 417; *Thomas v. Wagner*, 131 Mich. 601, 92 N. W. 106; *Griswold v. Bragg* (C. C.) 6 Fed. 342, 346; *Wells v. Riley*, 2 Dill. 566, Fed. Cas. No. 17,404; *Harrison v. Castner*, 11 Ohio St. 339; *Whitney v. Richardson*, 31 Vt. 300; *Barrett v. Stradl*, 73 Wis. 389, 41 N. W. 439, 9 Am. St. Rep. 795; *Dorn v. Dunham*, 24 Tex. 366, 378; *Parrish v. Jackson*,

69 Tex. 614, 7 S. W. 486. Every opinion on the question we have looked into, except *Pugh v. Bell*, 2 T. B. Mon. (Ky.) 125, 15 Am. Dec. 142, requires the betterments to have been put on the land in good faith; but, partly from general reasons, and partly from statutory discrepancies, the courts disagree about the circumstances which will prevent that quality from being ascribed to the occupant. *Warvelle, Ejectment*, § 357, *passim* §§ 546, 649.

The terms "good faith" and "notice" are intimately related in jurisprudence, but are not of uniform meaning. The former retains, in some measure, the popular sense of honest belief, but its technical significance depends largely on the doctrine of notice as developed in the progress of the equity system. Considered with reference to and as influenced by "notice," the term "good faith" bears several legal meanings according to the subject-matter of the litigation in which it is used. As applied to the purchase of a parcel of land, the title to which has passed from the grantor by a prior recorded deed or incumbrance, the constructive notice of the prior conveyance which the record imparts prevents one taking title subsequently from being a purchaser in good faith. *Turk v. Funk*, 68 Mo. 18, 30 Am. Rep. 771. When the controversy is between the record owner of land and a defeated occupant seeking pay for improvements, such constructive notice of the adverse title will not impeach the good faith of the occupant in putting betterments on the land, and this can be done only by proof that he had actual notice of the successful title when the improvements were made. *Hill v. Tissier*, 15 Mo. App. 299. But in this class of cases the occupant may be found to have had actual notice of the adverse title from proof that he knew other facts which, if followed up, would have led to notice; and if, with such knowledge of collateral facts, the occupant fails to investigate, he will be charged with knowledge of whatever would have been learned by proper inquiry. *Lee v. Bowman*, 55 Mo. 400. Those examples illustrate two senses attached to the phrase "in good faith" under the influence of the doctrine of notice, and perhaps a third might be drawn from the law of negotiable paper. *Hamilton v. Marks*, 63 Mo. 167. In discussing the significance of the terms as used in the statute relevant to the present case, our courts have said they were adopted by the Legislature from equity with the full meaning and force given to them in that system of jurisprudence, saying, further, in substance, that "notice" and "good faith" cannot coexist, for it is an equity doctrine of universal recognition that he who takes with notice takes subject to the claim, and the notice which will suffice for this purpose does not mean direct and positive information, but anything calculated to put a prudent man on the alert. *Lee v. Bowman*, *supra*; *Marlow v. Liter*, 87 Mo. App. 584.

The rule that notice of a fact will be imputed to a man who remains ignorant of it from neglecting to follow up a sufficient clue is applied carefully in equity; but we have no reason to set forth the rules for its application, or ask whether it is adapted to cases like the one in hand, as the Supreme Court holds it is. The clear effect of *Lee v. Bowman* is that if a defeated occupant had notice in the chancery sense, of the successful title before he improved the land, he should be denied the status of an improver in good faith; and this rule has been enforced consistently by our courts, with the qualification already stated regarding the inadequacy of constructive record notice to impugn the bona fides of the occupant. *Hill v. Tissler*, 15 Mo. App. 299; *Pierce v. Rollins*, 60 Mo. App. 497, 508; *Stump v. Hornbeck*, 15 Mo. App. 367; *Marlow v. Litter*, 87 Mo. App. 584, 589; *Kugel v. Knuckles*, 95 Mo. App. 670, 69 S. W. 595; *Gallenkamp v. Westmeyer*, 116 Mo. App. 680, 93 S. W. 816; *Sires v. Clark*, 132 Mo. App. 537, 112 S. W. 526; *Brown v. Baldwin*, 121 Mo. 106, 25 S. W. 858.

We have found no pointed adjudication in this state of the question whether an honest but erroneous opinion in favor of the security of his own title will suffice to uphold the occupant's demand for compensation, if he had notice of the existence of the adverse title and, considering it worthless, made betterments. The conclusion to be drawn from the decisions and judicial comments is against this proposition and in favor of the view that notice of a title adversely held is incompatible with good faith, regardless of the opinion of the occupant concerning the validity of such title. A person who claims to own land in the possession of another may bar the occupant from compensation for betterments by giving him notice in writing of the claim and its nature. *Rev. St. 1899*, § 3080 (*Ann. St. 1906*, p. 1768). This statute cannot be construed to allow an exception in favor of an occupant who thinks the hostile title is bad and makes betterments regardless of the written notice. In *Brown v. Baldwin*, the relief was denied the occupant because he had been notified in writing of the better title before he improved, though the Supreme Court thought he had acted from faith in his own title. This authority settles the law against the right of a party who improves after formal notice to compensation, even though he deemed the hostile title worthless. And in *Lee v. Bowman*, the Supreme Court held actual notice of the adverse claim, however derived, was as potent to bar compensation as when formally given in writing. That is to say, the kind of notice which is imputed from facts sufficient to arouse inquiry is accorded the same efficacy as the statutory notice. It may be the Legislature intended any notice except the statutory one should leave the question of good faith open, but it is enough for us to

say the law has been declared the other way by the Supreme Court. The Missouri cases do not quite cover the point of whether an occupant is entitled to payment for bettering the land while he cherished an opinion, on reasonable grounds, that his own title was good and an outstanding one of which he knew bad. In the absence of a direct precedent, and inasmuch as this doctrine has been accepted by eminent courts and contains some equity, we have endeavored to ascertain what rule is supported by the weight of those outside judgments which were not pronounced under the influence of statutes more favorable to the occupant than ours. Allowing compensation is admitted to be attended with this injustice: The betterments may be unsuited to the use and purposes of the real owner of the land, or more expensive than he can afford; and the disposition is to confine the remedy to such instances as fall clearly within the terms of the statute, or, in the absence of a statute, within the rules of equity. *Warvelle, Ejectment*, § 606. It goes without saying that no court will deny the occupant relief because his title turned out to be bad, for this would defeat the remedy, which proceeds on the theory that the improver will lose to a better title, and aims to reimburse him for enhancing, in good faith, the value of the land. *Jones v. Perry*, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430; *Krause v. Means*, 12 Kan. 335. Nevertheless, faith in his own title, as against an adverse one of which he was aware, is not enough to confer the right to reimbursement. This is according to the weight of adjudication and the texts of commentators. *Walker v. Quigg*, 6 Watts (Pa.) 87, 31 Am. Dec. 452; *Jackson v. Loomis*, 4 Cow. (N. Y.) 168, 15 Am. Dec. 351, and note; *Morrison v. Robinson*, 31 Pa. 456; *Hall v. Hall*, 30 W. Va. 779, 5 S. E. 260; *Linthicum v. Thomas*, 59 Md. 574; *Montgomery v. Whitfield*, 41 La. Ann. 649, 6 South. 224; *White v. Stokes*, 67 Ark. 184, 189, 53 S. W. 1000; *Holmes v. McGee*, 64 Miss. 129, 8 South. 169; *Horton v. Sledge*, 29 Ala. 478, 498; *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813; *Green v. Biddle*, 8 Wheat. 1, 79, 5 L. Ed. 547; *Hawke v. Deffebach*, 4 Dak. 20, 41, 22 N. W. 480; *Sedgwick-Waite, Land Titles* (2d Ed.) § 694 et seq.; *Warvelle, Ejectment*, § 553. In *Holmes v. McGee*, on facts like those before us, the Supreme Court of Mississippi determined the point under examination, and said: "On his own testimony the appellant was not a bona fide holder of the land so as to entitle him to compensation for improvements under section 2512 of the Revised Code of 1880. When he purchased and made the improvements he knew all the facts about the title. True, he thought the tax title was good and sufficient to defeat the claim of the McGee heirs. In this he was mistaken, and as he knew the facts and mistook the law, the sincerity of his erroneous belief is not sufficient to bring

him within *Cole v. Johnson*, 53 Miss. 94." The so-called "Texas rule" is condemned both on principle and authority in the treatises we have cited, and we think the argument for the proposition that compensation ought to be refused when the occupant had notice is unanswerable, if he not only knew of the outstanding title, but was not led by the holder to believe it would never be asserted in hostility to his own.

Turning now to the rulings on the instructions given in the present case, we find the first instruction granted for plaintiff left out the element of notice and authorized a verdict for him if he made the improvements in good faith, thereby failing to take account of the effect notice of defendant's claim would have on the demand of plaintiff. The first instruction granted by the court of its own motion went further and adopted the Texas rule. It follows the case was submitted to the jury on erroneous principles of law.

The question remains of whether, on the entire evidence, plaintiff's demand must be defeated as a matter of law. Beyond doubt he was apprised of the incidents which had occurred in connection with the title after the first sale under the execution against defendant's husband in 1893, and he knew defendant had refused to deliver him the deed conveying any interest which might be vested in her. Notwithstanding these facts there is a strong equity in his favor. The case is to be distinguished from *Brown v. Baldwin*, supra, wherein it appeared the title which prevailed had been asserted continuously and the occupants repeatedly notified in writing of the rights of the holder. Moreover, the latter began an action for possession as soon as negotiations for a sale had ceased between him and the occupants, and nothing was said or done meanwhile to lull them into security or induce them to expend money on the property. In the case before us, though defendant had refused to make a deed to plaintiff, she took no step toward asserting her title until aroused into activity by his suit to quiet title filed six years later and then merely to remove what he supposed was a technical blemish. During those years plaintiff made improvements which trebled the value of the land. He had offered to convey the property to defendant before they were made if she would pay him what he was out. This she was not bound to do and cannot be estopped for refusing to do, and neither does his right to reimbursement depend on her omission to sue. *Whitney v. Richardson*, 31 Vt. 300. If she was not bound to say or do anything to put plaintiff on his guard, she had no right to lull him into false security by declarations adapted to induce the belief that her title was not inimical to his and would never be asserted against him. The evidence inclines to prove she misled plaintiff by saying she did not want the land, had never worked it, and would not work it if she had it. This

matter needs further elucidation, but makes an impression unfavorable to defendant as it stands. All the cases on the subject say the notice an occupant must have to bar his recovery for improvements is notice of an adverse title, and, indeed, these are the words of our statutes. Without laying down any broad rule, we think both the statutes and the decisions contemplate notice of an outstanding title which the occupant has no good reason, based on professions of the holder, to believe will not be vitalized. If assurances are given that it will not be, and the occupant improves on the faith of them, his claim for compensation falls within the doctrine of equitable estoppel, which has been recognized by courts as entitling a party, under appropriate circumstances, to pay for betterments, though made with knowledge that his title is defective. *Brown v. Baldwin*, 121 Mo., loc. cit. 125, 25 S. W. 858; *Hall v. Hall*, 30 W. Va. 779, 784, 5 S. E. 260; *Morris v. Terrell*, 2 Rand. (Va.) 6; *Cawdor v. Lewis*, 1 Younge & Coll. 427; 2 Story, Eq. Jur. (17th Ed.) §§ 385, 655, 799, and cases cited. Such decrees are given upon the general principles of equity jurisprudence and independent of any statute; but we do not see that our statutes would hinder the application of those principles to this case, if what defendant said would have induced a prudent man, apprised of all the facts plaintiff knew, to believe defendant did not intend to disturb him. Story says, if the real owner has fraudulently misled the other party regarding the title, the claim for compensation stands on the highest equity, and this theory of justice pervades our jurisprudence and has been enforced in a variety of cases to prevent owners from recovering their property or recovering it without making purchasers or occupants whole. Story, supra; 3 Pomeroy, Eq. Jur. (3d Ed.) § 1241, and notes. Among instances of its application are some wherein widows were denied their dower in realty because, by their assurances, they had led purchasers to believe they claimed no dower. 2 Scribner, Dower (2d Ed.) 266; *Sweaney v. Mallory*, 62 Mo. 485. After the declaration we have stated, defendant allowed plaintiff to improve the property through six years at much labor and expense to him; and, if otherwise she would have been under no duty to protest, it would work a fraud to exempt her from reimbursement if he relied on what she said and reasonably might rely on it. Her refusal to deliver the deed is a strong circumstance against plaintiff, but ought not to be treated as conclusive in view of her subsequent statement, which indicated that, if she had intended to assert her title, she had abandoned the intention. On a retrial of the case the pleadings may need amending to allege the estoppel.

The judgment is reversed, and the cause remanded. All concur.

# ROWDEN v. SCHOENHERR-WALTON MINING CO.

(Kansas City Court of Appeals. Missouri.  
March 29, 1909.)

## 1. MASTER AND SERVANT (§ 102\*) — SAFE PLACE TO WORK.

It is the duty of a master to exercise reasonable care to provide the servant with a reasonably safe place to work so as not to enhance the natural risks of the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 173, 174; Dec. Dig. § 102.\*]

## 2. MASTER AND SERVANT (§ 203\*)—ASSUMPTION OF RISKS.

The only risks assumed by a servant are those which are incidental to the employment, and he does not assume risks which arise from the master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 538; Dec. Dig. § 203.\*]

## 3. MASTER AND SERVANT (§ 118\*)—DUTY TO FURNISH SAFE PLACE TO WORK.

Where a master employed servants in a drift in a lead and zinc mine to drill and haul material, which was blasted while the servants were away, and the master knew that the blasting tended to loosen rocks in the roof so as to increase the danger from falling material, it was its duty to provide for inspection of the roof and removal of dangerous material for the safety of the servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. § 118.\*]

## 4. MASTER AND SERVANT (§ 235\*)—DUTY TO INSPECT WORKING PLACE—DELEGATION OF DUTY TO SERVANT.

If by express direction, or by implication from custom, acquiesced in by master and servants, the duty of inspecting and trimming a mine roof to prevent injury from falling material be delegated to a servant, and he be injured by his failure to discharge the duty properly, he cannot recover therefrom from the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710, 711, 714; Dec. Dig. § 235.\*]

## 5. MASTER AND SERVANT (§ 206\*)—ASSUMPTION OF RISK—NATURAL RISKS OF EMPLOYMENT.

If an injury occurred during the servant's discharge in a proper manner of the duty placed upon him to inspect, the cause would be one of the natural risks of the employment assumed by the servant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 206.\*]

## 6. MASTER AND SERVANT (§ 107\*)—ASSUMPTION OF RISKS — WORK INHERENTLY DANGEROUS.

Where work in hand is dangerous for the reason that it is to make safe an unsafe place, the general rule that the master must furnish the servant a safe place in which to work has no application.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 255; Dec. Dig. § 107.\*]

## 7. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

In an action by a servant for injuries from the falling of rock from the roof of a mine, whether the master had made it one of the duties of the servant and his helper to inspect and trim the roof held under the evidence for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.\*]

## 8. MASTER AND SERVANT (§ 118\*)—DUTY TO PROVIDE SAFE PLACE TO WORK—ASSUMPTION OF DUTY BY SERVANT.

The mere fact that a servant, to protect himself from threatened and obvious danger, makes it a practice to remove loose rocks from the roof of a mine over the place where he is required to work, does not, as matter of law, absolve the master from the performance of his duty to make reasonably safe an unsafe place before requiring the servant to work there and throw the duty on the servant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 118.\*]

## 9. MASTER AND SERVANT (§ 235\*)—DUTY OF SERVANT TO INSPECT PREMISES.

A servant assigned to a task is not required on his own motion to make comprehensive inspections to detect dangers, but he need only use his senses in the position assigned him, and as to dangers not to him apparent and not inherent to the employment he may rely upon the master's judgment and humanity for the safety of the position.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.\*]

## 10. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY —CONTRIBUTORY NEGLIGENCE.

In an action by a servant for injuries from the falling of rock from a mine roof, whether the servant was negligent held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.\*]

## 11. MASTER AND SERVANT (§ 118\*) — SAFE PLACE TO WORK—CHANGING PLACE AND CONDITIONS OF WORK — APPLICATION OF RULE.

Where miners were employed to drill and remove rock in a mine, the work being so arranged that blasting was done while they were absent, giving an opportunity to remedy the dangers resulting therefrom by gases generated and the effect of the explosions on the roofs and walls, it was the master's duty to make the place reasonably safe before requiring the miners to go back to work, and the rule that, where the servant is engaged where the conditions are from time to time changing and the place being changed by the work of the servant and his co-servants, the master need only furnish such a reasonably safe place as the necessary hazards of the employment will permit, and exercise such care to provide a safe place to perform the service as the character of the work done will justify, does not apply.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. § 118.\*]

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by J. H. Rowden against Schoenherr-Walton Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Walden & Andrews and A. L. Berger, for appellant. W. R. Shuck and P. E. Gardner, for respondent.

JOHNSON, J. Plaintiff sued for personal damages caused by the negligence of defendant, his employer. The answer is a general denial, pleas of contributory negligence, and assumed risk. The trial resulted in a verdict and judgment for plaintiff in the sum of \$1,000. Defendant appealed.

The principal contention of defendant is that the court erred in not peremptorily instructing the jury to return a verdict for defendant. At the time of the injury, February, 1908, defendant was engaged in the operation of a lead and zinc mine in Jasper county and employed plaintiff to drill holes for blasting. A machine was used for this purpose, and plaintiff was assisted in his work by a helper. Plaintiff's duties required him to drill and load the holes and fire the shots. It was customary to work during the day drilling and loading and to explode the charges the last thing in the evening. The workmen left the mine before the explosion occurred and did not return to work until the next morning. This method had been pursued by plaintiff and his helper the day before the injury. They drilled, loaded, and fired a number of shots in the drift where they had been directed to work by defendant. The roof of this drift was about seven or eight feet above the floor, and the nature of the material was such that the explosions were likely to crack and shatter the roof in a way to make it dangerous for miners to work under it until it had been inspected and trimmed. To trim it properly, it was necessary for a miner to detach with pick or spoon the stones, boulders, and slabs that had been loosened by the shots and were likely to fall. When plaintiff and his helper went to work on the morning of the injury, the roof had not been trimmed. In a moment or two after they entered the drift, plaintiff left for some reason, not important, and the helper, observing some loose stones in the roof, began detaching them with a pick. Plaintiff returned to the drift while this was being done, and immediately after his return a large slab, 12 to 15 feet long, 10 to 12 feet wide, and from 2 to 8 inches thick, fell from the roof. Plaintiff, who was under one edge of it, was struck and injured. The following extracts from the evidence deal with the subject of whose duty it was to inspect and trim the roof after the explosions:

From the testimony of plaintiff: "The Court: When you would fire a shot at night as you told Judge Walden, in the morning what was the rule there as to who should see the effect and ascertain the effect and trim down the roof, if anybody? A. The boss or superintendent. The Court: The ground boss? A. Yes, sir. The Court: Did he do it that morning? A. I couldn't tell you. \* \* \* Q. It was your duty to take down anything loosened up over your head by these shots? A. Where I was at work. Q. Around where the shots had been fired and where the machines were? A. No, sir; I wasn't supposed to take it down where the shots were. Q. Anything you noticed that was loose it was your duty to take down? A. Right over my work it was; not my duty, either, but I did it."

From the testimony of W. Cobble, the help-

er: "We had been working together. We wasn't together that morning. We went down together. He was up there and went away and came back when the slab fell. Q. Whose duty was it to examine and trim the roof over this place where this boulder fell? A. I couldn't say for certain whose duty it is. It is natural if a man sees anything loose over him he pulls it down. Q. Who looks after the roof in that mine there? A. The superintendent or ground boss, I suppose, are the natural men to look after it. The Court: Tell what you know about it. Q. Tell who looked after the roof in that mine, if you know. A. I don't know. We all took a hand in it. If there was anything over me I looked after it, but for me knowing who looked after it, I don't know for sure. \* \* \* Q. What were your duties with reference to looking after any part of the roof? A. As I told you awhile ago, if I saw anything loose over me, I pulled it down; but I never went around to examine the roof. Q. Was it your duty to go around to examine the roof? A. I had no orders as to that. Never was asked to go around and examine the roof."

From the testimony of another miner: "Q. Whose duty was it to look after the roof at this place where this stuff fell from? A. The machineman usually trims where he sets up the machine, but the superintendent gave me orders not to go under anything that looked bad, unless I sent either the ground boss or some one to have them trim it; but so far as knowing whose duty it was to trim this roof, I don't know. \* \* \* Q. That is the general custom when the men go into the ground, the machineman, not the shovelers. Is it their duty to look and see what is the effect of the shots the night before? A. Yes, sir; they look to see. Q. Each machineman is supposed to look after his own drift, isn't that the custom? A. I don't know about the trimming. They do the trimming around where they set the machine."

The negligence charged in the petition is: That defendant "carelessly and negligently failed to inspect and examine the roof and walls of the drift wherein plaintiff was required to work, in a proper manner and carelessly and negligently failed to trim the roof and walls so as to work out loose boulders and slabs and rock therein, and carelessly and negligently failed to support the roof and walls of said drift with timbers and props so as to prevent the same from falling and caving in on said plaintiff and carelessly and negligently failed to provide a snowshed to cover plaintiff while at work and to prevent rock, earth, and boulders from falling upon him, and carelessly and negligently failed to adopt any means to render said roof and walls reasonably safe, but, on the contrary, allowed said roof and walls to become and remain in a dangerous and defective condition by reason of boulders and rock and slabs therein becoming loosened and remaining loosened



and liable to fall; that such dangerous and defective condition of the said roof and walls was known to defendant, or could have been known to the defendant by the exercise of ordinary care on its part; and that the same was unknown to plaintiff."

It is the duty of the master to exercise reasonable care to provide his servant with a reasonably safe place in which to work, or, to state it differently, the master must not, by negligent acts of omission or commission, enhance the natural risks of the employment. His right to conduct his business in his own way does not include the license to be negligent, but is restricted to the limits of reasonable care, and the only risks assumed by the servant are those which are incidental to the employment, not those which arise from the negligence of the master. The operation of blasting in the drift created risks, some of which, it is obvious, should be classed as incidental to employment there. It appears to be conceded in the evidence that it was not practicable to timber the drift, and the only method that could be pursued to prevent the fall of material from the roof was that of trimming. If defendant exercised reasonable care to inspect and trim the roof before sending men in there to work after shots had been fired, the risk of injury from falling material which still remained would be one of the natural risks of the business, and therefore one assumed by plaintiff; but knowing, as it must have known, that the firing of shots would have a tendency to increase the danger of working under the roof, defendant was bound to provide for the inspection of the roof and for the removal therefrom of the dangerous material, in order that its servants might have the protection of reasonable safeguards. To omit the performance of this duty would constitute a breach of its obligation to plaintiff to exercise reasonable care to provide him a reasonably safe place in which to work. But it is argued that the testimony of plaintiff and his witnesses shows that defendant had made it the duty of a "machineman," such as plaintiff, to inspect and trim the roof in the vicinity of his machine, and therefore that to plaintiff himself had been assigned the task of keeping the roof over the place of his employment in a reasonably safe condition. If, by express direction, or by implication from custom, acquiesced in by both parties, the duty of inspecting and trimming the roof had been delegated by defendant to plaintiff and his helper, in such case plaintiff would have no cause of action. If the fall of the slab resulted from his failure to discharge such duty properly, that would be a result of his own fault, or, if it occurred during the discharge of that duty in a proper manner, the result should be attributed to a cause that belonged to the natural risks of the employment. "When the work in hand is dangerous

for the reason that it is to secure and make safe an unsafe place, the rule, as generally applied, that the master must furnish the servant a safe place in which to work, can have no application. To say that a man can have a safe place to work in an unsafe place is an absurdity." *Henson v. Packing Co.*, 113 Mo. App. 618, 88 S. W. 186.

The question of whether defendant had made it one of the duties of plaintiff and his helper to inspect and trim the roof is presented by the evidence as an issue of fact for the jury to determine. Plaintiff, himself, states that the duty in question was performed by and belonged to the ground boss. We think his evidence on this point is substantial, despite the fact, which he and his other witnesses admit, that when they observed loosened stones or other material over the place where they were required to work plaintiff and his helper removed the threatened danger by knocking down such stones or material; but it is a far cry from protecting one's own safety from threatened, obvious, and imminent danger and being charged with the duty of inspecting and making safe an unsafe place. The former act springs from the instinct of self-preservation and is but an exercise of the degree of care the law imposes on a servant to make reasonable use of his senses to guard his own safety. Because the servant protects himself to this extent, or, in other words, does nothing more than an ordinarily careful and prudent person in his situation would do, is no reason for saying, as a matter of law, that the master had become absolved from the performance of his duty to make reasonably safe an unsafe place before requiring the servant to work there. It is the duty of the servant to do the work the master assigns to him. "It is not supposed when given a task to perform that he will, on his own motion, consume his master's time in making comprehensive inspections to detect dangers. All that is required of him is that he use his senses in the position assigned him and as to dangers not to him apparent, and not inherent to the employment, he has the right to rely upon his master's judgment and humanity for the safety of his position." *Gibson v. Bridge Co.*, 112 Mo. App. 594, 87 S. W. 3. The evidence is sufficient to take to the jury the issue of defendant's negligence in not inspecting and trimming the roof after the shots were fired and before requiring plaintiff to resume work in the drift.

The issue of contributory negligence likewise was one of fact for the jury. It appears that the detachment and fall of this large slab came as a surprise to plaintiff and his helper, who was removing some stones with his pick. Plaintiff had just returned to the drift, and we do not feel justified in assuming that the appearance of the slab should have indicated to a person in his

situation that its fall was imminent, or that he failed to make reasonable use of his senses for his own protection. The demurrer to the evidence was properly overruled.

Complaint is made of the following instruction given at the request of plaintiff: "The court instructs the jury that it was the duty of defendant to use ordinary care to furnish its employés in its mine a reasonably safe place in which to work, and if you believe and find from the evidence that on the — day of February, 1908, plaintiff was in the employ of defendant as a miner, and as such miner it was his duty to go down into defendant's mine and work in a certain drift described in evidence, in assisting to get out ore, and that defendant carelessly and negligently allowed said drift to become and remain in a dangerous and defective condition by reason of its failure to inspect and trim the roof of said drift in a proper manner, so as to work out loose boulders and rock therein, and the defendant knew of such dangerous and defective condition, if you find it was dangerous and defective, of said roof, or could have known it by the exercise of ordinary care on its part, in time so that by the exercise of ordinary care on its part it could have made said roof reasonably safe before the injury to plaintiff, if you find he was injured, and if you find from the evidence that while said plaintiff was working in said drift in the scope of his employment and in the exercise of ordinary care on his part, he was injured by earth, rock, and boulders falling from said roof down upon him, if from the evidence you believe he was injured, and that said injury to plaintiff was caused by the carelessness and negligence of defendant as aforesaid in allowing the roof of said drift to become and remain in said dangerous and defective condition, if you find it was dangerous and defective, then your verdict should be for the plaintiff, unless you further find from the evidence that the dangers arising to said plaintiff by reason of the dangerous and defective condition of said roof, if from the evidence you find said roof was in a dangerous and defective condition, were so obvious and imminent as to threaten immediate injury, and were such that an ordinarily prudent person under the circumstances would not have remained in defendant's service and performed the duties he, the said plaintiff, was employed to perform."

We find the scope of the issues here submitted to be within those pleaded in the petition. It is argued that the instruction fails to square with the rule "that where the servant is engaged in a work for the master of the character of that in question, in performing labor where the conditions are from time to time changing and the place being changed by the work of the servant and his co-servants, it is incumbent upon the

master to furnish only such a reasonably safe place as the necessary hazards of the employment will permit and to exercise such care to provide a safe place to perform the service as the character of the work done will justify." We recognize as sound the rule thus stated, but say that it has no material relation to the cause of action before us. True, the blasting changed the character of the place and made it more dangerous not only on account of the gases engendered, but also because of the effect of the explosions on the roof and walls; but the work was so arranged that the miners withdrew from the mine before the explosion, and it is but fair to say they were not expected to return until the hazards caused by the changed conditions had been removed. An interim was provided for the master to make safe the unsafe place. No matter what was the origin of the dangerous condition, it nevertheless became the duty of defendant to make the place reasonably safe before requiring the miners to go back there to work. The principal issue of fact for the jury to determine was whether the duty to inspect and trim the roof had been delegated to plaintiff or reserved by defendant. The instruction is not subject to the objections urged against it.

Other objections to the rulings of the court in giving and refusing instructions have been answered sufficiently in the views expressed.

There is no substantial error in the record, and, accordingly, the judgment is affirmed. All concur.

#### WICECARVER v. MERCANTILE TOWN MUT. INS. CO.

(St. Louis Court of Appeals. Missouri. March 23, 1909.)

#### 1. INSURANCE (§ 618\*)—ACTION ON POLICY—VENUE.

Under Rev. St. 1899, § 8092 (Ann. St. 1906, p. 3843), providing that a suit on a town mutual insurance policy may be brought in the county where the cause of action originated, or in the county where the company has its principal office, an action on a town mutual insurance policy is properly brought in the county where the property insured and destroyed was located.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1536; Dec. Dig. § 618.\*]

#### 2. INSURANCE (§ 626\*)—MUTUAL COMPANIES—SERVICE OF PROCESS—"PRINCIPAL OFFICE"—"USUAL BUSINESS OFFICE."

Under Rev. St. 1899, § 8092 (Ann. St. 1906, p. 3843), providing for service of process on town mutual insurance companies by service on the president, secretary, or other chief officer in charge of the company's "principal" office, a return of service of process showing service on the secretary of the company in its "usual" business office and in charge thereof is insufficient to confer jurisdiction over the company, because the "usual" business office of the com-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pany may be a place other than its "principal" office.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1572; Dec. Dig. § 626.\*]

For other definitions, see Words and Phrases, vol. 6, p. 5559.]

### 8. PROCESS (§ 155\*)—DEFECTIVE SERVICE—OBJECTIONS.

Where the return of service of process showed on its face that it was insufficient to confer jurisdiction over defendant, the court might disregard the matter when sought to be raised by an answer in the form of a plea in abatement.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 210; Dec. Dig. § 155.\*]

### 4. APPEARANCE (§ 8\*)—VOLUNTARY APPEARANCE.

As a general rule, an answer to the merits operates as a voluntary appearance.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 27; Dec. Dig. § 8.\*]

### 5. PLEADING (§ 107\*)—DEFECTS—MANNER OF RAISING.

Where the defect relied on in a special plea is one latent in the case, and does not appear on the face of the proceedings so as to be available by demurrer or motion, it may be raised by special plea in the answer.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 107.\*]

### 6. PLEADING (§ 107\*)—DEFECTS—MANNER OF RAISING.

Where the defect relied on is latent in the case, and does not appear on the face of the proceedings so as to be available by demurrer or motion, a plea in bar in the answer raising the defect by special plea does not waive the question of plaintiff's right to proceed.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 107.\*]

### 7. PLEADING (§ 406\*)—DEFECTS—WAIVER.

A defendant who fails to demur for a defect patent on the face of the petition thereby waives his right to complain thereof by answering over, provided the petition is sufficient to sustain the judgment when construed by allowing reasonable implications under the rule obtaining after verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1358; Dec. Dig. § 406.\*]

### 8. PROCESS (§ 166\*)—DEFECTIVE SERVICE—WAIVER.

Where the defect of jurisdiction over the person of defendant appears on the face of the return of service of process and is not challenged by motion to quash, defendant by answering to the merits waives its right to complain of the want of jurisdiction, though it also attempts to abate the action because of the defect by special plea reciting appearance for that purpose only.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 253; Dec. Dig. § 166.\*]

### 9. INSURANCE (§ 634\*)—ACTION ON FIRE POLICY—PETITION.

A plaintiff, suing on a mutual fire policy stipulating that the amount of the loss shall be due 60 days after the ascertainment thereof, must in his petition state facts showing a determination of the character, amount, and extent of the loss 60 days before the institution of the suit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1608; Dec. Dig. § 634.\*]

### 10. PLEADING (§ 433\*)—DEFECTS—AIDER BY VERDICT.

Under Rev. St. 1899, § 672 (Ann. St. 1906, p. 686), providing that no judgment shall be reversed for the omission of any averment on

account of which a demurrer could have been maintained, etc., a judgment on a fire policy stipulating that the amount of the loss shall be due 60 days after the ascertainment thereof will not be reversed for the insufficiency of the petition to specifically allege that an ascertainment of the loss was had 60 days before the institution of the suit, where it appears from the petition by reasonable implication that an ascertainment was in fact had 60 days before the institution of the suit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1464; Dec. Dig. § 433.\*]

### 11. PLEADING (§ 433\*)—DEFECTS—AIDER BY VERDICT—"PROOF."

A petition in an action on a fire policy stipulating that the amount of the loss shall be due 60 days after the ascertainment thereof, which alleges that the property was destroyed by fire on April 28th, that on May 20th plaintiff gave defendant notice and proof of the fire and loss and demanded payment, sufficiently shows, after verdict, the ascertainment of the loss 60 days before the institution of the suit, which was instituted more than 60 days after May 20th, the word "proof" meaning the degree of evidence which convinces the mind of any truth or fact and produces belief.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1464; Dec. Dig. § 433.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5684-5686.]

### 12. INSURANCE (§ 668\*)—FIRE INSURANCE—NOTICE OF LOSS.

Where the petition in an action on a town mutual fire policy does not indicate within what time notice of loss should be transmitted to insurer, the court could not declare as a matter of law that proof of a loss sustained April 28th was furnished too late when furnished May 20th, especially in view of the public policy indicated by Rev. St. 1899, § 7979 (Ann. St. 1906, p. 3793), providing that notice of loss may be given within 90 days after a loss, though such provision is inapplicable to town mutual companies by virtue of section 8084 (page 3840).

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1747; Dec. Dig. § 668.\*]

### 13. INSURANCE (§ 645\*)—FIRE INSURANCE—PETITION—PROOF.

A petition in an action on a fire policy which alleges that plaintiff has performed all of the conditions of the policy on his part is sufficient to permit proof of any and all forms of waiver by insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1634; Dec. Dig. § 645.\*]

### 14. APPEAL AND ERROR (§ 909\*)—REVIEW—PRESUMPTIONS IN AID OF JUDGMENT.

Where it was competent under the petition in an action on a fire policy to show waiver by insurer of notice of loss, it would be presumed in support of the judgment that a waiver was proved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. § 909.\*]

Appeal from Circuit Court, Bollinger County.

Action by N. C. Wicecarver against the Mercantile Town Mutual Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Barclay & Fauntleroy, for appellant. Chas. G. Revelle, for respondent.

NORTONI, J. This is a suit on a policy of fire insurance issued to the plaintiff by the defendant, a town mutual fire insur-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ance company. Plaintiff recovered, and defendant appeals.

The first question presented for consideration relates to the jurisdiction of the circuit court over the person of the defendant. The property insured was located in Bollinger county. Having been destroyed there by fire, the suit on the policy was instituted in the circuit court of that county. The defendant is a town mutual insurance company, organized and existing under the laws of this state, with its principal office in the city of St. Louis. Our statute (section 8092, Rev. St. 1899; Ann. St. 1906, p. 3843) touching the place for institution of suits against and the service of process upon town mutual insurance companies provides that suit may be brought on a policy issued by such companies in the circuit court of any county in the state where the cause of action originated, or in the county where the company issuing the policy has its principal office. The suit was therefore properly instituted in Bollinger county, where the cause of action originated, and the circuit court of that county was possessed of jurisdiction over the subject-matter thereof. As to the manner of acquiring jurisdiction over the person of the defendant in those cases where the suit is instituted in a county other than that in which the company maintains its principal office, the same section of the statute provides substantially that, whenever a suit is so instituted in a county other than that in which the company maintains its principal office, service may be had on the defendant by the acting sheriff of the county in which the company maintains its principal office serving on the president, secretary, or other chief officer of such company in charge of its principal office a certified copy of the original petition and summons in the cause. And if such company shall have its principal office in the city of St. Louis, then the acting sheriff of that city shall serve the process mentioned. The service, being had as indicated, shall be deemed service on the company proceeded against. The process, having been issued by the circuit court of Bollinger county, was transmitted to the acting sheriff of the city of St. Louis for service. The return of the sheriff on this writ shows that, instead of serving the same and a certified copy of the petition upon defendant's officer mentioned in charge of the principal office of the company, it was served upon or delivered to J. W. Daugherty, secretary of said defendant corporation, in the defendant's usual business office and in charge thereof, in the city of St. Louis. In response to the service, defendant appeared in the circuit court and filed its answer to the petition. The first paragraph of the answer, after reciting that defendant appeared for that purpose solely, contains a plea in abatement to the jurisdiction of the court over the person of the defendant, because service, as shown by the return, was insufficient to con-

fer jurisdiction over the person of the defendant, and for that reason prayed that the cause should be abated. In the same answer, in the second count thereof, the defendant answered to the merits of the action by its general denial of all the allegations contained in the petition, and, further, denied specifically that it had executed the policy of insurance sued upon. The court, after hearing the matter on the plea in abatement, overruled the same, whereupon defendant's counsel, after saving exceptions to the ruling of the court, with the statement that they appeared for that purpose only, withdrew from further participation in the proceedings.

It is clear the sheriff's return failed to show the court had acquired jurisdiction of the person of the defendant. The statute required service to be had "upon the president or secretary or other chief officer in charge of the principal office of such company." Of course, service upon Secretary Daugherty was sufficient, had the same been had while he was in charge of defendant's principal office. But the return recites that it was had upon Daugherty, the defendant's secretary, in charge of defendant's "usual" business office. The usual business office of the defendant in St. Louis may be a place other than its principal business office. The statute requires service, if on the secretary, to be had upon him in charge of the "principal" office of the company, and not while in charge of the "usual" business office thereof. The identical question here involved was so ruled in *Thomasson v. Mercantile Town Mut. Ins. Co.* (decided at the present term of the Supreme Court) 116 S. W. 1092; also by this court, *Thomasson v. Mer. Town Mut. Ins. Co.*, 114 Mo. App. 109, 89 S. W. 564, 1135. It therefore appears from the face of the return the circuit court was without jurisdiction over the person of the defendant. It would no doubt have so ruled had the sufficiency of the return been challenged by motion to quash the same. However, the defendant did not see fit to present the question on motion, but, instead, sought to invoke it by a plea in abatement contained in the answer. The court was at liberty to disregard this matter entirely, when sought to be raised by answer in the form of a plea in abatement, for the reason it was a matter appearing on the face of the proceeding; that is, on the face of the return of the sheriff. However this may be, it appears from the face of the record the court was without jurisdiction over the person of defendant, unless jurisdiction was conferred by its appearance to the merits of the cause. The court was evidently of the opinion that, by failing to raise the question of jurisdiction over the person by motion to quash the return, the defendant waived the same by answering to the merits of the action, for upon the withdrawal of defendant at the ruling on the plea in abatement the court proceed-

ed with the hearing of the cause and gave judgment for the plaintiff. This action of the court was obviously on the theory that the defendant had waived the matter of jurisdiction over its person, and voluntarily entered its appearance to the merits of the action. As stated, the answer contained a general denial of all the allegations contained in the petition, and, further, specifically denied the execution of the policy. These were matters in bar, and pertained to the merits of the controversy. As a general rule, an answer to the merits operates a voluntary appearance. The defendant argues, however, that it was entirely competent for it to unite the plea to the jurisdiction of the court over the person of defendant in the same answer with the plea to the merits in bar, provided the two matters be separately stated in such a manner as to be intelligibly distinguished. Section 605, Rev. St. 1899 (Ann. St. 1906, p. 635). And it is said the case of *Little v. Harrington*, 71 Mo. 390, declares the rule that, in view of our statutory provision, a joinder of a plea in bar in the same answer with a plea in abatement to the jurisdiction shall not be regarded as a waiver of the matters pleaded in abatement, and therefore the jurisdiction over the person was not waived by the defendant's answer to the merits. We believe counsel have misinterpreted the case of *Little v. Harrington*, supra, and have not accurately deduced the proposition of law therefrom. Now, in that case, the defect invoked by the special plea in the answer did not appear on the face of the return, nor did it appear on the face of the petition. It was therefore incompetent to raise it by motion or demurrer. In other words, the defect complained of in the special defense was latent in the case, so far as the face of the record was concerned, and could only be made to appear upon the coming in of the proof. In such circumstances, of course, it could only be raised by the answer. Our Code (section 598, Rev. St. 1899; Ann. St. 1899, p. 624) expressly provides that the defendant may demur to the petition when it appears on the face thereof that the court was without jurisdiction of the person of the defendant or of the subject of the action, or that the plaintiff has no legal capacity to sue, or that there is a defect of parties plaintiff or defendant, etc. And we believe it is the policy of our Code that when defects of jurisdiction, as to the person at least, appear on the face of the record, they should be challenged by proper motion in those cases where the demurrer is inappropriate. *Little v. Harrington*, supra, was a suit in conversion. Winkle was a joint owner with the plaintiff of the goods alleged to have been converted. This fact did not appear on the face of the petition, and Winkle was not made a party to the suit. In this state of the case, of course the incapacity of the plaintiff to prosecute the action in his own name was not one

which could properly be raised by demurrer or motion. It could only be brought to the attention of the court upon the coming in of the proof. In those circumstances, the Supreme Court declared that it was not only competent for the defendant to raise the question of plaintiff's incapacity to maintain the suit by a special plea in the answer, as authorized by our statute (now section 605, Rev. St. 1899; Ann. St. 1906, p. 635), and to join in the same answer a plea to the merits of the action, but that the joinder of the plea to the merits did not operate to waive the matter of plaintiff's incapacity to sue, raised by the special plea therein. The proposition of law to be deduced from that case is that where the defect relied upon in the special plea is one latent in the case, and does not appear on the face of the proceedings so as to be available by demurrer or motion, it is competent to raise the same by special plea in the answer, and that, in those circumstances, a plea in bar in the same answer does not operate a waiver of the question of plaintiff's right to proceed with the suit. See *Little v. Harrington*, 71 Mo. 390. The principle of that case is not pertinent here, for the reason the defect of jurisdiction over the person of the defendant in this case appeared on the face of the return and was waived by answering over to the merits without challenge by proper motion to quash the service. The principle underlying the waiver is the same which obtains in those cases where the petition defectively states a good cause of action which is not challenged by demurrer, and the defendant answers over. In those circumstances, the defendant is regarded as having waived its right of demurrer as to the sufficiency of the allegations by answering thereto. *Hurst v. City of Ash Grove*, 96 Mo. 168, 9 S. W. 631; *Grove v. Kansas City*, 75 Mo. 672; *Lycett v. Wolff*, 45 Mo. App. 489. In such circumstances, if with all implications and intendments in aid thereof the petition can be reasonably construed to have implied facts for the omission of which a demurrer would have been sustained in the first instance, it will suffice. The principle is elucidated with care and accuracy in *Munchow v. Munchow*, 96 Mo. App. 553, 70 S. W. 386. To more accurately state the extent to which the principle referred to is applicable to this case, we should say, by failing to demur for a defect patent on the face of the petition, the defendant waived its right to complain thereof by answering over; provided, always, however, the petition is sufficient to sustain the judgment when construed by allowing reasonable implications, under the rules which obtain after verdict. This proviso, of course, is not pertinent in this case, for the reason the question does not arise on the petition. In consonance with the principle touching the pleadings, the doctrine is well established in this state to the effect that, where the defect of jurisdiction over the person appears on

the face of the return and is not challenged by motion to quash, the defendant, by answering to the merits, will be regarded as having voluntarily entered its appearance and waived its right to complain of the jurisdiction of the court over its person. And this is true, notwithstanding the fact it attempts to abate the action because of the defect of jurisdiction over the person by a special plea which recites the appearance for that purpose only. See *Thomasson v. Mercantile Town Mut. Ins. Co.* (Mo.) 116 S. W. 1092; *Id.*, 114 Mo. App. 109, 89 S. W. 564, 1135; *Newcomb v. Railway*, 182 Mo. 687, 81 S. W. 1069. We conclude, therefore, that notwithstanding its special plea to the jurisdiction of the court over the person of the defendant, and the refusal of the defendant to further participate in the trial after the court had overruled the same, the defendant waived the jurisdiction of the court over its person by failing to move to quash the return. And, having thus waived the matter, it voluntarily appeared by filing its answer to the merits.

The evidence given at the trial is not before us. No bill of exceptions was taken in the case. The defendant has presented for review on appeal the record proper only. The petition avers under the policy the amount of the loss shall be due and payable 60 days after the "ascertainment" thereof. It is nowhere pointedly averred in the petition, in that particular language at least, that "ascertainment" of the loss was ever made. In view of this fact, the sufficiency of the petition to support the judgment given thereon is challenged after verdict. The principal criticism leveled against its sufficiency in respect of stating a cause of action is that, the plaintiff having alleged that the amount of the loss was due him by the provisions of the policy 60 days after its ascertainment, it devolved upon him to aver as well that the loss had in fact been ascertained more than 60 days before the institution of the suit; otherwise it appears the suit is prematurely brought, for the reason the amount sued for was not then due. Had this question been raised by demurrer to the petition, it might possibly have been well taken, for it certainly devolved upon the plaintiff to state facts therein from which it appeared an ascertainment of the loss had been had 60 days prior to the institution of the suit on the policy. *Carberry v. German Ins. Co.*, 51 Wis. 605, 8 N. W. 406. Be this as it may, we are now considering the sufficiency of the petition after verdict, and if it appears therein by reasonable implication, upon a fair construction of its averments, that an ascertainment was in fact had 60 days or more before the suit was instituted, it is sufficient, for under such circumstances all intendments and implications which may arise from a fair construction of the petition are to be allowed in aid of its sufficiency to support the judgment. Our statute of jeofail (section 672, Rev. St. 1899;

Ann. St. 1906, p. 686) provides, among other things, that no judgment shall be reversed for the omission of any averment on account of which omission a demurrer could have been maintained, or for omitting any allegation or averment without proving which the triers of the issue ought not to have given such verdict. It is presumed the matter of ascertainment 60 days before suit was proved, as it was incumbent on the plaintiff to do so. In the circumstances stated, the doctrine obtains that the defect in averment of the petition is cured by the verdict in favor of the party pleading, on the theory and presumption that he has proved on the trial the facts so insufficiently averred. *Hurst v. City of Ash Grove*, 96 Mo. 168, 9 S. W. 631; *Grove v. Kansas City*, 75 Mo. 672; *Lycett v. Wolff*, 45 Mo. App. 489; *Munchow v. Munchow*, 96 Mo. App. 553, 70 S. W. 386.

The policy itself is not before us. As stated, the evidence was not preserved in a bill of exceptions. None of the provisions of the policy touching the matter of ascertainment, or any other matter, so far as that is concerned, are incorporated in *hæc verba* in the petition or annexed thereto. So it is we are unable to determine therefrom what particular significance the "ascertainment" referred to has in the context employed in the policy. To deal, then, with the word "ascertainment" as it appears in the petition only: The averment is that the loss was payable 60 days after ascertainment. "To ascertain a matter is to make a thing certain to the mind; to free from obscurity, doubt or change; to make sure of; to fix; to determine." (*Webster's Dict.*) When, as here, the matter is not illuminated by the context of the policy touching the matter of ascertainment, we understand the word as thus employed in the petition to signify that the loss was payable 60 days after its character, amount, and extent had been ascertained by the plaintiff; that is, after plaintiff had determined the character, amount, and extent of the loss. Upon his determination of the character, amount, and extent of the loss, plaintiff had ascertained the same within the meaning of the policy, so far as we can see from the petition. Now it is subsequently averred in the petition that on the 20th day of May plaintiff gave defendant full notice and proof of the fire and loss aforesaid, and demanded its payment, etc. Proof is said to be "that degree of evidence which convinces the mind of any truth or fact, and produces belief; conclusive evidence; demonstration." Therefore, if plaintiff made proof of loss on May 20th, as averred, this essentially involved the ascertainment thereof, for to demonstrate it, or render it certain, essentially determined its character, amount, and extent. While what the proof of loss must contain in insurance cases depends upon the requirements of the policy, it is a matter generally conceded in insurance law that proof of loss involves a showing of the character, amount,

and extent of the same. Ostrander on Fire Insurance (2d Ed.) § 223. A fair construction of the allegation that the plaintiff gave defendant proof of loss on May 20th, allowing the words employed their usual import, essentially involves the idea that the character, amount, and extent of the loss had been determined or ascertained and was communicated that day to the defendant. It appearing the suit was instituted more than 60 days after that date, it follows the amount was due at the time of the institution of the suit.

The petition avers that the fire which destroyed the property occurred on the 28th day of April. It is also averred therein that on the 20th day of May thereafter plaintiff gave due notice thereof to the defendant. On these facts, it is insisted that it affirmatively appears on the face of the petition the plaintiff failed to give defendant notice of the loss within a reasonable time and therefore ought not to be permitted to recover. Authorities are cited to the proposition that, where it appears conclusively that a matter which should be done within a reasonable time had been neglected until an unreasonable time had elapsed, the court may declare as a matter of law that the act was not performed within a reasonable time. *Wiggins v. Burkham*, 10 Wall. 129, 133, 19 L. Ed. 884. Nothing whatever appears in the petition indicating within what time notice of the loss should be transmitted to the defendant, and, under those circumstances, we certainly could not declare as a matter of law that the time elapsing between April 28th and May 20th was unreasonable, especially in view of the public policy of this state, as indicated by our statute (section 7979, Rev. St. 1899; Ann. St. 1906, p. 3793), applying to fire insurance companies other than town mutual, to the effect that such notices may be given within 90 days after the loss. It is very true that particular section does not apply to the policy in suit here, issued by a town mutual insurance company, for the reason our Legislature, in 1901 (see Laws Mo. 1901, p. 190; section 8084, Ann. St. 1906, p. 3840), exempted town mutual insurance companies from its provisions. Nevertheless its provision to the effect that notice of the loss may be given fire insurance companies other than town mutuals within 90 days after the loss is such a forceful exemplification of our public policy on the question as to constitute a sufficient reason for our declining to declare as a matter of law that a lapse of less than 30 days is an unreasonable time, even in cases of town mutual insurance companies, which are exempted therefrom. Learned counsel rely, however, upon the provisions of section 7977, Rev. St. 1899 (Ann. St. 1906, p. 3792), as though it affixes the duty as a matter of law upon the insured in every cause to give notice within a reasonable time. We believe there may be no doubt of the general proposition, aside from any statute on the subject, that it is the

duty of the insured to give notice of the loss within a reasonable time thereafter, especially if the policy so requires. The requirements of the policy on this question are not before us, however, nor does the petition allege that notice was given within a reasonable time. The statute last mentioned (section 7977) is relied upon exclusively. The purport of that section and the succeeding section, 7978 (page 3793), is to the effect that if the insured shall give notice of the loss to the company within a reasonable time thereafter, then it becomes the duty of the company to furnish the insured blank forms for rendering proof of loss, and that, if the company fails to discharge this duty, it will be considered to have waived the requirements of the policy pertaining to proof of loss. The provisions of the section referred to as to reasonable time would, no doubt, be pertinent here, were the question in decision one pertaining to a waiver of the proof of loss, operated by the statute for the default of the company in supplying the same to the insured after having received notice of the fire. No such question is before us, however, and we have found ourselves wholly unable to perceive the relevancy of the statute referred to at all, in so far as the matter in judgment is concerned. Although it appears from the petition that it was the duty of the plaintiff to give notice of the loss, and this no doubt under the rule of the common law, within a reasonable time, we decline to affirm, as a matter of law, that the notice alleged to have been given on the 20th day of May concerning the loss which occurred April 28th was not within a reasonable time. Indeed, this very matter of notice may have been waived by the defendant, and the fact that it was waived may have been proved on the trial. It is true such waiver was not pointedly pleaded. However, the petition contains the usual allegation that plaintiff had performed all of the conditions of the policy on his part, and it is well settled in this state that, under this general allegation of performance in an action on an insurance policy, the plaintiff may prove any and all forms of waiver. It is said the proof of waiver establishes performance, within the meaning of the allegation. Of course, the rule does not otherwise obtain, but it does obtain in insurance cases beyond question. *Andrus v. Ins. Co.*, 168 Mo. 151, 67 S. W. 582; *McCullough v. Ins. Co.*, 113 Mo. 607, 21 S. W. 207; *Murphy v. Ins. Co.*, 70 Mo. App. 78; *Winn v. Ins. Co.*, 83 Mo. App. 123. It being competent to show under this allegation of performance that defendant waived the notice, it may be presumed, in order to sustain the judgment, that it was proved the notice was waived, and the averment of notice on May 20th could be treated as surplusage. This is allowable after verdict.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

**SEGER v. ABINGTON et al.**

(Supreme Court of Missouri, Division No. 2.  
March 30, 1909.)

**APPEAL AND ERROR (§ 1033\*)—HARMLESS ERROR—ERROR AGAINST RESPONDENT.**

Error in an ejectment verdict, awarding the land to plaintiff, but finding that the improvements equaled the rents and profits, the matter of improvements not being involved in the issues, was error against plaintiff, of which defendants cannot complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4039, 4060; Dec. Dig. § 1033.\*]

Appeal from Circuit Court, Butler County; J. C. Sheppard, Judge.

Action by Alice E. Seger against George O. Abington and others. From the judgment, defendants appeal. Affirmed.

Abington & Phillips, for appellants. David W. Hill, for respondent.

**GANTT, P. J.** This is an appeal from the Butler county circuit court in an ejectment suit for an undivided two-ninths of lot 1 of the N. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 33, township 22, range 5, in Butler county, and for \$100 damages for the withholding, and \$2 monthly rents and profits from the rendition of the judgment. The answer admitted possession, and denied all other allegations of the petition. The cause was tried to a jury, and resulted in a verdict for plaintiff for possession and \$1 damages, and judgment accordingly. The verdict was in these words: "We, the jury, find the issues in this case for plaintiff, that she is entitled to an undivided two-ninths of the land described in the petition, and assess her damages at \$1, and that the value of the monthly rents and profits is nothing. Improvements equal rents and profits. William Ferguson, Foreman."

The only error assigned for reversal of the judgment is that portion of the verdict which finds "improvements equal rents and profits." It is agreed that the matter of improvements, if any, was not involved either in the pleadings, evidence, instructions of the court, or argument of counsel. The evidence tended to establish that there are about 15 acres of the land in cultivation, and its rental value was from \$2 to \$3.50 per acre per year. It is obvious that, in failing to fix the value of the monthly rents and profits to which plaintiff was entitled, the jury committed error against the plaintiff; and the court, in accepting the verdict in that form, confirmed the error against plaintiff. It is not contended that any harm has occurred to defendants in this case from this informal finding; but defendants anticipate that it may be pleaded as *res judicata* in a subsequent suit by them for the value of their improvements on said land. To reverse this judgment and tax the costs

of this appeal against the plaintiff for this informality in the verdict, for which she is in no manner whatever responsible, would be a travesty upon justice and our administration of law, and involve these parties in another trial, which would cost them more than the amount involved. The only error in the record is one against the plaintiff, and of that the defendants cannot complain.

There is no merit in this appeal, and the judgment is affirmed.

**BURGESS and FOX, JJ., concur.**

**SWEARINGIN v. SWEARINGIN et al.**

(Supreme Court of Missouri, Division No. 2.  
March 30, 1909.)

**EJECTMENT (§ 95\*)—OUTSTANDING TITLE—EVIDENCE.**

Defendant in ejectment does not establish an outstanding title by mere hearsay evidence that a deed of trust was unsatisfied; no such deed being offered in evidence, it not being shown when, if ever, it was executed, what amount it secured, or when the debt was due, and witness not pretending to know whether any part of the debt remained unpaid.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 280; Dec. Dig. § 95.\*]

Appeal from Circuit Court, Douglas County; John T. Moore, Judge.

Action by William R. Swearingin against William A. Swearingin and others. From an adverse judgment, plaintiff appeals. Reversed.

Burkhead & Clarke, for appellant. J. L. McPherson and D. M. Coleman, for respondents.

**GANTT, P. J.** This is an action of ejectment in statutory form, in the circuit court of Douglas county, to recover the possession of the W.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  and the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 23, township 27, range 18, in Douglas county, Mo. The defendant Samuel Bookout in his answer admitted his possession of all the lands in the petition described as the tenant of McDonald Swearingin, and further said not. Defendant W. A. Swearingin in his answer disclaimed ownership or possession of any of said lands. The cause was tried to the court without a jury, and judgment was rendered for plaintiff for the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 23, township 27, range 18, except the N. E.  $\frac{1}{4}$  of the said N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of said section, and judgment for the defendants as to the W.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of said section 23. From the judgment in favor of defendants, the plaintiff, after unsuccessful motions for a new trial and in arrest, appealed to this court.

Part of the 80 acres in controversy was originally purchased directly from the United States, and the other portion was se-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



lected and proved up as a homestead prior to 1874. By mesne conveyances the title vested in W. A. Swearingin. On November 29, 1889, J. A. G. Reynolds conveyed the W. ½ N. E. ¼, section 23, township 27, range 18, to William A. Swearingin in satisfaction of deeds of trust held by him thereon. The verbal testimony established that William A. Swearingin had been in possession, exercising ownership over said lands, for more than 20 years; that Samuel Bookout was the son-in-law and tenant of William A. Swearingin, and was in possession of this tract at the commencement of this action. William A. Swearingin's title passed by foreclosure of deed of trust executed by him to Andrew Swearingin, and by deed of Andrew to William R. Swearingin in July, 1905. It would seem that on the trial the defendant Bookout attempted to establish an outstanding title in McDonald Swearingin, a son of William A. Swearingin. To establish this outstanding title the defendant Bookout offered M. C. Reynolds as a witness, who testified that "he was a son of J. A. G. Reynolds; that his father held four trust deeds against this land, together with a lot of other lands, and in a settlement of the consideration of said trust deeds, as he understood it, W. A. Swearingin still owed his father about \$100, and his father refused to release one of the trust deeds until the \$100 was settled, and W. A. Swearingin has never settled the \$100 to his knowledge. He and the other heirs some time ago made a quitclaim deed to the land in question to McDonald Swearingin, for which he was to pay \$100." On cross-examination this witness stated that neither J. A. G. Reynolds, nor his heirs, nor any one of them, ever had possession of this land, and had never paid any taxes on it. It is obvious that, if plaintiff was entitled to recover any of this land, he was entitled to recover all of it. The defendant Bookout does not deny plaintiff's right to possession. He merely says he is in possession as the tenant of McDonald Swearingin.

While plaintiff, of course, must recover upon the strength of his own title, and not the weakness of defendant's title, when he established by one and the same evidence his title to a part of the land, it is inconceivable that the court should adjudge him title to a part and deny him title to the remainder. The attempt to establish an outstanding title in McDonald Swearingin was utterly groundless. It was based upon pure hearsay that a deed of trust executed by W. A. Swearingin in favor of J. A. G. Reynolds was unsatisfied. No such deed of trust was offered in evidence. It was not shown when, if ever, it was executed, nor what amount it secured, nor when the debt was due. The witness did not pretend to know whether any part of the debts once owed by William A. Swearingin to J. A. G. Reynolds

remained unpaid. J. A. G. Reynolds was never in possession of the land, nor were his heirs. Obviously, as far as the record shows, J. A. G. Reynolds had no title which he or his heirs could convey to McDonald Swearingin. In the face of the quitclaim, acknowledging full satisfaction of the only deeds of trust which were shown to have existed, this very flimsy hearsay testimony amounted to no substantial evidence of an outstanding title in McDonald Swearingin. But, as already said, if it was good enough to defeat plaintiff's recovery of a part of the land, it was good as to all.

The judgment was inconsistent and illogical, and in the face of the title as shown by the various deeds in evidence; and it is accordingly reversed as to that part which gave judgment for defendant.

BURGESS and FOX, JJ., concur.

## PHELPS v. CONQUEROR ZINC & LEAD CO.

(Supreme Court of Missouri, Division No. 1.  
Feb. 25, 1909. Rehearing Denied  
March 31, 1909.)

### 1. TRIAL (§ 192\*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

It is not error for an instruction to assume existence of a fact which all the evidence in the case shows did exist.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.\*]

### 2. APPEAL AND ERROR (§ 928\*)—RECORD—EVIDENCE.

One asserting error in an instruction, in that there was no evidence on which to base it, must bring up by the record all the evidence introduced, the presumption being in favor of the correctness of the acts of the trial court, one of general jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3751; Dec. Dig. § 928.\*]

### 3. APPEAL AND ERROR (§ 1002\*)—REVIEW—FINDINGS OF FACTS.

The finding of the jury on conflicting evidence as to the facts bearing on the question of negligence is binding on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3935; Dec. Dig. § 1002.\*]

### 4. MASTER AND SERVANT (§ 270\*)—INJURIES TO SERVANT—EVIDENCE.

As tending to show that a defect in a shaft was a flaw therein, and not a key seat cut for the purpose of keying the shaft to the hub, plaintiff could introduce evidence that the wheels on shafts of the size of the one in question were not secured by that means, but were invariably fastened by means of set screws.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 270.\*]

### 5. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR.

Where the petition for injury from the breaking of a shaft alleged that the defect causing the break was a flaw or a hole cut therein for keying the wheel to it, and that it so weakened the shaft as to render it unsafe for persons employed to work under it, so that the important question was whether the defect, which all the evidence showed did exist, ren-

dered it unsafe and dangerous, any error in admitting evidence to show that it was a flaw, rather than a cut, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.\*]

**6. DAMAGES (§ 216\*)—INSTRUCTIONS—ELEMENTS TO BE CONSIDERED.**

An instruction which, after calling attention to the various elements to be considered in fixing the damages for a personal injury, concludes, "together with all the facts and circumstances in the case, and assess the damages at such sum as from the evidence you may deem proper, "while technically open to the criticism of giving the jury, by the concluding clause, a roving commission to allow damages for other elements, must have been considered to refer to like elements, and so could not have been prejudicial.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.\*]

**7. DAMAGES (§ 132\*)—PERSONAL INJURIES.**

A verdict of \$7,500 was not excessive where plaintiff's skull was badly fractured, several pieces of it and a portion of the brain had to be removed, the head was disfigured, and his injuries were permanent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 173, 372-385; Dec. Dig. § 132.\*]

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

Action by Mack S. Phelps against the Conqueror Zinc & Lead Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The plaintiff instituted this suit in the circuit court of Jasper county to recover the sum of \$20,000 damages for personal injuries sustained by him through the alleged negligence of defendant in furnishing him with defective and dangerous pieces with which to work. A trial was had before the court and a jury, which resulted in a verdict and judgment for plaintiff for the sum of \$7,500. From that judgment the defendant duly appealed to this court.

The material portions of the petition are as follows: "That the rock and earth from said mine was raised in tubs and lowered back into the mine, through said shaft, by means of a cable drawn over an iron pulley by a hoisting apparatus which was propelled by steam power applied and controlled by levers and brakes, manipulated by hand. That it was the duty of the plaintiff, as holsterman, to manipulate said levers and brakes, thus hoisting and lowering said tubs. That the iron pulley, before mentioned, was fixed in a derrick directly over the center of said shaft, and overhead the plaintiff when at his post as holsterman, and revolved with an iron or steel axle or shaft to which it was fastened. But plaintiff states that the defendant negligently furnished him with an unsafe appliance with which to do hoisting, in this: that the iron or steel axle or shaft to which said pulley was fastened, and with which it revolved overhead the plaintiff, was dangerous and unsafe for said work, in this: that said axle or shaft was weak and defective, and, among other defects, contained a

hole or flaw which rendered it liable to break and fall from its place, thus endangering the life of the plaintiff. And said hole, if it was a hole and not a flaw, was so cut and placed in shaft or axle as to render said axle or shaft, on account of its small size compared with the size of said hole, weak and defective, and not reasonably safe for the purpose for which it was used. That defendant, its agents and officers, knew of said hole or flaw in said axle or shaft, and of its weak and defective condition on account thereof, or by the exercise of reasonable care might have known the same, in time to have same replaced before the happening of the accident hereinafter mentioned. That on the 24th day of September, 1904, the plaintiff, while in the performance of his duty as holsterman for defendant, and while in the exercise of ordinary care, was lowering a tub by means of the hoisting apparatus aforesaid, when the said iron or steel axle or shaft, by reason of its defective condition and of the hole or flaw in the same, broke and fell with the pulley, striking the plaintiff on the head, breaking and crushing his skull so that much brain matter escaped from plaintiff's head, by reason of which the plaintiff has suffered much bodily pain and mental anguish, and has been confined for seven weeks to his room, and has since said injury been unable to perform any labor; and that his head, by reason of said injury, has been permanently injured, so that he suffers pain in his head, and his eyesight is impaired, and his head scarred and disfigured, by reason of which he has been damaged in the sum of \$19,500, and that on account of said injuries the plaintiff has been compelled to become liable to pay, and has paid, to physicians and surgeons for professional attention to him, and for nursing and drugs and medicines, the sum of \$500."

The answer is a general denial and a plea of contributory negligence. The reply denies the charge of contributory negligence.

The evidence in this case is voluminous, covering 150 printed pages, and no useful purpose would be served by attempting to set out even the substance of it; but when necessary for a proper understanding of the legal propositions presented, we will state so much thereof as bears upon those questions.

The plaintiff introduced testimony tending to prove all of the allegations of the petition, while that of defendant tended to show that the shaft or axle complained of was reasonably safe for the purposes for which it was being used; that the defect therein complained of was latent and unknown to it; and that plaintiff was guilty of contributory negligence.

The court gave instructions for each party, submitting their respective theories of the case to the jury.

The defendant objected and saved its ex-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ceptions to the action of the court in giving for plaintiff instructions numbered 2 and 4, which read as follows:

"(2) Even though the jury may believe from the evidence that the hole in question in the shaft of the sheave wheel was made or cut for a key seat, yet if the jury further believe that said hole was cut too large and too deep compared with the size of said shaft, and that said shaft or axle was thereby rendered weak and defective and insufficient, and not reasonably safe for the purpose for which it was used; and if the jury further believe that defendant, its agents and servants, knew, or by the exercise of reasonable care might have known, of said hole in said axle or shaft, and of the weak and defective condition of said shaft on account of the same (if you believe said hole rendered said shaft weak and defective), or by the exercise of reasonable care might have known the same in time to have prevented the injury to plaintiff; and if the jury further believe from the evidence that by reason of the weak and defective condition of said shaft on account of said hole so made and cut (if you believe the same was made and cut in said axle) that said axle broke and said sheave wheel fell from its place and struck and injured plaintiff—your verdict should be for the plaintiff."

"(4) The court instructs the jury that if you find for the plaintiff you will, in assessing his damages, take into consideration his age; his condition in life; the injury sustained by him, if any; the physical pain and mental anguish suffered and endured by him on account of said injury, if any; his loss of time, if any; such damages, if any, as you may believe from the evidence he may sustain in the future as the direct effect of such injury; together with all the facts and circumstances in the case—and assess the damage at such sum as from the evidence you may deem proper, not exceeding \$19,500, the amount sued for."

Defendant also objected and excepted to certain rulings of the court in the admission of testimony, which will receive consideration in the opinion.

A. E. Spencer and Perkins & Blair, for appellant. Thos. Dolan and L. P. Cunningham, for respondent.

WOODSON, J. (after stating the facts as above). Appellant challenges the correctness of instruction numbered 2 given on behalf of respondent, for the following reasons assigned: First. "Because it assumed the existence of a hole in the shaft, while the evidence on that question was conflicting." Second. "Because it submits to the jury the question whether the hole was made or cut for a key seat, and was cut too large and too deep, when there is no evidence whatever on which to base such an instruction." We will consider those objections in the order stated.

As regards the first objection, even though it be conceded that the instruction assumes that the hole mentioned did exist in the shaft, yet that assumption would not render the instruction erroneous, for the reason that all of the evidence in the case shows that it did actually exist. The testimony of respondent tended to prove that the hole was a flaw in the shaft, or a defect in its construction, and that of appellant tended to show that the hole was cut therein by the manufacturer as a key seat into which a key had been driven for the purpose of fastening the sheave wheel to the shaft. In passing upon this same question in the case of *Davidson v. Transit Co.*, 211 Mo., loc. cit. 357, 109 S. W. 593, this court said: "Where the testimony is absolutely uncontradicted, and not a word of testimony offered to disprove the facts testified to by the witnesses, and during the progress of the trial it is made manifest to the judge presiding at the trial, by the manner of the examination of the witnesses by counsel engaged in the cause, that such facts are not to be treated as a real disputed question in the controversy, then, and in that case, the court would be authorized, without the commission of any error, in giving its instructions to the jury to assume the existence of such facts, which, during the progress of the trial, counsel by their conduct and manner had indicated were not seriously in dispute." So hold all of the cases. *Sotebler v. Transit Co.*, 203 Mo. 702, 102 S. W. 651; *Pratt v. Conway*, 148 Mo. 291-299, 49 S. W. 1028, 71 Am. St. Rep. 602; *Taylor v. Iron Co.*, 133 Mo., loc. cit. 365, 34 S. W. 581.

The second objection to the instruction is based upon the contention that there was no evidence introduced which tended to prove that the hole or flaw in the shaft so weakened it as to render it unsafe and dangerous for persons working about it. The evidence showed that the shaft was made of iron or steel, and was something less than 1½ inches in diameter, which passed through the hub of a sheave wheel 24 inches in diameter, and was designed to carry a load weighing from 1,000 to 2,000 pounds. The respondent's evidence tended to prove that there was a flaw or hole in the shaft which was so large that a man's little finger could have been inserted into it. While the record does not show the exact depth of the hole, yet counsel for respondent in oral argument of the case stated that it was about one-half inch in depth, and that if the court would examine the axle, which was introduced in evidence, it would substantiate his statement in that regard. While the record shows the shaft was introduced in evidence, yet it was not preserved therein, and cannot, therefore, be inspected by the court. Upon this state of the record counsel for respondent contends that appellant is in no position to insist that there was no evidence introduced tending to

prove that the hole in the shaft was so deep and broad as to so weaken it as to render it unsafe and dangerous for persons working about it. In our opinion, that contention is well taken. The law is well settled that before the defendant can successfully maintain that there was no evidence introduced at the trial to support the verdict of the jury, or upon which to base an instruction given by the court, it is incumbent upon him to bring by the record to this court all of the testimony introduced at the trial in order that we may view and determine what it does tend to prove or establish. The circuit court is a court of general jurisdiction, and, in the absence of a showing to the contrary, every presumption must be indulged in favor of the regularity and correctness of its acts and rulings. *State v. Brown*, 75 Mo. 317; *State v. Silvis*, 105 Mo. 530, 16 S. W. 880. We must therefore hold that instruction numbered 2 is not vulnerable to the assaults made upon it.

2. Appellant's next insistence is that the defect or flaw complained of in the shaft was latent, and that it had no knowledge of its existence, nor by the exercise of ordinary care upon its part could it have discovered the same; and, having purchased the axle from a reliable manufacturer, it had a perfect right to presume that the shaft was free from all defects, and was reasonably safe for the purpose for which it was being used. As an abstract legal proposition that contention cannot be questioned, but it is unavailing to appellant on this appeal, for the reason that while there was testimony tending to support that contention, yet there was also substantial evidence introduced tending to show that the shaft broke just at the end of the hub of the sheave wheel and right through the center of the flaw or hole, and that, while one half of the hole was covered and concealed from view by the hub, the other half extended beyond the hub, and could have been readily discovered by defendant had it exercised ordinary care in observing the shaft. Under proper instructions, the court submitted that issue to the jury, and they found for the respondent and against the contention of appellant. That finding is binding upon the appellant, and is controlling upon this court. We must therefore hold that appellant was negligent in furnishing respondent with the defective and dangerous appliances with which to work, and that his injury was the result of that negligence. And especially is that true since the jury, under proper instructions, found respondent was free of contributory negligence.

3. It is contended by counsel for appellant that the trial court erred in admitting over his objection testimony tending to prove that key seats were not ordinarily cut in shafts of the size of the one involved in this case, and that it was not considered

necessary to do so; also evidence tending to show that where a set screw is used a key is not used. In order to correctly understand this contention, it will be necessary to state the respective positions of counsel for appellant and respondent regarding the defect complained of in the petition. Appellant contends that the so-called defect was in fact a key seat or groove cut by the manufacturer lengthwise of the shaft, with a corresponding groove cut into the hub of the sheave wheel into which an iron wedge or key was to be driven for the purpose of fastening the wheel to the shaft, and that such was the usual mode by which such fastenings were made, and that such mode was reasonably safe. Upon the other hand, counsel for respondent contended that the defect complained of was a flaw in the shaft, and, in order to support that contention, introduced the testimony objected to for the purpose of showing the wheels upon shafts of that size were not secured by that means, but were invariably fastened by means of set screws, and that such was the proper and safe mode of securing them thereto. In the light of those contentions, we are clearly of the opinion that the testimony was properly omitted, for the reason that if such wheels and shafts were never constructed so as to be fastened together by means of a key or wedge, then that fact would be a circumstance tending to show that the defect complained of was a flaw in the shaft, and not a key seat cut for the purpose of keying the shaft to the hub. But conceding for the sake of the argument that the admission of that testimony was erroneous, yet we are unable to see in what possible manner it could have prejudiced the rights of the appellant, for the reason the petition alleges that the defect complained of was either a flaw in the axle or a hole cut therein for the purpose of keying the wheel to the shaft, and that whichever it was the shaft was so weakened thereby that it was rendered unsafe and dangerous to persons employed to operate the hoist; and this record abounds in evidence tending to prove those allegations. The important question was not as to what caused the defect in the axle, but the question was, did the defect, which all the evidence showed did exist, render it unsafe and dangerous? This question we have answered in the affirmative in paragraph 2 of this opinion. Under that state of the pleadings and evidence, it was wholly immaterial as to what was the usual and safest way of fastening the wheel to the axle.

4. The next error assigned by counsel for appellant is lodged against instruction numbered 4, given on behalf of respondent. That instruction related to the measure of damages, and, after correctly calling the jury's attention to the various elements of

the injury to be considered in fixing the amount of their verdict, it used this additional language: "Together with all the facts and circumstances in the case, and assess the damages at such sum as from the evidence you may deem proper." The contention of respondent is that the instruction without the quoted words embraced all of the elements of the injury which the jury should have considered in fixing just compensation for the injury, and that by the use of the quoted clause the instruction gave the jury a roving commission to allow him additional damages for matters not contributing to just compensation, and thereby increased the amount of the verdict beyond actual compensation for the injuries sustained. The instruction may technically be open to that criticism, but when we consider that the criticised clause limits the amount of the verdict to "such damage as from the evidence they deem proper," as shown by all the "facts and circumstances in evidence," then we are unable to see in what manner any substantial injury was thereby done to appellant, for evidently the jury must have considered the general clause following the specific elements of damage mentioned referred to like elements, and, if the evidence failed to disclose such additional elements, then clearly the jury under that instruction could not have allowed any sum therefor, and, consequently, could not have worked prejudicial to the rights of appellant. This is the view this court has taken of several instructions given in similar cases, notably in the case of *Harmon v. Donohoe*, 153 Mo. 263, loc. cit. 275, 54 S. W. 453, 456, where the identical language was used. We must therefore rule this contention against appellant.

5. It is finally insisted by counsel for appellant that the amount of the verdict is excessive. The undisputed testimony showed that respondent's skull was badly fractured, the wound being six or seven inches in length and about two inches in width, that several pieces of the skull had to be removed at different times, that a portion of his brain was crushed out and had to be removed, that his head is disfigured, and that his injuries are permanent. For those injuries the jury awarded him the sum of \$7,500. In the case of *Beave v. Transit Co.*, 212 Mo. 331, 111 S. W. 52, the injuries sustained by the plaintiff were almost identical with those received by the respondent in the case at bar—greater, if any difference, to respondent. In that case this court said that "a verdict of \$7,500 is very reasonable." We must therefore hold that the verdict in this case is not excessive.

Finding no substantial error in the record, the judgment, in our opinion, should be affirmed. It is so ordered. All concur.

# BLEYER v. BLEYER et al. (two cases).

(Supreme Court of Missouri, Division No. 1.  
Feb. 23, 1909. Rehearing Denied  
March 3, 1909.)

## 1. TRUSTS (§ 56\*) — VACATION OF DEED OF TRUST—FRAUD.

In a suit to set aside certain conveyances in trust, for fraud, evidence of the existence of a fiduciary relationship between the parties is admissible under a general allegation of fraud.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 56.\*]

## 2. TRUSTS (§ 56\*)—VACATION OF DEED OF TRUST—FRAUD.

Evidence held to require a finding that certain deeds in controversy were procured by fraudulent representations made to the grantors with reference to the character of the instruments.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 56.\*]

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Actions by Jigo F. Bleyer and by Jennie Bleyer against William H. Bleyer and others. Judgment for defendants in each case, and plaintiffs appeal. Reversed with directions.

Wm. R. Gentry, for appellants. Bond, Marshall & Bond, for respondents.

GRAVES, J. This cause is the consolidation of two causes of action. The consolidation was had in the circuit court of the city of St. Louis, wherein both were pending, but in different divisions of that court. The one cause was Jigo F. Bleyer v. William H. Bleyer, Adrien S. Bleyer, Clifford M. Bleyer, and Mildred M. Bleyer, and the other was Jennie Bleyer against the same defendants. The purpose of each suit was to set aside a deed in trust. Jigo F. Bleyer, in the evidence called "Jake," on September 26, 1904, whilst in Queens county, state of New York, had executed a deed to defendant William H. Bleyer, by the terms of which all the property of Jigo F. Bleyer, including valuable real estate in St. Louis and \$10,000, were conveyed to William H. Bleyer in trust, which trust is thus crisply described in the deed:

"To have and to hold unto the said party of the second part, his successors and assigns forever, but in trust, nevertheless, for the purposes, objects and intents, and subject to the limitations, discretions and powers hereinafter declared and expressed as follows, to wit:

"That said trust shall continue for and during the natural life of the party of the first part.

"During the life of the party of the first part the trustee shall pay over to him or expend for his benefit, monthly the net income of the trust estate.

"On the death of the said Jigo F. Bleyer, the aforesaid party of the first part, the trust shall end and determine, and the trust estate, real, personal, and mixed, shall go

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to William H. Bleyer, Adrien S. Bleyer, Clifford M. Bleyer, Mildred M. Bleyer, nephews and grand niece of the said Jigo F. Bleyer, in equal parts, share and share alike."

By the further terms of the deed the trustee is given absolute control of the property, with full power to sell, loan, mortgage, re-invest as to him seemed best, and all this without bond.

The petition then charges that plaintiff, at the time of the execution and delivery of the instrument, "had been and was in feeble health, and was infirm in body and mind, by reason of long-continued sickness; that the defendant William H. Bleyer led the plaintiff to believe that the instrument so executed by him was a mere power of attorney, and the plaintiff, relying upon such representations, executed the said instrument under the belief on his part that it was merely a power of attorney, and the plaintiff was without knowledge that the said instrument was of the kind and character it now proves to be, and in fact was at the time of its execution; that in the execution of the said instrument plaintiff did not intend to make a conveyance of any description of the property described in said instrument, to create the trust which said instrument on its face evidences, or to make any conveyance in trust for the benefit of the said defendants or either of them; that plaintiff was led by the said defendant William H. Bleyer to believe that the said instrument was of the kind and character which he claimed it to be, and the plaintiff executed the said instrument relying upon the representations and statements of the said defendant in that behalf made." The petition also charges that the conveyance was without consideration. The prayer was for the cancellation of the deed and an accounting and a return of the \$10,000.

On the same day and at the same place Jennie Bleyer executed a similar deed, which conveyed real estate alone, however. The terms of the trust in the two deeds are identical, and the powers of the trustee the same. The purpose of the suit of Jennie was to annul this deed, and an accounting of the rents and profits. She asks the cancellation upon these grounds, as averred in her petition:

"That at the time of the execution of the said instrument plaintiff was infirm in body and mind; that she was a single woman, without knowledge of the legal operation or effect of instruments of such character; that it was represented to her by the defendant William H. Bleyer that the instrument so executed by her was a power of attorney, and, relying upon such representations, she was led to execute the said instrument: that she did not intend by the execution of said instrument to create any trust or make a conveyance of any property for the benefit of the defendants or any other person, and that

had she known or been led to understand the true character of the instrument it would never have received her signature, and she would not have permitted it to have been delivered to the defendant. Plaintiff states further that no consideration for the said instrument proceeded to her from any person or any quarter; that the instrument was purely a voluntary one upon her part, to whose execution she was led by the representations as to its real nature made to her by the defendant William H. Bleyer; that she executed the same and caused the same to be delivered in full reliance upon her part on the representations as to its real character so made to her."

By appropriate answer the alleged mental and physical conditions of the plaintiffs were denied and placed in issue, as were also the allegations that the said William H. Bleyer represented to them that the instruments were mere powers of attorney. In fact, by appropriate language the answers placed in issue all the averments of the petitions, save the allegation as to the execution and delivery of the written instruments. Trial was had before the Hon. Warwick Hough, as the chancellor, nisi, and he concluded the cases with these remarks, as we find them in the printed record:

"The case is one that stands solely upon the weight of the testimony, and nearly all of the parties to the suit testified on the trial, and the direct testimony is irreconcilably conflicting. There are a great many facts and circumstances, and a great deal of correspondence between the parties, which shed light upon the true state of affairs. It would be a very unpleasant task to review the testimony in detail and state what the court believes to be true and what does not wear the hue of verisimilitude. It is sufficient to say that after a careful review of the testimony I have reached the conclusion that the finding should be for the defendants in both cases, and that plaintiffs' bills should be dismissed, and it will be so ordered."

Some history of the Bleyer family appears in the record, thus: The Bleyer family was originally made up of one girl, Jennie Bleyer (plaintiff), and five boys, Samuel T. Bleyer, Dore L. Bleyer, Charles E. Bleyer, William M. Bleyer, and Jigo F. Bleyer (plaintiff). Some 15 years before the transaction out of which this lawsuit grows, William M. Bleyer died, leaving surviving him two sons William H. Bleyer and Adrien S. Bleyer, one a lawyer and the other a doctor, and both beneficiaries in these deeds, and defendants herein. Clifford M. Bleyer is a son of Charles E. Bleyer, and Mildred M. Bleyer is the daughter of William H. Bleyer. On September 26, 1904, the date of these deeds, the Bleyer family consisted of Jennie, aged 62; Samuel T., aged 57; Charles E., aged 46; Clifford M. (son of Charles E.), aged 23; William H., aged 30, and Adrien S., aged 26 (sons of William

M., deceased); and Mildred M., daughter of William H. Of the original six, Jennie, Samuel T., Dore L., and Jigo never married.

Shortly prior to and at the time of these deeds, Samuel T. Bleyer was the president of the Hawley Down Draft Furnace Company of Chicago, from which he drew \$10,000 per year as salary and some \$3,000 as dividends. Samuel T., Jigo, and Jennie had lived together a large portion of their lives. Charles E. Bleyer was vice president of the said furnace company, and William H. Bleyer was also interested in said company. It also appears that the property Jennie and Jigo had came to them largely through the efforts of Samuel T. Bleyer.

In July, 1904, Samuel T. Bleyer left Chicago for Europe to meet his brother, Charles E., upon a business matter. About this time, Jennie and Jigo were traveling in the state of New York. From this point we have the interesting part of the history of this case. It comes from telegrams, cablegrams, letters, written documents, as well as from personal conversations.

From New York, August 1, 1904, Jennie telegraphed William H. as follows: "Sam arrived safely and met Charley. Am at Manhattan Hotel New York."

And on same day, from same place, she telegraphed William H., thus: "Cable from Sam. Arrived safe. Met Charley. Have grass cut on Olive St. lots. Address all mail to office here. Likely to return to Saratoga."

On August 6th, from Bristol Hotel, Berlin, Sam cabled to William H. as follows: "Secure options on Hawley shares below forty pay five dollars for privilege."

However, upon the receipt of this cablegram from Sam, William H. had left his home in St. Louis and gone to Jefferson Highlands, N. H., to join members of his family who were spending the summer there. Upon reaching that place or within 10 minutes thereafter, he received from Charles E. a cablegram from Berlin, reading: "Sam mentally unbalanced. Temporarily in Sanatorium. Can you come immediately. Get expense money from Drumm. Say nothing to folks." Drumm was the treasurer of the Hawley Company. William H. then cabled to Charles E. to bring Sam home.

On August 27th, from New York, Jennie telegraphed William H. at Laclede Building, St. Louis, thus: "Sam and Chas. arrived. Sam in poor condition. Telegraph me if Tuholske is East and his address. Can you come on here. Wire Murray Hill Hotel."

Tuholske was a physician known to the parties, and William H. wired his address to Jennie, and also wired to Charles E. as to where he, William H., could meet him and Sam. He was advised by wire and letter that Sam had been placed in a sanatorium at Flushing, N. Y., on Long Island, and that he could do nothing for Sam, but that he might come on later and pacify Jennie. The letter

also stated that Charles would be in Chicago on September 6th. William H. met Charles E. there on the 6th, and discussed with him some matters pertaining to the Hawley Company, in which both were interested, and upon which it is claimed that Charles E. had unladen \$10,000 of his debts by consolidating therewith another company which was owned by Charles E.

September 8, 1904, found William H. and Charles E. en route to New York, and whilst en route it appears that Charles E. made inquiry of the property owned by Jennie and Jigo in St. Louis and was informed of its character. They also discussed the future of Jennie and Jigo, and Charles E. urged that this St. Louis property be made productive, as Sam's salary would soon stop, and that he, Charles E., could not carry the whole burden of their support.

It seems that Jennie had not been permitted by the physician in charge of the sanatorium to see Sam, and William H., having knowledge of that fact, went to Flushing on September 10th with a letter to Dr. Brown, of Sanford Hall, from Charles E. Bleyer. William H. first went to see Jennie and Jigo, and then to the sanatorium to see Sam. He was there informed that Sam was incurably insane from paresis. This information he claims came from two eminent New York physicians, Dr. Allan McLane Hamilton and Dr. Carlos F. McDonald. After spending some time with Sam, William H. then returned to the hotel where Jennie and Jigo were stopping, and then told them of his talk with Charles E. as to the St. Louis property. He then suggested to them that Jigo's vacant lot could perhaps be leased to advantage, and that the vacant lot belonging to Jennie ought to be sold and the money put at interest. After this talk, and on September 12th, both Jennie and Jigo signed separate powers of attorney to William H., the one of Jigo's covering his vacant lot, the one of Jennie's covering not only the vacant lot, but the one upon which there was a house, which was renting at \$60 per month. These powers of attorney were prepared by William H., and the significant part thereof, if there is a significant part, is couched in this language:

"Know All Men by These Presents: That I, Jigo F. Bleyer, of the county of Cook, state of Illinois, have made and appointed and by these presents do make, constitute and appoint William H. Bleyer of the city of St. Louis, state of Missouri, my true and lawful attorney for me and in my name, place and stead, and for my use to grant, bargain and sell, lease, convey in trust or otherwise dispose of the following lot, tract or parcel of land situate in the city of St. Louis, state of Missouri, to-wit: \* \* \* Or any part thereof for such price and on such terms, and for such rents, to such person or persons as he shall think fit and proper, and also for me and in my name and as my act and

deed to sign, execute, acknowledge and deliver such deed, lease or conveyance in trust, or other instrument either with or without covenants of warranty and with such clauses, covenants or agreements to be therein contained as my said attorney shall think fit and expedient; hereby ratifying and confirming all such deeds, bargains, sales, leases, conveyances in trust or other conveyances which shall at any time hereafter be made by my said attorney touching or concerning the premises."

The one by Jennie is in substantially the same language.

William H. remained at Flushing until the 13th, when he started for St. Louis. During this time he claims that he looked for a better institution for Sam, but, not finding one, advised Jennie to let him remain there until he could investigate around Chicago and St. Louis, with the view of getting him closer to home. Charles E., who remained in New York, on September 17th wrote William H. a letter, in which he first describes Sam's condition, then that the doctor had no objection to Jennie seeing Sam if she could compose herself and be reasonable, but that he (the doctor) feared that such a visit would make Sam violent as he had been on a former occasion. The letter then concludes: "While in the room J. F. urged upon me to let him transfer all his property and money to me, fearing that Jennie might get possession of it and be foolish enough to spend it in giving it to lawyers in her determined effort to get Sam out of that place. I told Jake I did not want him to do this, but what I would like to have done is that the property he has and all his interests be conveyed to some trust company for the benefit of Sam and Jennie, so in the event of anything happening to him and to me, they would to a certain extent be taken care of. I wish you would think this matter over carefully and advise me what you think would be the best plan to adopt under the circumstances. I don't want the property conveyed to me as Jennie would be sure to think I was trying to rob her of her interest. Hoping to see you in Chicago soon, I am, Yours very truly, C. E. Bleyer."

From the testimony of William H. it appears: That he looked around St. Louis, and not finding a desirable sanatorium there, he returned to Chicago on September 19th and there had a further talk with Charles E. with regard to the Hawley Company business, and in the talk he says Charles E. again referred to the property of Jennie and Jigo in St. Louis. That Charles E. there repeated to him what he had written in the letter of September 17th, which we have in substance stated above. That he told Charles E. of the powers of attorney which he held, whereupon Charles E. asked if the \$10,000 in cash to Jigo was included, and whether or not Jennie and Jigo could still sell or

mortgage their real estate. That he informed Charles E. that the \$10,000 was not included in the powers of attorney, and that they could still sell or mortgage their real estate. That Charles E. said that it ought to be changed, and asked him what were his views upon the subject. William H., as stated by him, then suggested that he had thought the matter over and talked it over with his folks, and before leaving St. Louis had discussed with the Mississippi Valley Trust Company about acting as trustee for Jennie and Jigo, but that they wanted to charge 5 per cent., and that he suggested to Charles E. that they (Charles E. and William H.) act as co-trustees, whereupon Charles E. said that Jennie was hostile toward him and would not consent, but that he thought Jigo would consent. William H. then left for New York to see Jennie and Jigo, arriving there on the 23d. At this point some immaterial communications occurred between Charles E. and William H. On the 24th and 25th he says that in conversations with Jennie and Jigo he suggested to them the talks he had with Charles E. in Chicago, as well as the contents of the letter of September 17th, supra; that Jennie at once said she would have nothing to do with Charles E.; that he told them that Sam's will was drawn so as to make them (Charles E. and William H.) co-trustees for them, and that they replied that they knew such to be the case, and Jigo said that his will was similarly made. From the details of these talks by William H. it further appears that Jennie objected to Charles E. because he had unloaded \$10,000 of his debts upon the Hawley Company, and that Jigo objected to the Mississippi Valley Trust Company for reasons of his own; that William H. suggested that the trust company wanted 5 per cent., and that he would act for nothing and take more interest in their property. It also appears that Jennie accused Charles E. of failing to account for \$5,000 insurance money coming to her from the estate of a deceased brother, and urged that William H. act as sole trustee; that to William H. acting as sole trustee Jigo objected, because it would make Charles E. angry, and he had nothing against Charles E.; that Jennie was persistent in saying that Jigo turned over everything to William H., because, as she said, "the fool wanted to give his money and a deed to his lot to Charley the other day"; to which remark Jigo responded that "it was his property, and he would do what he damn pleased with it." After some further conversation, the deeds of September 26th and the deeds in dispute were drawn by William H., and, as he says, read to them and left with them for an hour and a half, whilst he got a notary to acknowledge them, which he did on his way back from the sanatorium, where he called upon Sam. That after the signing of the deeds Jigo indorsed his certificate of



deposit for \$10,000 in the Boatmen's Bank of St. Louis to William H. The consideration of \$25 to each, William H. claims was paid then and there. The next day they took Sam to Chicago, he being accompanied by a physician and nurse, with the other three upon the train.

The plaintiffs, however, tell a different story. They claim that the certificate of deposit was given William H. prior to the time the deeds were executed, and for the purpose of getting it renewed for another six months, and that William H. told them he had put it in a safety deposit box. They say that they executed these powers of attorney without reading them, trusting to William H.; that they, especially Jennie, were under the impression that their brother Sam was wrongfully confined, and they were much interested in procuring his release; that William H. was pretending to be assisting them in this work; that when William H. brought the two papers (the two deeds in suit) he represented that they were powers of attorney, so that he could get money from the Hawley Down Draft Furnace Company to be used for Sam; that they, having confidence in him, signed the same without knowing the actual purport or contents thereof; that they were anxious to have Sam released, and thought the money was to be obtained from the Hawley Company for that purpose on these last instruments; that they did not know the contents thereof for several months thereafter, when they were informed by a lawyer. These parties likewise deny the alleged conversation detailed by William H. which led up to the deal, and deny that the deeds were left with them whilst the notary was being procured.

From Flushing, N. Y., the scene now shifts to Geneva, Wis., 80 miles north of Chicago. Upon Sam's arrival in Chicago as above detailed, he was placed in a sanatorium at Geneva. Thence followed Jennie and Jigo, and from that point the further acts occurred which counsel for defendants contend corroborate the theory that these two deeds were knowingly and understandingly entered into by the parties. William H. had returned to St. Louis the evening upon which Sam and the party reached Chicago, i. e., September 28th. For the defendants the story, from this point, thus runs: On October 6th, William H. returns to Chicago with copies of the two deeds now in issue and shows them to Charles E., and the latter was much displeased that he had not been made co-trustee in the deed made by Jigo. On the 7th he visited Jennie and Jigo, as well as Sam at Geneva, and on the next day returned to Chicago and informed Charles E. that he was willing that they be joint trustees in Jigo's deed if Jigo would consent, but that he did not think Charles should be a beneficiary, inasmuch as he had unloaded some of his debts upon the Haw-

ley Company. In the same talk Charles suggested that he wanted to be made conservator of Sam's estate, so that he could vote the stock and elect himself president and thus obtain the \$10,000 salary paid to that officer, whereupon William H. suggested that, inasmuch as Sam's will provided that both he and Charles E. be made joint trustees, he thought they should be joint conservators, and that with Jigo's consent they would both be made trustees of his estate. This is said to have been satisfactory to William H. and Charles E. at the time, and William H. returned to St. Louis. At this point some correspondence occurred between William H. and Charles E. relative to the conservator of Sam's estate and the joint trusteeship in Jigo's estate. On October 18th, William H. again reached Chicago and took up the matter with his uncle, Charles E., who had filed his application to be made sole conservator of Sam's estate. The interviews were not altogether friendly. William H. urged that he, Jennie, and Jigo were not willing for Charles E. to be made sole conservator, and Charles E. threatened to take steps to be made co-trustee in Jigo's estate. On October 21st, William H., having on the 20th concluded his talks with Charles E., proceeded to Geneva, and says he related the matters to Jennie and Jigo. At least, after a talk with them, he dictated, and they wrote, the following:

"Lake Geneva, Wis., October 21/04. We request and approve the appointment of William H. Bleyer as conservator of the estate of Samuel T. Bleyer. And we do not approve the appointment of Charles E. Bleyer as conservator of said estate. J. F. Bleyer. Jennie Bleyer."

"Lake Geneva, Wis., October 21/04. I hereby authorize William H. Bleyer whom I have heretofore constituted my trustee with full powers, to take the sum of one thousand dollars from the principal of my estate and pay the same over to me in twelve monthly payments of eighty-three (\$83.33) 33-100 dollars each, commencing October, 1904. J. F. Bleyer. Jennie Bleyer."

In this same conversation, at which time these written instruments were dictated by William H. and written and signed by Jennie and Jigo, the matter of taking from the corpus of the trust fund the sum of \$1,000 was mentioned by William H., as he says that owing to the hostile attitude of Charles E. they would be unable to get any further sums for Sam through the Hawley Company. These two written instruments were shown to Charles E., but retained by Sam. Up to December 16th it appears that \$600 had been furnished by William H. to Jennie and Jigo—some \$200 from the Hawley Company on account of Sam's salary—and there was some evidence that from July 26th to September 12th Jennie had also used \$867.38, all of her deposit with the Mississippi Valley Trust

Company. This closes the scene to October 25th.

On the next day Jennie telegraphed from Geneva to William H. at St. Louis, as follows: "The Chicago fiend called yesterday. Jake asked if he aimed at his money. I shouldered it all. You were not mentioned. If asked, you positively know nothing decided on your side. Particulars by mail. Get the best of lawyers for November ninth. Heed my words I have a terrible enemy to face."

She followed the same with this letter, which she on the stand admits, except as to the word "cur," and by experts that is shown to be hers: "My dear Will: Telegraphed to you this morning, now I add to it that Jake asked the cur if he intended having his money or property. He nearly went in a fit saying it was a d——d lie, and he intended getting everything in his possession to look out for me and Jake. I did not say anything although I felt like laying him out. Vick was present. Your name was not mentioned. I to prevent it on Jake's part said the money is in safe keeping. He struck me against the wall saying,———. This is evidence in court to show who he is to be a man over me. Never say anything after this except to me, and by all means do not own up that you spoke about the money or else you said nothing. Provide good lawyers to assist you. He tries to keep me from going to the Sanatorium. Am too nervous to write. With love, Jennie."

November 6th, William H. again returned to Chicago and conferred with Charles E. and his attorney, Judge Cratty. In that interview it was suggested that, if Jennie and Jigo would not consent for Charles E. to be co-trustee in their deeds, William H. withdraw entirely as to Jigo's property, and let Charles E. be named in his place. This would have left William H. as trustee for Jennie, and Charles E. for Jigo. It also appears that Charles E. offered to make William H. attorney for the Hawley Company at \$100 per month if this could be done. Charles E., it is claimed, further said that he would be appointed conservator of Sam's estate, notwithstanding the opposition of the others. William H. claims to have refused this offer, and proceeded to Geneva for a conference with Jennie and Jigo. In that conference and at the suggestion and dictation of William H., the following were written by the parties:

"Lake Geneva, Wis., Nov. 8/04. Judge Thos. Cratty, Chicago, Ill.—Dear Judge Cratty: We understand from Will to-day that Charley has retained a lawyer in St. Louis for the purpose of trying to have the trustee arrangements Jake and I made at Flushing on September 26th last, set aside. And he has no doubt consulted you in regard to the same. The object of this letter is to say to you that any such proceedings are

entirely without our consent as we want matters to remain as they now are. We made Will our trustee because we believe he would properly look after our interests. Jennie Bleyer.

"I have read and approved the foregoing letter. J. F. Bleyer."

"Lake Geneva, Wis., Nov. 8, 1904. I have never at any time received money from the estate of my brother D. L. Bleyer, nor any insurance money assigned to my sister Jennie and I, having relinquished my share to my sister Jennie Bleyer. J. F. Bleyer."

Upon the return of William H. to Chicago, following the advice of Jennie, suit was brought against the Hawley Company for the insurance alleged to have been collected by it as indicated in the letter last above quoted. William H. then returned to St. Louis, but returned to Geneva on November 22d. The next day the application of Charles E. to be made conservator was to be heard in Chicago. On the 22d William H. says he tried to quiet the feeling of Jennie toward Charles E., to the end that the family matter might be adjusted, and upon his return to Chicago the next day had the hearing postponed with that end in view. During all this time Jennie was telegraphing for money, and money was sent to her, although William H. had told her that she ought to economize, as Sam's salary would soon be at an end.

On December 4th, William H. was again at Chicago, attempting to get all the parties together. This he attempted through an interview with Judge Cratty and Charles E., and they finally agreed upon a settlement, and William H. proceeded to Geneva to procure the consent of Jennie and Jigo. The terms of the settlement had not been reduced to writing in Chicago, but William H. wrote up two copies which he said covered the agreement, except that there was placed therein the sum of \$250 per month for Sam's support, instead of \$200, as agreed upon between him and Charles E. This instrument reads:

"This agreement made this 6th day of December, 1904, witnesseth:

"First: The undersigned hereby consent and agree to the appointment of Charles E. Bleyer, of conservator of the estate of Samuel T. Bleyer.

"Second: Charles E. Bleyer hereby agrees to personally expend for the use and benefit of Samuel T. Bleyer, in the manner from time to time determined upon by a majority of the undersigned, the sum of two hundred fifty dollars (\$250.00) per month for and during the lifetime of said Samuel T. Bleyer, commencing January, 1905.

"Third: Charles E. Bleyer hereby agrees upon signing hereof to execute and deliver to William H. Bleyer, trustee for Jennie Bleyer, for a consideration of one dollar (\$1.00) a warranty deed to tract of land near Des Plaines, Illinois, containing about two hun-

dred, fifty-five (255) acres and improvements thereon, subject to the undivided interest of Samuel T. Bleyer therein, and subject to deed of trust for nine thousand dollars (\$9,000.00) now existing.

"Fourth: Charles E. Bleyer hereby agrees upon signing hereof, to execute and deliver to William H. Bleyer, trustee for Jigo F. Bleyer for a consideration of one dollar (\$1.00) a warranty deed to a tract of land in Forest Glen Subdivision, and improvements thereon subject to deed of trust for twelve hundred fifty dollars (\$1,250.00) now existing.

"Fifth: The undersigned, Jennie Bleyer, Jigo F. Bleyer, William H. Bleyer, Adrien S. Bleyer, hereby assign, sell, transfer, release and quitclaim to Charles E. Bleyer any and all right, title, and interest they now have, or at any time in the future may acquire, in the shares of capital stock of the Hawley Down Draft Furnace Company now owned by Samuel T. Bleyer.

"Sixth: The undersigned hereby consent and agree to the terms and conditions of agreement made September 26, 1904, between Jennie Bleyer and William H. Bleyer, whereby the net income of the property therein described is to be paid to Jennie Bleyer during her natural life and said estate thereafter vesting absolutely in William H. Bleyer, Adrien S. Bleyer, Clifford M. Bleyer, Mildred M. Bleyer as therein provided.

"Seventh: The undersigned hereby consent and agree to the terms and conditions of agreement made September 26, 1904, between Jigo F. Bleyer and William H. Bleyer, whereby the net income of the property therein described is to be paid to Jigo F. Bleyer during his life and said estate thereafter vesting absolutely in William H. Bleyer, Adrien S. Bleyer, Clifford M. Bleyer, Mildred M. Bleyer, as therein provided.

"Jigo F. Bleyer. [Seal.]"

He claims that Jennie first signed one of the two copies, but later tore off her name and the blank places for signature. Jigo signed the other copy as above set out, but before Jennie affixed her signature she wrote under Jigo's name the following and signed it: "I consent and agree to the above provided Charles E. Bleyer permits me to have the entire care, custody and control of Samuel T. Bleyer and withdraws all claims on the person of S. T. Bleyer in having put in an asylum, or taken therefrom or removing to any place for the benefit of his health. Jennie Bleyer."

With this William H. returned to Chicago, and Charles E. objected to paying \$250 instead of \$200 as first agreed, and objected to the clause added by Jennie. William H. remained in Chicago, with the hope, as he says, of finally getting the parties together, and whilst there received from Jennie a telegram which had been forwarded to him from St. Louis. This telegram reads: "Lake Geneva, Wis. Dec. 8/04. Wm. H. Bleyer, 4451 Wash-

ington Ave., St. Louis, Mo. I have drawn to-day three hundred dollars on the Mississippi Valley Trust through the 1st National Bank here. See that the money is deposited to spare yourself and me trouble. Sam warns you not to tie him up in any shape or manner by signature. Jake's signature holds no good. He does not know the nature of paper signed. You read it to me only, not to him. C. E. Bleyer cannot be conservator without my signature. Have my legal advise here to-day. Jennie."

December 21st the probate court of Chicago found Samuel T. to be insane, but made the Equitable Trust Company conservator of the estate instead of Charles E. Bleyer. January 17th the two suits now here for review were filed in the circuit court of the city of St. Louis. There are a number of flat contradictions in the evidence, some of which will be noted in the course of the opinion.

1. It is first contended by respondents that the petition fails to allege and charge a fiduciary relationship between the parties, and for that reason the burden to show fraud rests with these plaintiffs and did not shift, although the undisputed evidence shows at least a double fiduciary relationship between the grantors and the grantee prior to the deeds in dispute. The petition charges actual fraud. The proof not only tends to show actual fraud, but unequivocally shows this fiduciary relationship, which by some writers has been denominated "constructive fraud." In support of this contention, we are cited to 9 Ency. of Plead. & Prac. p. 690, where the broad statement is made thus: "In an action for constructive fraud, arising out of the violation of the fiduciary relation, the plaintiff should allege the existence of such relation." This announcement of the law purports to be based on the case of Feeney v. Howard, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162, which to our mind lends but little countenance to the context of the text. We are also cited to Newham v. Kenton, 79 Mo. 382, Christian v. Insurance Co., 143 Mo. 469, 45 S. W. 268, and Cole v. Armour, 154 Mo. 351, 55 S. W. 476, neither of which discusses the exact question. The question before us is whether or not in a case where actual fraud is alleged and the proof tends to show the actual fraud, and also shows a fiduciary relationship, then is it incumbent upon the person who is made the grantee in written instruments to show the utmost fairness thereof? In this transaction the defendant William H. Bleyer, his daughter, and his brother get three-fourths of the estates in remainder.

This is a very nice question for discussion, but one purely academic in this case, because, even if the burden to show fraud was upon plaintiffs, they have successfully carried it, as will appear in the succeeding paragraph, where we discuss the evidence. The evidence of a fiduciary relationship was admitted without objection, and was properly admitted. It

could be shown on the general allegation of fraud, but as to whether such showing made it incumbent upon the defendants to assume the burden of showing utmost fairness we do not discuss, because unnecessary in this case.

2. On the merits of this case, whilst we have the utmost regard for the learned chancellor who passed upon it nisi, we cannot agree to the conclusions reached. We concede with him that the evidence is conflicting. We concede with him that there are things testified to by the plaintiffs that are not strictly in accord with what we think was done in the transactions which transpired between these parties. Signatures are denied when they should not have been denied. Other things are denied when they should not have been denied. But, after all, it is for a court of chancery to take the whole case, and upon it administer what is right. Eliminating the question of the burden of proof, and whether it was shifted by the proof that there was fiduciary relationship, let us consider for the moment the case presented. That there was proof of a fiduciary relationship between the plaintiffs and the defendant William H. Bleyer cannot be denied. That this relationship was not pleaded cannot be denied. But for the present purpose concede that status, and what have we? Jigo Bleyer had been an invalid, suffering from locomotor ataxia for years. Jennie Bleyer was an old lady of 62 years. Both had been looked after and cared for by their brother Sam. No business cares had been cast upon them. They trusted in him as does the child in the parent. Suddenly misfortune overcomes the staff of their lives. The word comes that the greatest of all afflictions has overcome Samuel T. Bleyer; that the mind which had guided, directed, and supported these two plaintiffs had flown. In their extremity they call upon William H. Bleyer. To them, Charles E. Bleyer had not been faithful, or, at least, they so thought.

William H. Bleyer had counseled with them upon other matters, and why not upon this? That Jennie Bleyer was wrought up over the condition of Sam, her brother, is breathed in every line of the testimony. That she, whether rightfully or wrongfully, conceived that her brother Sam, the staff and stay of her life, was wrongfully detained of his liberty, is equally apparent. In this distress she telegraphed William H. to come to New York. He had hardly landed until he suggested powers of attorney as to their property interest in St. Louis. Counsel for plaintiff seem to concede that these two instruments were understood by the parties. In fact, counsel for plaintiffs urge nothing against these instruments. That they were secured upon the suggestion of William H. Bleyer there can be no question. We are also of opinion that the wording of the instruments has more significance than would appear at first blush. In these very instruments it is provided that the attorney in fact can "convey in trust or otherwise dispose of"

the property in question. To our mind, the words are significant, especially the words "convey in trust." They become more significant when they are considered with the attendant circumstances. Here we have William H. and Charles E. discussing the situation of these two people whilst en route to New York, and immediately these peculiarly worded instruments as procured by William H. Had he meant to merely mortgage the property for security or otherwise, it is not likely to have been couched in this peculiar language. It becomes more evident that there was a purpose in the mind of William H. when he drew the instruments to hold the right to convey the properties "in trust," in the true sense of the term, when we see and read what occurred afterward. At every corner there seems to appear a disposition of William H. and Charles E. to have the corpus of the estates held by these two decrepit people (we said decrepit, for one was aged and the other an invalid, and both inexperienced) intact for the survivors in blood. William H. and Charles E. seemed exceedingly anxious to hold these estates, as well as that of Samuel T., jointly as trustees. In fact, William H. seems to have been as much or more interested in that than in pressing the claim of Jennie and Jigo for the liberation of Sam. This record cannot be read without this conclusion. When diplomacy failed to get him and Charles E. together, threatened litigation was used, and this through the malleable minds of Jennie and Jigo, over whom William H. appeared to have absolute control.

These were met by counterthreats upon the part of Charles E. The plans finally failed, but not especially on account of the willingness of William H. for them to fail. He was willing that Charles E. act jointly with him throughout the three estates. The objections on the one side came from the enfeebled minds of the plaintiffs as to some things, and from the master mind of Charles E. as to others. Throughout all, William H. was anxious for joint instruments in all the estates. At the time he was the agent and counsel of the plaintiffs. To our mind there is one thread running through this transaction. This thread had its beginning in the conversation between William H. and Charles E. whilst en route to New York, where William H. was going in response to the message of distress previously sent by Jennie. From that time on every effort seems to have been to get these two estates, as well as their interests in their brother's estate, beyond the control of the plaintiffs, and under the absolute control of William H. and Charles E., and this no doubt would have been accomplished, but for the matters hereinabove detailed. The very deeds in issue were the results of the joint suggestions of William H. and Charles E., although not in strict accord with the ideas of Charles E., for in common parlance he demanded a "finger in the pie." To our mind it appears that for William H.

to have made a "conveyance in trust" so soon after the powers of attorney authorizing such would have lent color to fraud, and he and Charles E. so thought, and for that reason the last deeds were secured, and secured at a time whilst William H. was leading plaintiffs to believe that he was, in good faith, assisting them in trying to liberate Samuel T. Bleyer. Another fact should not be overlooked. From the record it appears that, whilst in proper mental vigor, Samuel T. Bleyer was a strong, successful business man. It also appears that he realized the frailties of the plaintiffs; that he kept them with him and managed their affairs; that he provided for their future by a proper will upon his demise. Of course, this will could not reach the property in plaintiffs' names, but only that which he was leaving to them; but it clearly indicates his idea of their inability to attend to business. This, however, does not warrant William H. or Charles E. to undertake to reduce the two estates in question to the same status of the one provided for by will. If these parties are incompetent under the law to handle their property, the law provides a method of changing it, without deeds. We do not believe these instruments were understandingly entered into by the plaintiffs. We believe that they were imposed upon by William H. Bleyer, he knowing the confidence they reposed in him. We have read and reread this record. Each reading has more thoroughly convinced us that the learned chancellor, nisi, was in error.

The decrees should be reversed, with directions to enter decrees as prayed for by the plaintiffs in their petitions. It is so ordered. All concur.

#### STONE et al. v. PERKINS et al.

(Supreme Court of Missouri, Division No. 2.  
March 9, 1909. Rehearing Denied March  
30, 1909.)

#### 1. PUBLIC LANDS (§ 61\*) — PATENTS FROM COUNTY—PRIORITY.

A subsequent land patent, issued by a county with knowledge of the issuance of a prior patent to the same land, passed no title.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 203; Dec. Dig. § 61.\*]

#### 2. JUDGMENT (§ 554\*)—CONCLUSIVENESS—NATURE OF ACTION.

A judgment for defendant in ejectment, no equitable defense having been pleaded, is no bar to a subsequent ejectment suit between the same parties for the same land, whether the title and defenses be the same or not.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1051; Dec. Dig. § 554.\*]

#### 3. ADVERSE POSSESSION (§ 44\*)—COLOR OF TITLE—CONTINUITY OF POSSESSION.

Possession under color of title, shown to have lasted only for about three months, was insufficient after the expiration of the period of limitations to establish title by adverse possession on the theory that the law presumes the continuance of adverse possession once existing,

since the occupancy in order to ripen into title must be continuous, uninterrupted and adverse for the entire required time.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 227; Dec. Dig. § 44.\*]

#### 4. QUIETING TITLE (§ 47\*)—TRIAL OF TITLE—QUESTION FOR COURT OR JURY.

The trial of title under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), providing for suits to determine interests and quieting title to real estate, is for the court and not for the jury.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 96; Dec. Dig. § 47.\*]

#### 5. APPEAL AND ERROR (§ 1071\*)—HARMLESS ERROR — INSTRUCTIONS — TRIAL BEFORE COURT.

Where an action to quiet title was tried to the court without a jury in so far as the issue of title was concerned, an instruction that plaintiffs' prior legal title should be sustained, though the jury should find that W. had a temporary building or structure on the land, which he occupied for a few months and then abandoned, was not prejudicial to defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4235; Dec. Dig. § 1071.\*]

#### 6. ADVERSE POSSESSION (§§ 23, 88\*)—PAYMENT OF TAXES—CUTTING TIMBER.

Payment of taxes and cutting timber on land do not constitute adverse possession, but are evidence of a claim of ownership.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 113, 509; Dec. Dig. §§ 23, 88.\*]

#### 7. PLEADING (§ 406\*)—MISJOINDER OF CAUSES—WAIVER.

Where an alleged misjoinder of causes of action appeared on the face of the petition, defendants waived it by failing to demur on that ground.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1370; Dec. Dig. § 406.\*]

#### 8. TRESPASS (§ 44\*)—RIGHT TO SUE—OWNERSHIP—PRESUMPTIONS.

Where plaintiffs had the legal title to land not in the actual occupancy of another, plaintiffs are presumed to be in possession and were entitled to sue in trespass for the cutting of timber therefrom.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 112; Dec. Dig. § 44.\*]

#### 9. JUDGMENT (§ 203\*)—DIFFERENT CAUSES OF ACTION—ONE JUDGMENT.

Rev. St. 1899, § 694 (Ann. St. 1906, p. 703), provides that where there are several causes of action united in a petition, or where there are several issues, a judgment on each separate finding shall await the trial of all the issues, and section 773 (page 750) declares that only one final judgment shall be given in an action. Held that, where an action involved the quieting of title to certain land and a claim for trespass in the cutting of timber, forms of judgments entered on such counts on different days should be treated as one final judgment, though it would have been better practice for the court merely to have made its findings and deferred entry of final judgment until after trial of all the issues.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 361; Dec. Dig. § 203.\*]

Appeal from Circuit Court, Stoddard County; J. L. Fort, Judge.

Action by Parmelia L. Stone and others against A. B. Perkins and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Mozley & Wammack, for appellants. Jas. E. Reese and Keaton & Keaton, for respondents.

GANTT, P. J. This is an action under section 650, Rev. St. 1899 (Ann. St. 1906, p. 667), made returnable to the March term, 1904, of the circuit court of Stoddard county, wherein the plaintiffs allege in their first count that they are the owners in fee simple of all of section 9 of township 23, range 12, in Stoddard county, Mo. They allege that the defendants claim to have some title, estate, and interest in and to said lands adverse to the title of plaintiffs, and they prayed the court to ascertain and determine the title and interest of the plaintiffs and the defendants respectively in and to said real estate, and to adjudge and decree the title of the plaintiffs therein, and to declare the defendants' claim a cloud upon plaintiffs' title and to remove the same. In the second count plaintiffs state that on or about the 1st day of October, 1896, and on divers days and times thereafter, the defendants without leave wrongfully entered upon said section of land, and did hire and command other persons to enter into and upon said premises, and did then and there cut down and destroy and carry away and convert to their own use timber and trees of the value of \$3,000, to the damage of the plaintiffs in the sum of \$3,000, for which plaintiffs pray judgment. In their answer defendants deny that the plaintiffs are the owners in fee of the S.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  and the W.  $\frac{1}{2}$  of section 9 in township 23, range 12, containing 440 acres, and being a part of the land described in plaintiffs' petition. They denied that they had trespassed upon said land, and admitted that they claim title to the same, and that their claim is adverse to the claim of plaintiffs. They aver that they are the owners in fee simple and claim the title to the above-described 440 acres, and that they have been in the actual possession thereof from the 17th of December, 1892, to the present date and disclaimed all title or ownership to the remainder of said land in said section 9 as aforesaid. Further answering, the defendants state that on the 17th of December, 1892, the defendant A. B. Perkins acquired title by mesne conveyances from Stoddard county to said real estate and immediately entered into the possession of the same, and that on the 4th of March, 1893, W. B. Stone, the ancestor of the plaintiffs, and plaintiffs' grantor, brought suit against A. B. Perkins and John Ware in the Circuit Court of the United States in the Eastern Division of the Eastern District of Missouri to recover possession of said real estate and for damages on account of cutting and removing the timber therefrom, being the same cause of action set forth in the petition of the plaintiffs herein, and in said action, upon a trial of said cause on its merits, judg-

ment was rendered by said court on the 21st day of March, 1898, in favor of the defendants therein. Defendants, further answering, pleaded the 10 years' statute of limitations, and for answer to the second count of plaintiffs' petition defendants pleaded, first, a general denial, and, second, a plea of both the 5 years' and the 10 years' statute of limitations; and in answer to this second count defendants also pleaded that on the 4th of March, 1893, W. B. Stone, under whom plaintiffs claim, brought suit against the defendants therein in the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri for \$8,000 damages on account of cutting and removing timber from the land described in said second count of the petition, and upon the trial upon merits judgment was rendered by the court in favor of the defendants. Therefore the defendants prayed judgment. There was a reply denying all the new matter pleaded in the defendants' answer.

The evidence on both sides tended to establish that the land in dispute was what is known as swamp and overflowed lands, which had been given by the United States by Act Cong. Sept. 28, 1850, c. 84, § Stat. 519, to the state of Missouri. And by the state of Missouri by the several acts of the General Assembly in the years 1851, 1853, 1855, and 1857 (Laws 1850-51, p. 238; Laws 1852-53, p. 108; Laws 1855, p. 160; Laws 1857, p. 32), were donated to Stoddard county. In 1869 Stoddard county executed a deed by its commissioner to the lands in suit to Louis N. Ringer, and plaintiffs acquired this Ringer title by mesne conveyances. On the 16th of December, 1892, Stoddard county by patent conveyed this land to J. S. Miller, and on the 17th of December, 1892, Miller conveyed the same by quitclaim deed to the defendant A. B. Perkins for an alleged consideration of \$1,100. This deed and patent were duly recorded in the recorder's office of said county on the 11th of January, 1893. At that time the evidence tended to show the land was vacant and not in the possession of any one, but on the 17th of December, 1892, the defendant A. B. Perkins erected a building thereon and put one John Ware in it as his tenant. At the May term, 1893, of the United States Court for the Eastern Division of the Eastern District of Missouri, W. B. Stone, plaintiffs' ancestor and immediate grantor, holding at that time whatever title plaintiffs now have, instituted two actions against the defendant Perkins and his tenant, John Ware, one in ejectment to recover the possession of the land in suit, and another by injunction to restrain them from cutting the timber from the land pending the action of ejectment. At the return term of that writ Perkins and Ware filed their answers, which were general denials. In 1898 a trial was had in the United States Circuit Court, which resulted

in a judgment for the defendants in the ejectment case. See *Stone v. Perkins* (C. C.) 85 Fed. 616, and the temporary injunction which was ancillary to the action of ejectment was dissolved. On March 22, 1898, A. B. Perkins and wife conveyed the land in suit to their son Dale Perkins, and on April 25, 1898, A. B. Perkins sold the timber of said land to Nimmons & Bennett and gave them until January 1, 1900, to remove all of the white oak from said land in consideration of \$2,000, which timber the evidence tended to show they did cut and remove to a large extent from and after October 26, 1898. The evidence further shows that Jerry Tramble about the year 1891 cleared 2½ acres of the land in section 9 and cultivated it for about two years, and that after that Tramble sold his holding or claim to Kitterman and gave him a quitclaim deed therefor, and Kitterman took possession, and his testimony was to the effect that during the last 15 years no person had been in the actual possession of any portion of this land except himself and Tramble. The evidence as to Ware's possession was to the effect that A. B. Perkins built a house on the land and put Ware in possession thereof to hold for him. Ware remained thereon until the injunction suit, when he abandoned the same, and the house was removed therefrom about two months after Ware had gone into possession. After that Perkins had no other person in actual possession of the land or any portion thereof. Samuel F. Campbell, one of the plaintiffs, testified that he found Tramble on the land and told him to hold the land for W. B. Stone in 1897. There was no written lease, but Campbell told Tramble to stay there, and when they got the title settled they would sell him 40 acres of the land. On December 24, 1902, defendant Dale Perkins brought an action of ejectment against Kitterman for the possession of the premises, and under the rule of the court the parties were required to file an abstract of the title under which they claimed, and the defendant Perkins, as plaintiff in that suit, filed the same abstract of title through the patent to J. S. Miller, which A. B. Perkins had filed in the ejectment suit in the United States Circuit Court, being the same that W. B. Stone brought in the United States Circuit Court in the case of *Stone v. Perkins*. This action was tried in September, 1903, and plaintiff Perkins dismissed his ejectment suit. In 1893 Perkins took possession of the land through his agents and was cutting the timber off of it when he was stopped by the injunction. In 1904 plaintiffs began this action. Plaintiff Campbell derived his title to the one-half interest by purchase from Carrie E. Thurber under a power to sell contained in the will of Nathan T. Thurber of date September 1, 1903. This summary of the evidence is a sufficient basis for a dis-

cussion of the rights of the parties involved in this suit.

1. It will be observed that the county of Stoddard is the common source of title of both plaintiffs and defendants, and the plaintiffs deduce their title to this land through the patent made by Stoddard county through its special commissioner, Alfred Eltzroth, to Louis M. Ringer April 28, 1869, and that patent was duly recorded May 10, 1869, and Ringer's title by mesne conveyances was conveyed to W. B. Stone on May 30, 1888, and the deed of the latter was duly recorded July 7, 1888; whereas, the defendants' paper title is deduced through the patent of Stoddard county to J. S. Miller December 16, 1892. So that there can be no sort of doubt, under the decision of this court in *Simpson v. Stoddard County*, 173 Mo. 421, 73 S. W. 700, that the plaintiffs by their conveyances from Stone held the superior paper title to the land in suit. The defendants claim title under the patent from Stoddard county to Miller in 1892 when the county had already disposed of the title to Ringer with full notice of Ringer's title at the time. So that as to the first count under section 650 it is only necessary to determine the effect of the ejectment action brought by Stone against Perkins in 1893 in the United States Circuit Court for the Eastern District of Missouri. It is insisted by the defendants that the judgment in that case, being for the defendants, estops the plaintiffs from claiming title at this time. As already seen, that was a plain action of ejectment in the United States court, and the answer was a general denial, and there was a judgment for defendants. There was no equitable defense relied upon in that case, and it is a settled law of this state that a judgment in ejectment pure and simple is not a bar to another action in ejectment for the same land between the same parties. The law of this state was fully and exhaustively reviewed and settled by Judge Napton in *Kimmel v. Benna*, 70 Mo. 52, and has since been adhered to in numerous cases. *Sutton v. Dameron*, 100 Mo. 141, 13 S. W. 497; *Speed v. Terminal Railroad Co.*, 163 Mo. 111, 63 S. W. 393; *Crowl v. Crowl*, 195 Mo., loc. cit. 345, 346, 92 S. W. 890. In the case of *Speed v. Terminal R. R. Co.* it was expressly ruled that a judgment for a defendant in the ejectment case tried in a federal court is no bar to a subsequent ejectment between the same parties for the same land, whether the title and defenses be the same or not. Accordingly, it must be held that the third instruction requested by the defendants and refused by the court was properly denied for the reason that the judgment in favor of the defendants in the United States Circuit Court did not have the effect to vest the lawful possession of the land in controversy in the defendant A. B. Perkins as therein asserted. As the judgment in the Circuit

Court of the United States was no bar to a subsequent ejectment by the plaintiffs for the same land against the defendants, neither can it be pleaded as a bar to this action to have the title declared and adjudicated in plaintiffs as against the defendants.

2. This brings us to the remaining defense of the statute of limitations of 10 years interposed by the defendants in this case. Having already determined that the plaintiffs have the legal title to the lands in controversy as the grantees of the title conveyed by Stoddard county to Ringer April 28, 1869, it follows that, unless the defendants have established title to the land by adverse possession for 10 years, the legal seisin and possession of the land followed the legal title and plaintiffs are entitled to a decree to the same. *Bradley v. West*, 60 Mo. 33. The evidence, in brief, as to the actual possession of this land, consisted on the part of the defendants as well as the plaintiffs of proof that in 1893 the defendant A. B. Perkins built a small house upon a portion of this land and placed one John Ware in possession thereof, and Ware resided in this house on the land for some two or three months, when he left it. The house was removed by a third party, and after that neither Ware nor defendant Perkins were ever in actual possession of the land. On the other hand, there was evidence that one Tramble built a house at one time on a part of section 9 by mistake and never claimed title to any portion of section 9 until after the United States court decided the case of *Stone v. Perkins* in favor of the defendant. Some time in 1899 Tramble quitclaimed to Kitterman and Tramble and Kitterman's claim, however, was only to 40 acres in section 9. It is too plain for discussion that this evidence did not establish a continuous, uninterrupted, and adverse possession of the land by the defendant Perkins by virtue of the Ware occupation of the land. There was also evidence that the defendant Perkins sold the timber to two parties, and that they cut a large portion thereof. To sustain their claim of adverse possession, the defendants insist that their taking of the actual possession of the land in December, 1892, and putting Ware in possession to hold the same for them, commenced the running of the statute of limitations in their favor, and that the law presumes the continuance of such adverse possession upon the principle that, when the existence of the state of facts is once established by proof, the law presumes such state of things to continue to exist as before until the contrary is shown; but this contention ignores an equally well-settled principle of law that presumptions must yield to facts and are only indulged in the absence of facts to the contrary. The assertion by the defendants that their possession under color of title, to wit, their possession under the Miller patent, which was taken

subsequent to and with full notice of the prior Ringer patent, may be discontinued after a month or a year, and that thereafter the constructive possession of the land would follow their color of title, instead of the true title, and after 10 years the real owners would be barred by the statute of limitation, is in plain violation of the well-established law of this state. In *Turner v. Hall*, 60 Mo. 275, Judge Hough, speaking for this court, said: "It would be a new and dangerous doctrine to hold that a possession under color of title may be discontinued after a year or a month or a week, and that thereafter the constructive possession of the land would follow the color of title instead of the true title." On the contrary, all the authorities in this state hold that that act of possession must be visible and continuous for the requisite period of 10 years in order to create the bar. The circuit court found, and we think the evidence abundantly supports it in so doing, that there was no adverse possession by the defendants of this land for 10 years, and therefore the claim of adverse possession predicated alone upon the judgment of the United States Circuit Court, and the temporary occupation by Ware of a part of the land for not exceeding three months, and the presumption that this possession was continued in face of all the evidence to the contrary, is utterly untenable.

In this connection it may be well to consider the objection to the second instruction given by the court, in which it stated that the prior legal title of the plaintiff must be sustained, notwithstanding the jury may find and believe from the evidence that one John Ware had a temporary building or structure on said premises for a few months and occupied the same, which he abandoned after occupying the same for a few months, and said structure was removed soon after he abandoned the same. It must be borne in mind that this cause was tried before the court, without the intervention of the jury, as to this first count. It has been uniformly ruled that the trial of title under section 650 is for the court and not for a jury, and hence this declaration of law could in no manner have affected the rights of the parties in the determination of their title. As to the objection that it was a comment upon the evidence, as it was a trial before the court, this comment could in no wise have misled any one and was strictly within the evidence in the case. And it may also be observed that the defendants' claim of possession by the reason of payment of taxes and cutting the timber on the land did not constitute adverse possession, but were only acts tending to show claim of ownership. *Carter v. Hornback*, 139 Mo., loc. cit. 245, 40 S. W. 893. In our opinion the circuit court properly adjudged the title to this land in the plaintiffs as against the defendants.

3. We are thus brought to a consideration



of the action of the court upon the second count in the petition. After having decreed the title of the land to be in the plaintiff Samuel F. Campbell, the court then proceeded to try the action of trespass for the cutting of timber on the said land from 1896 up to the commencement of the action alleged in the second count of the petition, to wit, that on or about the 1st day of October, 1898, and on divers days and divers times thereafter, the defendants without leave wrongfully entered upon said section 9, of which the plaintiffs were then and there the owners, and did hire, command, and order divers other persons to enter upon said premises, and did then and there cut down, destroy, and take and carry away timber and trees of the value of \$3,000. To this count the defendants, as already noted, pleaded first the five years' statute of limitation and the ten years' statute of limitation. This action was returnable to the March term, 1904, and the court gave the following two declarations of law on the question of trespass:

"The court declares the law to be that unless it finds and believes from the testimony that the plaintiff was in possession of the land in controversy on the 24th day of October, 1903, and continued in such possession during the time in which the trespass is alleged to have been committed, that he cannot recover in this action, and the finding will be for the defendant.

"The court declares the law to be that an action for trespass will not pass to the grantee by a conveyance of the land upon which the alleged trespass was committed, and, unless the plaintiff has shown by the testimony a lawful assignment of the cause of action herein to himself, he cannot recover, and the findings will be for the defendant."

The testimony on the part of the plaintiff was to the effect that he owned one half of this land in February, 1897, under a contract, and he acquired the other half in 1903, and that he acquired this title from Mrs. Carrie Thurber, the wife of John T. Thurber. On cross-examination he stated that he took an assignment of this cause of action. There was no proof or at least nothing upon which a judgment could be rendered as to any timber cut by the defendant prior to 1898. The testimony tended to prove that after the 28th of October, 1898, Nimmons & Bennett cut what is known as "headings" on said land and took away the timber therefrom for a period of about three years to the amount of \$3,000 in value. The testimony on the part of the defendant was that A. B. Perkins sold the timber on this land to Nimmons & Bennett for \$2,000, that after he sold to them he did not cut any of the timber himself nor direct them to cut off any of it after he had sold it, but that Nimmons & Bennett cut the same with his consent under his contract with them and paid for it, and that the date of the sale was April 25, 1898. There is no formal written assignment of the cause of

action for the trespass from Mrs. Thurber to the plaintiff Samuel F. Campbell. All that appears on this subject is as follows: "Q. You have an assignment of Carrie E. Thurber's interest or cause of action, is that it? Ans. Yes, sir." Neither is the bill of sale of the timber from Perkins to Nimmons & Bennett of date April 25, 1898, set out in the record, although the record does show that the plaintiff offered the record of the said bill of sale in evidence, and when offered the court said: "Read it, and I will see what it is." When the plaintiffs proceeded to make their proof upon the second count, the defendants objected to the introduction of any testimony for the reason that this was an action sounding in tort or trespass and could not be joined with a suit to quiet title, but this objection was overruled, and the defendants saved their exceptions. As to this misjoinder it was apparent on the face of the petition, and by failing to demur for this cause the defendants must be held to have waived it. *Blair v. Railroad Co.*, 89 Mo., loc. cit. 394, 1 S. W. 350; sections 598 and 602, Rev. St. 1899 (Ann. St. 1906, pp. 622, 628).

Under this count it is insisted, first, that there is no evidence upon which judgment for the plaintiff could be based. It is conceded by the learned counsel for the defendants that, if plaintiffs had constructive possession of the land at the time the timber was cut by defendant by reason of his ownership of the title thereto, he may maintain trespass, in the absence of adverse possession thereof by the defendant. When a party has the legal title to land not in the actual occupancy of another, he is presumed to be in the possession so as to maintain trespass against the wrongdoer. *Ware v. Johnson*, 55 Mo., loc. cit. 503. And as the evidence in this case before the court negatived the adverse possession of the defendant, and the court so decreed on the first count in the petition, it is plain that this objection to the right of the plaintiff to recover because they had no possession of the land sufficient to maintain trespass cannot be sustained. We have already held in the examination of the evidence on the first count that the pleadings and judgment in the federal court did not establish the legality of the defendants' possession of the land. The case of *Estes v. Nell*, 140 Mo. 639, 41 S. W. 940, does not support the defendants' position in this case.

4. As to the claim that there was no proof of an assignment of Mrs. Thurber's interest or right of action for the trespass prior to her conveyance of the land to Campbell, the plaintiff herein, we have already recited the evidence brought out by the defendant himself that she had assigned this cause of action to the plaintiff, and no objection was made to the form of this proof at the time, and it is too late now to object that the formal written assignment was not preserved in the record.

5. The defendants complain of the court's

refusal to give the third instruction requested by them. That instruction was in the following words: "The court declares the law to be that the effect of the judgment in ejectment, in the suit of *W. B. Stone v. Amos B. Perkins*, rendered in the District Court of the United States for the Eastern District of Missouri, in favor of said Amos B. Perkins (the same not having been set aside or reversed), was to vest the lawful possession of the land in controversy under color and claim of title in said Amos B. Perkins from the date of the filing of the petition in said cause, to wit, the year March, 1893, and that, in the absence of proof to the contrary, said lawful possession of said land has presumptively continued in said Amos B. Perkins and his grantee from said year 1893, down to the date of the filing of this suit, to wit, October 24, 1903, a period of 10 consecutive years, and the finding will be for the defendant, unless the court further finds from the testimony that said Perkins abandoned, or intended to abandon, the possession thereof before the institution of this suit, and, in this connection, the court declares the law to be that failure on the part of said Perkins to actually occupy said land for any number of years (in the absence of actual occupancy thereof adverse to him) is no evidence of abandonment or intention to abandon said land upon his part." We think it is entirely clear that the judgment of the Circuit Court of the United States in the ejectment cause brought in that court by *W. B. Stone* against the defendant *A. B. Perkins* did not have the effect of vesting the lawful possession of this land in the defendant Perkins, nor did it furnish a basis for the presumption that the possession of said land continued in the defendant *A. B. Perkins* from the year 1893 down to the filing of this suit on October 24, 1903. As already said, this presumption necessarily yielded to the proof that the defendants had not been in adverse possession of the land for a period of 10 consecutive years, as required by the statute in order to vest title in them by adverse possession, and the court found that the defendants had not been in such adverse possession for 10 years. In fact the whole testimony tended to show that the defendants only had possession of a very small portion of the land for about three months in 1893, and never had any possession after that time, and the court committed no error in refusing this declaration of law because it was not supported by the evidence.

A question of practice has suggested itself to us by the forms of the judgments entered on the two counts on different days, but upon consideration we have reached the conclusion that the two entries may be and should be treated as one final judgment, as our statute (section 694 and 773 [pages 703, 750]) clearly indicates should be done before the

entry of the final judgment in a cause. Under our Code the circuit courts can administer both legal and equitable rights and remedies, when necessary, in the same civil action, and the trial court is armed with discretionary power to direct separate trials where the nature of the issues on the pleadings require them. So that it would have been better for the court to have simply made its findings on the first count and deferred entering its final judgment until it had also tried the second count, and then entered one final judgment as the statute evidently contemplated.

Upon a full consideration of all the exceptions of the defendants, we are of the opinion that there is no reversible error in the record, and the judgment is, accordingly, affirmed.

BURGESS and FOX, JJ., concur.

WABASH R. CO. v. FLANNIGAN et al.  
(Supreme Court of Missouri, Division No. 1.  
March 31, 1909.)

1. COURTS (§ 231\*)—JURISDICTION—CONSTITUTIONAL QUESTIONS.

Where a litigated point cannot be decided without construing a particular clause in the Constitution, a constitutional question is involved, and, whether raised or not in the trial court, the appeal must come to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 658; Dec. Dig. § 231.\*]

2. COURTS (§ 231\*)—JURISDICTION.

Whether, in a case where an injunction is only an incident to the main subject of the litigation, the party enjoined is, on a motion to assess damages on the injunction bond, entitled to recover his attorney's fees for defending the suit, or whether he actually employed an attorney, are not constitutional questions of which the Supreme Court has jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 231.\*]

3. APPEAL AND ERROR (§ 300\*)—CONSTITUTIONAL OBJECTIONS—TIME OF MAKING.

Where the opportunity to invoke a particular constitutional clause does not arise until the trial is under way, or as in the case of an instruction given, even when the trial is ended, the point is timely though not presented in the pleadings, and where such a question arose for the first time on motion after final judgment, it was timely when presented in motions for new trial and in arrest.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 300.\*]

4. CONSTITUTIONAL LAW (§ 46\*)—CONSTITUTIONAL QUESTIONS—SPECIFIC OBJECTION.

In order to raise a constitutional question, the party complaining must point to the particular section of the Constitution on which he relies, it being insufficient to say in general terms that the act complained of violates the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 44; Dec. Dig. § 46.\*]

Appeal from St. Louis Circuit Court;  
O'Neil Ryan, Judge.

Action by the Wabash Railroad Company

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

against Alexander Flannigan and another. From the judgment, plaintiff appeals. Transferred from the St. Louis Court of Appeals. Cause returned to said court.

For prior report, see 118 Mo. App. 124, 100 S. W. 661.

Geo. S. Grover and J. L. Minnis, for appellant. Jno. D. Johnson, W. H. Biggs, and Virgil Rule, for respondents.

**VALLIANT, J.** This cause was transferred to this court from the St. Louis Court of Appeals on the idea that a constitutional question is involved, but after going through the record we are satisfied that there is really no such question in the case.

The controversy arose in a motion to assess damages on an injunction bond after the injunction had been dissolved. The facts were as follows: One Tourville was an employé of the Wabash Railroad Company, and the company owed him \$81.98. Flannigan brought suit against Tourville before a justice of the peace in East St. Louis, St. Clair county, Ill., and obtained judgment against him, and also a judgment against the Wabash Railroad Company, as garnishee of Tourville, for \$81.98, the amount the company owed him. Then Tourville sued the Wabash Railroad before a justice of the peace in the city of St. Louis for the same debt, and obtained judgment for that amount, and assigned the judgment to Virgil Rule. Then the Wabash filed in the circuit court of the city of St. Louis a bill of interpleader against Flannigan and Rule praying to be allowed to pay the money into court and let those two interplead for it; praying also an injunction to restrain Rule from levying the execution which he had sued out. The preliminary injunction was issued, the Wabash Company giving an injunction bond for \$1,000. That suit was contested, and the end of it was that the injunction was dissolved and the bill dismissed. Then came the motion to assess damages on the injunction bond, on the hearing of which the court assessed in favor of Rule \$200 as for his liability for attorney's fees incurred in that litigation. The case seems to have turned in the circuit court on the question of fact whether any attorney's fees were paid or liability for such incurred, and also the question of law whether attorney's fees could be assessed in such case. The judgment was for the amount of the injunction bond, \$1,000, to be satisfied on payment of the damages assessed, \$200.

In its motions for a new trial and in arrest of judgment, among other grounds, the appellant said: "(7) Because in entering said judgment this honorable court denied the defendant (doubtless meaning plaintiff) the equal protection of the laws, and deprived it of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States, and of section 30 of article 2 of the Constitution of the

state of Missouri (Ann. St. 1906, p. 166)."

After those motions were overruled, appellant applied for an appeal to the St. Louis Court of Appeals, and it was granted, and the record was lodged in that court for review. In due time appellant filed in that court its abstract and brief. In the latter, under the caption "Points and Authorities," were only two points: First, "The restraining order being merely incidental or ancillary to the principal object of the suit, and its dissolution being wholly contingent upon a denial of the principal relief demanded, counsel fees incurred in defending the suit were not proper items of damages to be assessed on the injunction bond." Second, "Respondent was not damaged. He incurred no liability to Mr. Johnson (the attorney mentioned in the evidence) for advice or services, and was not, therefore, entitled to an allowance on that account." Authorities were cited under each point. Not only were those the only points presented for consideration to the appellate court, but the whole proceedings at the trial show that they were the only points made in the circuit court.

We have held that, where a point in litigation cannot be decided without construing a particular clause in the Constitution, a constitutional question is in the very vitals of the case, and, whether raised or not in the trial court, the appeal must come to this court. *State ex rel. Smith v. Smith*, 152 Mo. 444, 54 S. W. 218. But whether, in a case where the injunction is only an incident to the main subject of the litigation, the party enjoined is, on a motion to assess damages on the injunction bond, entitled to recover his attorney's fees for defending the suit, or whether in this case Mr. Rule did actually employ Mr. Johnson as his attorney, are questions that can be decided without going to the Constitution, either state or federal. For the proper answer to the one we go to the common law or the statute law of the state, and to the other we go to the evidence in the case.

We have also held that it was incumbent on the party desiring to raise a constitutional question to raise it at the first opportunity for doing so, and not bring it in as an afterthought when the case has gone against him on the theories on which he tried it. But in the application of this rule we recognize that the opportunity to invoke the protection of a particular clause in the Constitution may not arise until the trial is under way, sometimes perhaps, as in the case of an instruction given, even when the trial is ended, and, in such case, the point is timely though not presented in the pleadings. In the case we are now considering there were no pleadings required; it was on a motion in the case after final judgment, therefore the appellant could not have presented his constitutional point until it was developed, if developed it was, by his adversary's evidence at the trial. In

point of time, therefore, appellant was not too late when it presented this point in the motions for new trial and in arrest.

We have also held that in order to raise a constitutional question the party complaining must point to the particular section of the Constitution on which he relies; it will not do to say in general terms that the act complained of is in violation of the Constitution. *Ash v. City of Independence*, 169 Mo. 77, 68 S. W. 888; *Hardin v. Carthage*, 171 Mo. 442, 71 S. W. 673; *Shaw v. Goldman*, 183 Mo. 461, 81 S. W. 1223. In this case the appellant has specified the particular section of the state constitution which it asserts has been violated, and, by descriptive words, has indicated that it is the rights guaranteed to appellant under the first section of the fourteenth amendment of the federal Constitution that have been disregarded. Therefore it cannot be said that appellant was either belated in the assertion of his constitutional rights, or lacking in the matter of specification of section and article.

But due time and specification in the points above mentioned are not the only requisites for giving this court jurisdiction on the idea that a constitutional question is involved; there must also be some rational connection between the facts of the case and the section of the Constitution invoked. When a judgment is rendered against a man which he is thoroughly convinced is absolutely wrong, and the sheriff comes and takes his property to satisfy it, he is apt to feel that all law and constitutional guarantees have been violated. A man may say in any case, if he will, that the judgment against him is in violation of this or that clause of the Constitution. The first section of the fourteenth amendment in particular is so broad in its terms that it has been frequently invoked in cases where it had no application. If in this case the appellant had said that the judgment was in violation of the fourth section of article 2 of the Bill of Rights, of the state Constitution (Ann. St. 1906, p. 128), and the first section of the fifteenth amendment of the federal Constitution, the specification would have been specific enough, and would not have been less applicable to the facts of the case than the sections mentioned in the motions for a new trial and in arrest of judgment. If a party can bring his case within the jurisdiction of this court, by merely saying, in due form and due time, that the judgment complained of is in violation of a particular section or clause of the Constitution, when the facts of the case show no connection with the provisions of the Constitution named, and he makes no rational showing of such connection, then any party at his own will may give this court jurisdiction of any case.

We do not mean, of course, to imply that

the party must show that his constitutional point is sound before he can be heard on it, but we do mean to say that he must show that under the facts of the case, as he contends they are, a question under the particular clause of the Constitution is raised and calls for judgment. Why the attorney for the appellant inserted this point in his motions for a new trial and in arrest, we, of course, do not know, but we are entirely satisfied that if he ever thought that such a point was in his case he soon changed his mind, because he asked for and took his appeal to the St. Louis Court of Appeals, and filed his brief in the court asking a reversal of the judgment on the two grounds alone hereinabove mentioned, and never once alluded to his constitutional rights. It does not appear that it was on his motion that the cause was transferred here, but, so far as the record shows, he was invoking only the judgment of the St. Louis Court of Appeals.

There is no constitutional question in the case. The cause is returned to the St. Louis Court of Appeals. All concur.

#### POTTER v. LONG.

(Supreme Court of Missouri, Division No. 2  
March 30, 1909.)

##### 1. DEEDS (§ 120\*)—CONSTRUCTION AND OPERATION—PROPERTY CONVEYED.

S., the owner of a tract of land, conveyed it during his lifetime to a grantee, who conveyed it to T. Subsequently T. and others, heirs of S., conveyed all their interest in the real property of S., "deceased," contained in a described parcel of land. *Held*, that, assuming that the description of the land in the deed of the heirs was sufficient to embrace the tract conveyed by S., their deed did not convey any interest in the tract, since it operated merely to pass the grantors' interest in the property S. had at his death in the described land, and S. had parted with his title to the tract during his lifetime.

[Ed. Note.—For other cases, see *Deeds*, Dec. Dig. § 120.\*]

##### 2. ADVERSE POSSESSION (§ 114\*)—EVIDENCE.

Evidence *held* to show that the ancestor of a party's grantors had been in possession of the land conveyed, claiming it as his own, for over 30 years.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 682-690; Dec. Dig. § 114.\*]

Appeal from Circuit Court, Barry County; F. C. Johnson, Judge.

Action by James T. Potter against John D. Long. Judgment for defendant, and plaintiff appeals. *Affirmed*.

This cause is now pending before this court upon an appeal on the part of the plaintiff from a decree and judgment in favor of the defendant.

This proceeding is one brought under the provisions of section 650, Rev. St. 1899 (Ann. St. 1906, p. 667), to ascertain and determine the title to 12 acres of land in the N. E. ¼

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the S. E.  $\frac{1}{4}$ , section 23, in township 24, range 26, lying south of Flat creek, in Barry county, Mo. The petition is in the usual form, and alleges that plaintiff has been for 20 years or more last past in possession of the land in controversy. It also alleges that defendant makes claim, asserts title, and interest in and to the property described in the petition. Then follows the prayer of the plaintiff that the court ascertain and determine the estate, title, and interest of the parties to this litigation in the real estate involved. The answer of the defendant denies that plaintiff is in possession of the premises mentioned, or any part thereof, and also denies that plaintiff has any valid claim to said premises, or that he is seised of an estate of inheritance in said premises thereof. The answer further alleges and states that the defendant is in the absolute and exclusive possession of said premises, and that he and his grantors and their ancestors have been in the peaceable, continuous, open, notorious, and adverse possession of said premises for more than 30 years before the institution of this action, and that defendant is the owner of said premises in fee simple absolute. Following this the defendant prays that the court adjudge and decree all the right, title, and interest claimed by plaintiff, of and to the said premises mentioned in plaintiff's petition, to be in defendant, and that plaintiff be divested of all claim thereto, and for all other proper relief.

Upon the trial it was conceded that Thomas Stockton was the common source of title. It was also shown that on the 7th day of August, 1856, Thomas Stockton and wife, by warranty deed, conveyed the land in controversy to Alexander Linn, which deed was duly recorded in the recorder's office, and on March 5, 1866, Alexander Linn and wife conveyed the said land, with other lands, to Thomas Jefferson Stockton. This deed was duly recorded on the 25th day of April, 1867, in Book H, of the recorder's office of Barry county, at pages 142 and 143, and recorded in Book 64, p. 267. Plaintiff also introduced in evidence a deed dated August 21, 1867, from J. Stockton and others, including T. J. Stockton, to B. G. Eden, by which it was sought to convey their interest in the real estate of Thomas Stockton, deceased; said deed being in the following words and figures:

"[50 cents. Thomas Stockton.]

"Know all men by these presents that James Stockton, and Rebecca Stockton, Jonathan Eden and Matilda Eden, and S. I. Stockton, Madison Walker, and Rachel Walker, of the county of Barry, and state of Missouri, for and in consideration of the sum of two hundred and seventy-five dollars, account to them in full satisfaction of B. G. Eden, of Barry county, state of Missouri, the receipt whereof is hereby acknowledged, do give, grant, bargain, and sell, and convey, unto

the said B. G. Eden, and to his heirs and assigns, all our interest in the real estate, of Thomas Stockton, deceased, contained in the following described lot, tract, or parcel of land, viz.: Commencing at the south half of the northeast quarter of section twenty-three, in township twenty-four, of range twenty-six, and the northeast quarter, of the southeast quarter, of section twenty-three in township twenty-four, of range twenty-six, to have and to hold the above granted and bargained, premises with the appurtenances thereof unto the said B. G. Eden, his heirs and assigns, in fee simple forever, to their proper use and behoof, and further we the said James Stockton, Rebecca and Jonathan Eden and Matilda Eden, and T. J. Stockton, and Madison Walker and Rachel Walker, to covenant to and with the said B. G. Eden, that at and until the unseating of these present, we were seised of the above granted, and bargained premises, as a good and indefeasible estate in fee simple that the same are free from all incumbrance and that we will forever warrant and defend the title thereof to the said B. G. Eden, his heirs and assigns against all claims and demands whatsoever. And I Rebecca Stockton, wife of James Stockton, and Matilda Eden, wife of Jonathan Eden, and Rachel Walker, wife of Madison Walker, do hereby relinquish our right of dower in said estate as described for the above consideration aforesaid.

"In testimony whereof we have hereunto set our hands and seal this 21st day of August, in the year of our Lord one thousand eight hundred and sixty-seven.

"Samuel T. Clemens. Matilda Eden.

"Beththane Clemon.

his  
"James X Stockton. T. J. X Stockton.  
mark mark

her  
"Rebecca X Stockton. Madison Walker.  
mark her

mark  
"Jonathan Eden. Rachel X Walker.  
mark

"State of Missouri, County of Barry—ss.:

"Be it remembered that James Stockton and Rebecca Stockton and Jonathan Eden and Matilda Eden and T. J. Stockton, Madison Walker, and Rachel Walker, who are personally known to the undersigned justice of the peace to be the persons whose names are subscribed, to the foregoing deed, to be the parties thereto, this day appeared before me and acknowledged that they executed and delivered the same as their voluntary act and deed, for the use above specified, and the said wives by me made acquainted with the contents of said deed, acknowledged that they executed the same and relinquished the right of dower in said estate, before me this 21st day of August, 1867."

To this deed counsel for defendant interposed an objection for the reason that it does not convey or purport to convey any interest of the grantor, except such interest as

might be in the estate of Thomas Stockton, and for the further reason that the record of the deed as heretofore introduced by the plaintiff shows that the land in controversy had long before that time been conveyed to Jeff Stockton. Hence it is urged at the time of the execution of this deed the estate of Thomas Stockton owned no interest in this real estate, or did any of the parties by reason of being his heirs. The title had long since passed from Thomas Stockton. The objection to this deed is also urged that it is void for want of sufficient description of the property.

Plaintiff next offered in evidence a general warranty deed dated March 19, 1869, from Bolin G. Eden and wife to Peter Hought, which deed sought to convey the S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section No. 23, township No. 24, range No. 26, and the N. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section No. 23, township No. 24, of range No. 26, containing 120 acres. Following this there was offered in evidence a general warranty deed, dated February 26, 1871, which was filed for record October 22, 1904, Book 79, p. 620, from Peter Hought and wife and J. M. Stockton to Hastin Potter, by which deed it was sought to convey the same land as is described in the deed from Eden and wife to Peter Hought. Following this plaintiff offered in evidence a general warranty deed, dated the 13th of January, 1875, from Hastin Potter and wife, conveying to James T. Potter the land described in the immediately preceding deeds offered in evidence by the plaintiff.

Numerous witnesses were introduced by plaintiff, but we deem it unnecessary to set out their testimony in detail. It is sufficient to say that this testimony tended to show that the plaintiff had been in possession of the 12 acres of land in dispute in this action, and that plaintiff and his grantors had been paying the taxes on it for a number of years. The testimony of some of these witnesses tended to show that T. J. Stockton was occupying these premises as a mere tenant and accounting to the plaintiff for rent. There was other testimony introduced by the plaintiff to show that the defendant was the owner of 17 acres on the north side of Flat creek, the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 22, which adjoins on the east the quarter section in which the land in controversy is located, and that the plaintiff claimed to own the 12 acres of land in controversy on the south side of Flat creek, and that by mutual consent, brought about by the way the creek cut through the two forties, it was agreed that Thomas Jefferson Stockton should use, occupy, and cultivate the 12 acres in controversy on the south side of the creek, and that plaintiff should use, occupy, and cultivate the 17 acres on the north side of the creek; the use and occupancy of the one being a stand-off for the use and occupation of the other. It was

claimed by the plaintiff, and there was some testimony tending to establish that fact, that Thomas Jefferson Stockton occupied the land in controversy as the tenant of the plaintiff and the plaintiff's grantors, and not under claim of title in himself. This is a sufficient indication of the nature and character of the oral testimony on the part of the plaintiff.

The defendant offered in evidence Record Book 79, p. 477, being a warranty deed, dated April 1, 1904, filed for record June 16, 1904, from M. E. Stockton, by C. D. Manley, attorney in fact, to Benton Robbins, to the land in controversy. This conveyance was properly acknowledged and was in the following form:

"State of Missouri, County of Barry—ss.: On this the 14th day of June, 1904, before me personally appeared I. M. Stockton, who by me being first duly sworn, depose and says, that he is personally acquainted with the heirs of T. J. Stockton, deceased, and that Mary E. Stockton, his widow, and T. J. Stockton, C. E. Stockton, M. I. Huse, formerly M. I. Stockton, Pearl Langston, formerly Pearl Stockton, Minnie Fare, formerly Minnie Stockton, Norman J. Stockton, Lennie Stockton, Embre Stockton, Luster Stockton, and Myrtle Stockton, are all and only heirs of T. J. Stockton, deceased.

his  
"J. M. X Stockton.  
mark

"Attest mark:

"C. D. Manley.

"Subscribed and sworn to before me this 14th day of June, 1904.

"C. D. Manley,

"[L. S.] Clerk of the County Court.

"Filed for record this 16th day of June, 1904, at 8:45 a. m.

"A. L. Galoway,

"B. W. E. McKinney, Dep.

"General Warranty Deed by Attorney in Fact.

"Know all men by these present that I the undersigned, M. E. Stockton, of the Chicksaw Nation, Ind. Territory, by C. D. Manley, attorney in fact, of the city of Cassville, county of Barry and state of Missouri, duly authorized by letter of attorney under my hand, and seal in consideration, of the sum of one hundred and fifty and no/100 dollars to him paid in hand, by Benton Robbins of the county of Barry, and state of Missouri, do hereby grant, bargain, sell and convey to the said Benton Robbins heirs and assigns forever, the following described real estate lying, being, and situate in the county of Barry and state of Missouri, to wit: All the right, title and interest of M. E. Stockton as widow of T. J. Stockton, deceased, in the following lands set off to M. E. Stockton, as widow's dower viz.: One and one-half acres in the northeast corner of the northwest quarter, of the north-

east quarter, of section 26, also the undivided one-half interest in the northwest qr. southeast qr. section 23, also southwest quarter of southeast quarter sec. 23, also southeast quarter of southeast quarter, sec. 23, also southwest quarter of southwest quarter, sec. 24, also all that part of northeast quarter of southeast quarter of section 23, lying south of Flat creek, being 12 acres more or less, and all in township 24, range 26. To have and to hold the said premises, with all the privileges and appurtenances, to the same belonging to the said grantee and to his heirs and assigns forever. And I, the said M. E. Stockton, by C. D. Manley, Atty. in fact, do covenant with the said grantee and with his heirs that I rightfully seised in fee of the said premises that they are free of incumbrance except as above that I have good right to sell and convey the same in manner aforesaid. And that I and my heirs, executors, administrators will warrant and defend the title to the said premises to the said grantee and to his heirs and assigns forever against the legal claims and demands of all persons whomsoever except as above mentioned.

"In testimony whereof, I have, by C. D. Manley, said attorney, hereunto set my hand and seal this 1st day of April, A. D. one thousand nine hundred and four.

"M. E. Stockton. [Seal.]

"By C. D. Manley, Attorney in Fact."

Following this the defendant next offered in evidence a warranty deed from N. J. Stockton and wife to Benton Robbins, dated May 23, 1904, and recorded August 13, 1904, in Book 82, p. 250. This conveyance embraced the land in controversy and was duly acknowledged.

Defendant next offered in evidence a warranty deed dated May 21, 1904, recorded June 16, 1904, in Book 82, p. 137, from C. E. Stockton and wife and M. I. Huse and her husband, C. H. Huse, to Benton Robbins. This deed embraced the land in controversy, particularly mentioning the 12 acres more or less south of Flat creek, which is the land in dispute in this controversy.

There was next offered in evidence a deed dated May 23, 1904, from Pearl Langston (formerly Pearl Stockton), and J. S. Langston, her husband, and Minnie Fare (formerly Minnie Stockton), B. F. Fare, her husband, of Barry county, Mo., to Benton Robbins, conveying the land in controversy. This deed was duly acknowledged.

Defendant next offered in evidence a warranty deed from T. J. Stockton and wife, heirs of T. J. Stockton, deceased, to Benton Robbins, dated June 13, 1904, recorded in Book 82, p. 135. This deed described and undertook to convey the land in controversy, and was duly acknowledged.

Finally defendant offered in evidence the deed from Benton Robbins and wife to John D. Long, the defendant in this cause. This

was a warranty deed, made by Robbins and wife of Cassville, Mo., to John D. Long of the county of Barry in the state of Missouri. This deed undertook to convey and described particularly the 12 acres of land in controversy, lying south of Flat creek, and was duly acknowledged.

The defendant next offered in evidence the petition filed in the probate court of Barry county, on July 13, 1903, of Mary E. Stockton, the widow of T. J. Stockton, to set out homestead. This petition substantially stated that Mary E. Stockton was the widow of T. J. Stockton, and that on the 26th day of November, 1902, T. J. Stockton, late of said county, deceased, was seised and possessed in fee simple of certain described lands. Then followed the description of the land of which the deceased, T. J. Stockton, was possessed, embracing the particular description of the 12 acres of land in controversy. Following this was the order of the probate court, dated the 10th day of August, 1903, that a homestead be set off to Mary E. Stockton, widow of T. J. Stockton, deceased, and appointing J. M. Etheridge, Chas. P. Albright, and Len Boucher as commissioners to set out homestead to the widow and minor children of said deceased. Defendant also offered in evidence the report of the commissioners by which the homestead and dower of the widow of T. J. Stockton was assigned and set off. The homestead, as set off, embraced by a particular description the 12 acres of land in dispute in this controversy.

Following this record testimony the defendant and numerous other witnesses were introduced on the part of the defense to this action, all of which tended to prove that T. J. Stockton went into possession of this land after the purchase of it in 1866 from Mr. Linn, had it fenced, and cultivated it from that time up to the time of his death in 1902. A number of witnesses stated that they had never heard until a year or two before this suit was brought of any one else claiming any title to this 12 acres of land except T. J. Stockton. Jack Stockton, who was a brother of T. J. Stockton, deceased, stated that his brother had occupied and cultivated this 12 acres of land in dispute from the time he bought it. This witness made further references to the deed executed by him and other heirs of Thomas Stockton to Eden, and explained that the deed was a mere conveyance to whatever interest he had in his father's (Thomas Stockton's) estate. Judge M. A. Galaway was introduced as a witness on the part of the defendant. He substantially stated that Thomas J. Stockton had been in possession of and cultivated the 12 acres of land in dispute from the time he bought it, which was some time in 1866, up to the time of his death, and that during all that time he did not see anybody else exercising control or ownership over it, nor had he ever heard anybody claiming title to that land. Mr. San-

Langston was called as a witness on the part of the defendant. His testimony tended to show that the plaintiff tried to buy the interests of the heirs of T. J. Stockton. R. B. Hughes was called as a witness for the defendant. His testimony tended to show that T. J. Stockton occupied and cultivated the 12 acres of land in dispute, and that he had heard Mr. Stockton say that the land on the south side of the creek was his, and heard him say that several times. His testimony further tended to show that he never heard of anybody else claiming it. Peter J. Stockton also testified in behalf of the defendant. He was a son of T. J. Stockton. His testimony was that his father claimed the 12 acres of ground in dispute; was in possession of it and cultivated it for years. Another son of T. J. Stockton, Elbert Stockton, testified. He says that his father lived on this 12 acres of land; the land inclosed by the fence. This witness was 23 years old. He says that his father had been in possession of it ever since he could remember, and that his father stated that the land on the south side of the creek was his land, and that on the north side of the creek was Potter's. That was what he always taught us, and that plaintiff never made any claim to this 12 acres of land until after his father died. Abe Stockton testified as a witness for the defendant. He was a nephew of T. J. Stockton. This witness was 29 years old. He testified that he had practically all of his life lived close to this land, and that during all the years that he lived near the land he never heard of any one claiming it other than T. J. Stockton. After the death of T. J. Stockton, he rented the land from Mr. Manley, Mrs. Stockton's agent. He and Lee Weaver went into possession of the land together. Mr. C. D. Manley testified. He was the administrator of the estate of T. J. Stockton, also guardian for minor heirs. He took charge as administrator of the 40 east of the 40 in controversy. This 40 he was ordered to sell by the probate court. This 40 he sold at administrator's sale was purchased by Mr. Potter. He testifies that the balance of the estate was set off to the widow, including the 12 acres in controversy. He further testified that he had charge of this 12 acres as agent of Mrs. Stockton, and that in December, 1903, he leased it to Jack and Abe Stockton. Afterwards Mr. Weaver took Jack Stockton's place. In 1908 he says that Mr. T. J. Stockton lived on the land, and the first time that he was ever informed by Mr. Potter that he made any claim to this 12 acres in controversy was in October, 1904. He further testified that Mr. Potter, after he bought the 35 acres of land at the administrator's sale, wanted to negotiate with him in reference to the other tract of land, the tract set off to the widow as her homestead and dower, and at that time he never claimed any interest in this land in controversy.

This is a sufficient indication of the nature

and character of the testimony upon which this cause was submitted to the court to enable us to determine the legal propositions disclosed by the record. The cause was submitted to the court, and after due consideration the court found the issues for the defendant, and recited in the judgment that the defendant was the owner in fee of a six-tenths undivided interest in the premises, and that the plaintiff has no right or title to said premises in law or equity. It was then ordered by the court that the plaintiff be divested of whatever interest he may have heretofore claimed in said premises adverse to that of defendant, and that he be barred forever from claiming or asserting the same, and that plaintiff take nothing by his action in this behalf, and that defendant recover of plaintiff costs of this action, and that execution issue therefor.

A timely motion for new trial was filed and by the court overruled. From the judgment and decree rendered in this cause the plaintiff prosecuted this appeal, and the record is now before us for consideration.

N. Gibbs, D. H. Kemp, and R. H. Davis, for appellant. T. D. Steele, for respondent.

FOX, J. (after stating the facts as above). The errors assigned by the appellant, as disclosed by the record, are: First, that the judgment of the court is against the weight of the testimony, and the judgment upon the testimony should have been for the plaintiff. Second, that the court admitted irrelevant and immaterial testimony on the part of the defendant, over objections and exceptions of plaintiff. It is apparent that appellant relies upon the first assignment of error as the principal ground for the reversal of this judgment; that is, that the judgment of the court is against the weight of the testimony, and the judgment upon the testimony should have been for the plaintiff.

Directing our attention to the main assignment of error in this cause, it is apparent that the legal propositions rest within a very narrow compass. At the very threshold of the consideration of the legal propositions submitted to our consideration in this cause, it is important to determine the force and effect of the conveyance of August 21, 1867, by the heirs of Thomas Stockton, deceased, to B. G. Eden. If this conveyance had the force and effect of conveying the title to the 12 acres of land in dispute, then it will be necessary to direct our attention to the oral testimony concerning the claim of adverse possession by the defendant and his grantors; but if, on the other hand, this conveyance did not pass the title to Eden to the land in dispute, then it will not be essential to give any attention to the oral testimony as to the dispute between the parties as to who was in possession. The record discloses, and it is conceded, that Thomas Stockton is the common source of title, and



plaintiff offered in evidence a deed from Thomas Stockton to Alexander Linn, and the deed from Linn to Thomas Jefferson Stockton. Following this is the deed of August 21, 1867, from the heirs of Thomas Stockton, deceased, to B. G. Eden. The defendant relies upon the deeds offered by the plaintiff, together with the deeds offered in evidence by the heirs of Thomas Jefferson Stockton to Benton Robbins, as well as the conveyance from Benton Robbins to the defendant in this cause. Clearly if the deed from the heirs of Thomas Stockton to B. G. Eden in 1867 passed the title to the land in controversy, then the conveyance by the heirs of Thomas Jefferson Stockton to Benton Robbins and from Benton Robbins to the defendant in this cause did not pass any title. So, on the other hand, if the deed of August 21, 1867, by the heirs of Thomas Stockton, deceased, to B. G. Eden, did not pass the title to the land in controversy, then the deeds by the heirs of Thomas Jefferson Stockton to Benton Robbins and from Benton Robbins to the present defendant did pass the title, and the defendant would be the record title owner of the premises in controversy. Thus it will be seen the importance of first determining the legal effect of the deed of 1867 by the heirs of Thomas Stockton, deceased, to B. G. Eden.

It is earnestly contended by appellant that the deed of 1867 to B. G. Eden passed the title to said Eden to the land in controversy. On the other hand, it is within equal earnestness insisted that such deed did not convey any interest whatever to the land in controversy. We have carefully analyzed this deed of 1867 to B. G. Eden, and in our opinion it did not convey any interest in the 12 acres of land in dispute. Thomas Stockton on August 17, 1856, conveyed the title to the land in dispute to Alexander Linn, and in 1866 Linn conveyed the land in dispute to Thomas Jefferson Stockton. The deed of 1867 to B. G. Eden expressly recites that they "grant, bargain, and sell, and convey unto the said B. G. Eden, and to his heirs and assigns, all our interest in the real estate of Thomas Stockton, deceased, contained in the following described lot, tract, or parcel of land, viz." Now it will be observed that this deed expressly limits the conveyance to the interest of those heirs in the real estate of Thomas Stockton, deceased. Manifestly Thomas Stockton, deceased, had no interest in the 12 acres of land in dispute, for the reason that he had conveyed all his interest in said land in 1856 to Alexander Linn, and Linn had conveyed in 1866 said land to Thomas Jefferson Stockton. Again, it is extremely doubtful as to whether the description of the land in the deed of 1867 to B. G. Eden is sufficient. It recites: "The following described lot, tract, or parcel of land, viz.: Commencing at the south half of the northeast quarter of section twenty-three, in township twenty-four of range

twenty-six, and the northeast quarter of the southeast quarter, of section twenty-three in township twenty-four, of range twenty-six." To say the least of it, that is a very unsatisfactory description of the land, "commencing at the south half of the northeast quarter." At what point in the S.  $\frac{1}{2}$  is left to conjecture, and it undertakes to give the commencing point without designating at what point the description shall end. However, for the purposes of this case, let it be conceded that the description is full enough and embraced the land as therein designated, omitting the words, "commencing at," yet in our opinion this deed was limited to the conveyance of whatever interest these heirs had in the real estate of Thomas Stockton, deceased. Thomas Stockton, deceased, did own a part of the land embraced in the description in the deed to Eden. At the time of his death he owned that portion of the N. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  lying just north of Flat creek, but the 12 acres of land in dispute lying south of Flat creek had been conveyed in 1856 by Thomas Stockton to Alexander Linn. Again, it will be observed by the language employed in the deed to B. G. Eden that it was not contemplated by that conveyance to pass the title to all the land embraced in the deed, and it was not understood that Thomas Stockton, deceased, owned all of the land described in such deed, for the reason that the deed recites that the heirs of Thomas Stockton, deceased, convey only their interest in the real estate of Thomas Stockton, deceased, contained in the following described lot, tract, or parcel of land. In other words, this deed undertook to convey whatever interest the heirs of Thomas Stockton, deceased, had in any real estate which may have been embraced within the description. Clearly this deed must be limited to a conveyance of the interest of the heirs in the real estate owned by Thomas Stockton at the time of his death. Whatever real estate owned by Thomas Stockton embraced in the deed to Eden, the title to such real estate passed by this deed; but the significant terms used by the heirs in the conveyance to Eden that they were only conveying their interest in the real estate of Thomas Stockton, deceased, that was contained in the description embraced in the deed, clearly indicates that such conveyance did not undertake to convey the land in dispute, nor was it the intention of the heirs to convey such land. Having reached the conclusion that the deed of 1867 to Eden did not pass the title to the land in dispute, it logically follows from the conveyance introduced that Thomas Jefferson Stockton had the legal title to such land at the time of his death, and his heirs by their conveyance to Benton Robbins, and the deed from Benton Robbins to the defendant in this cause places the legal title to the land in controversy in this defendant.

As to the oral testimony developed upon the trial of this cause, it is sufficient to say that in our opinion the preponderance of evidence tends to establish the fact that Thomas Jefferson Stockton, upon the purchase of this land in 1866 from Alexander Linn, went into possession of such land and continuously occupied and cultivated it up to the time of his death. The testimony further indicates that neither the plaintiff nor his grantors made any claim of title to this property until after the death of Thomas Jefferson Stockton. It is significant that the probate court in administering the estate of Thomas Jefferson Stockton should proceed to appoint commissioners to set off the homestead of the widow, and that the commissioners in pursuance of such appointment should assign to her as a part of her homestead the identical land in dispute, and yet the plaintiff nor his grantors should not have at least known something about these proceedings. This 12 acres of land was assigned by the commissioners to the widow of Thomas Jefferson Stockton, and she subsequent to this time rented it through her agent, Mr. Manley, to other parties, and they accounted to her or her agent for the rent. The oral testimony strongly preponderates in favor of the defendant that Thomas Jefferson Stockton was in possession of this land and claimed the same as his own for over 30 years. This, together with the appropriate conveyances from the heirs and widow of the deceased Thomas Jefferson Stockton conveying the title to the defendant, emphasizes the correctness of the conclusion reached by the trial court; that is, that the title to this land was vested in the defendant, and that the plaintiff had no interest therein.

Entertaining these views, in our opinion the judgment and decree of the trial court was entirely proper and should be affirmed, and it is so ordered. All concur.

#### McQUITTY v. WILHITE et al.

(Supreme Court of Missouri, Division No. 1.  
March 31, 1909.)

#### 1. APPEAL AND ERROR (§ 193\*)—QUESTIONS NOT RAISED ON TRIAL—SUFFICIENCY OF COMPLAINT.

The objection that the petition does not state a cause of action may be first raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1232; Dec. Dig. § 193; \*Pleading, Cent. Dig. § 1366.]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 135\*)—CONTRACT OF DECEDENT TO CONVEY—CONVEYANCE BY ADMINISTRATOR.

The authority given an administrator by Rev. St. 1899, §§ 129, 130, 146 (Ann. St. 1906, pp. 379, 380, 384), on an order of the probate court to rent the land of decedent, make repairs on fences and buildings, and to sell land to pay debts, does not include authority to convey land in performance of a contract made by

decedent, and hence an administrator cannot be required to do so by decree in equity.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 553, 554; Dec. Dig. § 135; \* Specific Performance, Cent. Dig. § 46.]

#### 3. EXECUTORS AND ADMINISTRATORS (§ 135\*)—ORAL CONTRACT OF DECEDENT TO CONVEY LAND—SPECIFIC PERFORMANCE.

Rev. St. 1899, § 173 (Ann. St. 1906, p. 394), providing that the vendee, having a written contract with decedent for the conveyance of land, may present a petition to the probate court asking that the administrator be required to specifically perform by making a deed, does not authorize such performance of an oral contract made by decedent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 553; Dec. Dig. § 135; \* Specific Performance, Cent. Dig. § 46.]

#### 4. EXECUTORS AND ADMINISTRATORS (§ 135\*)—CONTRACT OF DECEDENT TO CONVEY—SPECIFIC PERFORMANCE—SUFFICIENCY OF PETITION.

Even if an administrator could be required to convey decedent's land, a petition to enforce conveyance is insufficient where it fails to allege that there are debts of the estate for the payment of which a sale of the land is required, and that the probate court has ordered the sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 553; Dec. Dig. § 135; \* Specific Performance, Cent. Dig. § 46.]

#### 5. SPECIFIC PERFORMANCE (§ 106\*)—CONTRACT BY DECEDENT—PARTIES DEFENDANT.

An action to enforce a contract, made by a person since deceased, to convey land, cannot be maintained without making the heirs of decedent parties defendant.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 347; Dec. Dig. § 106.\*]

Appeal from Circuit Court, Boone County; Alex. H. Waller, Judge.

Action by Harriet McQuitty against R. L. Wilhite and I. V. Evans, administrators of the estate of W. R. Wilhite, deceased. From a judgment for plaintiff, defendants appeal. Reversed.

Stephens & Collier, for appellants. W. M. Williams and E. W. Hinton, for respondent.

GRAVES, J. By the first count of the petition the plaintiff avers that at the request of the deceased, W. R. Wilhite, she went to his home, and that, after remaining there for six months: "The said W. R. Wilhite proposed, promised, and agreed that if plaintiff would remain with the deceased, W. R. Wilhite, and render to said W. R. Wilhite household services in the way of keeping house, doing washing, ironing, and perform any and all such other services incident thereto so long as the said deceased, W. R. Wilhite, should live, that he, the said deceased, would at or prior to his death make ample provision for plaintiff the rest of her days, and the further promise that she should be compensated and remembered far in excess of what she could make by working for wages. That plaintiff, then and there relying upon said promise and agreement, ac-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cepted the same and in good faith entered upon the discharge of her duties, and so continued to remain with and serve said deceased W. R. Wilhite, from said date, 1865, up to the time of his death, October ———, 1905, being a period of 40 years. That at all times plaintiff remained dutiful and faithful toward the deceased, W. R. Wilhite, in the capacity of housekeeper, and attended to all the duties incident thereto according to the directions of the said W. R. Wilhite, and at odd times worked upon the farm and made a hand for the said deceased. That for said services, so rendered as aforesaid, plaintiff has received no compensation, and that so far as plaintiff knows the said deceased, W. R. Wilhite, has utterly failed to make such provision as promised and agreed upon; but that plaintiff has in every particular carried out and complied with the agreement stated as aforesaid up to and after the death of the said W. R. Wilhite." Then follows the averment that reasonable compensation would be \$4,800, and judgment is asked in that amount. By the second count it is averred that, in addition to the promise mentioned in the first count, the said W. R. Wilhite "promised and agreed to give and devise to plaintiff the following described tract of land, to wit: [Description omitted.] In consideration that plaintiff remain with and perform all services incident to housekeeping and such other services in the way of attending to things outside, such as raising chickens, turkeys, etc., up to his death, that plaintiff, relying upon said promise in good faith entered upon and continued in the service of the said deceased, W. R. Wilhite, up to his death, and at all times rendered the services required of the plaintiff, and in accordance with the wishes of the said deceased." And by the prayer to said second count, the court is asked to specifically enforce this contract. Defendants are the administrators of W. R. Wilhite, deceased. Answer to the first count was general denial, plea of the five-year statute of limitations, as to all services rendered more than five years prior to death of W. R. Wilhite, and a plea of payment. Answer to second count was a general denial. Reply, general denial. Trial before the court, and judgment went for the defendants as to the first count, and for the plaintiff on the second count. Plaintiff abided the judgment of the trial court, but defendants, after unsuccessful motion for new trial, appealed to this court.

At the outset the defendants confront us with the proposition that no valid cause of action is stated against them in the second count of the petition, and therefore the judgment below must be reversed. The petition was not challenged below by demurrer, nor was there by answer any suggestion of a want of necessary parties. Defendants stand here on the broad proposition that no cause of action was stated at all as against them, and that such can be raised for the

first time in this court. It has long been held that, if a petition states no cause of action, such question can be raised here for the first time, and a judgment thereon should be reversed. *Davis et al. v. Jacksonville Southeastern Line*, 126 Mo. 69, 28 S. W. 965; *Hoffman v. McCracken*, 168 Mo., loc. cit. 343, 67 S. W. 878. We think defendants' contention is well founded. Administrators, the personal representatives of the deceased, have no interest in the lands. They take no title to the lands. Under an order of the probate court (Rev. St. 1899, § 130 [Ann. St. 1906, p. 379]), they can under certain conditions rent the lands, and by section 131, Rev. St. 1899 (Ann. St. 1906, p. 380), by order of court repairs to fences and buildings may be made by the ordinary administrator. By section 146, Rev. St. 1899 (Ann. St. 1906, p. 384), such administrator may on order of the probate court sell lands to pay debts. These sections cover all the rights an administrator has in the real estate, and none of them rise to the dignity of title in real estate. They are all mere rights contingent upon the order of the probate court.

In *Hale v. Darter*, 5 Humph. (Tenn.) loc. cit. 80, it is said: "The heirs, in such a case as the present, are the legal owners of the very estate sought to be conveyed. It does not belong to the personal representative either legally or beneficially, in trust or otherwise. He has nothing to do with the real estate." In 18 Cyc. pp. 297-299, the law is thus stated: "Neither an executor or an administrator has, as such, any inherent interest in, title to, or control over the realty of his decedent. The testator may, however, by his will, give to his executor such authority and control over real estate as he sees proper; and in some jurisdictions the statutes give to the executor or administrator a certain control over the land of the decedent, usually either for the purpose of preserving the same from waste during the course of administration, effecting a division and distribution among those entitled, or of subjecting the same to the payment of the decedent's debts in case the personal assets prove insufficient for this purpose. The authority of an executor in this respect is, however, strictly limited by the terms of the will, while a statutory grant to the personal representative of authority or control over the real estate of his decedent, being in derogation of the common law, must be strictly construed, and the rights of the representative restrained to those which are clearly given to him." So, also, it is said in 11 Am. & Eng. Ency. of Law (2d Ed.) p. 838: "At common law the real property of the decedent could not be subjected to his simple contract debts, but it descended directly to his heirs, who became liable for the debts by specialty or matters of record to the value of the inheritance, and in case of a deficiency of personal property the creditors by simple contract lose their debts. This rule

of common law was changed by statute at an early day, and the real estate of a decedent, in case of a deficiency of personal property, now descends to the heirs of a deceased owner, subject to the payment of his debts, for which purpose it may be sold in an appropriate proceeding."

Nor are we without authority in this state. In *Aubuchon v. Lory*, 23 Mo., loc. cit. 99, this court said: "The real estate of a deceased person descends, upon his death, to his heirs, or passes to the devisees under his will. By the common law the personal representative, whether executor or administrator, takes no interest in it, and our statute gives him nothing but the naked power to sell for the payment of debts, or to make short leases, under the direction of the county court. The right to the possession therefore belongs to the heirs or devisees, and they only are the proper parties to sue for any injury to it. It is upon this principle that executors and administrators, as such, are not allowed to maintain actions of ejectment." In this case the plaintiff, as executrix, was suing for trespass committed since the decease of the testator. Later in *Sturgeon v. Schaumburg*, 40 Mo., loc. cit. 485, 93 Am. Dec. 311, Holmes, J., said: "The real estate descended to the heirs or passed to the devisees. The personal representative takes no interest in the lands descended, but a naked power to sell for the payment of debts, and the possession as well as the defense of the title belongs to the heirs and devisees. The administrator had nothing to do with it. *Aubuchon v. Lory*, 23 Mo. 99." From this holding it would appear that the defense of the title to realty is for the heir or devisee, and not the administrator. In the case of *Thorp, Adm'r, v. Miller*, 137 Mo., loc. cit. 239, 38 S. W. 929, this court, through Sherwood, J., said: "The lands of a decedent descend to his heirs (or devisees, if so the will reads), and the possession of the land and defense of the title and all of its incidents belong to the heirs or devisees, and the personal representative has nothing at all to do with it—no concern in the matter. *Aubuchon v. Lory*, 23 Mo. 99; *Sturgeon v. Schaumburg*, 40 Mo. 482, 93 Am. Dec. 311; 2 *Woerner, Adm'r*, §§ 338, 463; 1 *Woerner, Adm'r*, § 276. And the equity of redemption of a mortgagor in like manner descends to his heirs. An administrator can do certain things in regard to the real estate of his decedent, as, for example, he may, under the provisions of section 129, Rev. St. 1889, rent the land of the deceased, where the probate court shall so order of record, in order to the payment of debts, and shall also order that the administrator take possession of such lands and rent the same, in which event, that section authorizes the administrator to maintain an action for the recovery of such land; but that section in explicit terms forbids an administrator to rent or control such real estate until such order be made. Outside of the order of the

probate court under permission and power expressly conferred by the statute, and outside of the duties which the statute prescribes, an administrator is an entire stranger to the real estate of the decedent. Thus he may purchase land of the estate sold under judgment of foreclosure rendered by the circuit court and take title thereto, just as any other stranger would. *Dillinger v. Kelly*, 84 Mo. 561. The statute, under which and from which an administrator exclusively derives his powers, nowhere authorizes a probate court to order an administrator to intervene as plaintiff in an action of this kind, and, if it did, there is no such order pleaded in the petition. From the foregoing considerations, it necessarily follows that the heirs of the decedent were the only parties who could maintain the present equitable proceeding." This was a suit in equity by Thorp, administrator of Cornelius Van Camp, deceased, the purpose of which was to set aside, for fraud and collusion, a sheriff's deed. The facts were that Van Camp owned 80 acres of land in Cass county upon which there was a school mortgage for \$1,000 and accrued interest. The equity was sold at the alleged fraudulent sale. If, as in this case, the mere naked right to sell the real estate of deceased, under order of the probate court, would confer no right in the administrator to sue for the protection of the estate and the landed interest thereof, then by no reasoning can we see how the shoe can be shifted and placed upon the other foot, in such manner as to say that such mere naked right to sell conferred any interest in the lands so as to authorize the administrator to defend an action involving the title. In the more recent case of *Hall v. Bank*, 145 Mo., loc. cit. 424, 46 S. W. 1000, we further said: "At the death of a person owning land the title descends to his heirs or devisees, and his personal representatives take no interest therein except a naked power to sell it for the payment of his debts. The possession of the land, as well as the defense of the title, belong to the heirs or devisees, and to no other person. The administrator has nothing whatever to do with it. *Sturgeon v. Schaumburg*, 40 Mo. 482, 93 Am. Dec. 311. He cannot maintain a suit to remove a cloud from the title thereto in the absence of an order of the probate court as before stated."

In the state of Iowa there was a statute as in this state which authorized a suit against an executor or administrator to enforce a contract to convey real estate, made by the decedent in his lifetime. There was also another section by which it was provided that it should not be necessary to make any other person a party to the suit, except the administrator or executor; but the court in its discretion might direct other parties to be made parties, and the heirs and devisees could on motion at any time be made parties. The Iowa court (*Judd v. Morely*, 30 Iowa,

loc. cit. 427), in discussing these statutes, in which case the heirs alone had been made parties, said: "But for this statutory provision, the action could not be brought against him. He represents only the personal property of the decedent. The real estate descends to the heir, and in the present case it is the heir who refuses to convey." Our section 173, Rev. St. 1899 (Ann. St. 1906, p. 394), is somewhat similar to the Iowa section first above mentioned. It provides that the vendee, having a contract in writing from the decedent for the conveyance of real estate, may present a petition to the probate court setting forth the facts and asking that the administrator be required to specifically perform by making a deed. By section 175 of the same statute (Ann. St. 1906, p. 395), notice must be served upon the administrator and also on the heirs and devisees. By section 179 it is provided that the action may be brought in the first instance in the circuit court, or, if first brought in the probate court, the executor or administrator, widow, or any heir or devisee may upon objection filed have it removed to the circuit court.

It will be observed that the contract referred to in this section must be one in writing, which is not the case at bar. This is the only case wherein by statute the administrator is required to be made a party, and our court has held that this statute does not apply where the contract to convey is not in writing. *Schulter's Administrator v. Bockwinkle's Administrator*, 19 Mo. 648. In the case last cited above, this court, speaking of this statute, said: "The special statutory proceeding for the specific execution of agreements against the administrators of vendors is only allowed where the agreements are in writing. Section 36. This case does not come within that statute." In the case at bar the defendants were sued in their representative capacity, and not otherwise. We do not think, under the authorities, that the bare naked contingent right to sell real estate to pay debts gives them such an interest in the real estate as to authorize an action against them for the specific performance of an oral agreement to convey real estate. In other words, the defense of the title to real estate belongs solely to the heir or devisee, except where by statute the general rule of the common law has been changed.

Under no circumstances does this petition state a cause of action, for, even if it be admitted, which we do not admit, that, by reason of the naked power to sell to pay debts, the administrators might have some interest in the realty and could defend the title, yet to make a good petition there should have been an allegation that there were debts, and that the land in question was necessary to pay debts, and further that the probate court had made an order of sale, because the right and power of an administrator is dependent

solely upon such an order. We do not place much stress upon this phase of the case, for in our judgment, except where otherwise provided by statute, the sole right to defend the title is in the heir or devisee, and not in the administrator.

It follows from these views that the second count of the petition stated no case or cause of action against these defendants, and this judgment should be and is reversed. All concur.

### VONKEY v. CITY OF ST. LOUIS.

(Supreme Court of Missouri, Division No. 1.  
March 31, 1909.)

#### 1. EVIDENCE (§ 10\*)—JUDICIAL NOTICE—GEOGRAPHICAL FACTS.

Neither the trial court nor the court on appeal can take judicial notice of the existence of streets in municipalities.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 10.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 771\*)—DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIANS—LIABILITY.

Where the unsafe condition of a street was occasioned by the sudden freezing at night of the snow and slush thereon, the city was not liable for injuries to a pedestrian, occurring about noon the following day, by slipping on the sidewalk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1627; Dec. Dig. § 771.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 771\*)—DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIANS—LIABILITY.

A pedestrian slipped on the ice on a sidewalk and was injured. Three or four days before, snow fell, followed by rain, rendering the sidewalk slushy. On the night before, a general freeze occurred, rendering the sidewalks slippery in places and uneven. Held, that the city was not liable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1627; Dec. Dig. § 771.\*]

Valliant, J., dissenting in part.

Appeal from St. Louis Circuit Court.

Action by Elizabeth Vonkey against the City of St. Louis. From a judgment refusing to set aside a nonsuit, plaintiff appeals. Affirmed.

Thomas Morris and Ed. L. Gottschalk, for appellant. Chas. W. Bates and Charles P. Williams, for respondent.

GRAVES, J. Plaintiff brought this action to recover the sum of \$10,000 for injuries alleged to have been caused by falling upon an icy sidewalk. She alleged notice of the condition upon the part of the city, and, further, that said condition had existed for such length of time that the city, in the exercise of ordinary care, could have known of the condition of said walk in time to have remedied the same prior to her injuries. The material portions of her petition are:

"Plaintiff states that on the 15th day of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

December, A. D. 1904, she had occasion to leave her house at 2906 Pine street to transact some business; that in returning from her business she came from Washington avenue to Ewing avenue, or Twenty-Ninth street; that there was snow and ice on the sidewalk on the west side of said Ewing avenue or Twenty-Ninth street, between Washington avenue and Locust street; that said snow and ice on the sidewalks on west side of said Ewing avenue or Twenty-Ninth street was rough and uneven and in ridges, and in an unsafe and dangerous condition to pedestrians traveling thereon, and that said snow and ice was in the said dangerous condition to pedestrians traveling thereon for several days prior to the 15th day of December, A. D. 1904. \* \* \*

"Plaintiff states that on said 15th day of December, A. D. 1904, at or about noon of the same day, she was walking on the west side of the sidewalk on Ewing avenue or Twenty-Ninth street between Washington avenue and Locust street, and exercising reasonable care in going to her residence south on Pine street, when she reached a point or place on said sidewalk on the west side of said Ewing avenue or Twenty-ninth street, about 100 feet north of Locust street, and about 20 feet south of the alley midway between Washington avenue and Locust street, and owing to the rough, rugged, and uneven and dangerous surface of the said sidewalk at said point or place, caused by the snow and ice that had prior thereto fallen and had been permitted to accumulate and remain on the said sidewalk by the defendant corporation's officers, agents, and servants in a rough, rugged, uneven, and dangerous condition, she slipped and fell, striking upon her right side with great force on the said sidewalk, and thereby, and by reason of the said fall, breaking the small bone of her right arm above and between the wrist and elbow, and wrenching and spraining the wrist of the right hand."

The answer of the city was a general denial, and a plea of contributory negligence. Reply general denial.

At the close of the plaintiff's case the trial court sustained a demurrer to the testimony, whereupon the plaintiff was forced to and did take a nonsuit. This nonsuit the court, upon timely motion made by plaintiff, refused to set aside, and thereupon the cause was by her appealed to this court.

From the evidence it appears that the accident occurred upon Thursday, just about noon. The case had been tried nisi prior to this trial, at which time the plaintiff evidently testified that the place where she fell was extremely smooth and slippery. In this testimony she explained that she was mistaken in the use of the preposition "on" for the preposition "by," as Germans frequently mix these words. In this trial she says that in the center of the sidewalk was a long, smooth, slippery place, and that to the side thereof it was rough, and she took the side

of the sidewalk, because she thought it safer. She also says that Thursday was a nice day, and the snow and ice had melted some, so as to make it slippery, and that in walking on the rough snow and ice on the side of the walk her foot slipped into a hole of some kind, and she fell onto this long, smooth portion in the center. From her evidence it appears that there was a general snow which fell either Sunday night or Monday night; that it was cold the day after the snow; that the snow was four or five inches deep, or more; that the day before the accident it rained so as to melt the snow; that the night before the accident at noon of the next day the snow and ice on the sidewalks froze hard; that the roughness in the snow and ice was occasioned by the footprints of travelers who had gone along before this freeze; that the frozen snow and ice at the place of accident was four or five inches deep. Two young ladies picked the plaintiff up just after her fall, and the roughness of the snow and ice at the point of the accident is by them described as being occasioned by the footprints of travelers on the walk. The testimony shows that the accident occurred on Ewing avenue at a point between Washington avenue and Locust street, at about the point named in the petition. The character of plaintiff's injuries need not be stated further than what the petition charges, as above set out. Such, in substance, are the facts of the case.

1. There are at least two good reasons for sustaining the action of the trial court in this cause. In the first place, there are three streets mentioned in the evidence, to wit, Ewing avenue, Washington avenue, and Locust street, as being at or near the locus of the accident. One witness, Fraudenstein, testified: "I am in the laundry business, 2907 Pine street. I have lived for about 35 years. I know the locality of Ewing, between Washington avenue and Locust street. It has asphaltum on the street. I know it to be a street at least twenty-five years." This is all we find in the entire record as to whether or not these streets are in the city of St. Louis, or that the accident occurred within the corporate limits of the city of St. Louis. Counsel for plaintiff seems to have proceeded upon the theory that not only the lawyers engaged in the case knew that the streets were in the city of St. Louis, and therefore the accident occurred in said city, but, further that both the trial court and this court were fully advised as to the locus of the accident and these streets. The trial court could not take judicial cognizance of the fact that these three streets were within the corporate limits of the city of St. Louis. This was a matter of proof, and the issue was made by the general denial. Nor can this court take judicial cognizance of such fact, if it be a fact. For this reason, if for no other, the demurrer to the evidence was properly

sustained. This loose method of trying cases in the large cities should be stopped. A few lines of testimony, or a short admission in the record, will suffice, but we cannot strain the doctrine of judicial cognizance to the extent of entertaining judicial knowledge of the existence of streets in municipalities, and will not do so.

2. Under the facts the city was not liable, and for several reasons:

(a) The city is not liable because the injury was occasioned by a sudden freeze the night before the injury at noon of the next day. No notice is brought home to the city, and one half day's time is not such as would permit the presumption of knowledge by the exercise of ordinary care. By the evidence it appears that whilst there was snow and slush on the sidewalk the day before the accident, yet it was safe for travel, and, if unsafe at the time of the accident, it was by reason of the sudden freeze of the night before, and not otherwise. Under such circumstances the city is not liable. *Hyer v. City of Janesville*, 101 Wis., loc. cit. 374, 77 N. W. 730; *Harrington v. City of Buffalo*, 121 N. Y. 147, 24 N. E. 188; *McNally v. City of Cohoes*, 127 N. Y. 350, 27 N. E. 1043; *Kinney v. City of Troy*, 108 N. Y. 567, 15 N. E. 728.

In the Wisconsin case cited supra, it was said: "If the walk was defective at all at the time of the injury, it was wholly caused by the sudden freezing of the soft slushy snow, spread evenly over it except as it was indented by footprints therein. Reasonable care did not require the walk to be scraped clean down to the planking, or that mere footprints made in the soft snow and frozen in that condition should be removed. They did not cause any obstruction to or render travel on the walk dangerous, tested by the standard of reasonable safety under the circumstances. The furthest the courts have gone on this question is to hold that snow and ice allowed to accumulate on a walk in an uneven and ridgy condition, so as to constitute an obstruction to public travel, renders it defective and actionably so."

In the *Harrington Case*, supra, the New York court, through Ruger, Ch. J., said: "The evidence established the fact that for four days previous to the accident the weather had been warm, causing the snow and ice on the walk to thaw, and become soft, wet, and sloppy. On the night previous to the accident the weather suddenly became colder, and the snow and slush in the streets froze hard, forming ice and leaving footprints, made during the previous sloppy weather, plainly visible in the frozen deposit. In some places the owners of property adjoining the walk had cleaned off the snow, but at the place of the accident it had not for some weeks been entirely removed. Much of the snow falling during that time had passed off through the natural effect of the elements upon it, but the portion referred to was what remained of a much larger ac-

cumulation. The walk, as thus shown, presented no unusual appearance for cities in our uncertain and inclement climate, and caused no more objectionable obstacle to safe passage than frequently exists in cities and villages during the cold season. Whatever might have been its condition, so far as danger was to be apprehended, it arose solely from its frozen and slippery condition, and that, as we have seen, was caused by the freezing of the night before the accident. The danger arising from the slipperiness of ice and snow lying in the streets is one which is familiar to everybody residing in our climate, and which every one is exposed to who has occasion to traverse the streets of cities and villages in the winter season. Accidents occurring from such causes are chargeable solely to the persons injured, unless it can be shown that the cause thereof has been occasioned, aggravated, or negligently permitted by the act of some third party charged with the duty of obviating or removing it. It was essential to the maintenance of this action that some breach of duty on the part of the defendant should have been proved, occurring prior to the happening of the accident, which was the cause of the alleged injury. We are of the opinion that the case made did not establish the existence of this essential fact. The proof fails to show that there was any unusual or dangerous obstruction to travel arising from snow or ice in the street, or, even if there was, that any such lapse of time had intervened between the period of its creation and the occurrence of the accident as afforded a presumption of knowledge in the municipality of its condition, or opportunity to remove the obstacle after notice was received. The duty resting upon municipal corporations to remove accumulations of ice and snow as it falls from time to time upon their streets is a qualified one, and becomes imperative only when dangerous formations or obstacles have been created and notice of their existence has been received by the corporation."

(b) The evidence shows a general condition to have existed in the city. Three or four days prior there was a general snow five or six inches deep. The day before was a rain, rendering the sidewalks sloppy and slushy. The night before there was a general freeze, rendering the sidewalks slippery in places, and slick and uneven (by reason of frozen footprints) in other places. Under such conditions there can be no liability upon the part of the city. The rule of liability is most aptly expressed by Valliant, J., in *Reedy v. Brewing Ass'n et al.*, 161 Mo., loc. cit. 536, 61 S. W. 862, 53 L. R. A. 805: "Snow and ice on sidewalks have been the occasion of many injuries to persons, and the lawbooks are full of instances where the duty of a municipality in respect to such conditions has been discussed. Running through all the cases to which our attention has been called

on this subject, we find the general proposition that ice or snow upon a sidewalk or in a street is not to be classed with dangerous obstructions, such as a city is required to remove. It would be more accurate to say that it is a dangerous obstruction, but that it is excepted from the category of obstructions for which the city is liable upon the ground of the impracticability of the city's removing it. There are, for example, in this city many hundreds of miles of sidewalks, upon which snow falls and ice forms when the weather suits, and immediately upon its fall the snow is beaten down by the feet of thousands walking over it. To some extent the sidewalks and streets may be and are cleared of such obstruction, but to remove it entirely, or to a degree that would render it not dangerous, is impracticable, and therefore not embraced in the law's reasonable requirements. There is another reason for making snow or ice on the sidewalks and in the streets an exception to that dangerous condition for which a city is liable; that is, when that condition exists generally, it is obvious, and every one is on his guard. Any pedestrian on the sidewalk or traveler in the street is warned by all his surroundings that ice and snow abound, and consequently danger of slipping and falling is to be apprehended at every step. The law is reasonable in this, as in all things."

All the evidence in this case shows that the roughness and unevenness at the point of injury was only such as was occasioned by footprints made in the slush and wet snow of the previous day which had frozen the night before the accident. There are cases which hold that where ice is permitted to accumulate in high, rough, and uneven ridges, and to thus remain, there is municipal liability, but this case does not even fall within the rule of those cases because of the absent facts.

Upon the facts of the case at bar, the trial court should have sustained the demurrer, and its judgment should be, and is, affirmed. All concur, except VALLIANT, J., who concurs in result and all the opinion except paragraph 1, to which paragraph he does not agree.

### PULLIS v. SOMERVILLE.

(Supreme Court of Missouri, Division No. 1.  
Feb. 25, 1909. Rehearing Denied  
March 31, 1909.)

#### 1. REFERENCE (§ 42\*)—REFEREES—OATH.

Under Rev. St. 1899, § 703 (Ann. St. 1906, p. 710), directing that the oath of a referee be taken "before some officer duly authorized to administer an oath," and that "it be filed and returned with the award," it is not necessary that the oath should be marked "Filed" by the clerk of the court.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 42.\*]

#### 2. MONEY LENT (§ 7\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence in an action to recover money loaned *held* to sustain a finding of the referee and judgment of the court for plaintiff.

[Ed. Note.—For other cases, see Money Lent, Dec. Dig. § 7.\*]

#### 3. INTEREST (§ 12\*)—LIABILITY FOR MONEY WRONGFULLY USED.

Where money was given defendant for investment, and he deposits it with his own money and checks against it as his own money, he is liable for interest thereon.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 23; Dec. Dig. § 12.\*]

#### 4. DEEDS (§ 208\*)—EVIDENCE OF ACCEPTANCE.

Evidence in an action to recover money loaned *held* not to show an acceptance of deeds of property which defendant alleged that he had transferred to plaintiff.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 208.\*]

#### 5. LANDLORD AND TENANT (§ 183\*)—IMPLIED AGREEMENT TO PAY RENT.

Where plaintiff occupies a place during several months, with a view to buying the same if she is satisfied with it, and at the end of the time leaves it, not being satisfied, no agreement for the payment of rent will be implied from the circumstances.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 736; Dec. Dig. § 183.\*]

#### 6. REFERENCE (§ 89\*)—REQUISITES AND SUFFICIENCY OF REPORT—SEPARATE FINDINGS ON EACH ITEM.

Where defendant, in an action for money loaned, answers "that at the request of plaintiff defendant paid out from time to time various sums of money for her on account, as appears by detailed statement attached and marked 'Exhibit A,'" and the exhibit is so vague as not to give the referee an intelligent understanding of what the various items mean, and many of the items testified to by defendant do not show under what item in the exhibit they should be placed, it is not necessary for the referee to make a separate finding for each of the items in the exhibit.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 89.\*]

#### 7. PLEADING (§ 310\*)—EXHIBITS—OPERATION AND EFFECT.

An exhibit is no part of the pleading, and per se tenders no issue calling for a separate verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 944; Dec. Dig. § 310.\*]

#### 8. DEEDS (§ 200\*)—DELIVERY AND ACCEPTANCE—ADMISSIBILITY OF EVIDENCE.

In an action for money loaned, defendant alleged the transfer of certain houses to plaintiff as part payment of her account against him. Plaintiff contended that she did not accept the deeds of the premises, and it was shown in evidence that her counsel took the deeds to examine the title, under an agreement to accept them if satisfactory, and her counsel testified that on his investigation he found that the property had recently been transferred by defendant to an insolvent relative, and that at the time of the transfer suits were pending against defendant which soon ripened into judgments against him, and that a title guaranty company refused to guarantee the title, and a number of court records were introduced showing judgments against defendant, and a certified copy of a deed from defendant to his relative was also introduced. The deeds by which defendant offered to transfer the property to plaintiff were deeds of his relative. *Held*, that the evidence was ad-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



missible as bearing on the question of whether plaintiff had accepted the deeds.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 200.\*]

**9. MONEY LENT (§ 7\*)—ACTIONS—ADMISSIBILITY IN EVIDENCE.**

In an action for money loaned, defendant alleged that he had transferred to plaintiff, without her knowledge and consent, certain worthless shares of stock in a mining company. *Held*, that evidence to show, not only the condition of the company at the time of the alleged transfer, but that it grew worse as time went on, and also evidence of its condition two years after the date of the alleged transfer, at which time plaintiff ascertained that the stock had been transferred to her, was properly admitted as bearing on the question of defendant's good faith in trying to sell the stock to plaintiff.

[Ed. Note.—For other cases, see Money Lent, Dec. Dig. § 7.\*]

**10. REFERENCE (§ 100\*)—REPORT—OBJECTIONS AND EXCEPTIONS.**

Exceptions to the report of a referee that "referee has erred in all his calculations of interest," and that "the referee has erred in his method of calculation of interest, the same being contrary to the law of this state," and that the referee ought to have allowed defendant interest on each item of his credits from the date of payment, do not raise the objection that the referee allowed plaintiff compound interest.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 100.\*]

**11. INTEREST (§ 58\*)—COMPUTATION—RESTS IN COMPUTATION.**

Where there are mutual running accounts, interest may be given on both sides until a balance is struck, and then interest runs only on the balance, and, when a part payment is made on a debt, interest should not be computed on the money paid, but only the balance due on the debt.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 181; Dec. Dig. § 58.\*]

**12. INTEREST (§ 60\*)—COMPUTATION—"COMPOUND INTEREST."**

Computing interest with annual rests constitutes compound interest.

[Ed. Note.—For other cases, see Interest, Dec. Dig. § 60.\*]

For other definitions, see Words and Phrases, vol. 2, p. 1373.]

**13. TRUSTS (§ 219\*)—MANAGEMENT—INTEREST ON FUNDS OF ESTATE—COMPUTATION—COMPOUND INTEREST.**

Rev. St. 1899, § 3711 (Ann. St. 1906, p. 2080), which allows compound interest only on an express written contract therefor, does not apply to the accounting of a derelict trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 314-317; Dec. Dig. § 219.\*]

**14. APPEAL AND ERROR (§ 221\*)—RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW—ERRORS APPARENT FROM RECORD.**

As a plaintiff can only recover on a case made by her own pleading and proof, and in an action to recover money loaned on asking for interest cannot recover compound interest, the objection to the report of a referee allowing compound interest may be taken for the first time on appeal, the error being one appearing on the face of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1145; Dec. Dig. § 221.\*]

**15. INTEREST (§ 56\*)—MODE OF COMPUTATION IN GENERAL.**

Interest should be calculated on a demand up to the first partial payment and added to the principal, and the payment deducted therefrom,

and then interest computed on the remainder to the second payment, and so on until the last partial payment, unless in any case the interest up to any payment shall exceed the payment, in which case the payment is to be deducted from the interest and the excess of interest carried forward without casting interest thereon to the next payment that will discharge the excess.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 129; Dec. Dig. § 56.\*]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Angeline E. Pullis against William Somerville. Judgment for plaintiff, and defendant appeals. Affirmed.

H. A. Loevy, for appellant. Rassieur, Schnurmacher & Rassieur, for respondent.

VALLIANT, J. This is an action to recover moneys loaned by plaintiff to defendant. The first item mentioned in the petition is \$3,500, a legacy under the will of Jason Crawford, bequeathed to defendant in trust, to pay the interest to testator's sister, Elizabeth Somerville, during her life, and the principal to the plaintiff at the death of Elizabeth. Elizabeth died September 22, 1883, and plaintiff, then being entitled to the principal, loaned it to the defendant at his request, on the agreement that he would pay it to plaintiff on demand and 8 per cent. interest per annum. The petition also states that in November, 1894, she loaned defendant \$25,000, which she at that time received from the Equitable Life Assurance Society of New York, \$5,000 from the Massachusetts Mutual Life Insurance Company, and \$3,015.16 from the Mutual Benefit Life Insurance Company. The petition admits the payment to her in 1893 of \$1,400 on account of the loans, and the same amount in 1895, and avers that in 1895, about four months after the life insurance moneys were loaned as above stated, defendant rendered the plaintiff an account of his indebtedness to her, showing the amount due her for principal and interest \$34,500, which sum he agreed and promised to pay on demand, with interest at 6 per cent. per annum. The petition then states that from November, 1894, up to and including September, 1899, the defendant paid plaintiff monthly, on account of the indebtedness, various sums ranging from \$150 to \$200 per month (she is unable to state it more accurately), and not any more. The prayer of the petition is for a judgment for \$34,500 and interest from November, 1894, less such sums as the court may find the defendant may have paid on the account.

The answer is, first, a general denial. Then follows an admission of having received from plaintiff \$32,500, which it states defendant was to keep and invest for plaintiff. Then there is a statement that he paid out for her from time to time sums aggregating

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

\$28,611.27, of which he files a list marked "Exhibit A"; and in addition thereto that he paid out for rent for her \$1,000 a year from 1895 to 1900, inclusive—total \$5,000; that in 1898, at her request, he delivered to her 50 shares of stock of the Andes Mining Company, for which he paid \$5,000; that in 1899 he paid her amounts collected by him as rent for the house at Westminster place in the city of St. Louis which he had purchased, \$100 per month—\$1,200; that in 1900 he deeded to her two houses in Westminster place subject to mortgages, the equity in which by agreement was fixed at \$12,000; that in 1900 "he assigned to her by way of power of attorney" to collect a portion of an estate in Ireland, valued at \$4,000; that he gave sums to her sons at her request from time to time, and paid out expense money for moving her family to New York, and money sent her when she was in Europe aggregating \$1,000. Total payments alleged to have been made, \$56,811.27, "largely in excess of what was received by him from her, for which, with interest, he prays judgment." The reply joins issue on all of those averments.

The suit was filed to the December term, 1900, of the St. Louis circuit court. At the February term, 1901, March 18th, defendant filed his amended answer, as above, and by stipulation filed the cause was on that day referred to George E. Smith, Esq., to try all issues and report. The trial was long, running through several years apparently, and the referee filed his report January 15, 1906. The report is full, covering all the disputed facts, and covers 15 printed pages. The referee in the conclusion of his report finds that there was a balance due the plaintiff at that date, January 15, 1906, of \$35,167.98, for which sum, with interest at 6 per cent. per annum from that date, he recommended that judgment in the plaintiff's favor be rendered. The defendant filed 31 exceptions to the referee's report, which were by the court considered and overruled; then followed motions for a new trial and in arrest, which were also overruled. Final judgment for the plaintiff in conformity to the referee's report was rendered, and the cause comes here on defendant's appeal.

1. Before entering upon a consideration of the case on its merits, we will notice a point made by appellant which if sustained would annul the whole trial and send the cause back to be tried all over again. The point, as stated in appellant's brief at page 139, is: "The record does not show that the referee ever took the oath of office mandatory required by statute, Rev. St. 1899, § 703 (Ann. St. 1906, p. 710), which invalidates his report and findings." The cause comes here on a short transcript, supplemented by an abstract of the record filed by appellant, in which there is no mention of the referee's oath or any allusion to that subject. Appel-

lant's statement in his brief is that "the record does not show that the referee ever took the oath." If by the use of those words appellant means to say that neither the short transcript nor the abstract filed by him shows that the referee took the prescribed oath, the statement is correct, but if he seeks to convey the idea that the record in the circuit court does not show that fact, then he should have so stated. The record in this court is one thing, that in the circuit court is another; a fact may be omitted in so much of the record as appellant sees fit to bring here, yet appear in the circuit court record. Therefore a party complaining here that a certain act, which he deems essential to the validity of the proceeding in the circuit court, was not done, must show us either by producing a full transcript of the record of the circuit court, or else show by his abstract, in some unequivocal form, that the record in the circuit court fails to show that fact. Appellant does not say that the record in the circuit court does not show that the referee took the oath, nor does his abstract in terms purport to show what the record in the circuit court shows on that subject, but he only says that "the record" does not so show, by which we understand that the record which he has brought here—that is, the short transcript and his abstract—do not so show.

What we have just said is well illustrated by the facts of this case. After appellant had presented his brief containing this point, respondent, as she had the right to do, filed a counter abstract in which, with other matters, she has set out the oath of the referee in due form taken before the clerk on the next day after his appointment and before he began the trial. Section 813, Rev. St. 1899 (Ann. St. 1906, p. 783), gives appellant the right, if he does not concur in this additional abstract, to file his written objections thereto, and he has availed himself of that right and filed an objection, the substance of which is that the oath does not bear the file mark of the clerk. We notice the change in the attitude. First he said or sought to imply that there was no oath, but when the oath is produced he says it does not bear the file mark. There is no question as to the form and validity of the oath; it bears the signature of the referee and that of the clerk certified under the seal of the court, but it does not bear the file mark of the clerk, and for this reason appellant contends that the whole proceeding is a nullity.

Section 703, Rev. St. 1899 (Ann. St. 1906, p. 710), directs that the oath to be taken "before some officer duly authorized to administer an oath," and that it "be filed and returned with the award." Appellant's point is that it was not marked "filed" by the clerk nor returned by the referee with his report. The statute is broad enough to authorize the oath to be taken outside of the

court or outside of the clerk's office, before a notary or any officer authorized to administer an oath, and when so taken it would likely remain in the possession of the referee himself, and in that event it would be necessary for him to return it with his report into court. But when taken before the clerk and left with him it is filed; the indorsement "filed" by the clerk is only evidence of the fact. In *Grubbs v. Cones*, 57 Mo. 83, the court said: "The filing is the actual delivery of the paper to the clerk, without regard to any action that he may take thereon."

In *Voght v. Butler*, 105 Mo. 479, 16 S. W. 512, among other exceptions to the referee's report, was one that it did not appear in the record that the referee had taken the oath; but on the hearing of the exceptions in the circuit court proof was made by affidavit to the effect that on the day the referee was appointed the oath was administered to him by the judge of the court, though no record or memorandum of it was made; upon that proof the circuit court allowed the referee to amend his report by interlining the statement that he had taken the oath. In passing on that question this court, per Gantt, P. J., said: "It is too late to object to the referee's report on this ground after all this acquiescence and consent. The subscribing of the oath was directory. The taking of the oath was the substantive fact required by law; the subscribing and filing it was intended to preserve the evidence of the compliance with the law. The attorney for the plaintiff appeared before the referee, examined and cross-examined the witnesses, and argued the cause before the referee, and made no objection at any stage of the proceedings on account of the referee not having subscribed and filed an oath. We think the objection is wholly without merit."

In the case at bar we have the oath duly subscribed by the referee and certified under the hand of the clerk and seal of the court, and lacking only the file mark of the clerk. Unusually long and apparently painstaking has been the trial, no hint of disqualification of the referee is made during the trial nor in the 31 exceptions to the report filed by appellant, nor in his motion for a new trial or in arrest of judgment, but only when the cause reaches this court is the supposed infirmity noticed. There is no merit in that point.

2. The evidence shows that the plaintiff is the sister of the defendant. The trust in him of her money affairs is shown to have commenced before the death of her husband, as early as 1883, when she loaned him £700 sterling. That was a sum that Jason Crawford had bequeathed to defendant to be held by him during the lifetime of the testator's sister, Elizabeth, the interest to be paid to her, and on the death of Elizabeth the principal sum to be paid to the plaintiff. When the life beneficiary died it was agreed be-

tween the plaintiff and defendant that he would retain the money as a loan and pay her 8 per cent. interest per annum on the same. There is no dispute about that.

The plaintiff's husband died in 1894, leaving three life insurance policies payable to her, one in the Equitable for \$25,000, one in the Massachusetts Mutual for \$5,000, and one in the Mutual Benefit for \$3,015.16. These several sums were collected in November, 1894, and placed in defendant's hands. The only difference between plaintiff and defendant as to those items is that she says they were loaned to him, while he contends that they were placed in his hands to be by him held without interest and invested for her. The referee decided that point against the defendant, and his decision is supported by the weight of the evidence. The only testimony in support of defendant's contention on that point was his own, and it was borne down by the testimony of the plaintiff herself and other witnesses, and by the course of dealing in which he paid her from time to time interest on these sums, and sometimes cautioned her that she was encroaching on the principal. But it is really of not much consequence what the original understanding or agreement was on that point, except as it may bear on an investment he claims to have made for her in stock of a mining company which owned or claimed to own certain mining property in South America, which alleged investment will be hereinafter again referred to and considered. But whatever may have been the original understanding, a very significant fact stands out concerning these life insurance moneys; that is, it was all placed in the hands of the defendant by his trusting widowed sister, and he gave her no note or memorandum, not even a receipt for the money. More implicit confidence could not have been shown than the plaintiff showed of her faith in the defendant; he was her brother, and she trusted him with her all. What did he do with it? According to his own statement as a witness, he deposited it in the treasury of a corporation of which he was then president, called the "Missouri Glass Company," to his own credit, and it became mingled with his own funds; he checked against it as his own money, and sometimes his account with that company was overdrawn. That was his own testimony. If, therefore, as he now claims, he was only custodian of the money, he made a use of it that he had no right to make. After thus appropriating it to his own use, he cannot complain if he is charged with interest.

The evidence shows that in January, 1895, the plaintiff requested defendant to give her a statement of account showing the amount of his indebtedness to her, and he accordingly gave her a little book containing the account as he reckoned it, which embraced

the Jason Crawford legacy, \$3,500, and the several life insurance sums, and, with items of interest on one side and credits on the other, showed a balance of something over \$34,500 due the plaintiff on January 1, 1895. This little book is referred to by the witnesses as the "red book," it being bound in red leather. When plaintiff was leaving St. Louis to go to New York in 1898 she requested the defendant to continue the account down to date, and for that reason she sent the red book to him, and, though several times requested, he never returned the book to plaintiff or gave her any statement of the account. Defendant in his testimony denied that book was returned to him, and denied that it showed a balance of \$34,500 in plaintiff's favor, but he did not say what the balance was. A brother of the plaintiff and defendant testified that he was present when Mrs. Pullis asked defendant to return the red book to her, saying it was the only thing she had to show the account between them, but that defendant stated that he had returned the book to her. This she denied, saying to him that she had sent to him for it several times and he had not returned it. The preponderance of the evidence is that the book was returned to defendant with the request that the account be brought down to date, and that he never returned it and never rendered any other account. The brother of plaintiff and defendant above mentioned also testified that at another time he told defendant that plaintiff had told him that she had asked defendant several times to give her a statement of the account, but that he had not done so, and witness asked defendant why he had not done so, and defendant replied that he would not do so for the reason that if he gave her a statement it would admit of her taking a judgment against him at once.

Sufficient appears to put it beyond question that the defendant at the several dates mentioned in the petition received the several sums of money as in the petition stated, and the only questions left to be considered relate to the credits to which the defendant is entitled. Before going into the smaller items we will notice some of the larger amounts which defendant claims as credits.

(a) In August, 1900, defendant gave plaintiff a power of attorney to collect his share of the estate of an aunt of theirs, Miss Sophia Crawford, in Ireland, and he claimed in his answer to be entitled to a credit for that share. We infer from the abstract that at the time he gave this power of attorney the aunt was living but has since died. He never before this suit gave the plaintiff an assignment of that interest, and when requested refused to do so. But in his answer to the petition he said that he "assigned to her by way of power of attorney" that interest, and in his testimony he said that he gave her the power of attorney to collect his share in

that estate and kept it for herself. Upon that pleading and evidence the referee allowed the defendant \$3,000 as a credit on that account. Although the power of attorney, standing alone, would not have been equivalent to an assignment, yet taken in connection with defendant's plea, and his own evidence and the allowance to him of that sum in the account, and the plaintiff's acquiescence in the allowance, it is sufficient. The plaintiff has never collected this item, and she might well have objected to the allowance, but, as she has acquiesced in the ruling of the referee, the ruling will stand, and the judgment of the circuit court on the ruling was a transference of the title in that fund to the plaintiff. The defendant's attitude or attitudes in reference to this item are not consistent. In his answer he pleads this item as one for which he is entitled to a credit of \$4,000, as a payment on the account, and in his testimony he said that he gave the plaintiff the power of attorney with the agreement that she was to collect it and keep it. At the trial he insisted that he had, in that way, assigned that item to the plaintiff and was entitled to a credit of \$4,000, which he said his share in that estate was worth. But Mrs. Pullis, after the aunt's death, went to Ireland to look after that very matter, and she there ascertained that his share when the estate would be settled would be \$3,000, and she so testified, and the referee found that to be the value, and gave defendant credit for that sum. But the defendant now says in his brief (page 111) that the referee erred "in deducting defendant's share" in that estate at all, because, he says, he never did assign it to the plaintiff. The power of attorney was given while the aunt from whom the inheritance was expected was living, and she was living when the answer was filed claiming that as a credit, but before the trial ended the aunt died, and then the prospect of collecting his share of the estate became more real; and he now insists that that item should not go into this account at all—he would now apparently rather collect that share himself and owe the plaintiff that much more. We think the referee took the just view of that transaction.

(b) Just before this suit was commenced the defendant claims to have invested \$5,000 for the plaintiff in the purchase of 50 shares of the Andes Mining Company, a corporation of which he had been president. The only property that corporation ever had was an undeveloped mining property in South America. The evidence shows that at the time of the alleged "investment" the corporation was entirely insolvent, and, as the referee found, the stock was "a liability rather than an asset." This was said in allusion to the condition of the company's affairs as shown by the evidence; the mines were yielding

nothing, expenses had accumulated, debts incurred, assessments were being solicited from unwilling shareholders, efforts were being made to induce others to buy stock to raise funds to develop the mines, but the efforts were unsuccessful. This transaction the defendant conducted all within himself; he was the owner of 81 shares, and was president of the company, and he transferred 50 of his own shares to the plaintiff, as he testified, for \$5,000 in cash. This he said he did in 1898, and it was not until nearly two years thereafter that he informed Mrs. Pullis, the plaintiff, of the "investment." She had never heard of it before, and never consented to it when she was informed of it. The first information the plaintiff received of the alleged transfer of this stock to her was in 1900, after she had placed her cause in the hands of her attorneys, and after her attorneys had demanded of defendant a settlement. On the trial before the referee, defendant was asked if he had instructions from Mrs. Pullis to make the purchase for her. He answered, "No, I had not; it was not necessary." That answer was on the theory that he was trustee for the plaintiff, holding her funds to be invested according to his own judgment. Even if he had not, as his own evidence showed he had, already converted the whole alleged trust fund to his own use, even if he had her money then in a separate treasury for her use, his investment of \$5,000 of her money in the purchase of his own worse than worthless stock would have been set aside in a court of equity as an abuse of the trust. The referee did not err in rejecting that item.

(c) The referee in his report says: "The defendant also claims a credit of \$12,000, the alleged value of an equity in two houses and lots on Westminster place transferred to the plaintiff by one Henderson at his request. I find from the evidence that the deed for this property was not accepted by the plaintiff. She did agree, through her attorney, to take the property if the title was such that the loan, then past due, could be renewed. An examination was made, and the examiner reported a large number of suits and judgments in existence which endangered the title. On this report a loan was refused, unless a guaranty of the title was procured. On application for a guaranty to a trust company, that was refused, and the deed from defendant's transferee was tendered back, and is again tendered in the reply. On this evidence I find that the deeds for the property were never accepted, and that defendant is not entitled to the credit he claims on that account." The testimony shows that after the plaintiff's case was in the hands of her attorneys, and the suit was either already begun or was imminent, the defendant offered to the plaintiff deeds to these two Westminster place houses. This occurred in the office of plaintiff's at-

torney, and defendant testified that he handed the deeds either to Mrs. Pullis or to Judge Rassieur, her attorney—he did not quite remember which. Judge Rassieur testified that when the deeds were offered he agreed to accept them for Mrs. Pullis, provided, after examination, he found the title to be satisfactory; that he afterwards made the examinations, and was not satisfied with the title, and refused to accept the deeds. He tendered them back to defendant, who refused to take them; tendered them also in plaintiff's reply and at the trial. We will refer to the evidence on this point again when we come to consider some objections offered to it by defendant at the trial. We are satisfied the referee did not err in refusing to give defendant credit for those houses in the account.

(d) Appellant assigns as error the refusal of the referee to allow him \$1,000 credit for rent of a place in the country called the "O'Day place." There was no claim in the answer for such a credit, and, so far as the evidence shows, the first time that claim was advanced was in February, 1905, long after the commencement of the trial before the referee. The evidence shows that the family moved on the place in 1891 on the suggestion of defendant in the following letter written by him to the plaintiff, dated May 4, 1891: "Dear Sister: The thought occurs to me in view of the many charms of the O'Day place and your love for a home to offer it to you. The balance coming to you and the difference for a gift will make it yours. I will advance what is necessary to build a house to your taste. Don't say no to this until you and Gus will come out with me and look and talk it over, as I feel this suggestion will do you good, Yours W." The "Gus" mentioned in the letter was the plaintiff's husband. As bearing on the question of the defendant's indebtedness, we must note that that occurred before the defendant had received the moneys paid by the life insurance companies, and he had then only the Jason Crawford legacy of \$3,500. The Pullis family remained on the place several months, the dwelling house having been destroyed by fire before they moved out there. They lived in the barn for several months, and, not finding the place to their taste, they moved back into the city. Defendant does not claim that there was any agreement to pay rent; it was only an experiment to see if Mrs. Pullis would be pleased to buy the place, but he says it was his understanding that she would pay rent, and when asked why he had not mentioned it earlier he said it was because she was his sister. Appellant now insists that although there was no express agreement to pay rent, yet the law will imply such an agreement by the mere fact of occupancy. Sometimes the mere fact of occupancy will raise an implied assumption to pay rent, but not always so, and

never so when all the circumstances repel the implication. The circumstances shown in the evidence in this case do repel such an implied promise. Besides, if there was nothing else in the case to be considered than the mere fact of occupancy, and if from that fact an implied agreement to pay rent arises, then it is the implied agreement of the husband of the family, and not of the wife. The referee was right in his judgment on that item.

(e) Defendant insists that the referee should have allowed him \$2,800 credit for premiums he had paid on the life insurance policies during the lifetime of the plaintiff's husband, whereas the referee allowed him only \$1,400 on that account. The evidence shows that the plaintiff's husband was a man of business affairs and reputed wealthy. While he lived he provided for his family, and there was but little, if any, occasion for Mrs. Pullis to draw on the Jason Crawford legacy fund then in the hands of the defendant. She testified that in addition to the fund in the defendant's hand she had from another source an income of \$40 a month. But the testimony of defendant shows that he did pay some of the premiums on these policies, that he did so at the request of Mr. Pullis, and did not mention the fact to Mrs. Pullis because Mr. Pullis had requested him not to do so, and defendant's testimony also shows that he took Mr. Pullis' notes for the premiums so paid, two of which notes, covering the last two largest premiums, were produced in evidence attached to the receipts. As the payment of these premiums was a matter between Mr. Pullis and the defendant, concerning which Mrs. Pullis was purposely not informed, the only evidence in relation to them available at the trial was that of the defendant himself. The receipts from the insurance companies were all made in the name of Mr. Pullis, and the evidence shows that when the policies were delivered to the defendant for collection after the death of Mr. Pullis many of the receipts were folded in the policies; and, besides, he had access to all Mr. Pullis' papers, therefore, unless the defendant had kept a more careful account of his dealings with the plaintiff's funds than his own evidence shows that he did keep, he may have been mistaken and have supposed that he had paid more premiums than he did pay. He testified that he took notes from Mr. Pullis for premiums paid other than the two produced, but he did not exhibit them at the trial.

The only premium paid by defendant that the evidence shows that the plaintiff had any information about was one paid in the last year of her husband's life, which she testified her husband asked her to allow the defendant to pay out of the Jason Crawford legacy, and she consented; that premium, she testified, was about \$1,400; on proof at

the trial it was shown to be \$1,381.83. The referee gave the defendant credit for \$1,400 on that account, which was full as much as the defendant's own evidence showed that he had any reason to claim, and really that much more than in strict legal right he was entitled to, because the preponderance of the evidence indicates that defendant had already taken credit in the "red book" for all the premiums that he had paid, together with doctor's bills and funeral expenses and other expenses incident to the last illness of Mr. Pullis, which were proper charges against the estate of plaintiff's husband and not against her. But defendant insists that the plaintiff in her petition admits that he is entitled to two items of \$1,400 each on this account. The clause in the petition on which this claim is founded is in the paragraph relating to the loan of the Jason Crawford legacy, and is as follows: "Plaintiff states that in the year 1893 the defendant paid about fourteen hundred dollars (\$1,400) at plaintiff's request on account of said loan, and in the year 1894 defendant paid the further sum of about fourteen hundred dollars (\$1,400) at plaintiff's request on account of said loan." The petition does not say that those two \$1,400 items were premiums on the policies, or that either of them was, and the evidence does not show that to be the fact. The referee found that the second one, the one paid in 1894, was for the premium that plaintiff in her testimony admitted she had authorized to be paid out of her Jason Crawford legacy, and that accords with the evidence. The first \$1,400 mentioned doubtless referred to other payments made prior to the death of plaintiff's husband. The account stated in the "red book" was made out by the defendant and given to the plaintiff as his own statement of his indebtedness to her on January 1, 1895, and the preponderance of the evidence is that the balance there shown on that date was something over \$34,500, but less than \$34,750. The plaintiff testified in reference to the account in the red book: "The funeral expenses, doctor bills, and other expenses of last illness of my husband, and family expenses up to January 1st, and insurance premiums were taken out, and left a balance of \$2,800 due on the note and interest. The note in 1888 was for \$3,900, and drew 8 per cent. interest." Those of plaintiff's witnesses who saw the red book also stated that it contained insurance premiums. The defendant himself testified: "It is my impression that I entered all the payments made by me for insurance premiums in the red book, but I won't testify exactly." If the referee had taken the balance shown by the red book as an account stated, and had heard evidence only as to items occurring after that date, he would have been entirely justified in so doing, and if the plaintiff were here appealing she might insist on eliminating the items of credit allowed prior

to that date. We are not overlooking the fact that defendant denied the testimony of the plaintiff and of her witnesses as to the contents of that red book, but he stands alone on that point. He also denied that the book had been returned to him to bring the account down to date, yet his brother testified that he was present on one occasion when Mrs. Pullis asked him to return the book to her, saying that it was the only writing she had to show how the account stood, whereupon the defendant replied that he had already returned it to her, which she strenuously denied, and subsequently defendant told the same brother that the reason he did not return the book to Mrs. Pullis was that if he did so she could take a judgment against him at once. Thus we find him at one time denying that the book had been returned to him, then saying that he had returned it to the plaintiff, and, afterwards, that the reason he had not returned it to her was that, had he done so, she could at once take a judgment against him. If, therefore, the referee concluded that the defendant's statement as to what the book contained was less reliable than the statements of the plaintiff and other witnesses who saw the book, we cannot say that he was wrong in his judgment. We think that in allowing the defendant \$1,400 on account of premiums paid the referee allowed him that much more than he was strictly entitled to, but, as the plaintiff was willing to allow it, the referee was justified in doing so, but we also hold that the referee did not err in not allowing him the other \$1,400 now claimed.

(f) Defendant paid the rent on the house in which the plaintiff was living at the time of her husband's death, and has charged that as cash paid her in his account. The referee has allowed that item. Defendant had three vacant houses, two of which were in Westminster place and the other on Washington avenue, all of which he desired to sell. In July, 1895, plaintiff moved into one of the Westminster place houses with the agreement, as she testified, that she would take care of the houses, show them to prospective buyers, and assist in the effort to sell them. Nothing was said about rent at that time, but after one of the houses was sold and the one adjoining the house in which she was living was rented, she told the defendant that she would pay him the same rent he was to get from the other house \$60 a month, and he agreed to that. In his account he has charged this rent as cash paid to Mrs. Pullis, and the referee has allowed him those items in the account; but in 1899 the plaintiff rented the house furnished with her own furniture at \$100 a month, which defendant collected and remitted to her, and charged her as cash the full sum of \$100 per month, while at the same time he was renting the adjoining house exactly like it, but unfurnished, for \$60 a month. The referee con-

cluded that the extra amount of rent collected for the furnished house was due to the fact that it was furnished, and therefore allowed defendant only \$60 a month for the house. Defendant complains of that ruling. We think the referee was right.

3. In addition to the items above discussed, the defendant has filed, as Exhibit A to his answer, a list of over 300 items which he claims as credits, and which aggregate \$28,611.27, and which, if added to the items already discussed and claimed by him, would make a total of \$56,811.27. We do not consider it necessary to discuss and set out in this opinion the evidence bearing on each of those 300 items. Some the referee has allowed, and some he has not allowed. We have read all the evidence shown in the two abstracts bearing on the alleged payments, and we find no fault with the referee's finding. The only specific complaint appellant now makes in reference to those 300 items is that the referee does not make a separate finding on each of them. Appellant in his brief says he cannot know from the report which items were allowed and which not allowed. The referee was not required to make a separate finding on each of those items; they were not set out in the pleadings in such a manner as to call for a separate finding as to each item. On each item specially pleaded in the answer the referee has made a separate finding; but these 300 items are pleaded in a lump, and the referee would have been entitled to treat them in a lump. This is the way in which these items are pleaded in the answer: "That, at the instance and request of plaintiff, defendant paid out from time to time various sums of money for her and at her request, on account, as appears by detailed statement attached hereto made a part hereof and marked 'Exhibit A,' aggregating the sum of \$28,611.27." An exhibit is no part of the pleading, and per se tenders no issue calling for a separate verdict; but the exhibit in this case is so vague and indefinite that it does not give the trier of fact an intelligent understanding of what the various items mean. Defendant's testimony was to the effect that many of the cash items he paid to plaintiff, many to her sons or daughters, and many were for rent and other things, but the exhibit does not show under which of those heads the various items fall. The referee took the evidence of the defendant and the plaintiff and her children on all of these items, and made a finding for each year of the aggregate of the payments made or credit earned.

Appellant relies on *State ex rel. v. Peterson*, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094, to sustain his demand for a finding on each item; but that case does not sustain that contention. That was a suit on an official bond, and there were a large number of counts in the petition. The only thing the court decided on this question was that there

should have been a finding on each count. The court said: "When several distinct causes of action are stated, the same reasons for separate findings would seem to apply to a referee as to the verdict of a jury." There the court likens the finding of a referee to the verdict of a jury. Suppose a plaintiff should sue in one court on an account for goods sold from time to time running through a period of a year or more; must the jury render a separate verdict on each item?

Defendant testified that he never kept an account of the items of moneys paid out by him to the plaintiff or to her children; he only had loose receipts or memoranda, which did not include all, and for the rest he relied on his memory; for a large number of the items claimed, he had nothing to show. He testified: "I did not keep any system of accounts at all; as the drafts or requests would come in, I would either give the money from my pocket or go down to the cashier of the Missouri Glass Company and get the cash from my account there for her. Q. Did you keep any system of books in connection with this fund? A. No, I did not." This was the business conduct of a man of experience in business affairs, who was at the time the president of a large mercantile corporation. According to his testimony, the only account that would show any of the items of this business was his own personal account in the books of the Missouri Glass Company. He was asked to obtain a copy of that account from the books of the company and present it to the referee, but he never complied with the request. While testifying on this point he was asked by Judge Rassieur, the plaintiff's attorney: "Will you give me authority to ask for a copy of that account (defendant's account on the books of the Missouri Glass Company) from the time of the deposit of Mrs. Pullis' money, and thus enable me to obtain such copy? A. No. There are different reasons for my refusal; in the first place, I have no right to authorize that authority; the second is, there is nothing in that account that will be of any utility to you in the world." Defendant's reliance to sustain his claim on every disputed item was his own uncorroborated testimony. If he had been an inexperienced man in business affairs, some excuse might have been indulged for this loose method of handling this business, but under the circumstances his method was not calculated to inspire confidence. We think the referee took a very just and equitable view of the controversy, and we find no fault with his conclusions as to the facts.

4. Appellant contends that the referee admitted illegal testimony. It was in evidence that when the defendant handed the deeds to the Westminster houses to Mrs. Pullis or to Judge Rassieur (defendant did not quite remember which), Judge Rassieur told him

he would take the deeds and hold them until he could examine the title, and, if satisfactory, would accept them for the plaintiff. Judge Rassieur testified that on his investigation he found that the title to the property had recently been transferred by defendant to an insolvent brother-in-law of defendant for a nominal consideration, and that at the time of that transfer suits were pending against the defendant which soon thereafter ripened into judgments against him; that Judge Rassieur went to a title guaranty company to see if it would contract to guarantee the title, but the company declined to do so; then he tendered the deeds back to defendant, who refused to accept them. In that connection the plaintiff also introduced in evidence a number of court records showing judgments against defendant, and in connection with those records introduced a certified copy of the deed from defendant to his brother-in-law, for the purpose of showing the comparative dates of the deed and the judgments. The deeds that were offered by defendant to the plaintiff were the deeds of this brother-in-law of defendant. All that evidence went in over the defendant's objection, and he now insists that it was error. If the issue on trial had been the title to the property, the evidence, at least that part of it in which the witness stated the result of his investigation and his conference with the title examiners and the title guaranty company, would have been incompetent. But that was not the issue. The question was, did the attorney investigate for the purpose of satisfying himself so as to be able to advise his client? He held the deeds to be retained or returned according to what his investigation would satisfy him as to the title. The information he obtained may have been incorrect, but if it satisfied him that the title was insecure he had the right to act on it in advising his client. His duty as a lawyer seeking information on which to advise his client did not demand of him to do more than he did. The evidence offered only tended to show that he had not arbitrarily or capriciously refused to accept the deeds, but had made a faithful examination and decided the question that was left with him to decide. On the examination, if he became satisfied that a deed made by defendant, then in the toils of lawsuits, to an insolvent brother-in-law, for a nominal consideration, and a transfer of the title by the brother-in-law to a sister of defendant, would probably involve her in a lawsuit with the defendant's creditors, he had the right to advise his client to decline to take the deeds. The referee was not passing judgment on the title to the property, but only on the question of whether or not the plaintiff had accepted those deeds, and this testimony only went to show that after the attorney had investigated the matter and satisfied himself as to the title he advised his client not to



accept the deeds, and she acted on his advice. There was no error in overruling the objection to that evidence.

There was also evidence tending to show the financial condition of the Andes Mining Company, not only at the date of the alleged "investment" in 1898, but also down to the time it was brought to the plaintiff's knowledge in 1900, the tendency being to show not only that the condition was bad in 1898, but that it grew worse as the time went on. The appellant contends that the showing should have been limited to the date of the alleged investment. The defendant's own testimony, in effect, though not in terms, shows that the stock was worthless when he claims to have transferred it, and he made no effort to show that it had improved since. If it was worthless in 1898, it will be presumed, until the contrary is shown, to have continued worthless, and, although the evidence tending to show the corporation's increased financial troubles may have been unnecessary as bearing on the question of the real value of the stock, it was pertinent as bearing on the question of the good faith of the defendant in trying to impose 50 shares of his own worthless stock on the plaintiff for \$5,000 in cash.

5. One more point of appellant remains to be considered. In his brief he complains that he has been charged with compound interest; that the referee has erred in calculating interest, and in his method of calculating interest. It does not appear from the abstract that the question concerning compound interest was presented to the circuit court, at least not so in express terms. In his 31 exceptions to the referee's report and 32 grounds in his motion for a new trial, no mention is made of compound interest. The nearest he came to raising that question in the circuit court was in exceptions 6 and 7, which are also repeated in the motion for a new trial. Exception 6 is: "Referee has erred in all his calculations of interest." That only means that the referee was at fault in his mathematics. Exception 7 is: "The referee has erred in his method of calculation of interest, the same being contrary to the law of this state." That only refers to the method of calculation. That that was what the exception was designed to mean is shown by another paragraph in appellant's brief, where it is said: "The error lies as shown, supra, in not calculating interest to date of first payment, deducting payment, calculating interest on remainder to date of next payment, deducting payment, and so on." Another method of calculating interest is indicated in appellant's exception 18, which is that the referee ought to have allowed defendant interest on each item of his credits from the date of payment. So far as the record shows, those two methods include all the complaint that the defendant

made in the circuit court on the question of interest, and neither of them refers to compound interest. Where there are mutual running accounts, interest may be given on both sides until a balance is struck; but when the balance is struck, the interest runs only on the balance. When one makes a part payment on a debt he owes, he is not entitled to have interest to run on the money he paid; in such case interest runs only on the balance due on the debt. The referee did charge the defendant interest with annual rests, which constituted compound interest. If defendant should be taken at his own word, both in his pleading and his testimony, he would be liable, in the discretion of the trial court, to be charged with compound interest, because, according to his statements, this money was not loaned to him at all, but was placed in his hands by his confiding sister to be invested for her as in his judgment would be best for her, and thereupon he immediately deposited it to his own credit and used it in his own business. The statute (section 3711, Rev. St. 1899; Ann. St. 1906, p. 2080), which allows compound interest only on express written contract therefor, does not apply to the accounting of a derelict trustee. *Cruce v. Cruce*, 81 Mo. 676; *Bobb v. Bobb*, 89 Mo. 411, 4 S. W. 511; *In re Murdoch & Dickson*, 129 Mo. 488, 31 S. W. 942.

But the plaintiff can recover only on the case made by her own pleading and proof, not that made by her adversary. And although the point was not raised in the circuit court, yet, as it is an error appearing on the face of the record, it should be corrected here; but the correction should not be made at the cost of the plaintiff, because the presumption is that if the attention of the trial court had been drawn to it the error would have been corrected there, or plaintiff would have been allowed to enter a remittitur to the extent of the excessive interest. The correct method of counting interest in case of partial payments is stated in *Riney v. Hill*, 14 Mo. 500, 55 Am. Dec. 119, as counsel for appellant rightly contends. The rule as there stated has been frequently referred to and approved by this court. It is this: "Interest is first to be calculated on a demand up to the first partial payment; then add the interest to the principal and deduct the payment therefrom; then cast interest on the remainder to the second payment, add the interest to the remainder, and deduct therefrom the second payment, and so on until the last partial payment, unless in any case the interest up to any payment shall exceed the payment, in which case such payment is to be deducted from the interest, and the excess of the interest is to be carried forward, without casting interest thereon, to the next payment that will discharge the excess."

Appellant also contends that the referee

should have calculated the interest up to the date of each payment, instead of adding together at the end of the year all the payments made at different dates in the course of the year and casting the interest to that date. Although that method would have given the referee a long and wearisome task, yet in strictness it is the method he ought to have pursued. And since the account as stated by the referee does not give the several items and respective dates, but gives the aggregate of all the items paid during the year, there is no other way to correct the error except to give the defendant credit as if he had made all the payments on the 1st day of January of the year in which they were paid. By so stating the account the defendant would gain more than if the method of calculating the interest up to the date of each item as contended for by him had been strictly pursued; but unless that advantage be given him the parties would be involved in a re-reference, which would cost more than the small difference in interest would be, to say nothing of the extension of the time of this already unusually long litigation.

Calculating the interest by the method above quoted from *Riney v. Hill*, 14 Mo. 500, 55 Am. Dec. 119, and giving the defendant credit on the 1st day of January of each year for all the payments thereafter made by him during that year, the true balance due the plaintiff from defendant at the date of the referee's report, January 15, 1906, is \$33,518.63, instead of \$35,167.98. We therefore deduct the excess of interest, \$1,649.35, from the balance shown by the referee's report, leaving the correct balance \$33,518.63, for which sum, with interest at 6 per cent. per annum from January 15, 1906, the judgment is affirmed. All concur.

#### MABRY et al. v. KETTERING et al.

(Supreme Court of Arkansas. March 8, 1909.)

#### 1. COURTS (§ 207\*)—APPELLATE JURISDICTION—ISSUANCE OF TEMPORARY INJUNCTION.

The Supreme Court, on the application for a temporary injunction in aid of the appellate jurisdiction, and on the motion to dissolve the injunction, exercises a discretion as to whether or not the temporary injunction should be issued.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 207.\*]

#### 2. TORTS (§ 8\*)—USE OF PHOTOGRAPHS OF PERSONS CHARGED WITH CRIME.

Public officers, charged with the enforcement of the criminal laws, and having in their custody individuals charged with crime, may use photographs for the purpose of identifying the individuals accused.

[Ed. Note.—For other cases, see Torts, Dec. Dig. § 8.\*]

#### 3. TORTS (§ 8\*) — USE OF PHOTOGRAPHS OF PERSONS CHARGED WITH CRIME.

The Supreme Court, on appeal from a decree dismissing a suit to restrain the use by defendants of photographs of plaintiffs, con-

fining in jail on criminal charges, will dissolve its order reinstating the temporary injunction, on it appearing that defendants are federal officers and a photographer, and that they propose to use the photographs of plaintiffs for the sole purpose of identifying them in various parts in the country, where offenses are charged to have been committed.

[Ed. Note.—For other cases, see Torts, Dec. Dig. § 8.\*]

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Action by J. C. Mabry and others against Kettering, Reynolds, and Swenson. From a decree dismissing the complaint, plaintiffs appealed, and obtained from one of the judges of the Supreme Court an order reinstating the temporary injunction. Motion of defendants to dissolve the injunction granted.

Bradshaw, Rhoton & Helm, for appellants. W. G. Whipple and Powell Clayton for appellees.

PER CURIAM. Appellants, J. C. Mabry, F. M. Clark, J. S. Johnson, and I. J. Warner, instituted this suit in the chancery court of Pulaski county against appellees, Kettering, Reynolds, and Swenson, praying for an injunction restraining the latter from developing plates of the photographs of appellants and using the same. They allege in their complaint that they are confined in the Pulaski county jail, being held there on criminal charges; that appellees had, over the protest of appellants, made photographic plates of each of them for the purpose of developing same into photographs and publishing same in what is known as the "Rogues' Gallery," and for the further purpose of publishing them broadcast in various journals and newspapers in the United States. They allege that they have never been convicted, and are not guilty of any criminal offense, and that said use of the photographs will result in irreparable injury to them. In an amendment to the complaint it is alleged that the photographic plates were taken with the consent of appellants, but under an express agreement that the plates would be held, and not developed or made use of in any way, until appellants had an opportunity to test in the courts of the state the legal right of appellees to use the photographs. The prayer of the complaint is, "upon final hearing of this cause, for a permanent injunction enjoining and restraining said defendants, and each of them, from developing, or causing or permitting to be developed, photographs from said plates, and from publishing or uttering, or causing to be uttered or published, said photographs, or any photographs, of these plaintiffs." The chancellor granted a temporary restraining order in accordance with the prayer of the complaint; but on a later date the chancery court sustained a demurrer to the complaint and dismissed same for want of equity. Appellants brought the case

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

here by appeal, and obtained from one of the judges of this court an order reinstating the temporary injunction until the further orders of this court. Appellees now move the court to dissolve the injunction.

The complaint, when it comes to be considered by this court on final hearing of the cause, will present an interesting question concerning what is now termed by modern authorities the "right of privacy," or the right of an individual to invoke the jurisdiction of a chancery court to restrain an improper use of his photograph without his consent. At the present time we deem it unnecessary to go into this question; but the following cases may be examined with profit, and we commend same to the student who seeks light on this interesting subject: *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828; *Atkinson v. Doherty*, 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507; *Schuyler v. Curtis*, 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671; *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 60 L. R. A. 101, 106 Am. St. Rep. 104, 2 Am. & Eng. Ann. Cas. 561.

On the application for temporary injunction in aid of the appellate jurisdiction of this court, and on the motion to dissolve same, we are permitted to exercise a discretion whether or not the temporary injunction should be issued. It appears that appellees Reynolds and Swenson, for whom Kettering made the photographs, are officers of the federal government, and that the arrests of appellants were made at their instance. They appear here by counsel, and state that the charges against appellants for violation of federal criminal statutes are made in various localities throughout the United States, and that the photographs are desired solely for the purpose of identifying appellants in the various localities where the offenses are charged to have been committed. They disclaim any purpose to use the photographs, except for the identification of appellants. Therefore, on this preliminary hearing, the question presented narrows to the sole one whether we should restrain the federal officers from causing the photographer to develop the photographic plates and from using the photographs for the purpose when so developed. Neither is the question presented whether or not the officers in charge of the prisoners should be restrained from compelling them to submit to having their photographs taken. The appellants have already been exposed to the camera, and the plates are ready to be developed. The authorities cited by appellants in support of their claim for a temporary injunction clearly recognize the principle that public officers, charged with the enforcement of criminal laws, and having in their custody

individuals charged with crime, may use photographs for the purpose of identifying the individual accused. *Schulman v. Whitaker*, 117 La. 704, 42 South. 227, 7 L. R. A. (N. S.) 274, 8 Am. & Eng. Ann. Cas. 1174; *Owen v. Partridge*, 40 Misc. Rep. 415, 82 N. Y. Supp. 248; *State v. Clausmeier*, 154 Ind. 599, 57 N. E. 541, 50 L. R. A. 73, 77 Am. St. Rep. 511. See, also, *Mollineux v. Collins*, 177 N. Y. 395, 69 N. E. 727, 65 L. R. A. 104; *Shaffer v. United States*, 24 App. D. C. 417.

On the final hearing of the cause, on the other questions, as to the right of privacy, and as to the right of appellants to invoke the aid of a court of equity to restrain appellees from any use of the photographs, the consideration will be confined to the allegations of the complaint, and will extend to all questions raised therein; but, on the showing made now, the court is unwilling to restrain the appellees from the use of the photographs for the only purpose for which they are attempting to use them now.

The temporary restraining order will therefore be dissolved; and it is so ordered.

#### POOLE v. OLIVER.

(Supreme Court of Arkansas. March 15, 1909.)

##### 1. TRUSTS (§ 86\*)—GIFT OR TRUST—PRESUMPTIONS.

Where a husband purchases land, and has the deed made to his wife, the presumption is that he intended it as a gift to her, and no trust results in his favor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 128; Dec. Dig. § 86.\*]

##### 2. TRUSTS (§ 41\*)—GIFTS—REBUTTING PRESUMPTIONS.

The presumption of gift arising from a deed to the wife of land purchased by the husband may be rebutted by evidence of a contemporaneous agreement that the wife should take the land as trustee for the husband.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 41.\*]

##### 3. TRUSTS (§ 41\*)—GIFTS—EVIDENCE.

On an issue whether land purchased by a husband, and conveyed to his wife was a gift to her or a trust, the husband's use and occupation is consistent with the presumption of a gift.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 41.\*]

##### 4. ADVERSE POSSESSION (§ 97\*)—POSSESSION WITHOUT COLOR OF TITLE—EXTENT OF POSSESSION.

Actual occupancy of the inclosed portion of a tract of land without color of title does not constitute possession of the unincluded portion, so as to vest title to the latter by limitation.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 537-541; Dec. Dig. § 97.\*]

##### 5. ADVERSE POSSESSION (§ 70\*)—COLOR OF TITLE.

A husband cannot, as against his wife and those claiming through her, claim the benefits of a deed to her as color of title.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 70.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Calhoun Chancery Court; E. O. Mahoney, Chancellor.

Action by Jephtha Oliver against C. L. Poole. Judgment for plaintiff, and defendant appeals. Affirmed.

Thornton & Thornton, for appellant. H. S. Powell, for appellee.

MCCULLOCH, C. J. This case involves the title to a tract of land in Calhoun county containing 40 acres. The plaintiff, Jephtha Oliver, originally owned the land, and in the year 1873 conveyed it to his daughter, who was then the wife of J. S. Newton. Newton purchased the land from the plaintiff, and paid for it, but at his request it was conveyed to his wife. Mrs. Newton reconveyed the land to her father in 1892, and about one year thereafter she and her husband separated from each other and were divorced. Newton died in the year 1900, and his administrator sold the land as his property in 1902, under orders of the probate court. The defendant, C. L. Poole, claims title under the sale. About 10 acres of the land was fenced and in cultivation, and the remainder has always been unclosed and unimproved. Newton occupied the inclosed part of the land up to the time of his death, claiming title thereto; and the defendant asserts that Mrs. Newton held the legal title as trustee for her husband, and also that the title was vested in Newton by adverse possession for the statutory period. The chancellor sustained the defendant's claim of title to the inclosed land by limitation, but decreed the unclosed part to the plaintiff. The defendant appealed.

Where a husband purchases land, and procures the deed to be made to his wife, the presumption is that he intended it as a gift, and a trust does not result in his favor. This presumption may be rebutted by evidence of facts showing the husband's intention to have been that his wife should take the land as trustee, and not for her own benefit; but such facts must have existed or taken place antecedently or contemporaneously with the conveyance, or so soon thereafter as to form a part of the transaction. *Milner v. Freeman*, 40 Ark. 62; *Robinson v. Robinson*, 45 Ark. 484; *Chambers v. Michael*, 71 Ark. 373, 74 S. W. 516; *Womack v. Womack*, 73 Ark. 281, 83 S. W. 937, 1136; *O'Hair v. O'Hair*, 76 Ark. 389, 88 S. W. 945. Tested by this rule, there is no satisfactory evidence of an intention to create a trust in favor of the husband. In fact, there is no evidence at all, except that he occupied the land and cultivated it, and afterwards claimed it as his own; but his use and occupation is referable to his natural desire to manage and care for his wife's property. *Chambers v. Michael*, supra.

Actual occupancy of a part of a tract of

land without color of title does not constitute constructive possession of the part not actually occupied, so as to vest title by limitation to the latter. Without color of title the possession is limited to the part actually occupied. J. S. Newton had no color of title, as the legal title was conveyed to his wife, and he could not, against the wife and those claiming title under her, claim the benefits of the deed to her as color of title.

The plaintiff did not appeal, and we do not decide whether or not the decree against him for the land actually occupied by Newton for the statutory period was correct.

Affirmed.

INGRAHAM et al. v. SUTHERLAND et al. (Supreme Court of Arkansas. Feb. 15, 1909.)

CHARITIES (§ 19\*)—VALIDITY OF BEQUEST—CERTAINTY—DESIGNATION OF BENEFICIARIES.

Where a will provided that, after the deaths of testator's wife and son, whatever of his estate remained should be used to build a church and a Masonic hall, but did not name any devisees or legatees to receive the estate, nor beneficiaries for whom the appropriation for the Masonic hall was intended, and gave no description of the hall to be built, and did not appoint or authorize to be appointed anybody who should direct the building, or who should accept it when built, the devise for the hall was void for indefiniteness.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 42; Dec. Dig. § 19.\*]

Appeal from Sebastian Chancery Court, Greenwood District; J. V. Bourland, Chancellor.

Action by Lee H. Ingraham and others against G. T. Sutherland and others. Judgment of dismissal, and plaintiffs appeal. Affirmed.

Winchester & Martin, for appellants. T. B. Pryor and Youmans & Youmans, for appellees.

BATTLE, J. Lee H. Ingraham and others, who are the officers of Oak Bower Lodge, No. 277, of Free and Accepted Masons, brought this suit in the Sebastian chancery court for the Greenwood district of Sebastian county, to recover one-half of certain lands, which belonged to James Yarbrough at the time of his death. They seek to recover in right of and for Oak Bower Lodge, No. 277. They based their claim to the land on the last will and testament of James Yarbrough, deceased. The parts of the will upon which their claim depends are as follows:

"First. I desire that my wife, Matilda Yarbrough, and my son, William Jasper Yarbrough, have the benefit of the homestead, with all the appurtenances thereunto belonging, and the stock belonging to the premises. The homestead embraces all my real and per-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sonal estate, for their maintenance as long as they live."

"Third. I further bequeath that at the death of my wife, Matilda Yarbrough, and my son, William J. Yarbrough, that what of my estate is left, if any, shall be appropriated to building a house of worship, belonging to the Methodist Episcopal Church (South), and a Masonic hall. My desire is that church and hall should be built together either on my premises, or somewhere near, as may be agreed upon by the neighborhood. But if the church and hall shall be built separately, then the amount of my estate shall be equally divided between the two interests."

Upon final hearing the court dismissed the complaint of plaintiffs for want of equity, and they appealed.

The part of the estate of the testator intended to be appropriated to the building of a church and Masonic hall was not bequeathed or devised to any one. The beneficiaries for whom the appropriation for a Masonic hall was intended were not named, no description of the hall to be built is given, and no one was appointed or authorized to be appointed to direct how and according to what plans it shall be built, or to accept it when built. The devise for the hall is too vague, indefinite, and uncertain to be capable of enforcement, and is void.

Decree affirmed.

#### WESTERN UNION TELEGRAPH CO. v. GILLIS.

(Supreme Court of Arkansas. March 15, 1909.)

##### 1. TELEGRAPHS AND TELEPHONES (§ 73\*) — NEGLIGENT DELAY OF MESSAGES—ACTIONS—QUESTIONS FOR JURY.

Where, in an action against a telegraph company for negligent delay in delivering a message, the evidence showed that the message was received at the point of destination after 7 p. m. and was delivered the next morning, and the operator testified that the hours for receiving and delivering messages were from 7 a. m. to 7 p. m., and a former employé testified that where a message was started as a day message, and received by the operator at its destination after office hours, the operator should deliver it that day and should also deliver important messages, the court erred in declaring as a matter of law that it was the duty of the company to deliver the message on the day it was received.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.\*]

##### 2. APPEAL AND ERROR (§ 1057\*)—HARMLESS ERROR — ERRONEOUS EXCLUSION OF EVIDENCE.

The error in excluding evidence to establish a fact shown by other uncontroverted evidence is not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4194; Dec. Dig. § 1057.\*]

##### 3. WITNESSES (§ 392\*)—IMPRACHMENT—CONTRADICTORY STATEMENTS.

The affidavit of a physician accompanying the order of commitment of one to an insane

asylum is admissible to contradict the physician testifying as a witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1251; Dec. Dig. § 392.\*]

##### 4. AFFIDAVITS (§ 18\*)—USE IN EVIDENCE.

The ex parte affidavit of one not called as a witness cannot be used as independent evidence.

[Ed. Note.—For other cases, see *Affidavits*, Cent. Dig. § 69; Dec. Dig. § 18.\*]

Appeal from Circuit Court, Arkansas County; Eugene Lankford, Judge.

Action by Berta Gillis against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is an appeal by the Western Union Telegraph Company from a verdict and judgment against it in favor of Berta Gillis for damages resulting from an alleged negligent failure to deliver a message. On the 29th day of May, 1905, the following telegram was delivered to appellant for transmission: "Fordyce, Ark., 5—29—05. Virda Gillis, De Witt, Ark. Mother very low, come at once. L. H. Gillis." The testimony does not show at what time the message was delivered to the operator at Fordyce, but it is conceded that it reached the office at De Witt between 7:30 and 8 o'clock p. m. of May 29th, and the testimony shows that it was intended for appellee. The office hours of the company at De Witt, as established by its rules and regulations, were between 7 a. m. and 7 p. m., but the operator, who was also the railroad agent, while attending to that work received the message at the time mentioned; but it was not delivered until the next morning between 9:30 and 10 o'clock. After receiving the message, appellee started at once to the bedside of her mother by the most practicable route, but when she arrived there her mother was insane. In a few days her mother was committed to the state hospital for nervous diseases and died in a few days thereafter without regaining her normal condition. Other facts are stated in the opinion.

Geo. H. Fearous, Thomas, Lee & Smith, and Rose, Hemingway, Cantrell & Loughborough, for appellant. W. B. Carpenter and J. M. Brice, for appellee.

HART, J. (after stating the facts as above). Counsel for appellant assigns as error the action of the court in giving the following instruction: "(4) The court instructs the jury that, if a day message is received for transmission by defendant company, it then becomes their duty to transmit same as far as possible, even though it is unable to reach the destination before 7 o'clock p. m. of that day, and should such message be received at its destination after 7 o'clock p. m., it becomes the duty of said company to deliver such message within the limits of its free delivery district." In the cases of W. U. Tel.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Co. v. Love Banks Co., 73 Ark. 205, 83 S. W. 949, and West. U. Tel. Co. v. Ford, 77 Ark. 534, 92 S. W. 528, it was held that a telegraph company may establish reasonable office hours for the transmission and delivery of telegrams, and that the reasonableness of a rule adopted by it relative to the hours of conducting its business at a certain office is for the court, and not for the jury. The court so instructed the jury in this case; but it is insisted by counsel for appellee that, under the proof as developed in the case, the instruction in question was a proper one. They claim that the instruction, although peremptory in effect, is warranted by the testimony of Hugh Bowers, which it is insisted is uncontradicted. We cannot agree with their contention. The book of rules of the company shows that their hours for receiving and delivering messages at De Witt were from 7 a. m. to 7 p. m., and that no night office was maintained there. It is conceded that the message is question was not received until between 7:30 and 8 o'clock p. m. Bowers testified that he had formerly worked for the company, and that if a message was started as a day message, and received by the operator at its destination after office hours, he should deliver it, and also that the operator, seeing that it was an important message, should have delivered it. The operator of appellant at De Witt testified positively that there was no night office of the company at that place, and that under the rules of the company the hours for receiving and delivering messages were from 7 a. m. to 7 p. m. Thus it will be seen that there is a conflict between the evidence of the operator at De Witt and that of Bowers. The jury might have inferred from the testimony of the former that the company owed no duty to deliver the message after 7 o'clock p. m., and from the testimony of the latter the jury might have drawn the inference that the rule had been abrogated to the extent of requiring the company to deliver a message which was started as a day message and received at its destination after the hours prescribed by the rules of the company for transacting business. Therefore there being a conflict in the testimony, and one from which reasonable minds might draw different conclusions, the court erred in declaring as a matter of law that, under the facts stated in the instructions, it became the duty of appellant to deliver the message.

2. It is, also, insisted by counsel for appellant that the court erred in refusing to permit the introduction in evidence of the order of commitment, the affidavits therewith and the copies of the letters mailed from the asylum to appellee and her father. The fact that Mrs. Myers became insane, that she was duly committed to the asylum in a few days after the telegram was sent, and died there in a few days thereafter, were established by

the uncontroverted evidence in the case. The letters of Dr. Saner to appellee were read to the jury. Hence these alleged assignments of error pass out of the case. The affidavit of Dr. Matlock, which accompanied the order of commitment, was read to the jury for the purpose of contradicting Dr. Matlock, who was a witness in the case, and was competent for that purpose. The affidavit of Dr. Cheatham was properly refused to be introduced in evidence. He was not a witness in the case, and his ex parte affidavit could not be used as independent evidence. *Smith, Adm'x, v. Feltz*, 42 Ark. 355.

3. Counsel for appellant insist that the court erred in permitting appellee to recover for mental anguish because it does not appear that, if the telegram had been promptly delivered, she could have reached her mother before she became irrational. The view we have already expressed will necessitate a new trial of the case, and on that account we do not deem it proper to discuss the evidence on this point, except to say that the evidence was sufficient to warrant the jury in finding that, had the message been promptly delivered, appellee could and would have reached her mother before she became irrational.

For the error in giving the fourth instruction as indicated in the opinion, the judgment is reversed, and the cause remanded for a new trial.

#### SHREVEPORT COTTONWOOD CO., Limited, v. MISSOURI VALLEY BRIDGE & IRON CO.

(Supreme Court of Arkansas. March 22, 1909.)

##### 1. NAVIGABLE WATERS (§ 20\*)—BRIDGES—AUTHORITY TO CONSTRUCT.

Where a bridge over a navigable river, built under authority of an act of Congress (Act June 27, 1882, 22 Stat. 109, c. 240), providing that the bridge should not be built until the plans and location were approved by the Secretary of War, was maintained for many years, it would be inferred that the plans and location had been approved as required, and that the structure was not unauthorized.

[Ed. Note.—For other cases, see *Navigable Waters*, Dec. Dig. § 20.\*]

##### 2. NAVIGABLE WATERS (§ 20\*)—OBSTRUCTIONS—LIABILITY.

A railroad maintaining over a navigable river a bridge, as authorized by an act of Congress (Act June 27, 1882, 22 Stat. 109, c. 240), placed temporary false work on one side of the river to repair the bridge. The draw span used to permit the passage of water crafts was never out of commission. The repair work was done as rapidly as practicable. A raft of logs in the river above broke from its mooring because of a sudden rise in the river, and the logs were caught in the drift that accumulated by reason of the false work of the bridge and were lost. *Held*, that the railroad was not liable for the loss sustained.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 86-89; Dec. Dig. § 20.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Miller County; Jacob M. Carter, Judge.

Action by the Shreveport Cottonwood Company, Limited, against the Missouri Valley Bridge & Iron Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Appellant brought this suit to recover damages sustained by it from an alleged obstruction of the navigation of Red river at Garland City, Ark., caused by appellee in repairing a railroad bridge.

The east end of the bridge is in Lafayette county, and the west end in Miller county, and the river is about 500 feet wide at that point. The railroad bridge was constructed under an act of Congress authorizing the railroad company to build certain bridges in the state of Arkansas. Appellee was employed by the railroad company to repair the bridge, and the work was begun about the 1st of January, 1907. In ordinary stages of the river the current was on the Miller county side, but in times of high water it was deflected to the Lafayette county side. The repair work consisted in putting a 200-foot span on the Lafayette county side; that is to say, the span extended 200 feet into the river from the Lafayette county bank. The draw span of the bridge was on the Miller county side. In order to make the repairs, it was necessary to drive piling and put in false work from the pier on the bank, the whole distance of the span being repaired, and a short distance beyond, right under one end of the draw; but during the progress of the work the draw span was at all times so that it could be turned for the passage of boats. Appellant was engaged in the business of cutting and rafting timber down Red river to its mill at Shreveport, La. In October, 1907, appellant had a raft of about 600 logs in Red river tied by wire cables at Dobson's Bend, about 12 or 15 miles above the bridge in question. The plan of appellant was to wait for a rise, then to cut the raft into blocks of from 30 to 60 logs, and float them down the river. About the 6th or 7th of October, 1907, a sudden and unusual rise occurred in the river. It came with such force that the raft broke loose, and the logs were caught in the drift that accumulated by reason of the false work of the bridge at Garland City. The logs were never recovered. Other facts are stated in the opinion. There was a jury trial and a verdict for appellee. The case is here on appeal.

Henry Moore, Jr., for appellant. Gaughan & Sifford, for appellee.

HART, J. (after stating the facts as above). No errors of law are complained of, and the sole issue raised by the appeal is: Was the evidence sufficient to sustain the verdict?

Red river is a navigable stream, and the bridge was built by the railroad company under authority given by act of Congress approved June 27, 1882 (22 Stat. 109, c. 240). The act provided that the bridges named in the act should not be built until their respective plans and locations were approved by the Secretary of War. The railroad had been in operation and its bridges constructed many years prior to the year 1907. Hence the jury might infer that the location and plans had been duly approved as required by the act.

Appellant cites the case of *Little Rock, Mississippi & Texas Railroad Company v. Brooks et al.*, 39 Ark. 403, 43 Am. Rep. 277, as supporting its contention; but we do not think the facts are similar. There the whole of the stream was obstructed, and the obstructions were permanent. Here the draw span, which was used to permit the passage of water crafts, was never out of commission. The false work was only placed on one side of the river, and its erection there was only temporary. It was never designed that it should remain permanently, but it was necessary to be there while the work of repair was in progress; otherwise the bridge could not have been repaired at all. The testimony shows that the work was being done as rapidly as practicable. The testimony shows that there were two ways of floating rafts in use on Red river. One was to fasten the logs together in blocks and to place a man in charge of each block to take care of it with ropes. The other way, and the one used by appellant, was to send a man and boat along with several blocks; but the logs here were not being run or floated in either of these ways. The raft broke from its mooring, and the logs were torn loose from each other. They were swept down the stream without any one in charge of them. Shreveport was about 200 miles below the bridge in question, and the river was full of drift. The stage of the water was very high, and the current was shifting. When the river fell, many of the logs which had floated in near the banks would remain there. Others would necessarily become entangled in snags and floating tree tops. The court instructed the jury without objection that the measure of damages was the market value of such logs as the evidence shows would have been saved by appellant if they had been caught in the drift.

Taking into consideration all the facts and circumstances proved in the case, we think the jury might well have concluded that none of these loose logs would in any event have reached Shreveport. We are of the opinion that there was sufficient evidence to sustain the verdict.

Finding no error in the record, the judgment is affirmed.

## ROSE v. ROSE.

(Supreme Court of Arkansas. March 22, 1909.)

## 1. DIVORCE (§ 133\*)—DESERTION—SUFFICIENCY OF EVIDENCE.

In an action by a husband for divorce, evidence held insufficient to sustain a finding that plaintiff was guilty of misconduct justifying desertion by defendant, or precluding him from obtaining a divorce on account of such desertion.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 133.\*]

## 2. DIVORCE (§ 298\*)—CUSTODY OF CHILDREN.

Where a mother voluntarily parted with her child when it was very young, and the father continued to keep it, he was entitled, on obtaining a divorce for desertion, to the custody of the child; the mother being permitted to see it at reasonable intervals and to have opportunity of enjoying its society.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 781-787; Dec. Dig. § 298.\*]

Appeal from Franklin Chancery Court; J. V. Bourland, Chancellor.

Divorce action by Dillard Rose against Sarah Rose. From the decree, plaintiff appeals. Reversed, with directions.

Sam R. Chew, for appellant. June P. Clayton, for appellee.

McCULLOCH, C. J. Appellant, Dillard Rose, instituted this suit against his wife, Sarah Rose, to obtain a divorce and the custody of their infant son. The grounds for divorce set forth in his complaint are willful desertion without reasonable cause for the period of one year. Appellee filed an answer denying that she had deserted her husband without reasonable cause, and also a cross-complaint praying for divorce on the alleged ground that he was guilty of conduct amounting to indignities which rendered her condition intolerable. The chancellor rendered a decree refusing a divorce, either on the prayer of the complaint or the cross-complaint.

The parties intermarried in August, 1903, and in February, 1904, appellee deserted her husband and has never lived with him since then. In August, 1904, she gave birth to a child, which she consented for appellant to take and keep when it was only two weeks old. Appellant was a farmer, and, being without a home of his own, he took his wife, as soon as they were married, to the home of his father and mother, where they lived for several months. He rented a farm for the next year, and they moved to it, and lived there until appellee returned to the home of her parents. She expressed to one of the neighbors at the time the reason for leaving, that "the Lord had told her to go." When the baby was born, appellant went to the house to see it, and she told him that he could not continue to come, but that, if he wanted to see the child, he could take it home with him and keep it. When he went back a week later to get the child, she again

said that if he "expected to come to see it she wanted him to take it." At the time the child was born, and afterwards, appellant importuned her to return to live with him, but she refused.

She testified that appellant mistreated her, quarreled with her without cause, left her to go to a dance while she was sick, and returned intoxicated, and forbade her reading her Bible and praying. We are of the opinion, however, that the preponderance of the evidence is against any mistreatment on his part. There is very little corroboration of appellee's claim. One witness testified that she spent the night at the home of appellant and appellee while they were living together, and heard him quarrelling during the night. Another testified that appellant admitted that he had not treated appellee right; that he stood on the hearth and danced and whistled, while she attempted to read her Bible. But these witnesses say he expressed sorrow for his conduct, and said he would do better.

We do not think that there is sufficient evidence to sustain a finding that appellant was guilty of misconduct which justified desertion by appellee, or which precludes him from obtaining a divorce on account of such desertion. The preponderance of the evidence shows that appellant was not unkind to his wife, and gave her no just cause for leaving him. Though he was probably not wholly free from fault, we can discover nothing in his conduct, judged by the evidence, calculated to render his wife's condition intolerable or to drive her from him. We think, therefore, that the chancellor erred in not granting him a divorce.

We are also of the opinion that the decree was erroneous with reference to the custody of the child. The custody was divided between the two parents—three weeks alternately to the father and one week to the mother. In view of the fact that the mother voluntarily parted with the child when it was very young, and the father has had it since then, we do not feel justified in disturbing the decree awarding the custody to him. And, of course, the mother should, notwithstanding the fact that she was willing to give the child up, be permitted to see it at reasonable intervals and have an opportunity to enjoy its society. But we deem it inadvisable, for the good of the child, for it to be shifted about at frequent intervals from the custody of one parent to another. Appellant has shown no disposition, as far as we can discover from the evidence, to deprive appellee of reasonable opportunity to see the child, and the general and customary order is sufficient, we think, giving the mother the privilege of visiting the child at reasonable intervals and of having the child to visit her, without specifying in the order any particular interval between visits or length of visits.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



Of course, if appellant should hereafter violate the spirit of the order, appellee can seek more definite relief in this respect.

The decree is reversed, with directions to enter a decree in accordance with this opinion.

#### HALL v. STATE.

(Supreme Court of Arkansas. March 15, 1909.)  
HOMICIDE (§ 163\*)—EVIDENCE—ADMISSIBILITY—REPUTATION OF DECEDENT.

On a trial for murder, it is not competent to prove the bad reputation of decedent for chastity.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 312, 314; Dec. Dig. § 163.\*]

Appeal from Circuit Court, Faulkner County; Eugene Lankford, Judge.

A. B. Hall was convicted of involuntary manslaughter, and he appeals. Affirmed.

Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

HART, J. A. B. Hall was indicted for murder in the second degree at the January term, 1908, of the Faulkner circuit court. The indictment charged him with the murder of Mrs. Susan Harness. He was tried at the July term of said circuit court. The jury returned a verdict of guilty of involuntary manslaughter, and assessed his punishment at the term of three months in the state penitentiary. Hall has duly prosecuted an appeal to this court.

Appellant complained that the court sustained the state's objection to a question which was propounded to one Campbell as to deceased's reputation for chastity. In a murder case, it is not competent to prove deceased's character to be immoral. *Green v. State*, 38 Ark. 304.

No brief has been filed in behalf of appellant. We have carefully examined the instructions, and are of the opinion that the assignments of error in regard to them as set out in the record are not well taken. The instructions, when considered as a whole, were fair to appellant, and there was ample evidence to support the verdict.

Finding no prejudicial error in the record, the judgment is affirmed.

#### BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DIST. v. POWELL.

(Supreme Court of Arkansas. March 15, 1909.)

1. APPEAL AND ERROR (§ 907\*)—REVIEW—PRESUMPTIONS—EVIDENCE NOT SHOWN BY RECORD.

In an action against a levee district for taking dirt from plaintiff's land, where the complaint alleged that defendant entered on plaintiff's land outside of a strip reasonably necessary for constructing the levee and removed productive soil, and the bill of exceptions fails to show that it contains all the

evidence, and an agreed statement of facts introduced in evidence does not purport to give all the facts, and the record is silent as to where the dirt for the levee was taken from, it will be presumed on appeal from a judgment for plaintiff that the allegations of the complaint in regard thereto were sustained by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911, 3673; Dec. Dig. § 907.\*]

2. APPEAL AND ERROR (§ 907\*)—REVIEW—PRESUMPTIONS—EVIDENCE IN CONFLICT WITH AGREED FACTS.

It will not be presumed that there was evidence in conflict with the facts agreed upon between the parties, where the bill of exceptions does not purport to contain all the evidence, and where, according to that agreement, damages for the injury sued for, as shown by the complaint, could not have exceeded a certain sum, less than the amount awarded, the judgment will be modified so as to reduce it to that sum.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911, 3673; Dec. Dig. § 907.\*]

Appeal from Circuit Court, Crittenden County; Frank Smith, Judge.

Action by William Powell against the Board of Directors of St. Francis Levee District. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

H. F. Roleson, for appellant. Allen Hughes, for appellee.

MCCULLOCH, C. J. Plaintiff, Wm. Powell, instituted this action against the board of directors of St. Francis levee district to recover damages done to his lands by taking dirt therefrom to use in the enlargement of a levee which had been previously built through the lands. It is alleged in the complaint: That the levee district constructed the stretch of levee in question through the tract of land in 1895; that plaintiff's grantor, Susan M. Sexton, executed a deed granting right of way across said land for the construction and maintenance of the levee; but that the defendant had, without authority, entered upon the land outside of the strip reasonably necessary for the construction and maintenance of the levee, and taken soil therefrom, leaving it stripped of productive soil and filled with burrow pits. The defendant answered, denying that it had taken any dirt from the lands of plaintiff outside of the right of way granted by Susan M. Sexton for the construction and maintenance of the levee. The case was tried before the court sitting as a jury, and judgment was rendered in favor of plaintiff, assessing the damages at \$250. The deed from Susan M. Sexton to the levee district, which was introduced in evidence, contained a grant of "all right of way that may be necessary in the judgment of the board of directors of St. Francis levee district, for the construction and maintenance of the levee or levees to be built and constructed in, upon, or across" said lands.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The width of the right of way is not stated in the deed. The bill of exceptions shows that an agreed statement of facts was introduced in evidence, and also that other evidence was introduced; but it fails to show that it contains all the evidence adduced.

The rule is well established here that, "unless the bill of exceptions negatives the idea that other testimony was adduced in the court below, this court will presume, in favor of the judgment below, that there was sufficient proof to warrant it." *Seifarth v. State*, 35 Ark. 412. It is sufficient, however, if it appears inferentially from the bill of exceptions that it contains all the evidence. *Leggett v. Grimmer*, 36 Ark. 496; *Overman v. State*, 49 Ark. 364, 5 S. W. 588; *Mitchell v. Young*, 80 Ark. 441, 97 S. W. 454, 7 L. R. A. (N. S.) 221, 117 Am. St. Rep. 89. There is this exception to the rule which must be recognized: That when the bill of exceptions shows affirmatively that the judgment is erroneous, and no evidence which could be supplied by presumption or intendment would sustain the judgment, then the judgment will be reversed, even though the bill of exceptions fails to show all the evidence. *Wadly v. Leggett*, 82 Ark. 262, 101 S. W. 720, 118 Am. St. Rep. 70; *North State Fire Ins. Co. v. Dillard*, 115 S. W. 154, 15 Ark. Law Rep. 553. The bill of exceptions in this case does not show, either directly or inferentially, that it contains all the evidence. Nor does the statement of facts purport to give all the facts of the case. It rather presupposes that other evidence was to be introduced, and other evidence was introduced, as shown by the bill of exceptions. Therefore we must indulge, in favor of the correctness of the judgment, every presumption which could be supplied by evidence. It is alleged in the complaint that the defendant without authority entered upon land outside of the strip of land necessary for the construction and maintenance of the levee, and removed soil for a distance of 600 feet and stripped the land of productive soil. There is nothing in the record to show where the dirt was taken from. The defendant, even under the broad authority conferred upon it by the terms of the right of way deed, would have no right arbitrarily to enter upon the plaintiff's land at will and remove soil for use in the maintenance of the levee. It would have to confine the removal of soil within parallel lines, so as to inflict as little injury as possible to the land. As the record is silent, we must indulge the presumption that the allegations of the complaint were sustained by the evidence.

We are of the opinion, however, that the evidence does not sustain the amount of the judgment. The plaintiff concedes in his complaint that the defendant had authority to remove soil within the limits of a strip 300 feet in width for the purpose of construct-

ing or maintaining the levee. The allegation of the complaint is "that no more than 300 feet through said lands is reasonable and necessary for the construction and maintenance of said levee; that the defendant had without authority entered upon said land, not only the strip of 300 feet, but also upon the land adjoining the same extending eastward and westward from the said levee more than 600 feet," etc. According to this allegation, it must be held that the plaintiff sues for injury to the land outside of the strip 300 feet wide. Now the agreed statement of facts contains a stipulation to the effect that the amount of land taken by the levee district, outside of the 300-foot strip, amounted to 1.4 acres, and it is also stipulated that the value of the land was \$50 per acre. The court in its findings assessed the damages at \$50 per acre for five acres, making a total sum of \$250. Now we cannot presume that there was evidence in conflict with the facts agreed upon between the parties, and according to this agreement the damages could not have exceeded the value of 1.4 acres, at \$50 per acre, which would make a total of \$70.

The evidence therefore does not sustain a judgment for more than \$70, and the judgment will be modified so as to reduce it to that amount.

It is so ordered.

#### MARTIN v. GWYNN et al.

(Supreme Court of Arkansas. March 22, 1909.)

##### 1. PROCESS (§ 109\*)—SERVICE—SUFFICIENCY—"ACTUAL SERVICE."

Where a nonresident defendant, in a suit to cancel a deed, was actually served with summons by personal service at the place of his residence in the manner prescribed by Kirby's Dig. § 6053, the court acquired jurisdiction to cancel the deed without first requiring the filing of the bond prescribed by section 6254 in cases of constructive service; the service made being actual service under the express provisions of section 6054.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 136; Dec. Dig. § 109.\*]

For other definitions, see *Words and Phrases*, vol. 1, p. 169.]

##### 2. APPEAL AND ERROR (§ 1034\*)—HARMLESS ERROR—FORMAL ERRORS.

The action of the court in permitting the foreign guardian of a nonresident infant defendant to defend the action, instead of appointing a guardian, as provided by Kirby's Dig. § 6023, is at most an irregularity, and does not render the judgment against the infant void, and he is not prejudiced thereby.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4063; Dec. Dig. § 1034.\*]

##### 3. INFANTS (§ 111\*) — JUDGMENT — SETTING ASIDE—STATUTES—CONSTRUCTION.

Kirby's Dig. § 6248, authorizing an infant within 12 months after arriving at full age to show cause against a judgment against him, applies to a decree canceling a deed to an in-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

fant, and he may after attaining full age show cause against the decree.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 315-319; Dec. Dig. § 111.\*]

**4. INFANTS (§ 111\*) — JUDGMENT — SETTING ASIDE—STATUTES—CONSTRUCTION.**

Under Kirby's Dig. §§ 4431, 4433, 4434, and 6248, authorizing the court to vacate a judgment for errors shown by an infant within 12 months after arriving at full age, and providing that a judgment shall not be vacated without showing a valid defense, an infant seeking to vacate a decree canceling a deed to him because fraudulent against creditors of the grantor must show facts showing the validity of the deed.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 315-319; Dec. Dig. § 111.\*]

**5. FRAUDULENT CONVEYANCES (§ 298\*) — INTENT TO DEFRAUD—EVIDENCE.**

That one, while greatly embarrassed financially, made a voluntary conveyance of land to his child, without which land he could not pay his debts, is conclusive evidence of a purpose to defraud creditors, especially where he subsequently mortgaged the land to others for large sums of money.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 892-894; Dec. Dig. § 298.\*]

**6. FRAUDULENT CONVEYANCES (§ 297\*) — EVIDENCE—CONCLUSIVENESS.**

Proof that one was solvent four years after the execution of a voluntary conveyance to a child does not show that he was solvent at the time of the execution of the conveyance, or that, in making the conveyance, he did not intend to defraud creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 891; Dec. Dig. § 297.\*]

Appeal from Greene Chancery Court; Edward D. Robertson, Chancellor.

Suit by Edgar C. Martin against C. T. Gwynn and others to vacate a decree rendered in a suit to cancel a deed. From a decree dismissing the complaint for want of equity, complainant appeals. Affirmed.

On the 22d of December, 1886, W. H. Martin and wife conveyed 120 acres of land in Clay county to their son Edgar C. Martin by warranty deed, which was recorded on the 27th day of December, 1886. W. H. Martin continued in possession of the land and claimed to be the owner thereof after this deed to his son was executed. More than a year afterwards, while he was still in possession, he borrowed \$900 from E. N. Royall and J. A. McNeil, for which he executed to them his note payable one year after date, and gave them a mortgage on this land to secure the note. W. H. Martin died on the 4th of February, 1891, without having paid the mortgage debt. In September, 1891, Royall and McNeil brought a suit to foreclose the mortgage. The five children of W. H. Martin, who were his sole heirs at law, were made parties defendant, as was the administrator of Martin's estate. The complaint alleged that the deed to Edgar C. Martin was a voluntary conveyance executed while W. H. Martin was insolvent,

and that it was void both as to prior and subsequent creditors. The plaintiffs asked for a judgment against the estate for the debt, and for a decree canceling the deed to Edgar C. Martin and foreclosing the mortgage by a sale of the lands. At the time this suit was instituted, Edgar C. Martin, one of the defendants, was a minor, and was residing with his uncle in Illinois, in which state his uncle had qualified as his guardian. Service was had upon him by the delivery to him and to his guardian in Illinois of a summons with a copy of the complaint attached, as provided in section 6053, Kirby's Dig. The Illinois guardian employed an attorney, who filed an answer for the infant denying all the material allegations of the complaint. The court, after hearing the evidence, found that the deed from W. H. Martin to his son was a voluntary conveyance, and that W. H. Martin at the time he executed it "was insolvent, and that said conveyance was made with the intent to fraudulently delay his creditors in the collection of their debts both prior and subsequent." The court canceled the deed and decreed a foreclosure of the mortgage. The lands were sold under the decree, and purchased by the mortgagees at the sum of \$1,150, and they afterwards sold to C. T. Gwynn.

The appellant brought this suit within a year after reaching his majority for the purpose of vacating the above decree. He alleges, after setting out substantially the above facts, as grounds for vacating the decree, the following: "That no warning order was published against him, no guardian ad litem was appointed, and no bond was made, as required by law; that it was not true that W. H. Martin was insolvent at the date of the deed to appellant, and it was not true that said deed was executed by W. H. Martin to defeat his prior and subsequent creditors; that at that time W. H. Martin was solvent." The answer alleged that the deed from W. H. Martin to his son was executed to defraud creditors of W. H. Martin prior and subsequent, that the deed was not delivered, that appellant was personally served with summons as provided by law in the suit to cancel the deed and to foreclose, that he was represented in that suit by his regular guardian, who was also personally served with summons, and that every legal step was taken to protect appellant's interest. The answer admitted that no warning order was published against Edgar C. Martin, nor bond executed in his favor, and that no guardian ad litem was appointed for him. The cause was heard upon all the pleadings, papers, and depositions both in the suit to cancel and foreclose and in this suit.

The evidence taken by agreement in the suit to cancel deed and foreclose the mort-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gage (and which is evidence in this case) showed that as early as February, 1882, a judgment was rendered against W. H. Martin in the sum of \$1,120. This judgment had not been satisfied, and on the 18th day of December, 1886, an execution was issued thereon for a balance of \$443.20. In 1884 W. H. Martin executed a mortgage to C. Wall. This mortgage was foreclosed on the 6th day of March, 1888, for the sum of \$455.22, and the sale of the land under it did not satisfy the decree. On the 3d of February, 1887, Martin executed a mortgage to J. B. and J. J. Allen to secure a debt of \$575. J. A. McNeill testified that, after the conveyances from W. H. Martin to his sons, he did not own sufficient property to pay his debts, and that the Martin estate was insolvent. E. N. Royall testified that, at the time of the execution of the mortgage to him and McNeill, W. H. Martin was in possession of the land and was cultivating it, and that the witness did not know that the deeds to Martin's sons had been executed. Walter Martin testified that he did not know of the deed from his father to him until after his father's death, that he paid no consideration, and that his father had been in possession of the land for 10 years. C. L. Sides testified: That he heard W. H. Martin state during his lifetime that he executed a mortgage to Royall and McNeill in order to get money to pay off an execution in favor of Hartline, that W. H. Martin conveyed all the land he owned to his boys, Walter L. and Edgar C. Martin, except 160 acres, that 80 acres of this had been sold under the decree of the court, and that the other 80 acres is not worth more than \$200. There was evidence tending to prove that W. H. Martin was solvent at the time of his death, and the court so found. The court found in favor of appellees and dismissed the complaint for want of equity.

J. D. Block and Murphy, Coleman & Lewis, for appellant. J. H. Hill, L. Hunter, and G. B. Oliver, for appellees.

WOOD, J. (after stating the facts as above). The court found that "all the service which was had upon the said Edgar C. Martin was by summons by certified copy of the complaint attached, and made upon him in the state of Illinois, where he then resided, that he had no guardian in the state of Arkansas, and that his regular statutory guardian in the state of Illinois employed an attorney in said cause who filed the answer therein." This service was in compliance with the requirements of section 6053, Kirby's Dig., and when service is had in this way "it shall be deemed an actual service of the summons." Section 6054, Kirby's Dig. Therefore, as no personal judgment was rendered against appellant in the suit to set aside the deed, and as he was not constructively summoned, the bond required to be filed by section 6254, Kirby's

Dig., in favor of parties constructively summoned was not necessary. See section 6264, Kirby's Dig. The court therefore had jurisdiction of appellant in the suit to cancel his deed. The court accepted the defense that was made for him by his guardian appointed in a foreign state where the appellant resided. The attorney employed by this guardian filed an answer denying all the material allegations of the complaint, and the court doubtless considered it a bona fide and full defense, as much so as could have been made by a guardian appointed by the court especially to defend for him. As the authority of foreign guardians is generally limited, in the absence of a statute, to the jurisdiction that appointed them, the action of the court in allowing the defense to be made by the foreign guardian did not conform to the letter of section 6023, Kirby's Dig. See Woerner on the American Law of Guardianship, §§ 28, 93; Schouler, Dom. Rel. §§ 327, 329; Woodworth v. Spring, 4 Allen (Mass.) 324; Taylor v. Barron, 35 N. H. 496; Wharton, Con. of Laws, § 260. By this section the law guards with jealous eye the rights of an infant defendant. But the above procedure was in accord with the spirit of the statute, not prejudicial at all to appellant, and at most but an irregularity that even on appeal would not have rendered the judgment of the chancery court void. See Boyd v. Roane, 49 Ark. 414, 5 S. W. 704.

Appellant is seeking to vacate the decree under section 6248, Kirby's Dig., which is as follows: "It shall not be necessary to reserve, in a judgment or order, the right of an infant to show cause against it after his attaining full age, but in any case in which, but for this section, such a reservation would have been proper, the infant, within twelve months after arriving at the age of twenty-one years, may show cause against such order or judgment." The statute applies in cases of this kind. Blanton v. Rose, 70 Ark. 415, 68 S. W. 674. But before appellant can succeed under the authority of the above section he must "show cause against such judgment." Errors in the judgment must be "shown" (section 4431, subd. 8), under the procedure prescribed by section 4433, and according to the requirements of section 4434. Section 4433 provides that the complaint shall set forth "the grounds to vacate or modify the judgment, and the defense to the action if the party applying was defendant." Section 4434 provides: "A judgment shall not be vacated on motion or complaint until it is adjudged that there is a valid defense to the action in which the judgment was rendered." In Boyd v. Roane, 49 Ark. 397, at page 417, 5 S. W. 704, at page 710, the court, commenting upon these statutes, said: "But the first decree is valid, and under it Boyd obtained his title, and the infant's only claim for vacating the second decree is for alleged errors in procedure. We are by no means sure that there is any re-

versible error in the proceedings; but, admitting that there is, the statute provides that the complaint in a proceeding by an infant to vacate a judgment shall 'set forth the grounds to vacate or modify it, and the defense to the action,' and enacts that a 'judgment shall not be vacated on motion or complaint until it is adjudged that there is a valid defense to the action.' The Supreme Court of Kentucky in construing a provision of the statute identical with that under which the infant here is proceeding, say the errors contemplated by the statute are such as affect the substantial rights of the infants, and to obtain relief, they must show that actual injustice has been done them." *Richards v. Richards*, 10 Bush (Ky.) 617; *Pearson v. Vance*, 85 Ark. 272, 107 S. W. 986.

Now the decree of the court setting aside appellant's deed was based on a finding that his father, W. H. Martin, was insolvent at the time he made it, and that he executed it for the purpose of defrauding his creditors. The court found that W. H. Martin was insolvent upon the testimony of a witness who said that he was "acquainted with the property and financial standing of W. H. Martin at the time he conveyed the land to his sons, and knew that W. H. Martin could not then pay his indebtedness with what property he held in his own name." This, with the other evidence we have set forth in the statement of facts showing W. H. Martin's financial embarrassment, fully warranted the court in finding that W. H. Martin was insolvent, and that he executed the deed to his sons for the purpose of defrauding his creditors. It is a significant circumstance evidencing such intention that the deed to his son was executed four days after the issuance of the execution on the judgment. A debtor who is both able and willing to pay does not wait for the goad of the law, nor run to cover when it is applied. The fact that W. H. Martin, while greatly embarrassed financially, made a voluntary conveyance of lands to his children, without which his debts could not be paid, is conclusive evidence of fraud; and it is incompatible with honest purpose that a man, after having conveyed his land to his children, should convey the same land by mortgage to other persons for large sums of money. Such conduct is conclusive evidence of a scheme to defraud creditors.

To meet the burden of showing that the decree of the chancery court canceling the deed was erroneous, appellant adduced evidence tending to show that his father's estate was solvent some four years after the deed to appellant was executed; but this evidence was "wide of the mark." It did not show that W. H. Martin was solvent at the time the deed to appellant was executed, and did not even tend to show that W. H.

Martin in making the deed to appellant was not intending to defraud his creditors. Learned counsel suggest that the defense made for the minor in the suit to set aside his deed was "purely perfunctory." If so, there was all the greater reason that, in the present suit, when the law gave him another opportunity, and when he was represented by able counsel, he should have made some proof that his father was solvent at the time the deed was executed. To avoid the decree that was imperative. The court did not find that W. H. Martin was solvent at the time of the execution of the conveyance, as counsel aver; but, if it had, there would be no evidence to sustain such finding.

The decree dismissing the complaint for want of equity is correct.

Affirmed.

## ARKANSAS MIDLAND RY. CO. v. MOODY.

(Supreme Court of Arkansas. March 29, 1909.)

### 1. CUSTOMS AND USAGES (§ 19\*)—BURDEN OF PROOF.

In an action by a consignee against a carrier for damages to cotton after having been delivered by the carrier to a compress company, instead of to the consignee, where the carrier contended that there was a custom that justified it in delivering the cotton to the compress company as agent of the consignee, the burden of proving such a custom was upon the carrier.

[Ed. Note.—For other cases, see Customs and Usages, Dec. Dig. § 19.\*]

### 2. CARRIERS (§ 94\*)—CARRIAGE OF GOODS—DELIVERY TO THIRD PERSON AS AGENT OF CONSIGNEE—EVIDENCE.

Evidence held not to show that a compress company, to which a carrier delivered a shipment of cotton, was the agent of the consignee, so that the carrier would not be liable for damages to the cotton while in the compress company's hands.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 94.\*]

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Action by H. W. Moody against the Arkansas Midland Railway Company and another. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Appellee shipped over appellant's line of railway from Blackton to Helena two bales of cotton, weighing 1,120 pounds and worth 11½ cents per pound. The cotton was consigned to Lee Pendergrass. The cotton was shipped on the 29th day of November, 1906. The cotton was in good condition when received by the appellant. It was shipped under a limited liability contract, entered into with appellee for a reduced consideration in the freight rate. The uncontradicted proof was that the cotton was delivered by appellant to the compress company at Helena, December 5, 1906, and received by it as in "good order." The compress company delivered the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cotton to the consignee December 7, 1906. They were marked damaged. They were sold at the fair market value for cotton of the character, and netted \$47.48. They should have netted appellee, but for their damaged condition, the sum of \$128.38. He sued the appellant, and also the compress company, for the difference, \$77.20, alleging joint negligence.

The court instructed the jury at the request of appellee as follows:

"The court instructs the jury that, if they find from the evidence in this case that defendant railway company received the two bales of cotton in controversy at Blackton, Ark., and agreed in its bill of lading to deliver said two bales of cotton to Lee Pendergrass at Helena, Ark., and failed to do so—that is, deliver them in a reasonable time—then the defendant railway company is liable to the plaintiff for said cotton or its value.

"(2) The court instructs the jury that the defendant railway company cannot escape liability to plaintiff for failing to deliver said cotton to Pendergrass in good order in a reasonable time by delivering same to any other person, party, or corporation, unless they had authority from said consignee to do so."

Appellant duly objected and excepted.

And at the request of appellant the court gave the following:

"(3) If you find from the testimony that the Citizens' Compress Company was the agent of Lee Pendergrass, the consignee of the cotton in controversy, and that the railroad company delivered said cotton to the said compress company in good condition, then your verdict should be for the defendant Arkansas Midland Railroad Company."

The following prayers of appellant were refused:

"(1) You are instructed to return a verdict for the defendant Arkansas Midland Railroad company.

"(2) If you find from the evidence that the persons to whom the cotton in controversy was consigned were accustomed to have cotton consigned to him or them delivered to the Citizens' Compress Company, and you further find from the evidence that the cotton sued for was delivered in good condition by the defendant railroad company to said compress company, then your verdict should be for the defendant Arkansas Midland Railroad Company."

The verdict and judgment were in favor of appellee against appellant and the compress company for \$77.32, and appellant railway company prosecutes this appeal.

E. B. Kinsworthy, Lewis Rhoton, and Thos. T. Dickinson, for appellant. H. A. Parker, for appellee.

WOOD, J. (after stating the facts as above). The agent of the compress company,

who received the cotton from appellant at Helena, testified: "That the letters 'O. K.' over his signature on the receipt, indicated that the three bales of cotton from H. W. Moody to Lee Pendergrass were received by the Citizens' Compress Company in good order on the 5th day of December, 1906." If the compress company was the agent of Pendergrass, the consignee, then, when the cotton was delivered to it in "good order," the duty of appellant was terminated, and it was no longer liable to appellee. If, on the other hand, the appellant has failed to show that the compress company was the agent of Pendergrass, then it has not discharged its duty under the contract, and is liable for the damages resultant. The only question, then, is: Does the uncontroverted evidence show that the compress company was the agent of Pendergrass?

The testimony of the agent of the compress company is: That the company received the three bales of cotton shipped by Moody to Lee Pendergrass on December 5, 1906, in good order, and that the company handled other cotton shipped to Lee Pendergrass. Sometimes he had several hundred bales stored with the compress. So far as he knew, the Citizens' Compress Company, of which he was agent, received "all cotton consigned to Lee Pendergrass." There was another compress and cotton warehouse in Helena at the time. It was the custom for cotton consigned to commission merchants or cotton factors to be delivered to the compress. Appellee objected to the evidence, as shown by the last sentence above. The appellant did not prove beyond controversy the existence of a custom that would justify it in delivering the cotton to the compress company as the agent of Pendergrass. The burden as to this was on appellant.

The court properly submitted the question as to whether the compress company was the agent of Pendergrass, and it was, under the evidence, a jury question. There was no error in the rulings of the court. The verdict is sustained by the evidence.

The judgment is therefore correct, and is affirmed.

#### EZELL v. HUMPHREY & SIMONSON.

(Supreme Court of Arkansas. March 22, 1909.)

#### 1. REFORMATION OF INSTRUMENTS (§ 45\*) — SUFFICIENCY OF EVIDENCE.

To justify the reformation of a written instrument, the evidence must be clear and satisfactory.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 157; Dec. Dig. § 45.\*]

#### 2. REFORMATION OF INSTRUMENTS (§ 43\*) — MISTAKE—BURDEN OF PROOF.

The vendor, who seeks a reformation of a deed for the omission by mistake of a provision that the vendee takes the land subject to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a drainage assessment, has the burden of showing that the deed was not prepared in accordance with the agreement of the parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 154; Dec. Dig. § 43.\*]

**3. REFORMATION OF INSTRUMENTS (§ 45\*) — MISTAKE—SUFFICIENCY OF EVIDENCE.**

Evidence held insufficient to show an agreement by which the vendee was to take the land subject to a drainage assessment, and that such provision was omitted by mutual mistake, entitling the vendor to a reformation.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 164; Dec. Dig. § 45.\*]

Appeal from Mississippi Chancery Court; Edward D. Robertson, Chancellor.

Action by Humphrey & Simonson against S. B. Ezell. From a judgment for plaintiffs, defendant appeals. Affirmed.

S. S. Semmes and W. J. Lamb, for appellant. J. T. Coston, for appellee.

MCCULLOCH, C. J. The defendant, Ezell, who is appellant here, owned two sections of land in Mississippi county (sections 31 and 32, township 14 N., range 10 E.), and on December 14, 1903, sold and, by deed containing full covenants of warranty of title and against incumbrances, conveyed them to the plaintiffs, Humphrey & Simonson. The conveyance also embraced a lot in the town of Luxora, Ark., and contained a reservation of title to the timber on the land. The land at the time of the conveyance was incumbered with special assessments, amounting to about \$1,100, for the drainage of the land, and constituted a lien thereon. Subsequent to the conveyance, the lien of these assessments was enforced against the land, and the plaintiffs were compelled to pay the same in order to protect the land from foreclosure sale. The plaintiffs then instituted this action at law to recover from defendant the amount paid out by them to remove the incumbrance. Defendant filed his answer and cross-complaint, alleging in substance that it had been understood and agreed that the plaintiffs should pay these assessments, but that the stipulation to that effect was by mistake omitted from the deed. The prayer of his cross-complaint is that the deed should be reformed, so as to correctly express the true agreement of the parties thereto. The cause was removed to the chancery court, and on hearing thereof the chancellor dismissed the cross-complaint for want of equity, and rendered a decree in favor of the plaintiffs for the recovery of the amount paid out by them in removing the incumbrance. Defendant appealed to this court.

The negotiations between the parties leading up to the conveyance of the land were entirely by correspondence, except the verbal negotiations preceding it, to which no importance is attached, and which tend in no degree to settle the point at issue. The verbal

negotiation was had in September, 1903, and the correspondence began on October 6, 1903, by a letter from the defendant, written from his home in Spartansburg, S. C., to plaintiff Simonson, with whom all the negotiations were had. This letter, after referring to other matters pending between the parties, contained the following statement, which is relied on as fixing the substance of the agreement: "I intended, also, to talk with you further about the sale of sections 31 and 32. If you wish to submit an offer on these two sections to your associate at \$10 per acre, you may do so, subject, of course, to the timber contract which is on them with Moore & McFerrin and the ditch tax when due." The letter also contained a further statement with reference to the reservation of timber: "In case of a sale to you, I would have to reserve the timber on the strip of new land which I ought to get on the west side to offset that cut off on the east side."

Simonson replied to this by letter dated October 12, 1903, which, after referring to the other matters, contained the following: "Will say I appreciate your proposition of \$10 per acre for your sections 31 and 32 in 14—10; but that is a big lot of money to put into lands that are in the condition that lots of this land is in. I think my proposition of \$11,200 for these two sections was very liberal on my part, and exceedingly profitable to you in case of acceptance. There are several points upon which I will need information before being in shape to proceed rightly; that is, the amount per acre or in total of the drainage tax upon this land, and the time of the expiration of the timber contract with Moore & McFerrin, or more definitely yet, perhaps, the time you could give us a warranty deed with full possession. In case this latter feature in particular was satisfactory, I will say I would recommend to my people the purchase of these two sections at \$12,000, including the timber mentioned. In case of a sale, we would pay all cash, or, if terms as to interest were satisfactory, would pay cash as you desired and balance later as you wished, though not less than two or three years, as we would prefer to pay cash, rather than make terms for a shorter time. Will say, by the time we pay the drainage tax and make any improvement toward constructing laterals to get the water off, we would have more than \$14,000 in the land right away."

Defendant replied to this letter on October 17, 1903, stating the amount of the drainage assessments as he understood it to be. On October 24, 1903, Simonson wrote defendant a letter containing a statement to the effect that he would recommend to his partner "the purchase according to price and conditions named in my last letter," referring to the letter of October 12th. Defendant replied to this on October 30th, stating that he had

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

decided to let them have the land for the \$12,000 offered, but adding that he would reserve the uncut timber sold to Moore & McFerrin, and a strip of timber on the west side of section 31. Simonson wrote on November 11th, calling attention to the fact that his proposition included the strip of timber on the west side of section 31, and declining to allow a reservation as to that. Defendant wrote on November 16th, insisting that if the trade was made he would reserve the strip of timber mentioned in former letters, and declining to make the trade otherwise. On November 28th Simonson wrote, stating positively that, unless the strip of timber was included in the trade, negotiations were at an end, but added a proposition that he and his associates would give \$5,000 for section 32. Defendant replied to this on December 1st, declining to accept \$5,000 for section 32, but offering to accept \$6,000 for it.

On December 9, 1903, Simonson wrote defendant, and stated in substance that he had been unable to consult his associate with reference to reserving the strip of timber in question from the trade, and added the following proposition, which was immediately accepted by defendant by telegraphic dispatch: "In order to further this matter, and make it possible for us to go ahead and close this deal, will say I will take the responsibility of closing it at the price of \$12,000 without consulting the judge further, on conditions that you reserve this strip of timber of 16 inches and up for a term of three years on west side of section 31, and in its place include the piece of vacant property in Luxora which we looked at and discussed when you were here." Defendant immediately replied by wire, accepting the proposition, and also followed it by letter, dated December 14th, accepting the proposition and stating that he had forwarded the deed and abstract of title to the bank at Luxora.

The deed, instead of containing a reservation of timber 16 inches and upward on the strip on the west side of section 31, reserved the timber 15 inches and upward; but, notwithstanding this variance from the proposition made by plaintiffs in the letter of December 9th, they accepted the conveyance and paid the purchase price. The deed of conveyance constituted the last expression of the agreement between the parties, and superseded all antecedent negotiations, either written or oral. The deed contained full covenants of warranty, which rendered the defendant liable for the amount of the incumbrance on the property. The only question in the case is whether or not the defendant has adduced proof sufficient to warrant the court in finding that the deed does not truly reflect the agreement of the parties, and that a mutual mistake was made in its preparation, execution, and acceptance. This court has repeatedly held that, in order to justify the

reformation of a written instrument, the proof must be clear and satisfactory. *McGulgan v. Gaines*, 71 Ark. 614, 77 S. W. 52; *Goerke v. Rodgers*, 75 Ark. 72, 86 S. W. 337; *Mfg. Co. v. Kempner*, 84 Ark. 349, 103 S. W. 880.

The correspondence between the parties tends to show that the defendant had in mind that his various propositions to the plaintiffs and his acceptance of their final proposition to him were on the basis that they should pay the drainage assessments. This is doubtless due to the fact that he believed that the assessments did not constitute a lien on the land, but that they would thereafter become a lien when the drains were cut. The final proposition made by the plaintiffs, in the letter of December 9, 1903, contained a distinct proposition to pay a specified amount for the land. This proposition was accepted, and the acceptance was followed up by a deed, prepared by defendant himself, omitting all mention of the drainage assessments, and expressly warranting the title against incumbrances. Plaintiff Simonson testifies that he knew at the time of the conveyance that the drainage assessments constituted liens on the land, and that he did not understand, and did not intend, that they should assume the removal of those incumbrances. The burden is on the defendant to show by clear and satisfactory evidence that the deed itself was not prepared in accordance with the agreement of the parties. This omission is not sustained by the proof. There was no agreement until the defendant accepted the proposition contained in plaintiff's letter of December 9th, and the deed correctly reflected that agreement, except the change as to the size of the timber which was incorporated into the deed by the defendant himself. Even conceding that the correspondence left the matter in doubt as to who should pay the assessments, it was the duty of the defendant to settle that doubt by an unequivocal stipulation in the deed itself; the burden being on him, in order to establish his right to a reformation of the deed, to show an agreement in the correspondence on the part of the plaintiffs to pay the drainage assessments, and that that agreement was by mutual mistake omitted from the deed.

The decree of the chancellor is correct, and it is therefore affirmed.

**HUNTER STATE BANK v. MILLS et al.**  
(Supreme Court of Arkansas. March 22, 1909.)

**1. COUNTIES (§ 99\*)—SURETIES OF TREASURER—LIABILITY FOR FAILURE TO DEPOSIT FUNDS.**

The obligation of the sureties on a county treasurer's bond that he would faithfully perform his official duties, and pay over all moneys that might come into his hands, does not include penalties imposed on the treasurer after



its execution, and hence sureties on a bond executed in 1906 are not liable for penalties imposed by Act March 7, 1907 (Acts 1907, p. 485), for their principal's failure to make an immediate deposit of funds, as therein required.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 99.\*]

## 2. CONSTITUTIONAL LAW (§ 140\*)—IMPAIRING OBLIGATION OF CONTRACTS.

A county treasurer in office when Act March 7, 1907 (Acts 1907, p. 485), was enacted, requiring the immediate deposit of funds received by him, did not hold his office by contract or grant, and the rights and duties attached to the office were created by law, and could be changed, or additional ones imposed on him during his term, and so penalties to secure performance of his new duties in such case were not in violation of Const. Ark. art. 2, § 17, and Const. U. S. art. 1, § 10, as impairing the obligation of contracts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 336, 356-361; Dec. Dig. § 140.\*]

Appeal from Circuit Court, Woodruff County; Hance N. Hutton, Judge.

Action by the Hunter State Bank against C. B. Mills and others. From a judgment for defendants, plaintiff appeals. Affirmed in part, and reversed in part.

J. T. Patterson, for appellant. H. M. Woods, for appellees.

**BATTLE, J.** The Hunter State Bank, the depositary of the public funds of Woodruff county, brought this action against C. B. Mills, county treasurer of said county, and certain sureties on his official bond, to recover penalties on account of the failure of Mills, as county treasurer, to immediately pay over to the plaintiff, as such depositary, the public funds of the county upon receipt of same.

The first paragraph of the complaint, omitting the caption, is as follows:

"The plaintiff, the Hunter State Bank, for its cause of action herein against the defendants, C. B. Mills, Robt. C. Lynch, T. C. Carter, and F. H. Kennedy, states that the plaintiff herein is a corporation organized and existing under the laws of the state of Arkansas and having its situs and principal office and place of business at the town of Hunter, in Woodruff county, Ark.

"That the above-named defendant C. B. Mills is, and has been since the 17th day of November, 1906, the duly elected, qualified, commissioned, and acting treasurer of Woodruff county, Ark. That on the 31st day of October, 1906, the said C. B. Mills, as treasurer as aforesaid, made, executed, and filed his bond as such county treasurer, with Robt. C. Lynch, T. C. Carter, and F. H. Kennedy, who are also made defendants herein, as his sureties upon such bond, and which bond was on the 17th day of November, 1906, duly approved by the county court of Woodruff county. \* \* \*

"That at the April term, 1907, of the county court of Woodruff county, Ark., this plain-

tiff, the Hunter State Bank, was by the county court selected and designated to be the depositary of the public funds of Woodruff county, including the school funds thereof. \* \* \*

"That in making the aforesaid order so selecting and designating this plaintiff as such depositary of the public funds of Woodruff county as aforesaid, the county court acted pursuant to the authority and in conformity to the provisions and requirements of an act of the Thirty-Sixth General Assembly of the state of Arkansas, entitled 'An act to create a depositary for the county funds of Woodruff county, Ark.,' which was approved March 7, 1907 (Acts 1907, p. 485).

"That on the 27th day of April, 1907, and within 20 days next after the county court made the aforesaid order selecting this plaintiff to be the depositary of the public funds of Woodruff county, including the school funds thereof, as aforesaid, this plaintiff made, executed, and filed with the county clerk of Woodruff county its bond as such county depositary as required by law, which bond was on the 27th day of April, 1907, duly approved by the county court of Woodruff county. \* \* \*

"That thereafter on the ——— day of ———, 1907, the said C. B. Mills, as county treasurer of Woodruff county, as aforesaid, paid over to this plaintiff as such county depositary of said county the public funds of Woodruff county, including the school funds thereof, which were then in his hands as such county treasurer of Woodruff county, as required by law.

"That on the 10th day of September, 1907, C. B. Mills, as county treasurer of Woodruff county as aforesaid, received from the treasurer of the state of Arkansas the sum of \$7,469.68; the same being a part of the public funds of said Woodruff county, including the school funds of said county. That after the receipt of the aforesaid sum of \$7,469.68 by the said C. B. Mills as county treasurer as aforesaid, the said C. B. Mills, as such county treasurer as aforesaid failed to immediately deposit the same with the plaintiff herein as such depositary of the public funds of said Woodruff county as aforesaid, as required by law; but the said C. B. Mills, county treasurer as aforesaid, held the aforesaid sum of money, the same being a part of the public funds of the said Woodruff county and a part of the school funds thereof, from the time of the receipt of the same by him as aforesaid until the 3d day of October, 1907, when he deposited the same with the plaintiff herein as such county depositary as aforesaid. That the action of the said C. B. Mills, as county treasurer as aforesaid, in failing to deposit with this plaintiff, as such depositary of the public funds of Woodruff county, the aforesaid sum of \$7,469.68, the same constituting a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

part of the public funds and a part of the school funds of Woodruff county as aforesaid, immediately upon receipt thereof by him as required by law, and in withholding and failing to so deposit with this plaintiff as such depository the aforesaid sum of money from the 10th day of September, 1907, or the time of the receipt thereof by him until the 3d day of October, 1907, when he deposited the same with this plaintiff as aforesaid, constitute a breach of the conditions of the bond of the said C. B. Mills as county treasurer, as aforesaid, and by reason of such breach of the conditions of the bond of the said C. B. Mills as county treasurer as aforesaid, this plaintiff has sustained injury and damage in the sum of \$572.66, the same being 10 per centum per month on the aforesaid sum of \$7,469.68 from September 10, 1907, to October 3, 1907, and for which sum the defendants herein are liable to the plaintiff herein under the provisions of the act of the General Assembly of the state of Arkansas as hereinabove referred to."

The complaint contains other paragraphs of like tenor alleging further damages.

The condition of the bond sued on is as follows: "Whereas, the above-bounden C. B. Mills was on the 3d day of September, 1906, duly elected to the office of treasurer of Woodruff county, Ark.: Now, if he, the said C. B. Mills, shall well, truly, and faithfully perform and discharge all of the duties of the said office, and if he shall account for and pay over all moneys that may come into his hands as such treasurer, then this obligation to be void; otherwise to remain in full force and effect."

Defendants demurred to the complaint for the following reason:

"Because the act entitled 'An act to create a depository for the county funds of Woodruff county, Ark.' is in violation of article 1, § 10, of the Constitution of the United States, and in violation of article 2, § 17, of the Constitution of the state of Arkansas, because said act impairs the obligation of a contract; said contract being a bond executed by defendants on the — day of —, 1906, and upon which this action is based. The penalties and liabilities under the special act herein mentioned being greatly in excess of those fixed by the statute in force at the time of the execution of the bond herein mentioned."

The court sustained the demurrer and dismissed the action, and plaintiff appealed.

The bond sued on was executed on the 31st day of October, 1906, and the act referred to in the demurrer was approved March 7, 1907. This act makes it the duty of the county judge of Woodruff county to loan the county funds of such county, including school funds, to any bank, banker, or trust company, which or who shall offer to pay the highest rate of interest thereon, at such rate; makes the successful bidder, on performing certain conditions, the depository of

such county; and makes it the duty of the county treasurer immediately upon the receipt of any county funds to deposit the same with the depository, to the credit of the county, and the particular fund to which it may belong, and for a failure to perform this duty makes him liable to the depository on his official bond for 10 per centum per month upon any sum not so deposited, to be recovered by civil action in any court of competent jurisdiction; and makes it the duty of the depository to provide for the prompt payment of all checks of the county treasurer drawn upon the county funds in his hands.

The obligation of the sureties on the bond sued on was that Mills would well, truly, and faithfully perform and discharge all of the duties of the office of county treasurer, and account for and pay over all moneys that may come into his hands as such treasurer. This does not include penalties imposed upon the treasurer after the execution of the bond. *Jeffries v. Malone*, 105 Ala. 489, 17 South. 21; *McDowell v. Burwell*, 4 Rand. (Va.) 317; 29 *Cyclopedia of Law & Procedure*, 1454, and cases cited; *Murfree on Official Bonds*, § 654.

In *Murfree on Official Bonds*, § 654, it is said: "The obligation of a surety for the due discharge of his official duties by his principal is that the surety will answer the damage that may result from the breach of the bond. It is not that the principal will respond to such fines and penalties for his misconduct, as may be prescribed by law, and awarded by judicial authority. The fine and penalty are punishment for neglect of duty, and may be imposed or incurred, irrespective of actual damages or loss suffered by any one."

It follows that the sureties on the bond sued on are not liable for the penalties imposed by the act of March 7, 1907, which was subsequent to the execution of the bond; but this is not true of the principal, Mills. He did not hold the office of treasurer by contract or grant. The rights and duties attached to it were created by law, and may be changed, or additional ones may be imposed upon him during the currency of his term, provided the new duties are appropriate to his office, and to secure the performance thereof penalties may be imposed upon him for failure or neglect to perform. New duties, which were appropriate to his office, were lawfully imposed upon Mills, with penalties attached for the failure to perform them, by the act of March 7, 1907, and he is liable therefor.

We have not failed to notice *Christian v. Ashley County*, 24 Ark. 142. The court in that case held that the sureties were liable for the penalty, because it was the intention of the statute to make them responsible. It did not say that they would be liable in the absence of such a statute.

The judgment is sustained as to the sure-

ties, and reversed as to Mills, and cause is remanded, with directions to the court to overrule the demurrer to the complaint.

**ST. LOUIS, I. M. & S. RY. CO. v. GARNER.**  
(Supreme Court of Arkansas. March 22, 1909.)

**1. RAILROADS (§ 350\*)—INJURIES TO PERSONS CROSSING TRACK — CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.**

Whether decedent, struck by a train, was guilty of contributory negligence in attempting to cross the track while an engine on an adjoining track was emitting steam, which might to some extent have obscured his vision, held under the evidence for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1166, 1170; Dec. Dig. § 350.\*]

**2. RAILROADS (§ 327\*)—INJURIES AT CROSSING —DUTY TO LOOK AND LISTEN—CONTRIBUTORY NEGLIGENCE.**

A traveler along a highway, who attempts to cross a railroad track without looking and listening for the approach of trains, is guilty of contributory negligence precluding recovery for injuries through being struck by a train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.\*]

**3. TRIAL (§ 260\*)—INSTRUCTIONS—INSTRUCTIONS COVERED.**

It is not error to refuse instructions covered in substance by those given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**4. DEATH (§ 104\*)—DAMAGES—INSTRUCTIONS.**

In an action for wrongful death, an instruction which, after correctly stating to the jury the matters which they should consider in measuring the damages, concluded: "All of these are proper elements in determining the value of the life taken"—was not erroneous; the instruction meaning that in awarding damages the jury should consider the matters named for the purpose of determining the value of decedent's life to his dependents.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 104.\*]

Appeal from Circuit Court, Independence County; Frederick D. Fulkerson, Judge.

Action by Arch Garner, as administrator, against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Kinsworthy and Lewis Rhoton, for appellant. J. B. Baker and McCaleb & Reeder, for appellee.

**McCULLOCH, C. J.** The railway company appeals from a judgment rendered against it in favor of appellee, Garner, as administrator of the estate of T. E. Jett, deceased, for damages caused by the death of said decedent. Jett was killed on the crossing at Judsonia, Ark., by a fast mail train which was south-bound, and was running at a speed variously estimated at from 50 to 75 miles per hour. He was engaged in the business of buying and selling cattle, and had a lot of cattle in appellant's stock pens near the station of Judsonia. At the time of the injury a long south-bound freight train had

reached the station and was standing on a side track, which was eight feet distant from the main track, awaiting the passing of the fast mail train. The front of the freight engine was within a few feet—from five to eight feet—of the edge of a road crossing just south of the station. Jett and his companion, Allen, after feeding and salting his stock in the pens, started to return to the station, and in doing so it was necessary to pass in front of the freight engine and to cross the track at the road crossing. Jett was slightly in front of Allen and was struck by the mail train and instantly killed. Allen discovered the approaching train just in time to step back and avoid it. The testimony shows that at that time the freight engine was making considerable noise by popping off steam, and that considerable steam was escaping from the engine. Allen testified that as he and Jett started across they checked up just a moment and looked for trains. He said that the engine around which they passed was blowing off steam, and that steam was escaping all around them. He said that they also listened to see if they could hear the train coming. Another witness testified that as the two men started across they hesitated or checked up, as if they were looking or listening for trains. Allen also testified that there was nothing to obscure their view except the escaping steam, and his and the testimony of other witnesses show that the track was perfectly straight for a mile or two. It may be taken as undisputed that but for the escaping steam there was nothing to hinder or obstruct the view along the track, or to prevent Jett and Allen from seeing the approaching train. There was evidence sufficient to justify the finding that the servants of the railway company in charge of the fast mail train were guilty of negligence in failing to give the statutory signal, and the only question in the case, so far as the sufficiency of the evidence is concerned, is whether or not it can be said as a matter of law that Jett was guilty of contributory negligence in failing to discover the approaching train.

There is no direct evidence that Jett did not look and listen for trains on the main track. On the contrary, there is evidence to the effect that he did look and listen. Appellant insists that the court should have taken the case from the jury by a peremptory instruction. We think that the testimony presented an issue of fact for the jury to determine, and the court committed no error in submitting it to the jury.

It is too well established by the decisions of this court to need the citation of authority that a traveler along a highway, attempting to cross a railroad track, must look and listen for the approach of trains; otherwise

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he is guilty of contributory negligence and cannot recover damages on account of injury resulting therefrom. Unless, however, the undisputed evidence shows that the traveler did not look and listen, then it is a question of fact for the jury to determine, from all the facts and circumstances, whether the precautions which he exercised in that respect were sufficient to acquit him of any charge of negligence. In the present case the evidence tends to show that Jett did both look and listen for the approaching train. The jury were warranted in finding that he exercised the necessary precaution, but was prevented from discovering the approaching train on account of its rapid approach and the fact that his vision was obscured by the escaping steam from the freight engine. The jury might well have found that it was negligent for him, under the circumstances, to have attempted to cross while the steam was escaping, but that was a question of fact for the jury, and not one of law for the court. We cannot say as a matter of law that he was bound to abandon the crossing for the time because the freight engine was emitting steam which might have obscured to some extent his vision. He may, as a reasonably prudent person, have thought that the escaping steam would not interfere seriously with his discovering a train on the other track, and yet he might have been mistaken about this, or his vision may have been obscured by a sudden and unexpected volume of steam. We are of the opinion that where the evidence shows, as it does in this case, that the deceased was making some effort to discover dangers on the track over which he was attempting to pass, and that the escaping steam brought about a condition which might have prevented his discovering the danger, even though by the exercise of greater care he might have discovered it, it was peculiarly a question for the jury to determine whether, under all the circumstances, the deceased acted as a prudent person, or whether he was guilty of negligence in attempting to cross, under those circumstances.

The case of *St. L., I. M. & S. Ry. Co. v. Robt. Hitt*, 76 Ark. 227, 88 S. W. 908, 990, was a suit to recover damages for injuries at a crossing while plaintiff and his companion were attempting to cross the track at night in a covered wagon. They stopped the wagon 82 feet from the crossing and looked and listened, and then attempted to drive across. The same contention was made as in this case—that the travelers were guilty of contributory negligence as a matter of law, and that the trial court should have so declared in a peremptory instruction. This court, speaking through Mr. Chief Justice Hill, said: "While it is true the sheet of the wagon obstructed the vision on either side, and in a measure the hearing, yet they believed from their investigation that the way was clear, and they continued to look ahead and listen. The electric arc light and the

headlight of the freight engine, casting their rays on the crossing, might well tend to prevent the discovery of the light from the headlight of the approaching train. The situation confronting Mr. Hitt was not such as requires the court to say, as a matter of law, that it was per se negligence, under the circumstances, to attempt to cross the track. The ringing bell or sounding whistle would doubtless have given the warning of the approaching train, which was not otherwise apparent to Mr. Hitt or his son. These are facts from which fair-minded men may draw different conclusions as to whether the care exercised was proportional to the danger to be avoided, and such as the situation called for from men of prudence and caution. When such are the facts of a case, then the question must be settled by a jury, under proper instructions." To the same effect, see *St. L., I. M. & S. Ry. Co. v. Johnson*, 74 Ark. 372, 86 S. W. 282; *C., R. I. & P. Ry. Co. v. Moon* (Ark.) 114 S. W. 228; *C., O. & G. Ry. Co. v. Baskins*, 78 Ark. 355, 93 S. W. 757; *La. & Ark. Ry. Co. v. Ratcliff* (Ark.) 115 S. W. 396.

Error of the court is assigned in its refusal to give the third, ninth, and thirteenth instructions requested. The substance of these instructions was given in others requested by appellant, and there was no error in the refusal to give these. The court gave very full and specific instructions, requested by appellant, on the subject of contributory negligence. We think that appellant has no cause for complaint in the rulings of the court in this respect.

Error is also assigned in the giving of an instruction requested by appellee on the measure of damages. This instruction, after correctly stating to the jury the matters which they should consider in measuring the damages, concluded with the following statement: "All of these are proper elements for your consideration in determining the value of the life taken." The instruction is criticised because of the use of the words "value of the life taken," and in support of this contention the language of Judge Riddick is quoted, in the case of *St. L., I. M. & S. Ry. Co. v. Dawson*, 68 Ark. 1, 56 S. W. 46, in which he said that, "in assessing damages for wrongs causing death, the law does not undertake to find a sum equal to the value of the life to the deceased, or for which the person killed would have voluntarily suffered death." We do not think that this language can be construed to support the contention of counsel. In that case Judge Riddick said that the value of one's own life could not be taken as a criterion for measuring damages, for, as he went on to say, a person's life is a priceless gift which would not be surrendered for the value of an entire railroad. What the court meant in this instruction was that, in awarding damages, the jury should consider the matters named

for the purpose of determining the value of decedent's life to his dependents. In this sense the language was entirely correct, and was approved by this court in *Railway Co. v. Sweet*, 60 Ark. 558, 31 S. W. 571.

We find no error in the record, and the verdict was warranted by the evidence. The recovery in this case was far less than it might have been under the evidence if the appellant was liable at all for the injury.

Judgment affirmed.

### CRAIG v. CRAIG.

(Supreme Court of Arkansas. March 22, 1909.)

#### 1. DIVORCE (§ 37\*)—DESEPTION—REASONABLE GROUNDS.

A reasonable cause which will justify one spouse in abandoning the other must be such conduct as could be made the foundation of a judicial proceeding for divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 123; Dec. Dig. § 37.\*]

#### 2. APPEAL AND ERROR (§ 1009\*)—REVIEW—FINDINGS OF FACT OF CHANCELLOR—CONCLUSIVENESS.

In the absence of a clear preponderance of evidence against a finding of fact of a chancellor, it will not be reversed for insufficiency of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

#### 3. DIVORCE (§ 37\*)—GROUNDS—DESEPTION—FACTS CONSTITUTING.

Where a wife of her own accord left her husband without his consent and against his will with the fixed determination to abandon him, and, though afterwards he requested her to return, she refused and continuously for the statutory period showed by her conduct a settled determination not to return to her husband and without legal cause, he was entitled to a divorce for desertion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 107-138; Dec. Dig. § 37.\*]

#### 4. DIVORCE (§ 222\*)—ATTORNEY FEES OF WIFE—DEFENSE TO HUSBAND'S CROSS-COMPLAINT.

Where a husband sued for divorce files a cross-complaint asking a divorce, it is usually proper to allow the wife attorney fees as suit money in her defense to the cross-complaint.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 644; Dec. Dig. § 222.\*]

Appeal from Sebastian Chancery Court; J. V. Bourland, Chancellor.

Divorce action by Phalby Craig against B. F. Craig. Decree for defendant on his cross-complaint, and plaintiff appeals. Affirmed.

Sam R. Chew, for appellant. Thos. B. Pryor, for appellee.

FRAUENTHAL, J. The plaintiff, who is the appellant in this court, instituted this suit asking for a divorce from her husband on the ground that he was guilty of such cruel and barbarous treatment towards her, and offered such indignities to her, as to render her condition in life intolerable. He

filed an answer in which he denied every allegation of her complaint, and also filed a cross-complaint, in which he asked for an absolute divorce on the ground of willful desertion. The Sebastian chancery court, in which the suit was instituted, entered a decree denying the prayer of the complaint and granting the prayer of the defendant upon his cross-complaint; and from that decree plaintiff now prosecutes this appeal.

The defendant was a widower with six children, who, at the time of his marriage to the plaintiff, were living with him, and whose ages ranged from 7 years to 20 years. He was reputed to be a man of some considerable property; and, although the parties lived within five or six miles of each other for a number of years, the plaintiff had never visited at the home of the defendant prior to their marriage. Plaintiff was a woman of considerable sentiment and some temper. She had been keeping house for her father for a number of years, and seemed to be greatly devoted to him. The plaintiff and defendant were married in February, 1904, and within a few weeks they disputed, and then quarreled, and in May, 1904, they bickered and quarreled more bitterly, until on May 16, 1904, plaintiff left the home of her husband and returned to the home of her father. It would appear from the testimony that she was disappointed in the home of the defendant, in its furnishings and surroundings, and the style in which it was maintained, and to some of the witnesses she said that, "if she had known that things were just like they were, she would not have married him," and to other witnesses she said that she did not love the defendant. He, upon his part, did not manifest those deep sentiments towards plaintiff for which her nature sought; so that within a very short time after their marriage a coolness sprang up between them and seemed to stay, and this separation might have been the wish of both, although she was active and he was only negative in the parting. Within a short time after she left him, the defendant went to her father's home to request and persuade her to return to his home; but neither evinced that strong affection towards the other which would secure a reconciliation. They remained separated, and in August, 1905, defendant instituted a suit for divorce on the ground of desertion, and in September following, at the taking of depositions on his part, a proposal of reconciliation was made by him, and they then both agreed to live together, and, to use their language, "Let the past be the past. We will bury it." The defendant then dismissed his suit, and they lived together until June 1, 1906, when plaintiff again left the defendant. It would serve no useful purpose to go into the details of their conduct towards each other during the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

time they lived together. To speak in general terms, she claimed that he treated her harshly and cruelly by his cold manner and lack of affection, and sometimes by offensive language. But her testimony is not corroborated by any witness in these particulars. She does not claim, however, that he ever placed a heavy hand on her, or that he failed to provide well for her. Her testimony indicates that they had bickerings and quarrels, and that the defendant was not demonstrative in his affections; but the testimony does not show any studied neglect on his part that the steadfast love of a wife could not and would not overcome. The testimony of witnesses other than the defendant shows that at times she spoke harshly to the defendant, and coupled his name wrongfully with disreputable persons, and sometimes spoke in an offensive manner of his first wife, and some of the witnesses testified that she said that she did not love the defendant, and her manner indicated that she was sorry that she had married him. Finally, about June 1, 1906, after some misunderstanding, they quarreled again, and she again left defendant's home and returned to her father. She says in her deposition, which was taken more than a year after she left him, that on that occasion she left the defendant forever. One of the defendant's sons, who was called as a witness by the plaintiff, testified that at the time she was preparing to leave the defendant told him to go to the house and speak to the plaintiff and try to persuade her to stay, that he did so, and that the plaintiff said she would not stay, and to him she said that she did not love the defendant. Plaintiff's father was a witness in her behalf, and he testified that he was doubtful if they could live together, and that he was opposed to her returning to the defendant. A few days after she left him in June, 1906, defendant saw the plaintiff at his store, and asked her to return to him, and she refused. He testifies that he said to her: "You are not satisfied to stay with me here, but let us make some changes and go from here where we will be satisfied." But she refrained from meeting his overtures, and refused to return to him. So that the evidence indicates that she left the plaintiff with the fixed determination to abandon him; and since she left him her actions and conduct in refusing any overture of the defendant for reconciliation, in connection with the opposition of her father to any reconciliation, evinces a settled intention on her part to remain in desertion of the defendant.

Now, as is said in *Rie v. Rie*, 34 Ark. 37: A "reasonable cause, which within the divorce statutes will justify one of the married parties in abandoning the other, must be such conduct as could be made the foundation of a judicial proceeding for divorce." There is no corroborative evidence that

shows that the plaintiff had such a reasonable cause as above defined to leave the defendant. Since she left him she has never shown a desire to return to him. There is no testimony that she has ever sent him a word or message of any kind since she left him, nor that she ever made an inquiry about him or evinced any concern as to him, although she has lived during all the time within a few miles of the defendant. The testimony of the defendant and other witnesses and the circumstances sufficiently show that the plaintiff left the defendant against his will without that reasonable cause which the law requires to be proved by proper evidence, and that this desertion on her part was intentional and willful and has so continued. This was the finding of the chancellor; and, in the absence of a clear preponderance of evidence against such finding, the decree will not be reversed for insufficiency of evidence. *Sulek v. McWilliams*, 72 Ark. 67, 78 S. W. 769; *Hinkle v. Broadwater*, 73 Ark. 489, 84 S. W. 510; *Reed v. Reed*, 62 Ark. 611, 37 S. W. 230. Upon the contrary, a preponderance of the evidence, consisting of testimony of the defendant, corroborated by the testimony of other witnesses and the circumstances, would establish a case where the wife left her husband of her own accord, without his consent and against his will, and that afterwards he requested her to return and she refused, and that continuously since she left him she has shown by her actions and conduct a settled determination not to return to her husband and without legal cause. This is sufficient to establish a case of desertion. 2 *Bishop on Marriage, Divorce & Separation*, § 1475; *Jennings v. Jennings*, 13 N. J. Eq. 38; *De Armond v. De Armond*, 66 Ark. 601, 53 S. W. 45. We have carefully examined the testimony in this case, and we are unable to say that the chancellor has committed any error in his findings or in his decree.

An application was made in this court for the allowance of attorney's fees for services in prosecuting this appeal before the final submission of this cause. At that time we stated that we would pass upon the application on the final hearing of the case, and in the meanwhile ordered \$50 paid thereon. An allowance of attorney's fees is usually proper in a case like this, as suit money in the wife's defense to the cross-bill of her husband asking a divorce. *Slocum v. Slocum* (Ark.) 111 S. W. 806; *Strickland v. Strickland*, 80 Ark. 451, 97 S. W. 659. The defendant was reputed to own considerable property, but we find that he is not in good financial circumstances, and that he must bear the expense of maintaining a considerable family. We think that \$75 is a reasonable allowance for attorney's fees for the services of learned counsel in this court, and of this sum \$50 has heretofore been paid, and the

balance of \$25 is now ordered to be paid as part of the costs of this cause.

The decree of the Sebastian chancery court is affirmed, at the cost of the appellee.

# MERCHANTS' GROCERY CO. v. LADOGA CANNING CO.

(Supreme Court of Arkansas. Feb. 22, 1909.)

## 1. CUSTOMS AND USAGES (§ 5\*)—REQUISITES AND VALIDITY—GENERALITY.

To make evidence of an alleged custom or usage admissible, it must be shown to have existed long enough to have become generally known.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 4; Dec. Dig. § 5.\*]

## 2. SALES (§ 446\*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

In an action by the buyer of canned corn who had rejected a shipment on the ground that the corn was spoiled, and purchased of another company, to recover the difference between the contract price of the rejected corn and the price paid for the subsequent purchase, where an alleged custom of buyers of canned corn to keep account of all "swells" and report them to the seller for reimbursement, and not to reject the goods because of a moderate quantity of "swells" was not proved because of the absence of a showing that it had been established long enough to have been generally known, a charge that, if the jury found the custom to exist, plaintiff could not reject the goods on account of "swells unless the number was so great that the custom would not require him to take them," was erroneous.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 446.\*]

## 3. SALES (§ 440\*) — REJECTION OF GOODS — PURCHASE IN MARKET—ACTION FOR DAMAGES—EVIDENCE.

In an action by a buyer to recover the difference between the contract price of goods purchased and rejected by it and the price paid by it for other goods purchased to take the place of those rejected, evidence that the seller had resold the rejected goods for more than the contract price to the original buyer was inadmissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1274; Dec. Dig. § 440.\*]

## 4. SALES (§ 440\*)—REJECTION OF GOODS — PURCHASE IN MARKET—ACTION FOR DAMAGES—EVIDENCE.

A card published by an individual quoting prices of the commodity was inadmissible in the absence of a showing that dealers in the commodity constantly received and acted upon the price list, thereby proving it worthy of confidence and reliable.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 440.\*]

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by the Merchants' Grocery Company against the Ladoga Canning Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded for a new trial.

J. W. & M. House, for appellant. Miles & Wade and M. M. Bachelder, for appellee.

BATTLE, J. "On the 24th day of May, 1907, the Merchants' Grocery Company pur-

chased of the Ladoga Canning Company 750 cases of corn, containing 18,000 cans of the 1906 packing. The purchase was made by sample, and the Merchants' Grocery Company agreed to pay 55 cents per dozen cans. The corn was promptly delivered by the canning company on the cars of the railroad company at Ladoga, and on or about the 12th day of June following arrived at Searcy, Ark., the home of the Merchants' Grocery Company. Upon its arrival the car was opened and the corn was unloaded and hauled a distance of three blocks to the warehouse of the Merchants' Grocery Company, which was engaged in the wholesale grocery business, and purchased the corn for its general wholesale trade. Two days later the Merchants' Grocery Company examined the corn, and pronounced it spoiled, whereupon it was reloaded into the car and the entire shipment refused. This refusal was immediately wired to the canning company, which at once wired that the refusal was unwarranted, and the shipment must be accepted. The Merchants' Grocery Company still refusing to accept the corn, the canning company wired to its brokers to resell the corn if possible, and, in case of not selling it, to ship it to Little Rock for storage. There being no other dealers in Searcy to buy, the corn was shipped to Little Rock." On the 6th day of September, 1907, the Merchants' Grocery Company purchased of the Illinois Canning Company 500 cases of corn containing 12,000 cans of the 1907 packing, paying for it 87½ cents per dozen. The Merchants' Grocery Company then brought this action against the canning company for the difference in the price of the two shipments per dozen cans. In a trial of the issues in the action the jury returned a verdict in favor of the defendant, and plaintiff appealed to this court.

There was a conflict of the evidence as to the goods conforming to the contract of purchase; that is to say, the samples by which the sale was made. There was evidence to sustain the verdict of the jury.

In the progress of the trial the appellee was allowed, over the objection of appellant, to adduce evidence to prove a custom or usage "among the canned goods trade of the country" to the effect "the buyers shall keep an account of the swells and report to the seller by any given time after the sale of the goods and the seller shall then reimburse the buyer for such swells," and not to refuse to take the goods on account of the swells, unless there was "an unreasonable amount of swells." Appellant objected specifically because it was not shown that it had notice of the usage or custom.

The appellee was also permitted to adduce evidence, over objection of the appellant, to prove that it sold the rejected corn to the Penzel Grocery Company for 70 cents by the dozen.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

A card published by William Dugdale quoting corn as late as August 17, 1907, from 55 to 57½ cents, was read as evidence, over the objection of the appellant.

Evidence was adduced tending to prove that there was a gradual advance in the price of canned corn all over the country from the 12th of June to the 1st of September, 1907, and that "the lowest advance that any of the canning factories quoted was about 22½ cents per dozen."

The court gave the following instruction, over the objection of appellant, to the jury:

"If you find from the evidence that it is a custom among dealers in canned corn that the buyers shall keep account of all swells and report to the seller by any given time after the sale of the goods, and that the seller shall then reimburse buyer for such swells, and you further find from the evidence that it is also the custom for the buyer not to refuse to take the goods on account of a moderate quantity of swells, then you are instructed that plaintiff could not reject said goods on account of swells, unless the quantity of swells was so great that the custom would not require plaintiff to take them, and that this is true irrespective of whether there were any swells in the samples."

The evidence adduced to prove a custom or usage was insufficient. Among other things it should have been shown to have been in existence a sufficient length of time to have become generally known. There was no evidence to show how long it had been established. The court, therefore, erred in giving the instruction copied in this opinion. *Ward Furniture Manufacturing Co. v. Isbell*, 81 Ark. 549, 561, 99 S. W. 845. The evidence and instruction were prejudicial in that the jury might have inferred from them that appellant should not maintain his action.

The evidence that the rejected corn was sold to Penzel Grocery Company at an advance price was clearly incompetent.

The evidence as to card published by William Dugdale was also inadmissible.

Prof. Wigmore says: "A printed list of prices at which a class of goods is for sale to any purchaser, or a printed report of the prices obtained at actual sale in open market, may become trustworthy so far as it is intended to be consulted by all persons who care to know the prices, and has been exposed to a test of accuracy by dealings with such persons on the faith of it, and has further been by their experience found generally reliable. A price current list or a market report which fulfills these conditions and has thus sufficed for the correct information of persons who transact commercial operations on the faith of it may well suffice for informing a court of justice." 3 Wigmore on Evidence, §§ 1702, 1704.

In *Sisson v. Cleveland & Toledo Railroad*

Co., 14 Mich. 489, 496, 90 Am. Dec. 252, Mr. Justice Cooley, speaking for the court, said: "Evidence of the state of the markets as derived from the market reports in the newspapers should not have been excluded."

\* \* \* The principle which supports these cases will allow the market reports of such newspapers as the commercial world rely upon to be given in evidence. As a matter of fact such reports, which are based upon a general survey of the whole market and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or inquiries; and courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character." See *St. Louis & S. F. Ry. Co. v. Pearce*, 82 Ark. 353, 358, 101 S. W. 760, 118 Am. St. Rep. 75; *Cliquot's Champagne*, 3 Wall. 114, 141, 18 L. Ed. 116; *Terry v. McNiel*, 58 Barb. (N. Y.) 241, 247; *Fairly v. Smith*, 87 N. C. 367, 371, 42 Am. Rep. 522.

It was not shown that dealers in canned goods constantly received and acted upon the Dugdale card, and has thereby proved it worthy of confidence and reliable; and it was not competent evidence.

Reversed and remanded for a new trial.

#### CAIN, Sheriff, v. WOODRUFF COUNTY.

(Supreme Court of Arkansas. March 1, 1909.)

##### 1. SHERIFFS AND CONSTABLES (§ 77\*)—DUTIES—POWER OF LEGISLATURE.

In the absence of any constitutional limitation, the Legislature has power to define, add to, and vary the duties of a sheriff.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Dec. Dig. § 77.\*]

##### 2. SHERIFFS AND CONSTABLES (§ 29\*)—COMPENSATION—STATUTORY PROVISIONS.

There being no constitutional limitation of the power of the Legislature to fix the compensation of the sheriff, Acts 1907, p. 328, amending Kirby's Dig. § 4402, allowing the sheriff 75 cents per day for keeping and feeding each prisoner confined in his jail, is valid.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 46; Dec. Dig. § 29.\*]

##### 3. SHERIFFS AND CONSTABLES (§ 29\*)—COMPENSATION—STATUTORY PROVISIONS.

Acts 1907, p. 328, amending Kirby's Dig. § 4402, allowing a sheriff 75 cents per day for keeping and feeding each prisoner confined in jail, is not void as in conflict with Const. art. 7, § 28, declaring that the county court shall have the exclusive original jurisdiction in all matters relating to taxes, disbursement of money, and matters of local concern.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Dec. Dig. § 29.\*]

Appeal from Circuit Court, Woodruff County; Hance N. Hutton, Judge.

Action by W. R. Cain, Sheriff, against Woodruff County. From a judgment for defendant, plaintiff appeals. Reversed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



H. M. Woods, for appellant. J. F. Summers, for appellee.

**FRAUENTHAL, J.** The appellant, who is the sheriff and jailer of Woodruff county, presented to the county court of that county for allowance his account against that county for the keeping and feeding of certain prisoners. His account amounted to \$483.50, and was based on fixing the rate or charge for each prisoner per day at 75 cents. The county court allowed him the sum of \$417.50 thereon, being at the rate of 65 cents per day for each prisoner, and refused to allow the difference of \$66. The appellant then appealed to the circuit court, and in that court this case was tried by the court sitting as a jury, upon an agreed statement of facts, from which it appears that the only issue in the case is whether the appellant is entitled, under the law, to 75 cents per day for keeping and feeding each prisoner, as provided by act No. 136 of the General Assembly of Arkansas of 1907, an act to amend section 4402 of Kirby's Digest. Acts 1907, p. 328. If, for said service, he is entitled under that act to 75 cents per day, then he should recover \$66; otherwise he should recover nothing. It is contended by appellee that the above act of the Legislature is unconstitutional, and on that account the appellant is not entitled to 75 cents per day as provided for in that act. The lower court declared as a matter of law that said act of the Legislature is unconstitutional and void, and that therefore the appellant was not entitled to recover, and rendered judgment against him for costs. And from that judgment an appeal is prayed to this court.

Act No. 136 of the General Assembly of the state of Arkansas of 1907 is as follows:

"Be it enacted by the General Assembly of the state of Arkansas:

"Section 1. That section 4402 of Kirby's Digest be amended to read as follows:

"Sec. 4402. Whenever any person committed to jail upon any criminal process, under the laws of this state, shall declare, on oath, that he is unable to buy or procure necessary food, the sheriff or jailer shall provide such prisoner the food necessary for his support, for which he shall be allowed the sum of seventy-five cents per day; and if from the inclemency of the season, sickness of the prisoner, or other cause, the sheriff or jailer is of the opinion that fuel or additional clothing is necessary for such prisoner, he shall furnish same, for which he shall be allowed a reasonable compensation."

"Sec. 2. That all laws and parts of laws in conflict herewith be and the same are hereby repealed, and this act take effect and be in force from and after its passage."

By section 46, art. 7, of the Constitution it is provided that: "The qualified electors of each county shall elect a sheriff, who shall be ex officio collector of taxes unless otherwise provided by law." And by section 4, art. 16, of the Constitution it is provided: "The

General Assembly shall fix the salaries and fees of all officers in the state, and no greater salary or fee than that fixed by law shall be paid to any officer, employé or other person, or at any rate other than par value; and the number and salaries of the clerks and employés of the different departments of the state shall be fixed by law." Now the Constitution does not define the duties of the office of sheriff. That is left entirely to the Legislature to fix and determine; and it is also left to the Legislature to fix the amount of the compensation that shall be paid for services required of such officer. It is well settled in the United States that, unless the Constitution otherwise expressly provides, the Legislature has the power to define the duties of an officer and to increase or vary those duties. Throop on Public Officers, § 19. There is no provision in our Constitution that inhibits the Legislature from adding to or varying the duties of the office of sheriff. The office of sheriff, in this regard, is similar to the office of clerk. In the case of *State v. McDiarmid*, 27 Ark. 176, this court said: "The office of clerk as fixed by the Constitution is an office which the Legislature cannot absolutely abolish; but the duties to be performed, and the fees to be paid, is a thing wholly within the control of the Legislature." And this applies equally to the office of sheriff under our present Constitution. The Legislature, unless restricted by the Constitution, has full and plenary powers to adopt such policies and prescribe the duties which it demands of officers in carrying out such policies which it deems best for the peace and welfare of the people. *Straub v. Gordon*, 27 Ark. 625; *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590.

Aside from the restriction of the state or federal Constitution the Legislature is unfettered in the exercise of legislative power. The question as to whether the enactment is wise or expedient belongs exclusively for the General Assembly to determine. *State v. Martin*, 60 Ark. 348, 30 S. W. 421, 28 L. R. A. 153. "The Constitution regards the county court as a political and corporate body that are to be controlled and regulated in their discretion by the acts of the General Assembly, and not as independent of or superior to it. As political and corporate bodies they are required to conform their action to the rule of the Legislature, and in the exercise of their jurisdiction to proceed in the mode and manner prescribed by law." *County of Pulaski v. Irvin*, 4 Ark. 475; *Hudson v. Jefferson County*, 28 Ark. 359.

Now the Legislature has prescribed the following duties to be performed by the sheriff, in addition to his other duties, and which are found in Kirby's Digest:

"Sec. 4399. The sheriff shall have custody and charge of the jails within his county, and all prisoners committed in his county, and he may appoint a jailer, for whose conduct he shall be responsible.

"Sec. 4400. It shall be the duty of the jailer to receive from constable, and other officers, all persons who may be apprehended by such constable or other officer for offenses against this state, or who shall be committed by any competent authority."

In addition to this the Legislature of 1907, by the above act No. 136, prescribed it the further duty of the sheriff to feed said prisoners. Now this is a duty that is added by the lawmaking power of the state to the other duties required of the sheriff. It is connected with, and is a part of, the machinery provided for the enforcement of the criminal laws of the state. As is held in the case of *Hart v. Howard County*, 44 Ark. 560, the expense of imprisoning a convict and all expenses connected therewith are a part of the cost of the criminal proceedings; and "this includes, of course, the cost of feeding him." In the performance of these duties the sheriff acts as an officer. He does not do these acts under an employment, but he performs them in his official capacity by virtue of the authority conferred and the duty prescribed by law. And therefore the receiving of the prisoner upon a commitment, the imprisonment by him, and the keeping and feeding of him are all acts done by the sheriff under authority of law and in his official capacity.

The Constitution provides that the General Assembly shall fix the fees and salaries of all officers of the state. In the case of *Humphry v. Sadler*, 40 Ark. 100, this court has said: "When an office is created by the Constitution, but the compensation is left to the discretion of the Legislature, it may be increased or diminished so as to affect the incumbent. Now it makes no difference whether the compensation be by fees or salary." The Legislature is therefore the final and supreme power to fix and determine the amount of the compensation that such officers shall receive for the duties prescribed. As is said in *Throop on Public Officers* (section 500): "The right of an officer to his fees, emoluments or salary is such only as is prescribed by statute. \* \* \* The compensation for official services are not fixed upon any mere principle of a quantum meruit, but upon the judgment and consideration of the Legislature, as a just medium for the services which the officer may be called upon to perform. These may in some cases be extravagant for specific services, while in others they may furnish a remuneration which is wholly inadequate." The Legislature has provided as a fee or remuneration for the feeding of a prisoner the sum of 75 cents per day. It has the power to do this; and so it is the law.

It is urged by appellee that the above act No. 136 of General Assembly of 1907 is in conflict with article 7, § 28, of the Constitution, which is as follows: "County courts shall have the exclusive, original jurisdiction in all matters relating to county taxes, roads,

bridges, ferries, paupers, bastards, vagrants, apprenticeship of minors, disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties. The county court shall be held by one judge, except in cases otherwise herein provided." It is contended that the duty placed upon the sheriff to feed the prisoners is a matter of local concern of the respective counties, and so confided to the exclusive jurisdiction of the county court; and on this account the Legislature has no constitutional authority to fix the amount of the compensation therefor. But as above seen, the feeding of the prisoners is a duty which the Legislature has prescribed must be performed by the sheriff as one of the duties of his office; and the Constitution provides that the Legislature shall fix the amount of the remuneration for the performance of the service required by the observance of that duty. The Legislature may have determined that the performance of this duty demanded more than the mere furnishing of food. It may require, and does require, in the performance of this duty also the care, protection, supervision, and responsibility of an officer. The fees and salaries that are paid by the respective counties to their respective officers are matters of local concern to the respective counties, and yet no one doubts that the Legislature has the power to fix the amount of those fees and salaries, and does. It is because the exercise of that power is not in conflict with the provision of the Constitution relied herein upon by appellee. And so, too, the provisions of act No. 136 of the General Assembly of 1907 are not inhibited by that provision of the Constitution.

Reversed and remanded.

#### JOHNSON et al. v. WEST.

(Supreme Court of Arkansas. March 22, 1909.)

#### 1. APPEAL AND ERROR (§ 365\*)—PROCEEDINGS FOR TRANSFER—ORDER FOR APPEAL.

Where the order granting an appeal recited that C., an attorney, prayed an appeal which was granted, and 90 days allowed him in which to file his bill of exceptions, but the records showed that defendants appeared by C. as attorney, and that the bill of exceptions was filed for them, the appeal was granted to defendants, and not to C.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1985; Dec. Dig. § 365.\*]

#### 2. CERTIORARI (§ 9\*)—NATURE OF WRIT—DISCRETION OF COURT.

Certiorari is not a writ of right, and will only be granted in the sound discretion of the court.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 15; Dec. Dig. § 9.\*]

#### 3. CERTIORARI (§ 41\*)—RIGHT OF WRIT—NECESSITY OF EXPEDITION.

Certiorari will be refused where a petitioner fails to show that he proceeded expeditiously after the necessity of suing out the writ

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

appeared, especially where great public inconvenience would result from issuing it, as where it is issued to review proceedings establishing a highway.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 59; Dec. Dig. § 41.\*]

**4. HIGHWAYS (§ 82\*)—ESTABLISHMENT—PROCEEDINGS—REMONSTRANCES.**

If proceedings to establish a public highway were void because the court had no jurisdiction, a remonstrator could have made himself a party to the proceeding by order of the court and showed the lack of jurisdiction.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 71-74; Dec. Dig. § 32.\*]

**5. HIGHWAYS (§ 60\*)—ESTABLISHMENT—CERTIORARI TO REVIEW PROCEEDINGS—RIGHT TO WRIT—DELAY.**

A petition to establish a highway was filed January 31st, and remonstrator appeared twice, on April and July 2d, and filed exceptions to the viewers' report, but did not object that the court had no jurisdiction because the petition did not show that 10 of petitioners were freeholders, and, when her exceptions were overruled on July 2d, she appealed to the circuit court and filed bond, thereby superseding proceedings on the order establishing the highway until the appeal was dismissed, a period of about five months. Lack of jurisdiction was first alleged in her petition for certiorari to review the order. The evidence taken at the hearing of the highway petition showed that 10 petitioners were in fact freeholders. *Held*, in view of remonstrator's delay in raising the jurisdictional question, that a writ of certiorari to review the order establishing the road should have been denied.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 208; Dec. Dig. § 60.\*]

**6. HIGHWAYS (§ 29\*)—ESTABLISHMENT—PETITION—QUALIFICATION OF PETITIONERS.**

A petition to establish a public highway should show that 10 of petitioners were freeholders of the county.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 51; Dec. Dig. § 29.\*]

**7. HIGHWAYS (§ 58\*)—ESTABLISHMENT—APPEAL—SUPERSEDEAS.**

Under Kirby's Dig. § 3006, providing that the county court after notice of appeal from its decision establishing a road has been given shall not issue any order in the premises until after 10 days from rendition of the decision appealed from, and, if the appeal shall not have been perfected, the clerk shall issue the order for the opening of the road, an appeal, with bond, to the circuit court from an order establishing a highway, superseded proceedings on the order until the appeal was dismissed.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 191; Dec. Dig. § 58.\*]

Appeal from Circuit Court, Independence County; Frederick D. Fulkerson, Judge.

Certiorari by E. C. West against Henry W. Johnson and others to review an order establishing a highway. From a judgment quashing the order, defendants appeal. Reversed and writ quashed.

Samuel M. Casey, for appellants. Ernest Neill and McCaleb & Reeder, for appellee.

**BATTLE, J.** On the 31st day of January, 1907, Henry W. Johnson and 240 other persons filed in the Independence county court a petition as follows:

"In the Independence County Court.

"To the Hon. S. B. Wycough, County Judge:

"We, your petitioners and citizens of the county of Independence and state of Arkansas, would most respectfully ask the court to grant such orders and have same entered of record for the opening of a new road in said county as follows, to-wit: [Here follows the description of the road.]

"We believe that the opening of said road is needed for the public travel and will be to the best interest of a considerable number of the citizens living in the vicinity of the proposed road.

"Respectfully submitted."

Upon the filing of the above petition, together with proof of publication and bond as required by statute, the court made an order appointing viewers on the 6th of February, 1907, said order reading as follows:

"On this day was presented to the court the petition of Henry W. Johnson and more than 10 other citizens of Independence county, asking the establishment of a public road, etc.

"These three viewers failed to meet at the time and place appointed and two of them filed a report showing this, and thereupon the court made an order upon application, appointing three new viewers with similar directions as those given the first three.

"Only two of the second set of viewers, namely, G. J. Lindsey and W. L. Wilkins, met at the time appointed, but they took the oath as required, made the view of the road, and reported to the county court in favor of its establishment and assessed damages to the landowners involved, allowing \$100 to the appellee herein.

"When the above report of the viewers came on for hearing in the county court, the appellee appeared in person and by attorney and filed her exceptions thereto, raising three objections to the confirmation of the said report as follows:

"First. That said report of the viewers showed that only two of the three viewers appointed by the court had met or participated in said view.

"Second. That said amount of damage allowed her was insufficient to compensate her for the lands taken because same are very valuable and worth \$75 per acre.

"Third. That said road would not be of sufficient importance to the public to authorize its establishment, and, further, that said road ran through a low and marshy ground, and would be very expensive and difficult to construct, etc.

"Upon the filing of these objections to the report of the viewers, the petitioners for the road, seeing that only two of the viewers had met, and not wishing to risk the matter on this point, asked leave of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

court to withdraw this report of the viewers, and that the court again and for the third time appoint three viewers, which the court did, appointing N. M. Wilson, G. M. Thompson, and J. W. Scott as viewers, and directing them to proceed on the 30th of April, 1907, or within five days thereafter to view and survey out said road.

"These three viewers met on the day appointed, the 30th day of April, 1907, and viewed out said road, and made a report to the county court recommending the establishment of the road as prayed for and assessing damages to the three landowners, including \$100 to the appellee herein, and it is the order of the court adopting this report that is now in question.

"Mrs. West was present with viewers at the time the last survey was made.

"Thereafter this report of the viewers came on for hearing at the July term of the county court.

"The appellee appeared therein in person and by attorney, and filed her exceptions to the report of said viewers, in which she raised three objections to the confirmation of the said report, namely:

"First. That the report of the viewers was so vague in description of the land intended to be taken that it was void, because it failed to state on which side of the township line said road was to be established.

"The second exception related to the inadequacy of damages allowed by the viewers. And the third and last exception, because the proposed road would not be of sufficient importance to the public to justify its establishment, owing to the great expense necessary to construct and maintain it, etc. However, she suggested a route for said road in her exceptions which would be free from above objections, and she recommended this route.

"It will be observed that no question as to failure of the petition to state that petitioners were freeholders was raised. Nor was any question raised by appellee that she had not been properly notified of the meeting of the viewers as provided by section 2999 of Kirby's Digest.

"On the 2d day of July, 1907, the following order was made by the court:

"In the Matter of Establishing a Public Road in Christian Township:

"On this day was presented to the court the report of N. M. Wilson, G. M. Thompson, and J. W. Scott, heretofore appointed viewers by the court to view, survey, and lay out a new road, situated in Christian township, to wit:

"Beginning at the northwest corner of the northeast quarter of the northeast quarter of section 8, township 11 North, range 4 West, thence running on the township line west between township 11 North and 12 North about one mile or such distance necessary to intersect the public road that leads

from Oil Trough to, or in the direction of Pleasant Plains, Ark.

"And, it appearing to the court that Mrs. E. C. West and others had filed certain exceptions to said report, the same was submitted to the court upon the testimony of the witnesses both for the original petitioners and the exceptors, and upon argument of counsel for both of same, and the court, being fully advised in the premises, is satisfied that such road will be of sufficient importance to the public to cause damages and compensation which have been assessed by the said viewers, to be paid by the county, and finding that the amount so assessed is reasonable and just, except as to Mrs. E. C. West, the said report of the viewers is hereby confirmed, except that Mrs. E. C. West is allowed for full compensation for damages by reason of the opening of said road the sum of \$150, which, together with the amounts assessed to Mrs. Lizzie Vaughan, to wit, the sum of \$16.50, and J. M. Stephens, \$16.50, the county treasurer is directed to pay to the said parties.

"It is thereupon considered, ordered, and adjudged that a public road be and the same is hereby established as above described, to wit:

"[Here follows copy of description of said road which has been given.] The order proceeds.

"It is further considered, ordered, and adjudged that the county of Independence pay all costs in and about this proceeding. From which ruling of the court in laying out said road and assessing damages therefor Mrs. E. C. West prayed an appeal to the circuit court, which is by the court granted, and she is given 10 days by the court in which to file her bond."

An appeal from the order and judgment of the county court was taken in due time and an affidavit and bond were filed. This appeal was afterwards dismissed on motion of Mrs. West.

On the 20th day of December, 1907, Mrs. West presented to the Independence circuit court a petition for a writ of certiorari directing the clerk of the Independence county court to certify to the circuit court copies of all the foregoing petition, exceptions, reports, and proceedings, to the end that they may be reviewed by the circuit court, and other relief. The writ was granted, and the return of the county clerk showed the same as we have stated.

The petition alleged two reasons why the order of the county court was void:

"First. Because the petition originally filed in the county court, as well as the order made thereon, failed to show that the petitioners were freeholders of said county.

"Second. Because no notice was given the petitioners of the time and place of meeting of the viewers as provided by section 2999 of Kirby's Digest."

Evidence was adduced at the trial of this

cause by consent of the parties. It was shown in part by this evidence that more than 10 of the petitioners to the county court for a new road were freeholders of the county of Independence.

On the 18th day of May, 1908, the circuit court, after hearing the pleadings and the evidence, and inspecting the records, quashed the order of the county court made on the 2d day of July, 1907; and defendants appealed.

The order of the circuit court granting the appeal is as follows: "And thereupon Sam M. Casey, attorney, prayed an appeal to the Supreme Court, which is by the court granted; and upon his application he is allowed 90 days in which to file his bill of exceptions." Appellee contends that the appeal was granted Casey, and he was given time in which to file bill of exceptions, and the appeal was improperly granted, because the record does not show that he was a party. But it does show that the defendants appeared by him as attorney, and that the bill of exceptions was filed for the defendant. This clearly shows that the appeal was granted to the defendants.

The writ of certiorari is not a writ of right, and its allowance rests in the sound discretion of the court. "The rule," says the court in *Black v. Briakley*, 54 Ark. 375, 15 S. W. 1030, "is to refuse it when the party seeking it fails to show that he has proceeded with expedition after discovering that it was necessary to resort to it, and especially where great public inconvenience will result from its use." And in *Sumerow v. Johnson*, 56 Ark. 86, 19 S. W. 114, 115, it is said: "The court to which the application for the writ is made may hear testimony dehors the record to determine whether it is unwise to grant the use of the writ." *Burgett v. Apperson*, 52 Ark. 221, 12 S. W. 559. In a case like this, when the building of a public road is involved, the party seeking the writ ought to apply for it without unreasonable delay. He ought not to be allowed to postpone the building of public improvements unnecessarily. *Dunlop v. Toledo, Ann Arbor & Grand Trunk Ry. Co.*, 46 Mich. 190, 9 N. W. 249, and cases cited above.

In the case before us, appellee seeks to set aside an order of the county court for an omission—for the failure of the record to show that 10 of the petitioners for new road were freeholders of the county, which the record should have shown. The petition for the new road was filed on the 31st day of January, 1907. Twice in the progress of the proceeding, to wit, on the 2nd day of April, 1907, and 2nd day of July, 1907, the appellee appeared and filed exceptions to the viewers' report. In no case did she allege that the proceedings of the viewers or court were void because the court did not have

jurisdiction. She had a speedy remedy. She could have made herself a party to the proceeding by order of the court and shown that the court had no jurisdiction, if it had none; but she was silent as to jurisdiction, and, when the county court overruled her exceptions on the 2d day of July, 1907, appealed to the circuit court, and filed bond, and thereby superseded proceedings on the order of the county court until the appeal was dismissed, a period of about five months. Kirby's Dig. § 3006. The failure of the record of the county court to show jurisdiction was kept in the background until the 20th day of December, 1907, when the petition for writ of certiorari was filed. The evidence taken at the hearing of the last-mentioned petition by consent of parties shows a reason for so doing; and that is, the truth is that more than 10 of the petitioners to the county court for a new road were freeholders of the county, and their petition could have been so amended as to show the jurisdiction of the county court. The writ of certiorari should have been denied. Appellee should not be permitted to delay the building of the public road in such manner. Judgment reversed and writ quashed.

#### McFARLANE et al. v. YORK.

(Supreme Court of Arkansas. March 29, 1909.)

#### 1. CONTRACTS (§ 155\*)—CONSTRUCTION—CONTRACT PREPARED BY PARTIES BENEFITED.

A contract prepared by the parties for whose benefit it was executed merely as a privilege to them must be construed as unfavorably against them as its terms will admit.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 736; Dec. Dig. § 155.\*]

#### 2. BILLS AND NOTES (§ 432\*)—CONTRACT TO PAY IN COAL—CONSTRUCTION.

A coal company in which plaintiff was interested, being indebted to a lumber company of which he was president, executed notes therefor, which by a separate written contract between the parties were made payable in coal to be delivered when ordered by the lumber company, which agreed to renew the notes so as to extend the time of payment till they could be paid in coal. At the same time defendants as principal and sureties executed a note in controversy to plaintiff for his stock in the coal company, and plaintiff and two other parties interested in the lumber company by a written contract granted defendants the right to pay the note in coal delivered to the order of the lumber company as ordered, but not to exceed 1,000 tons per month, except by mutual consent, provided defendants could not begin delivery till the debt of the coal company to the lumber company was fully paid as provided by the contract first referred to. It was further agreed that defendants' privilege to pay in coal should be at an end on maturity of the note, and whatever sum should then be due should be payable in money according to its terms. Held that, on maturity of the note in controversy, the right to pay it in coal ended in accordance with the plain letter of the contract, which could not be construed to simply mean that the right to deliver coal in satisfaction of the note should

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not interfere with delivery of coal to the lumber company.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 432.\*]

**3. CONTRACTS (§ 15\*)—NECESSITY OF ASSENT OF PARTIES.**

Courts do not make contracts for parties, but merely construe and enforce them.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 61; Dec. Dig. § 15.\*]

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by J. B. York against R. W. McFarlane and others. From a judgment for plaintiff, defendants appeal. Affirmed.

T. G. Malloy and Palmer Danaher, for appellants. Taylor & Jones and Daniel Taylor, for appellee.

MCCULLOCH, C. J. York sued McFarlane, Pryor and McKelvey on a past-due promissory note for \$2,200, and recovered judgment below for the amount of the note, with interest. Defendants pleaded as a defense that, under a contemporaneous written agreement with plaintiff, they had the right to pay said note in coal, and that they had from time to time offered to deliver coal in satisfaction of the note, which plaintiff had refused to accept. The facts in the case are undisputed, and are, in substance, as follows:

At the time of the transactions in question York was president of the Bluff City Lumber Company, of Pine Bluff, Ark., and McFarlane was president of the Greenwood Coal & Lumber Company, of Sebastian county, Ark. The Greenwood Coal & Lumber Company was indebted to the Bluff City Lumber Company in the sum of \$10,000, and executed notes for the amount, with interest. A separate contract was executed between the two companies, wherein it was stipulated that said notes should be payable in coal, to be delivered from time to time to the Bluff City Lumber Company at prevailing prices at the time of such deliveries. It was agreed that the coal should be delivered when required by the Bluff City Lumber Company and ordered by it, and that the notes should be renewed from time to time so as to extend the time of payment until they could be paid in coal under the contract. York was also interested in the Greenwood Coal & Lumber Company as a stockholder, and the note in controversy was executed to him by McFarlane, with his codefendants Pryor and McKelvey as sureties, in payment for his stock in said company. At the same time another contract was entered into between McFarlane, Pryor, and McKelvey on the one side, and York, Rutherford, and Samstag on the other, the last-named parties being also interested in the Bluff City Lumber Company, which said contract is as follows: "That whereas, R. W. McFarlane, T. B. Pryor, and A. A. McKelvey have executed three

notes in the sum of twenty-two hundred dollars, each payable respectively to J. B. York, J. F. Rutherford, and C. J. Samstag, eighteen months after their date, May 25, 1906, at the Sebastian County Bank, of Greenwood, Arkansas. Now, the makers of said notes, McFarlane, Pryor, and McKelvey, are hereby granted the right and privilege to pay off said notes in coal at the prevailing price, set by the McAlester Fuel Company, less a commission of ten cents per ton, to be delivered f. o. b. cars Greenwood, Arkansas, to the order of the Bluff City Lumber Company and of such grade as ordered, but not to exceed in quantity one thousand tons per month, except by mutual consent; provided, however, that said McFarlane, Pryor, and McKelvey shall not be permitted to begin the delivery of any coal under the terms of this agreement until the indebtedness provided by a certain written contract, this day executed, between the Greenwood Coal & Lumber Company and the Bluff City Lumber Company, and R. W. McFarlane, J. B. York, C. J. Samstag and J. F. Rutherford, is fully paid off and discharged under the terms as provided in said written contract. All coal as furnished under the terms of this agreement shall go as a credit upon said notes, to be credited on each of said notes pro rata and equally.

"It is further agreed that the privilege herein granted to deliver coal as a credit upon said notes shall be at an end and this contract shall terminate upon the maturity of said notes and whatever sum shall be due on said notes at their maturity shall be payable in money according only to the terms of said notes."

The note to the Bluff City Lumber Company had not been paid in full at the time of the trial of this cause, and the plaintiff had refused to accept deliveries of coal in satisfaction of the note in controversy. All of these notes and contracts are conceded by both parties to have been contemporaneous in point of time, and that they should be treated together as parts of the same transaction. Viewing them in this light, have defendants the right to require the acceptance of coal in satisfaction of the note to the plaintiff prior to the satisfaction of the note to the Bluff City Lumber Company? Mr. McFarlane testified that, if sufficient coal had been taken by the Bluff City Lumber Company under the contract, both obligations could have been discharged by the delivery of coal before the maturity of the note to York. It will be observed that the Bluff City Lumber Company was not required to accept any given quantity of coal within any stated period. The effect of the contract was to stipulate for payment of the notes in coal, to be delivered when needed by the lumber company, and required it to extend the payment of the notes until such time as

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

they should be paid in coal as ordered. The contract provided no method for the payment of those notes except in coal, and no other method could have been resorted to except in the event of the refusal of the coal company to pay in coal. The lumber company was compelled, under the contract, to accept payment in coal, but could choose its own time for accepting deliveries of coal. Of course, it should be read into the contract that the lumber company could not unreasonably postpone the delivery and acceptance of the coal; but there is no evidence in this case tending to show that such was done, or that the lumber company failed to order coal when it needed the same.

The supplemental contract with reference to the manner of paying the note in controversy expressly provides that the defendants should not be permitted to deliver coal under the terms of the agreement until the indebtedness of the coal company to the lumber company should be fully paid off and discharged; and it further provides that the privilege granted of paying the note in coal should be at an end at the maturity of the note. The substance of this agreement was merely to grant the privilege to the defendants of paying in coal before the maturity of the note in the event that the indebtedness to the Bluff City Lumber Company should be discharged before that time. This contract being executed for the benefit of the defendants and merely as a privilege to them, and also being a contract prepared by them, it must be construed as unfavorably against them as its terms will admit. *English v. Watkins*, 4 Ark. 199; *Leslie v. Bell*, 73 Ark. 338, 84 S. W. 491; *Allen-West Com. Co. v. People's Bank*, 74 Ark. 41, 84 S. W. 1041. Now, if we interpret the contract according to the literal meaning of its terms, the defendants have not brought themselves within the privilege granted by it, for it is conceded that the debt to the Bluff City Lumber Company has not been paid, and that the note in controversy is past due. Under the plain letter of the contract their right to pay in coal has ended.

It is insisted, however, that the contract, when fairly construed, simply means that the right to deliver coal in satisfaction of this note should not interfere with the delivery of coal to the Bluff City Lumber Company, and that, as the defendants show that they could have delivered sufficient coal to satisfy this note before the maturity thereof without interfering with the performance of their contract with the Bluff City Lumber Company, the plaintiff had no right to refuse acceptance of the coal. There would be some plausibility in this argument if there were no other circumstances growing out of the relationship of the various parties which show that no such meaning was intended. York was the president of the lumber company,

and it is manifest from the language of the contract that it was intended that coal should only be accepted according to the needs of the lumber company. He was willing to extend the time of payment of the debt to the lumber company until such time as that company could use enough coal at current prices to satisfy the debt. But as to the note to himself, which represented the sale of his stock in the coal company, an entirely different method of payment was clearly provided in the contract. That was to be paid in money, unless the lumber company should first order enough coal to satisfy its own debt from the coal company, and then sufficient coal be delivered in payment of this note before its maturity. It can be readily seen that York might have been willing to postpone indefinitely the payment in coal of the debt to the lumber company without being willing to extend the same privilege as to his own debt. The parties, at least, had the right to agree on different terms as to the payment of the two debts; and it is clear that they did so, for the form and substance of the two contracts demonstrate that they intended that the effect should be different. It is manifest from the language of the contract that no privilege was intended to be granted to the defendants with reference to payment in coal except that plainly stated in the contract itself. Courts do not make contracts for parties, but merely construe and enforce them.

We are of the opinion that the circuit judge was correct in his construction of the contract, and the judgment is affirmed.

#### SIMMONS BURKS CLOTHING CO. et al. v. LINTON et al.

(Supreme Court of Arkansas. March 29, 1909.)

#### 1. CORPORATIONS (§ 642\*)—FOREIGN CORPORATIONS—REGULATION—CONSTRUCTION OF STATUTES—"BUSINESS."

Act May 23, 1901 (Acts 1901, p. 386), regulating the business of foreign corporations, provides (section 1) that before a foreign corporation shall be authorized to establish a business in the state, or to continue business therein, it shall file a copy of its articles of incorporation with the Secretary of State, etc. Section 2 provides that no foreign corporation may make any contract in the state, nor sue thereon, until it has complied with the provision of the preceding section. *Held*, that the term "business" as used in the act means an established, continuing business, rather than mere single, isolated acts done in the state, either in connection with, or apart from, some business that has its domicile in another state.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.\*

For other definitions, see *Words and Phrases*, vol. 1, pp. 915-923; vol. 8, pp. 7593, 7594.]

#### 2. CORPORATIONS (§ 657\*)—FOREIGN CORPORATIONS—REGULATION—CONSTRUCTION OF STATUTE—"CONTRACT."

The word "contract" as used in section 2 (Acts 1901, p. 387), refers to a contract pertain-

\*For other cases see same topic and section NUMBER in Dec., & Am. Digs. 1907 to date, & Reporter Indexes

ing to the established and continuing business contemplated by the preceding section, and the act does not preclude a foreign corporation, not having complied with the provisions of the act, from taking in the state notes and a deed of trust for goods sold by it, and delivered in another state to the persons giving the notes and deed, nor from suing thereon in the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536-2543, 2550, 2552-2554; Dec. Dig. § 657.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1513-1530; vol. 8, pp. 7615, 7616.]

Appeal from Marion Chancery Court; T. H. Humphreys, Chancellor.

Action by the Simmons Burks Clothing Company and others against I. N. Linton and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded, with directions.

Woods Bros., for appellants. Seawel, Jones & Seawel, for appellees.

WOOD, J. This was a suit by appellants against appellees on certain notes and to foreclose mortgage. The Simmons Burks Clothing Company and the Du Pont Company are foreign corporations, engaged in the mercantile business in the state of Missouri, and doing an interstate business. The debts for which they sued were contracted for goods and merchandise sold by appellants and delivered to the appellees, I. N. Linton & Co. and others in the state of Missouri. The notes and deed of trust were executed in the state of Arkansas, to secure past-due debts for said goods and merchandise. Appellants have never filed their articles of incorporation in this state, nor done any business here, except interstate commercial business. So the only question presented is the construction of the act of 1901 (Acts 1901, p. 386). The title is: "An act to regulate the business of foreign corporations other than railways," etc. The act is as follows:

"Section 1. Every corporation formed in any other state, territory, country or county, before it shall be authorized or permitted to establish a business in this state, or to continue business therein, if already established, shall by its certificate, under the hand of the president and seal of such company or corporation, file in the office of the Secretary of this State, a copy of its articles of incorporation, if not already filed therein, and also with the clerk of the county in which it has opened an office for the purpose of transacting business, and in addition thereto shall file with the Secretary of State and the clerk of the county in which it has opened an office, or commenced business, within six (6) months after the establishment of such office or beginning of such business, a statement showing the proportional part of its capital stock which it has in use in the operation of its business, both in the state and in the county in which it is doing business.

"Sec. 2. That no corporation formed or organized in another state, territory, country or county, shall be authorized or entitled to make any contract in this state until it has complied with the provisions of the foregoing section, nor shall it be authorized to sue on any contract made in this state until the provisions of section one (1) of this act are complied with: Provided, that corporations now doing business in this state may have sixty (60) days to comply with this act.

"Sec. 3. That this act shall not apply to railway, express, telegraph, palace car and insurance corporations, and shall take effect and be in force from and after its passage."

The acts of April 4, 1887 (Acts 1887, p. 234), February 16, 1899 (Acts 1899, p. 18), and as amended May 8, 1899 (Acts 1899, p. 305), and of May 23, 1901 (Acts 1901, p. 387), are upon the same subject, and for the same purpose. They relate to the subject-matter of "prescribing conditions upon which foreign corporations may do business in this state." To "do business in this state" in the meaning of these statutes "implies corporate continuity of conduct in that respect, such as might be evinced by the investment of capital here, with the maintenance of an office for the transaction of its business, and those incidental circumstances which attest the corporate intent to avail itself of the privilege to carry on a business." Penn Collieries Co. v. Edward J. McKeever, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. (N. S.) 127. Conducting litigation, taking a note and mortgage to evidence and secure a debt past due for goods sold by a foreign corporation in another state, these, and such like isolated and single acts not connected with any established business in the state as above defined, do not constitute the "doing business in the state" within the purview of our law. Railway v. Fire Association, 55 Ark. 163, 18 S. W. 43; Florsheim Bros. Dry Goods Co. v. Lester, 60 Ark. 120, 29 S. W. 34, 27 L. R. A. 505, 46 Am. St. Rep. 162; Sunny South Lumber Co. v. Lumber Co., 63 Ark. 268, 38 S. W. 902; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 523, 69 S. W. 572, 91 Am. St. Rep. 87. The act under consideration, which repealed former acts upon the subject (Western Union Tel. Co. v. State, 82 Ark. 302, 101 S. W. 745), did not change the meaning of the terms "do business in this state" as used in former acts. On the contrary, the lawmakers used language which showed that it intended to adopt the construction which this court had given the words to "do business in this state"; for instance, the words "to establish a business in this state or to continue business therein if already established," and the words "it has opened an office for the purpose of transacting business," and "after the establishment of such office." These words show that the Legislature had in mind a business that was "established"

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



and "continuing" in this state, rather than mere single, isolated, and transitory acts done here, either in connection with, or apart from, some business that has its domicile in another state. As to what constitutes "carrying on" or doing business under similar statutes, see *Booth & Co. v. Weigand*, 30 Utah, 135, 83 Pac. 734, 10 L. R. A. (N. S.) 693; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; 19 Cyc. pp. 1268, 1269, and other authorities cited in appellant's brief.

The act must be considered as a whole. The second section was but a part of an act the purpose of which, as expressed in its title, was to "regulate the business of foreign corporations." The business to be regulated was business of a continuous nature, established and to be "carried on" in an office or permanent place for "transacting business." The term "business" as thus explained is the dominant idea and the larger expression throughout the act, and the particular word "contract" must be so construed as to harmonize with the broader expressions, in order to make the act, if possible, a consistent whole, and to give effect to the intent of the Legislature in its enactment. 28 A. & E. Ency. Law (2d Ed.) p. 610; *State v. Jennings*, 27 Ark. 419; *Haglin v. Rogers*, 37 Ark. 491; 23 A. & Eng. Enc. Law (1st Ed.) 310. Now the word "contract" as used in the second section has no other or different meaning than the same word where it occurs in the Acts of 1887 and 1890, supra, and there is no more reason why recovery on the contract evidenced by the notes and mortgage in the instant case should be denied than there was in the cases of *Florsheim Bros. Dry Goods Co. v. Lester* and *Sunny Side Lumber Co. v. Nelmeyer Lumber Co.*, supra. The contracts were enforced in those cases, and the doctrine rules here. The taking of the notes and mortgage was a transaction or "doing of business"; it was also the "making" of a "contract." If our interpretation of the act be correct, the word "contract" in the second section means any contract pertaining to business of the character expressed in the first section as we have construed it above. In the case of *Woolfort v. Dixie Cotton Oil Co.*, 77 Ark. 203, 91 S. W. 306, 113 Am. St. Rep. 139, the question was whether a foreign corporation actually engaged in business in this state—i. e., business of an established and continuous nature as above indicated, intrastate business—could recover upon a contract made with it, without complying with the provisions of the statute, before attempting to do such business in the state. We held in that case that such contracts were not void, and that recovery could be had if there had been compliance with the statute after the contract was made, although there had been no compliance before the business was established. It thus appears that the question here was not con-

sidered in the case last mentioned, and nothing is said therein that tends even to support appellee's contention.

The judgment is therefore reversed, and the cause is remanded, with directions to sustain the demurrer, and for further proceedings not inconsistent with this opinion.

#### DINNING et al. v. MOORE.

(Supreme Court of Arkansas. March 22, 1909.)

**HEALTH (§ 38\*)—DRAINING PRIVATE PROPERTY—ENFORCEMENT OF LIENS FOR PENALTIES AND EXPENSES—EFFECT OF FAILURE TO RECORD PROCEEDINGS.**

A city board of health, required by ordinance to record its proceedings and all orders made by it, could not establish a lien on a lot for a penalty and for the expense of draining it, pursuant to Kirby's Dig. §§ 5722, 5723, on the owner's failure to comply with an order to construct a sewer which was not entered of record on its minutes.

[Ed. Note.—For other cases, see *Health*, Dec. Dig. § 38.\*]

Appeal from Phillips Chancery Court; Edward D. Robertson, Chancellor.

Suit by W. G. Dinning and another against John P. Moore. From a decree for defendant, plaintiffs appeal. Affirmed.

W. G. Dinning, for appellants. Ray D. Campbell, J. M. Jackson, and Jacob Fink, for appellee.

**BATTLE, J.** W. G. Dinning and W. C. Russwurm, constituting the board of health of the city of Helena, Ark., instituted a suit against John P. Moore, in the Phillips chancery court, to recover \$187 and certain penalties and costs, and for the purpose of having the same declared a lien upon a certain lot in said city.

"The complaint charges that the plaintiffs, constituting the board of health of the city of Helena, Ark., on the ——— day of January, 1905, issued an order requiring John P. Moore, the owner of lot 1, block 5, 'New Helena,' to construct a sanitary sewer and drainage thereon for the purpose of draining therefrom all excrement, filth, and waste water upon said premises, and discharging same into the city sewer. That due notice of the order in the form required by law was served upon defendant upon the 17th day of January, 1905.

"That defendant failed and refused to comply with the order, and that after a reasonable time the board of health, by contract with the lowest bidder in the manner prescribed by law, caused the sewer to be constructed on the premises at a cost of \$187. That the sewer and drainage were thereafter in daily use by the defendant. That plaintiffs are entitled to recover the sum of \$187, and as penalty the further sum of \$37.40, and all costs of suit, for all of which plain-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiffs pray judgment, and that same be declared a lien on said premises."

The defendant answered, and admitted that he was and is the owner of lot numbered 1 in block numbered 5 in the addition to the city of Helena, Ark., known as "New Helena," and specifically denied the other allegations in the complaint.

Section 5525 of Kirby's Digest provides as follows: "The city council (of cities of first and second class) shall have power to establish a board of health; \* \* \* to invest it with such powers and impose upon it such duties as shall be necessary to secure the city and the inhabitants thereof from the evils of contagious and malignant and infectious diseases; to provide for its proper organization, and the election or appointment of the necessary officers, and to make such by-laws, rules and regulations for its government and support as shall be required for enforcing the prompt and efficient performance of its duties and the lawful use of its powers."

The city of Helena, in the exercise of this power, passed an ordinance as follows:

"Sec. 57. That there is hereby created and established a board of health of the city of Helena, the membership of which shall be composed of persons holding the membership of the committee known as the 'Sanitary Committee of the Council of the City of Helena.' And that said persons shall, for and during the time that they shall be members of said sanitary committee, be and constitute the board of health, and be invested with and perform all the duties and powers as such.

"Sec. 58. Said board shall elect its own president and secretary, who shall each hold office during the pleasure of the board, until his successor is elected and qualified. Said board shall determine the time of meeting, and keep a record of its proceedings, and of all rules and orders made by them."

Section 5722, Kirby's Dig., reads as follows: "After the completion of any sewer or branch sewer, authorized to be built under the provisions of this act, it shall and may be lawful for the board of health of any city, to which this act is applicable, to order any one or more property owners near or adjacent to any sewer to construct upon their property sewers leading from some point or place on their premises to the sewer of the city, for the purpose of draining off surface or other water, and for the purpose of conducting any excrement that may be at or about said premises and filth of every nature, character and description into the sewer belonging to the city. In the order so issued to construct the sewers aforesaid, for the purpose aforesaid, the town within which the same shall be completed, the nature and character of the material to be used in the construction thereof, and the place of tapping the sewers of the city shall be designated, as well as the manner of doing the same."

And section 5723 provides that, "If the owner of said property shall neglect or fail to make the sewer so ordered within the time in said order so prescribed," it shall be the duty of the board to have it constructed and charge his property therewith.

An agreed statement of facts was filed and read by the parties as evidence in the hearing of this cause. The minute or record book referred to therein is the record of the proceedings of the board of health of the city of Helena. The agreed statement is, in part, as follows:

"It is further agreed as a fact that said minute book at no place shows that lot one (1), block five (5), New Helena, was found by the board of health to be in an unsanitary condition. It is further agreed as a fact that no record was found in said book where the board of health directed or ordered that lot one (1), in block five (5), New Helena, should be connected in any way with the sewer.

"It is further agreed as a fact that said record or minute book does not disclose that the board of health ordered or directed that John P. Moore be notified to make sewer connections of any kind for the house situated on lot one (1), block five (5), New Helena. It is further agreed that it is a fact that said record book does not disclose where any order or motion or resolution of the board of health was adopted, submitting the work to be done on said lot one (1), block five (5), New Helena, to bidders, nor is there any record showing that any bids were accepted, and that the work was ordered to be done.

"It is further agreed as a fact that said minute book does not show where the board of health at any time required lots one (1) and two (2), in block five (5), New Helena, to have bar fixtures, sinks, etc., to be connected with the sewers.

"It is further agreed as a fact that said minute book does not show that the board of health by resolution, motion, or otherwise, directed said sewer connections to be made with lot one (1), block five (5), New Helena, belonging to John P. Moore, at the expense of said Moore."

Plaintiffs undertook to prove by parol evidence that the order mentioned in their complaint was made by the board of health.

The chancery court found in favor of the defendant, and dismissed the complaint of plaintiffs for want of equity, and plaintiffs appealed.

The question in this case is, Is parol evidence admissible to prove that an order was made by the board of health requiring John P. Moore, the owner of lot 1, block 5, in New Helena addition, to construct a sewer to drain therefrom all excrement, filth, and waste water thereon and discharge the same into the city sewer?

Sound public policy requires proceedings of boards of health, and other bodies affecting the titles of real estate, should be made

a matter of record. The title to such property cannot be perpetuated by the memory of witnesses until it shall cease to exist, and hence records are prepared for that purpose. The ordinances of the city of Helena wisely require that the board of health shall "keep a record of its proceedings, and of all rules and orders made by them." Such proceedings and orders often affect real estate, and the ordinances to that extent, at least, should be upheld and enforced.

In *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397, the defendant was sued for pulling down five dwelling houses. Several witnesses testified that the houses were a nuisance, which could be abated in no other way than that resorted to. The defendant proved that the board of health of the city had directed the nuisance to be abated. To this proof the plaintiff objected, insisting that the minutes of the board or written evidence of the orders should be produced. The objection was overruled, and parol evidence was received. *Savage, C. J.*, delivering the opinion of the court, said:

"It was objected that parol evidence should not have been received of the orders of the board of health. This objection was well taken. The board of health is a tribunal created by statute, clothed with large discretionary powers, and, being a public body, its acts should be proved by the highest and best evidence which the nature of the case admits of. Every proceeding of a judicial character must be in writing. It is not to be presumed that the minutes of their proceedings are not kept by such a body, and that determinations which seriously affect the property of individuals were not reduced to writing, but rest in parol."

In *Byer v. Town of New Castle*, 124 Ind. 86, 24 N. E. 578, it is said: "The right of third persons, who acted in good faith, in reliance upon the proceedings of a corporate board, cannot be prejudiced by the default or neglect of the corporation, of the officers of the corporation, who failed to keep a proper record of its acts or proceedings. *City of Troy v. A. & N. R. R. Co.*, 13 Kan. 70. In like manner, where a third person has actually received the benefit or consideration which resulted from the proceedings of a board of trustees, he may be estopped to deny the regularity of the proceedings, while retaining the consideration, on the ground that they were not properly entered of record.

"Where, however, an attempt is made to appropriate the property of an individual, the record of the board of trustees must be made to show that the steps necessary to accomplish the appropriation were taken, unless the owner of the land has in some way estopped himself from denying the fact of appropriation. *City of Aurora v. Fox*, 78 Ind. 1.

"It would be going too far to hold that a

municipal corporation might prove by parol that the essential steps required to be taken by the body representing the municipality, in proceedings to appropriate real estate, had been taken, although the records of the corporation indicated nothing upon the subject. Whether the board might cause its records to be corrected is quite a different question, with the decision of which we are not now concerned. *Chamberlain v. City of Evansville*, 77 Ind. 542."

Here the board of health seeks to establish liens upon, and, if need be, appropriate real estate to, the satisfaction of such lien, by virtue of orders which, if made, were not entered of record upon its minutes. Under the ordinance of its creation this cannot be done.

Decree affirmed.

### EL DORADO & B. RY. CO. v. KNOX.

(Supreme Court of Arkansas. March 22, 1909.)

#### 1. CONTINUANCE (§ 20\*)—GROUNDS—ABSENCE OF COUNSEL.

A motion for a continuance stated that defendant's regular counsel, who prepared the case for trial, was unavoidably absent, attending another trial, and that its present counsel did not know who defendant's witnesses were, or how to reach them, but it did not appear that any witnesses were, in fact, summoned and there was no showing of any effort to get witnesses, it being known two days before trial that the regular attorney would be absent, when other attorneys were employed. *Held*, that the motion failed to show the exercise of diligence in preparing for trial, so that the motion for continuance was properly denied.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. § 51; Dec. Dig. § 20.\*]

#### 2. RAILROADS (§ 441\*)—INJURY TO ANIMALS—ACTIONS—NEGLIGENCE—WEIGHT OF EVIDENCE.

Under *Kirby's Dig.* § 6773, making railroads responsible for all damage done to property in operating trains, the killing of a dog by a train was prima facie evidence of negligence by the railroad, and an instruction that, if a railroad killed a dog by the operation of its trains, the killing is presumed to have been negligent, and the burden was on the company to show that it was not negligent, was not prejudicial error.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1576, 1577; Dec. Dig. § 441.\*]

#### 3. RAILROADS (§ 443\*)—INJURY TO ANIMALS—ACTIONS—WEIGHT OF EVIDENCE—VALUE OF ANIMAL.

That a dog killed by defendant railroad was not assessed did not prove that it had no value, especially in view of undisputed evidence that it was valuable.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1609; Dec. Dig. § 443.\*]

#### 4. RAILROADS (§ 435\*)—INJURY TO ANIMALS—ACTIONS—VENUE—"OTHER STOCK."

The statute requiring actions against a railroad for damages for killing animals, such as horses, mules, cattle, or other stock, to be brought in the county where the killing occurred, does not apply to actions for killing dogs; "other stock" only including such animals as those mentioned, so that it was not necessary

to prove that a dog was killed in the county where the action was brought.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1547; Dec. Dig. § 435.\*]

**Appeal from Circuit Court, Union County; Geo. W. Hays, Judge.**

Action by J. A. Knox against the El Dorado & Bastrop Railway Company. From a judgment for plaintiff, defendant appeals. **Affirmed.**

El B. Kinsworthy and Lewis Rhoton, for appellant. Pat McNalley and R. G. Harper, for appellee.

**BATTLE, J.** J. A. Knox brought an action against the El Dorado & Bastrop Railway Company to recover damages caused by the killing of a certain dog, the property of plaintiff. In a trial before a jury a verdict was returned in favor of plaintiff for \$25, and judgment was rendered accordingly, to reverse which an appeal was taken to this court.

When the action was called for trial on the 8th day of April, 1908, the defendant filed a motion for continuance as follows: "Comes the defendant herein, and moves the court to continue this cause to the next term of this court, and for cause states: That Hon. C. C. Hamby, its regular attorney, who has prepared for trial this cause, and who tries all cases at El Dorado, Ark., is absent from this court, in attendance upon the circuit court at Mt. Ida, Ark., and is there engaged in the trial of a large and important case for the St. Louis, Iron Mountain & Southern Railway Company; that C. C. Hamby is the only attorney for the defendant who is prepared to try this case; and that his absence is unavoidable, and that he would have to be absent was unknown to defendant until the 6th day of this month, when it spoke to the other counsel for the purpose of getting this continuance, and that the counsel it now has is not familiar with the case, does not know who the witnesses for the defendant are, and does not know how to reach them to get them here."

The court properly overruled the motion. The motion does not show any effort made to get witnesses. It seems none were summoned. It was known two days before the trial that the regular attorney would not be present, and other attorneys were employed. It fails to show the exercise of diligence in getting ready for trial.

On the 12th of November, 1907, the dog of plaintiff was found dead on the railroad of the defendant, between Dollar Junction and Felsenthal. He was cut in two. His body was scattered upon the track. The blood was fresh, and appeared to have been shed recently. The passenger train of the defendant had passed over the track where the dog was killed about an hour before he was

found. No other train was seen to pass there about that time. The dog was a valuable dog. One witness testified that his reasonable cash market value was \$50.

The court instructed the jury over the objections of the defendant as follows:

"The jury are instructed that if they find from a preponderance of the testimony in this case that the defendant railway company, by the operation of its trains, killed the dog in controversy, the property of the plaintiff, the killing is presumed to have been negligently done, and the burden is upon the defendant to show that the killing of said dog was not through its negligence.

"You are further instructed that, if you find for the plaintiff in this case, you shall assess his damages at such amount as you may believe from the evidence that he is entitled to recover for the killing of said dog, not to exceed \$25, the amount sued for."

The following instruction was requested by the defendant, and refused by the court:

"The jury are instructed that if they find from the evidence in this case that the dog in controversy was not assessed, and that the plaintiff was the owner of said dog on the first Monday in June, 1907, then you will find for the defendant."

This court has held that dogs are personal property, for the negligent killing of which a railway company is liable. *St. L. S. R. Co. v. Stanfield*, 63 Ark. 643, 40 S. W. 126, 37 L. R. A. 659; *St. Louis, I. M. & Sou. R. Co. v. Philpot*, 72 Ark. 23, 77 S. W. 901.

Section 6773, Kirby's Dig., provides: "All railroads which are now or may be hereafter built and operated in whole or in part in this state shall be responsible for all damages to persons and property done or caused by the running of trains in this state." Under this statute the killing of the dog by the running of a train was prima facie evidence of negligence on the part of the railroad company. *St. Louis, Iron M. & Sou. R. Co. v. Neeley*, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616, and cases cited.

There was no prejudicial error committed in giving the instruction at the request of plaintiff. The court properly refused to give the instructions asked for by appellant. The fact that the dog was not assessed did not prove that the dog was of no value, especially when the undisputed evidence shows that the dog was valuable.

Appellant contends that the statute requires that actions of this kind should be brought in the county in which the animal was killed; that, the action in this case having been brought in Union County, it was necessary to prove that the dog in question was killed in that county. But the statute referred to does not include dogs. It does say that actions for damages sustained by the killing or wounding certain

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

animals by railroad trains should be brought in the county where the killing or wounding occurred. It describes the animals referred to to be such as horses, mules, cattle, or other stock. "Other stock" means such as horses, mules, and cattle, and this does not include dogs. *Hempstead County v. Harkness*, 73 Ark. 600, 602, 84 S. W. 799. It was therefore not necessary to prove that the dog was killed in Union county.

The evidence in the case shows that the market value of the dog was at least \$25. There is none to the contrary. The evidence was sufficient to sustain the verdict.

Judgment affirmed.

# AMERICAN STANDARD JEWELRY CO. v. R. J. HILL & SON.

(Supreme Court of Arkansas. March 29, 1909.)

## 1. CONTINUANCE (§ 19\*)—GROUNDS—ABSENCE OF PARTIES—JUDICIAL DISCRETION.

Even without a strict showing in accordance with the statute regulating continuances for the absence of witnesses, it is not error to postpone a case on account of unavoidable absence of one of the parties, especially where such party is a material witness; the matter being within the discretion of the court.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 41, 43, 48; Dec. Dig. § 19.\*]

## 2. SALES (§ 364\*) — SALES BY SAMPLE — ACTIONS — INSTRUCTIONS.

In an action for the price of jewelry sold by plaintiff to defendant under a written contract, authorizing a return within a given time for repair or exchange of articles not found satisfactory, an instruction that if the jewelry delivered was of the same grade as the samples shown by plaintiff's agent when the sale was made, and as described in the contract, then, if any of it proved unsatisfactory, defendants could not resist the suit by showing that it was unsatisfactory, unless they returned the same under the terms of the contract, was proper.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 364.\*]

## 3. SALES (§ 62\*)—CONSTRUCTION OF CONTRACT—DEPENDENT OR INDEPENDENT STIPULATIONS—SEVERABLE CONTRACTS.

A contract for the sale of an itemized list of articles at separate prices for each kind, and which provides that any article failing to give satisfaction may be returned to the seller, to be repaired or replaced, is a severable contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 171-179; Dec. Dig. § 62.\*]

## 4. TRIAL (§ 252\*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

Where, in an action for the purchase price of jewelry sold under a severable contract, there was no testimony that part of the jewelry was good and part bad, plaintiff having testified that it was all up to the contract, and defendant having testified that it was all bad, an instruction authorizing a recovery for the contract price of such of the articles as were as represented was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 506-612; Dec. Dig. § 252.\*]

## 5. APPEAL AND ERROR (§ 1046\*)—HARMLESS ERROR—REMARKS OF TRIAL JUDGE.

In an action for the purchase price of jewelry sold under a contract authorizing a return

of the jewelry if not as represented, a statement by the court that, if the jury found for defendants, the court would make the proper orders for the return of the jewelry, was not prejudicial to plaintiff; the statement not indicating an opinion of the trial judge as to the facts of the case, but being equivalent only to saying that defendants could not keep the jewelry in case of a verdict in their favor.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1046.\*]

## 6. TRIAL (§ 251\*)—INSTRUCTIONS—CONFORMITY TO ISSUES—MISLEADING INSTRUCTIONS.

Where, in an action for the price of jewelry, the sole issue was whether defendants had the right to reject the jewelry, and there was no issue before the jury as to their refusal to accept a show case, an instruction that the delivery of the case to a public carrier properly consigned to defendants constituted a delivery to them, while abstractly correct, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

## 7. SALES (§ 364\*) — ACTION FOR PURCHASE PRICE — INSTRUCTIONS.

In an action for the purchase price of goods, an instruction that the burden was on plaintiff to prove that he had performed his part of the contract and delivered goods of the kind and quality specified in the contract before he could recover, unless the goods were received by defendants without objection, was not erroneous as stating that the burden was not on defendants to prove an alleged breach of warranty.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 364.\*]

## 8. SALES (§ 439\*)—BREACH OF WARRANTY—BURDEN OF PROOF.

A vendee alleging a breach of warranty must prove it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1258-1260; Dec. Dig. § 439.\*]

## 9. SALES (§ 357\*) — ACTION FOR PURCHASE PRICE—BURDEN OF PROOF.

Where, in an action for the purchase price of goods sold under a contract, the complaint alleged and the answer denied that plaintiff performed the contract, the burden was on plaintiff to prove that the goods contracted for were tendered; it not sufficing for plaintiff merely to show that a lot of goods were shipped to defendants without showing that they answered the requirements of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1044-1048; Dec. Dig. § 357.\*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Action by the American Standard Jewelry Company against R. J. Hill & Son. Judgment for defendants, and plaintiff appeals. Affirmed.

C. T. Wetherby, for appellant. Jos. M. Spradling and Geo. W. Dodd, for appellees.

McCULLOCH, C. J. The plaintiff, American Standard Jewelry Company, instituted this action at law against R. J. Hill & Son to recover the price of a lot of jewelry sold and delivered to them under written contract. The contract, after setting forth an itemized list of the articles sold, giving separate prices of kind, aggregating the total sum of \$180, contains the following clauses:

"Warranty.—Any article of jewelry ship-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

ped by us, which fails to give entire satisfaction any time within five years from date of purchase, must be returned to us, and we will repair or furnish a new duplicate article in its place.

**"Goods Exchanged.**—Any jewelry shipped by us not selling readily or which may be unsatisfactory for any cause may be exchanged for any jewelry in our stock, if returned to us for exchange within one year from date of purchase.

**"Important Conditions.**—In consideration of the conditions under which we sell our goods, we cannot accept countermands, and the purchaser hereby agrees not to countermand this order either before or after it is received by us. This contract contains all the conditions and agreements between the parties, and no agreement is binding unless expressed in original order received by us. Purchaser hereby acknowledges receipt of duplicate hereof. Jewelry is shipped by express, show case by freight from distributing point or factory, at our option, and when we deliver goods to transportation company in good order they become the property of the purchaser, subject to all the conditions and safeguards contained herein, and cannot be returned for credit. Purchasers pay all transportation charges. All goods are shipped at our earliest convenience.

**"Sales Guaranteed.**—We guarantee that the purchaser will sell a quantity of jewelry in one year which at retail prices will equal at least one and one-half times the amount of this order. If the sales are less than the above, we agree to buy back for cash, at the purchase price, all goods bought of us and remaining on hand at the end of the year. This guaranty is given on condition that purchaser will keep this jewelry displayed for sale one year, in the show case furnished by us, use best efforts to push the sale of the same, and furnish us every month, between the first and fifth of the month, an itemized list of all goods on hand.

**"Our guaranty of sales** does not imply that we ship our goods on consignment to be paid for as sold. For amount and time of payments, see the following terms of settlement:

**"All long time accounts** must be closed by acceptances. This order is payable in six equal payments, due in two, four, six, eight, ten and twelve months from date of invoice, provided purchaser sends us promptly on arrival of jewelry, his six acceptances, for amounts and time above payments, payable to our order at Detroit, Michigan.

**"Cash.** If acceptances are not sent as above, terms are cash; five per cent. discount if paid in full promptly on arrival of jewelry."

It is alleged in the complaint that the jewelry and show case were shipped to the defendant by common carrier in accordance with said contract, and that defendant had received the jewelry, but refused to execute

the acceptances or pay the price in accordance with the terms of the contract.

Defendants answered as follows: "That they contracted with an agent of the plaintiff to purchase certain articles of jewelry mentioned and cited in the written contract exhibited as a part of the complaint; that the said agent fraudulently and falsely represented to defendants that said jewelry was of the kind, character, and quality specified in said contract and would readily sell to defendant's customers; that defendants relied upon representations of the said agent, and that the same were fraudulent, and that the jewelry was made of cheap metals, and was not of the kind, character, and quality specified in said contract, and that defendants refused to pay for same, and offered to return same to the plaintiff and in this answer offer to return the same. The defendants charge that the plaintiff well knew that said jewelry was not what it was represented to be, and that it was cheap, shoddy and almost valueless, and to put the same upon the market would be detrimental to defendant's business as merchants; that it would be a fraud upon defendants' customers."

A trial before jury resulted in verdict and judgment in favor of defendants, and the plaintiff appealed.

The first assignment of error is that the court improperly required the plaintiff either to submit to a postponement of the case on account of the sickness of R. J. Hill, one of the defendants, or to admit before the jury that he would testify, if present, to the state of facts set forth in the motion for continuance.

It is stated in the motion that said defendant was sick and unable to attend the trial, but would, if present, testify to said facts. The motion was not verified by affidavit, and it is contended that it should not have been granted. Even if a decision of the court granting a continuance of a case could under any circumstance be held to be reversible error, it is not error to postpone a case on account of unavoidable absence of one of the parties, especially where such party is a material witness. That is a matter within the discretion of the court, and no error of the court can be predicated upon it when the postponement is granted, even without a strict showing in accordance with the statute regulating continuances on account of the absence of witnesses. Defendants adduced testimony tending to show that plaintiff's traveling salesman who made the sale to defendants showed them samples of some of the jewelry at the time he made the sale, and that the jewelry shipped to them did not come up to the samples in quality or to the contract, and that it was worthless and not merchantable. The evidence justified a finding by the jury that this was true, and the court submitted this issue to the jury under appropriate and correct instructions. The

following is one of the instructions given at the request of plaintiff, and clearly defines the issue: "(1) The court tells you that if you find from the evidence that the jewelry delivered to the defendants under the contract sued on was of the same grade shown by the agent as samples when the sale made, and as described in the contract, then, if any of said jewelry proved unsatisfactory, the defendant cannot resist the suit by showing that the same was unsatisfactory, unless they returned the same under the terms of the contract."

In the case of *Main v. Dearing*, 73 Ark. 470, 84 S. W. 640, we said: "Ordinarily the law implies no warranty of quality, leaving that a matter of contract between parties, but there is an exception to this rule as thoroughly recognized as the rule itself. When a manufacturer offers his goods for sale, where the opportunity of inspection is not present before the purchase, the vendee necessarily relies on his knowledge of his own manufacture. In such cases the law implies a warranty that the article shall be merchantable and reasonably fit for the purpose for which it was intended." The following from *Benjamin on Sales*, § 656, was quoted with approval: "He cannot without warranty insist that it shall be of any particular quality or fitness, but the intention of both parties must be taken to be that it shall be salable in the market under the denomination mentioned in the contract. The purchaser cannot be supposed to buy goods to lay them on a dunghill."

The court refused to give the following instruction requested by plaintiff: "(6) You are instructed that the instrument upon which this action is founded is what is known as a severable contract, and it is therefore necessary for the defendants to prove that each and every item of goods received by them from plaintiff was not as represented in the contract before a verdict can be rendered for the defendants. Therefore, if you should find that some articles were as represented and some of them were not, then you should give a verdict in favor of the plaintiff for the contract price of such as you find were as represented." According to the rule announced by this court in *Duffie v. Pratt*, 76 Ark. 74, 88 S. W. 842, the contract in the present case was severable. A comparison of the two contracts reveals no points of distinction. The above instruction was therefore correct in the abstract, and should have been given if there had been any evidence to base it on. But there was no evidence that part of the jewelry was good and part bad. Defendants' testimony was to the effect that it was all worthless, unmerchantable, and below the standard of the contract, and the plaintiff's testimony was that it was all up to contract. There was no middle ground, and the jury could not have done otherwise than accept the version of one side or the other. It is true that one of the jurors in-

quired of the court whether or not they could bring in a verdict for a less amount than sued for if they were satisfied that some of the jewelry was of an inferior quality. But this only indicated, to some extent, the view of that particular juror, and did not justify the court in submitting an issue contrary to the contention of both parties. The court replied to this inquiry by stating that, "if the jewelry was of the grade and kind ordered, they would find for the plaintiff, and, if it was of a different or inferior grade to that ordered by the defendants and not marketable, the jury would find for the defendant."

Error of the court is assigned in stating to the jury in the same connection that, if the jury found for the defendants, "the court would make the proper orders for the return of the jewelry." We can see no possible prejudicial effect from this. The statement did not in the remotest degree indicate an opinion of the trial judge as to the facts of the case. The jewelry remained in the hands of the defendants, and the court doubtless meant only to relieve the minds of the jurors of any idea that the defendants could retain it if the verdict should deny the plaintiff the recovery of the price. The remark was equivalent to saying that the defendant could not keep the jewelry if the verdict should be favorable to them.

The court refused to give an instruction requested by plaintiff to the effect that the delivery of the show case to a public carrier properly consigned to defendants constituted a delivery to defendants; and this is assigned as error. The instruction was abstractly correct, but its refusal was not prejudicial. There was no issue before the jury as to refusal to accept the show case. No charge was made in the contract for that article, but it was sent without price for use in displaying the goods on sale. The sole issue before the jury was whether or not the defendants had the right to reject the jewelry. That instruction was calculated to mislead the jury, and it was properly refused.

The court gave the following instruction over plaintiff's objection: "(2) The burden is upon the plaintiff to prove by a fair preponderance of the evidence that he has performed his part of the contract, and delivered the goods of the kind, character and quality specified in the contract, before he can recover the purchase price from the defendants, unless you find from the evidence that said goods were received without objection." It is contended that the effect of this instruction was to tell the jury that the burden was not on the defendants to prove an alleged breach of warranty. Such is not the purport of the instruction. It is undoubtedly the correct rule that a vendee who alleges and relies on a breach of warranty must prove it. But the goods in this case were never accepted by the vendee, and this action is an effort to compel them to pay the price notwith-

standing their refusal to accept. The complaint alleges and the answer denies that the plaintiff performed the contract, and on this issue the burden was on the plaintiff to prove that goods called for in the contract were tendered. It is not sufficient in this state of the pleadings for the plaintiff merely to show that a lot of jewelry was shipped without showing that it answered the requirements of the contract.

It is contended, also, that the defendants retained the goods an unreasonable length of time before examining and rejecting them, but we are of the opinion that under the circumstances proved this question was properly submitted to the jury.

Upon the whole we find no prejudicial error, and the judgment is therefore affirmed.

#### ARKANSAS MIDLAND R. CO. v. RAMBO. (Supreme Court of Arkansas. March 29, 1909.)

##### 1. CARRIERS (§ 316\*) — INJURIES TO PASSENGERS — PRESUMPTION OF NEGLIGENCE.

In an action by a passenger for injuries received by the derailment of the train, a presumption of negligence of the carrier arises from such derailment resulting from the defective condition of the track, or defective equipment, or negligent operation or handling of the train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1288; Dec. Dig. § 316.\*]

##### 2. TRIAL (§ 278\*)—INSTRUCTIONS—SUFFICIENCY OF OBJECTIONS.

In an action against a carrier for injuries to a passenger, the court instructed on the question of contributory negligence, and in another instruction authorized the jury to find for plaintiff if his injuries were caused by the negligence of defendant, but made no mention in that instruction of the effect of contributory negligence. *Held*, that a formal general objection to the instruction was not sufficient, as the objection was one of form, which would probably have been corrected on specific objection.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 278.\*]

##### 3. TRIAL (§ 252\*)—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

In an action for injuries to a passenger caused by the derailment of a mixed train, a refusal to instruct as to ordinary jars and jolts incident to the operation of freight trains was not error, where the undisputed evidence showed the jolt was occasioned by the derailment of the cars, and not by the stoppage of the train in the usual course of its operation by the trainmen.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 252.\*]

##### 4. DAMAGES (§ 130\*) — PERSONAL INJURIES — EXCESSIVE DAMAGES.

A verdict for \$658 in an action by a passenger for injuries occasioned by the derailment of the train is not excessive, where the evidence showed that he was confined to his bed for three weeks, spit up a good deal of blood, and suffered great pain.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 130.\*]

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Action by T. M. Rambo against the Arkansas Midland Railway Company. Judg-

ment for plaintiff, and defendant appeals. Affirmed.

This suit was brought by T. M. Rambo against the Arkansas Midland Railroad Company to recover damages for injuries sustained by him while a passenger on defendant's train and alleged to have been caused by the derailment of the train. The railroad company denied negligence on its part, and pleaded contributory negligence on the part of the plaintiff.

On the 29th day of February, 1908, plaintiff became a passenger on one of defendant's trains running from Helena to Clarendon, in the state of Arkansas. It was a mixed train, having a passenger coach at the rear, a baggage car in front of it, and two freight cars in front of the baggage car. When about 10 miles out from Helena, the two freight cars jumped the track and were overturned. The cars ran along on the ties about five car lengths after leaving the rails. The rear freight car was loaded with lumber, and the wreck occurred while the train was going downgrade. The train conductor said that the lumber was loaded to the roof of a box car, and that this made the car top-heavy, which caused it to swing or sway from side to side. He said that was the only way he could account for the wreck. Plaintiff's witnesses said that they examined the roadbed after the wreck, and found that some of the ties were broken and that the ends of them were rotten.

Plaintiff testified that he was sitting on the right-hand side of the coach looking out of the window, and went to raise up to go to the water cooler to get some water; that just as he arose the wreck occurred, and that he was pitched across the aisle and knocked down; that he was confined to his bed as a result of his injuries for about three weeks, and suffered great pain. On cross-examination he stated that he had not drank any whisky in the coach prior to the accident, and that he had not been walking around in it. The defendant adduced evidence tending to show that he had been walking and standing in the coach some time prior to the accident, and that he had also taken some drinks of whisky. The jury returned a verdict in favor of plaintiff for \$658, and defendant has duly prosecuted an appeal to this court.

E. B. Kinsworthy and Lewis Rhoton, for appellant. Manning & Emerson, for appellee.

HART, J. (after stating the facts as above). Counsel for appellant assigns as error the action of the court in giving the following instruction: "(2) If you believe from the evidence that plaintiff was injured while a passenger on the train of defendant, and that his injuries were caused by the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



derailment of cars in the train resulting from the defective condition of the track, or defective equipments, or negligent operation or handling of the train, he would be entitled to recover in this action such sum as will compensate him for loss of time, expenses, and for the pain and suffering sustained by the plaintiff, as shown by the proof."

In the case of *Railway Company v. Mitchell*, 57 Ark. 418, 21 S. W. 883, the court said: "In an action against a railroad company for personal injuries, evidence that the coach in which plaintiff was riding as a passenger was derailed and overturned, and that plaintiff was injured thereby, is sufficient to cast upon the company the burden of proving that the injury was not caused by want of care on its part." This rule has been recognized and followed ever since. *St. L., I. M. & Sou. Ry. Co. v. Fambro* (Ark.) 114 S. W. 230, and cases cited. The appellant made no effort to overcome this presumption of negligence. Hence, under the undisputed facts in the case, it was guilty of negligence.

It is claimed that the instruction permitted the appellee to recover if the jury should find the appellant guilty of negligence, without containing any qualification in regard to the contributory negligence of appellee. In the case of *Winter v. Bandel*, 30 Ark. 362, the court criticised an instruction similar to the one here under consideration, and said that the habit so common in this state of stating a single proposition of correct law applicable to the case, but not involving all the law or fact involved, and concluding that on such partial proposition the jury may find for the plaintiff or defendant, as the case may be, is objectionable. The judgment in that case was reversed, but the instruction criticised was not made a ground for reversal. This form of instruction has been frequently criticised, and it has been repeatedly held by this court that it is not error to refuse an instruction where such phraseology or its equivalent is used. The question now is, did any prejudice result to the appellant from the instruction "contributory negligence is a defense, and the burden of proof in such case is upon the defendant"? *Aluminum Co. of America v. Ramsey*, 117 S. W. 568, and cases cited. In this case, the court recognized this to be the law, and gave to the jury an instruction prepared by counsel for appellant on the question of contributory negligence. It cannot be doubted that, if his attention had been called to the fact that the qualification in this respect had been left out of the instruction now under discussion, the trial judge would have corrected it. No such request was made, and only a formal general objection was made to the instruction. We think it was the duty of counsel to have made a specific

objection. The court had told the jury, if they found from the evidence that appellee was guilty of contributory negligence, he could not recover. This meant if they found that fact from all the evidence. We think the omission complained of was a defect in form, and should have been met by a specific objection calling the court's attention to the omission and asking that it be corrected. Such is the effect of the following decisions, which are directly in point: *L. R. & H. S. W. R. Co. v. McQueeney*, 78 Ark. 22, 92 S. W. 1120; *St. Louis Southwestern Ry. Co. v. Graham*, 83 Ark. 61, 102 S. W. 700, 119 Am. St. Rep. 112; *St. L., I. M. & Sou. R. Co. v. Puckett* (Ark.) 114 S. W. 224.

Counsel for appellant also complain that the court refused to give appropriate instructions in regard to the ordinary jars and jolts incident to the operation of freight trains. There was no error in this. Such instructions had no application to the facts in the record. The undisputed evidence shows that some of the cars ran off the track, and that the jolt was occasioned by the derailment of the cars, and not by the stoppage of the train in the usual course of its operation by the employees of appellant.

We cannot say that the verdict was excessive. According to the statement of appellee, which the jury had a right to believe, he was confined to his bed for three weeks, spit up a good deal of blood, and suffered great pain.

Finding no prejudicial error in the record, the judgment is affirmed.

#### BEACH v. NORDMAN.

(Supreme Court of Arkansas. March 29, 1909.)

##### 1. COVENANTS (§ 102\*)—BREACH—PARAMOUNT TITLE—ESTABLISHMENT.

A grantee in a deed containing covenant of warranty was entitled to maintain an action for breach of the covenant on reversal of a judgment in his favor against an adverse claimant, though there was a clerical error in the mandate of the Supreme Court in describing the land conveyed.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 164; Dec. Dig. § 102.\*]

##### 2. APPEAL AND ERROR (§ 173\*)—GROUNDS OF OFFENSE—PRESENTATION IN LOWER COURT.

In an action for breach of a covenant of warranty of title, brought after a judgment for plaintiff against a claimant had been reversed on appeal and title adjudged in claimant, a contention, first made on appeal in the covenant action, that the mandate of the Supreme Court in the former suit did not properly describe the land conveyed, will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1079; Dec. Dig. § 173.\*]

##### 3. COVENANTS (§ 102\*)—BREACH—COVENANTS OF WARRANTY—EVICTON.

The filing of the mandate of the Supreme Court, after the reversal of a judgment in favor of a grantee in an action against a claimant, was not necessary to enable the grantee to maintain an action against his grantor for breach

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
117 S.W.—50

of the covenants of warranty, as the grantor's covenant was breached when the Supreme Court adjudged title in claimant; grantee then having been evicted in law.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 164; Dec. Dig. § 102.\*]

#### 4. COVENANTS (§ 132\*)—ACTIONS FOR BREACH—DAMAGES.

The grantee, in an action for breach of a covenant of warranty, can recover costs and necessary expenses, including reasonable attorney's fees, incurred in a bona fide defense or assertion of his title, though there was no express agreement by the grantor, in addition to his covenant, to pay such expenses.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 260-262; Dec. Dig. § 132.\*]

Appeal from Circuit Court, Woodruff County; Roy D. Campbell, Special Judge.

Action by F. Nordman against W. B. Beach. From a judgment for plaintiff, defendant appeals. Affirmed.

On January 29, 1901, appellant sold appellee 680 acres of land in Woodruff county, Ark. Appellee entered upon the land and began to cut the timber therefrom, whereupon S. C. Robinson, claiming to be the owner of 160 acres of the land, brought suit against appellee for the possession thereof and for damages in the sum of \$600. Appellee also brought suit in equity against Robinson to remove the cloud from his title to the 160 acres claimed by Robinson. The case at law was transferred to the chancery court and consolidated with the chancery suit to remove cloud. A decree was rendered in favor of appellee. Robinson appealed to this court and was by this court adjudged to be the owner and in possession of the land. The decree of the chancery court was reversed, and the cause remanded, with directions to the chancery court to enter a decree in accordance with the opinion of this court. Thereafter appellee brought this suit against appellant, alleging: That immediately upon the institution of the suit by Robinson against him he notified appellant and requested him to defend it, which appellant agreed to do, and directed appellee to incur reasonable and necessary expenses in defending it; that appellant advised and directed the institution of the suit to remove the alleged claim of Robinson as a cloud upon appellee's title; that the final result of the consolidated suits was that Robinson was declared the owner of the land; that by reason of this there has been a breach of appellant's covenant to warrant and defend the title, appellee had incurred attorney's fees in the sum of \$286, court costs in the sum of \$265, and other expenses amounting to \$100 by reason of the suit, and, besides, had lost the purchase money paid for the land in the sum of \$480, to his damage all told in the sum of \$1,575, for which he asked judgment. Appellant answered and admitted the conveyance of the land by warranty deed, admitted the covenant to warrant and defend the title to same, admitted the suit by Rob-

inson against appellee at law to recover possession of the land and for damages, admitted that appellee instituted suit against Robinson to remove the cloud, but denied, that he directed appellee to bring the suit in equity, and denied that he consented to the consolidation of the suits, and denied that he directed and instructed appellee to incur any expenses whatever with reference to the suits. Further answering, appellant stated: That on the 16th day of September, 1903, the chancery court of Woodruff county for the southern district rendered a decree in said cause in favor of appellee; that said S. C. Robinson prosecuted an appeal to the Supreme Court of Arkansas; that on the 10th day of June, 1905, said court reversed the decree of said chancery court and remanded said causes back to the said chancery court for further proceedings in accordance with the decision of said Supreme Court; that the appellee neglected and refused to take out and file in said chancery court the mandate from the Supreme Court until the 11th day of July, 1906; that appellee's right of action, if any he ever had, against appellant upon the warranty in said deed, is now barred by reason of his failure to take out and file the mandate from the Supreme Court.

The evidence on behalf of appellee tended to show: That the deed from appellant contained the following covenant: "We hereby covenant with the said F. Nordman that we will forever warrant and defend the title to said lands against all lawful claims whatsoever." That, as soon as he was sued by Robinson, he (appellee) notified appellant of that fact, and appellant promised to assist him all he could in straightening out the matter. There was evidence in the record which would have warranted the court in submitting to the jury the questions as to whether or not appellant, after being notified of the suit between appellee and Robinson involving the title to the lands, instructed appellee to proceed with the suit and acquiesced in all that appellee did in connection with that litigation; but, in the view we have taken of the case, we deem it unnecessary to set out that evidence in detail. There was a verdict and judgment in favor of appellee for the sum of \$1,269, from which appellant prosecutes this appeal.

F. G. Taylor, for appellant. Trimble, Robinson & Trimble, for appellee.

WOOD, J. (after stating the facts as above).

1. Appellant contends that the land mentioned in the mandate of the Supreme Court is not the same land mentioned in the decree in the case in the chancery court which was appealed to this court and reversed, and not the same land mentioned in the complaint in this suit. There is no merit in the contention. The clerical misprision in describing

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the mandate of the Supreme Court is immaterial. The pleadings in the chancery court show what lands were adjudicated finally in that suit to belong to Robinson. These are the same lands mentioned in the complaint in this suit; but the question was not raised in the court below, and therefore cannot be raised here. Had the attention of the court and appellee been called to the misprision, it could have been corrected so as to make the description in the mandate conform to the description of the land in the pleadings in the chancery suit. Moreover, the filing of the mandate of this court in the lower court in the chancery suit was not a condition precedent to the maintaining of the present suit. Appellant's covenant of warranty had failed when this court adjudged the right to the title and possession of the lands in the suit in the chancery court to be in Robinson. *Robinson v. Nordman*, 75 Ark. 595, 88 S. W. 592. Appellee was not required to await the filing of the mandate before he could maintain the present suit. In law he had been evicted. 2 *Warvelle on Vendors*, § 977, and authorities to this point cited in appellee's brief.

2. The instructions of the court given at the instance of the appellee correctly submitted the questions raised by the pleadings and evidence. The prayers for instructions by appellant were not correct. Under a covenant to warrant and defend title, the costs and necessary expenses incurred by a covenantee in a bona fide defense or assertion of his title are recoverable in an action by him against the covenantor for the breach of his warranty. Necessary expenses would include reasonable attorney's fees and other actual expenses paid by the covenantee in a bona fide but ineffectual effort to uphold the title which he has acquired from his covenantor. There is some conflict among the authorities, but, as Mr. Warvelle says: "The larger and apparently better considered class of cases, how-

ever, all incline to the doctrine that the purchaser is entitled to reimbursement for his necessary costs and expenses incurred in defending the title, and that such costs and expenses include a reasonable attorney fee." 2 *Warvelle on Vendors*, § 980; 11 Cyc. 1176, and cases cited in notes. In the cases of *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338, *Carvill v. Jacks*, 43 Ark. 439, *Barnett v. Hughey*, 54 Ark. 195, 15 S. W. 464, and *Alexander v. Bridgford*, 59 Ark. 195, 27 S. W. 69, the question that is here presented was not involved. We have never announced a rule on the measure of damages for a breach of covenant to warrant and defend title contrary to the above, which is generally held to be the sound doctrine. In 8 Am. & Eng. Enc. Law (2d Ed.) p. 190, the reason for the rule, and the rule itself, are given as follows: "A grantee in possession of land under a deed containing the usual covenants would, in surrendering possession to what he supposed to be a paramount title, act at his peril; and it is therefore generally held that where he defends the action by the owner of the paramount title to recover possession of the land, he may recover from his covenantor the expenses necessarily incurred, including a reasonable fee paid to his attorney." See other cases cited in notes on pages 190 and 191. The instructions given at the instance of appellee were in conformity to the above doctrine. The prayers for instructions by the appellant, and which were refused by the court, were predicated upon the idea that appellant would not be liable unless there was an agreement, aside from the covenant, to pay the expenses incurred by appellee, and were therefore erroneous according to the rule above announced.

There was a substantial basis in the evidence upon which to rest the verdict.

The judgment is therefore correct, and is affirmed.

## GRAND FRATERNITY v. MELTON.

(Supreme Court of Texas. April 7, 1909.)

## 1. INSURANCE (§ 646\*)—ACTION FOR LIFE INSURANCE—PRIMA FACIE CASE—BURDEN OF PROOF—DEFENSE OF SUICIDE.

In an action for life insurance, defended on the ground of suicide, where plaintiff proved that insured died, he established a prima facie case, and the burden was on the defendant to prove its defense.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1663; Dec. Dig. § 646.\*]

## 2. APPEAL AND ERROR (§ 1003\*)—REVIEW—QUESTION OF FACT.

Where a case was submitted to the jury on a single issue of fact, and the charge was favorable to the losing party, on error the judgment must stand affirmed, unless the evidence establishes the fact in his favor to that degree of conclusiveness which precludes a reasonable doubt to the contrary, and there must be no room for fair and reasonable minds to differ on the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3938; Dec. Dig. § 1003.\*]

## 3. EVIDENCE (§ 588\*) — WEIGHT AND SUFFICIENCY—CREDIBILITY OF WITNESSES.

While the jury are the judges of the credibility of the witnesses, they have no right to arbitrarily reject the evidence of an unimpeached witness, against whom there is no discrediting fact or circumstance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.\*]

## 4. EVIDENCE (§ 594\*) — WEIGHT AND SUFFICIENCY—UNCONVERTED EVIDENCE.

While the jury are the judges of the weight of the evidence, they cannot lawfully deny proper weight to undisputed facts, with no suspicion cast thereon.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.\*]

## 5. INSURANCE (§ 665\*)—ACTION FOR LIFE INSURANCE—EVIDENCE OF SUICIDE—SUFFICIENCY.

Evidence held not only to raise an issue for the jury as to the intention of insured in shooting himself, but to establish to a moral certainty that he shot himself with intent to destroy his life, inflicting the wound from which he died.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1720; Dec. Dig. § 665.\*]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by Mattie Ketchum Melton against the Grand Fraternity. There was a judgment for plaintiff, and defendant appealed to the Court of Civil Appeals, which affirmed the judgment (111 S. W. 967), and defendant brings error. Reversed, and judgment entered for defendant.

Buck, Cummings, Doyle & Bouldin and J. J. Eckford, for plaintiff in error. Beckham & Beckham, for defendant in error.

BROWN, J. On the 28th day of October, 1901, the Supreme Lodge of the United Moderns, a foreign corporation, issued to J. H. Melton a certificate of membership whereby it agreed, upon the death of the said Melton, to pay \$1,000 to Mattie Ketchum Mel-

ton. The constitution of the United Moderns contained this provision: "If any member dies \* \* \* by self-destruction, whether sane or insane, \* \* \* then in such case the beneficiary certificate, together with all claims by reason of membership, shall be null and void." The United Moderns and the Grand Fraternity consolidated into one concern under the name of the latter on the 19th day of November, 1903, and the Grand Fraternity issued to Melton, in lieu of the certificate which had been issued by the United Moderns, a certificate which contained this provision: "The consolidated order, the Grand Fraternity, accepts you as a member, and assumes and will pay all benefits provided for in the said beneficiary certificate in the manner and as prescribed in the constitution and laws, rules, and regulations of the United Moderns." Melton paid all dues, and on the 8th day of February, 1905, was in good standing in the order, on which day he shot himself, inflicting a wound from which he died. This suit was instituted by the defendant in error upon the certificate above described. The only defense set up by the plaintiff in error was that J. H. Melton had taken his own life, and that therefore it was not liable on the certificate.

The court submitted the case to the jury upon one issue in the following affirmative and negative form, which the attorneys agreed presented the only issue of fact, and the jury answered as stated below: "In this case I submit the following special issue, to wit: Did Jesse Melton come to his death by self-destruction? Upon this issue, if you believe from the evidence that Jesse Melton intentionally shot himself in the breast, and as a direct consequence thereof he died, you will answer this question 'Yes.' Unless you find from the evidence that Jesse H. Melton did intentionally shoot himself in the breast, you will answer this question 'No.' Upon this issue submitted to you the burden of proof is upon the defendant to show the affirmative of said issue, and if you do not believe by a preponderance of the evidence that Jesse H. Melton came to his death by self-destruction then you will find in the negative on the issue submitted. You are the exclusive judges of the credibility of the witnesses, of the weight of the evidence, and of the facts proved. Irby Dunklin, Judge." The jury answered, "No."

The conclusion reached by this court renders it unnecessary to discuss the question presented on the rulings of the trial court in excluding declarations of Melton, but we do not wish to be understood as approving such action. Judgment was rendered in favor of the plaintiff against the Fraternity for the amount of the policy, with interest thereon. Upon appeal to the Court of Civil

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeals of the Second District, a majority of the court reversed the judgment and remanded the case. Upon motion for rehearing, the membership of the court having been changed by the resignation of Mr. Justice Stephens and the appointment of Judge Pressler, a majority of the court, as then constituted, granted the motion for rehearing and affirmed the judgment of the district court.

The evidence which bears upon the issue submitted by the court is in substance as follows: L. H. Jewell was the first witness who saw Melton after he was shot. He was then lying upon a couch in a room of his home, with a wound in his left breast near to the nipple. A pistol was lying within two or three feet of him on the floor. Jewell had a conversation with him, which was by agreement of attorneys submitted to the jury as testimony in the following form: "Melton told Jewell, when he went there, that he had shot himself, and that he was up against it, and owed on his home; that he asked for the pistol, and said he wanted to blow his brains out." Dr. Pollock, the physician attending Melton at the time of his death, stated that Melton said to him: "I wish I had shot myself in the head," or he said, "I wish it had shot me in the head." "Now what he said I don't know; but he said something about shooting himself which led me to believe that no one had shot him, but that he had shot himself, whether accidentally or not I was unable to make up my mind." When the plaintiff proved that J. H. Melton had died, she established a prima facie right to recover. The burden was upon the Fraternity to prove that Melton shot himself and that he did it intentionally. *Insurance Co. v. Payne*, 105 Fed. 172, 45 O. C. A. 193; *Benefit v. Sargent*, 42 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160.

The Fraternity introduced Jewell, who testified that he heard that a man was shot, and went into the house where Melton lived to see about it. Mrs. Melton was in the house. J. H. Melton was lying upon a couch, with a wound in his left breast and a pistol on the floor within a few feet of the couch. Counsel for the Fraternity asked of Jewell this question: "Without going over details of your testimony, I want to ask you if Mr. Melton stated to you the cause for his doing what he had done." The question was objected to, because it called for the statements of Melton, and the court sustained the objection for that reason; but subsequently counsel agreed to submit to the jury as the evidence of Jewell this statement: "Judge Beckham says he is willing to put it in as Jewell's testimony, not waiving his objection that Melton told Jewell, when he went there, that he had shot himself, and that he was up against it and owed on his home, and that he asked for the pistol, and said he wanted

to blow his brains out." Interpreting the statements as an answer to the question, it means that Melton told Jewell that he (Melton) shot himself. Why did he shoot himself? He shot himself because he was "up against it and owed on his home." Did Melton shoot himself intentionally? He asked for the pistol, and said he wanted to blow his brains out. The conditions which have caused so many unfortunates to go the same way were present in his case, and the intention to end his life was so fixed that it dominated his mind and directed his action into the very shadow of death. Dr. Pollock testified to practically the same facts as did Jewell. The doctor said, however, that he was not sure whether Melton said he shot himself or that "it"—the pistol—shot him. It is plain that Melton did not say the pistol shot him; for, whether it was accidental or intentional, he must have done the shooting himself. The facts are consistent with suicide, intentional shooting of himself, and inconsistent with an accidental killing.

We have sought for a fact or circumstance which would sustain a conclusion that the shooting was accidental; but our search has been in vain. The judge of the district court submitted to the jury the single issue, was the killing intentional? The charge was favorable to the defendant. Therefore the judgment must stand, unless the evidence establishes that the shooting was intentional to that degree of conclusiveness which precludes a reasonable doubt to the contrary; that there must be no room for fair and reasonable minds to reach different conclusions from the evidence. This is the rule that governs in this court. The jury were the judges of the credibility of the witnesses; but they had not the right to arbitrarily reject the evidence of an unimpeached witness, against whom there was no discrediting fact or circumstance. Jewell and Pollock appear from their testimony to have been friends to Melton, and there is nothing to show that they bore any relation whatever to the Fraternity that would justify a suspicion against their truthfulness. The jury were the judges of the weight of the evidence; but they could not lawfully deny proper weight to undisputed facts, with no suspicion cast upon them. If the jury had the power to discredit any and every witness, and to disregard any and all facts, their verdicts could not be set aside by the judge, nor reviewed by the appellate courts. Yet the law enjoins it upon the courts to set verdicts aside when contrary to the evidence or the law.

The trial judge should not have submitted the case to the jury, because the evidence did not raise an issue on the intention of Melton in shooting himself. By the evidence the Fraternity established to a moral certainty that Melton shot himself with intent to destroy his life, inflicting a wound

from which he died. As a matter of law the defendant below was entitled to the verdict, and the trial judge should have directed the jury to return a verdict for the defendant.

It is ordered that the judgments of the district court and court of Civil Appeals be reversed, and that judgment be here entered for the plaintiff in error.

## HOUSTON & T. C. R. CO. v. DAVENPORT et al.

(Supreme Court of Texas. March 24, 1909.)

### 1. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—QUESTIONS FOR JURY.

In an action for the death of an engineer through the explosion of the fire box in his locomotive, whether the explosion resulted from defects in the box attributable to defendant's negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 286.\*]

### 2. NEW TRIAL (§ 105\*)—NEWLY DISCOVERED EVIDENCE.

In an action for death, that one of plaintiff's witnesses had stated in the presence of two affiants that, though summoned as a witness, he knew nothing about the case, did not as a matter of law entitle defendant to a new trial on the ground of newly discovered evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 221; Dec. Dig. § 105.\*]

### 3. DEATH (§ 52\*)—DAMAGES—PLEADINGS.

In an action for death by the widow and minor children of decedent, a petition stating the extent of decedent's earnings for services rendered, and alleging that plaintiffs have lost his services and earnings, and also alleging his death, his character, his relation to plaintiffs, and their ages, and concluding with the averment that, "by reason of the premises," plaintiffs have been damaged in a certain sum, was sufficient to authorize the recovery of all damages legally recoverable, including such as the law allows for the loss of the assistance, care, and nurture of husband and father.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 69; Dec. Dig. § 52.\*]

### 4. TRIAL (§ 256\*)—INSTRUCTIONS.

Where the petition in an action for death by the widow and minor children of decedent stated the extent of decedent's earnings for services rendered, and alleged that plaintiffs had lost his services and earnings, and also alleged his character, his relation to plaintiffs, and their ages, an instruction authorizing only the recovery of such sum as would compensate for the "pecuniary" loss sustained by decedent's death was not affirmatively erroneous, since any indefiniteness in the language could have been cleared up by a special charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

### 5. MASTER AND SERVANT (§ 265\*)—PERSONAL INJURIES—NEGLIGENCE—BURDEN OF PROOF.

In an action for death of a servant through the explosion of a fire box on a locomotive, the burden of proving that defendant's negligence caused the explosion was on plaintiffs.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 897; Dec. Dig. § 265.\*]

### 6. MASTER AND SERVANT (§ 265\*)—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—INSTRUCTIONS.

Where, in an action for death of a servant through the explosion of a locomotive boiler, the evidence justified a finding both that defendant negligently provided an unsafe boiler, and that the negligence of decedent contributed to the accident, a charge that the burden was on defendant to show contributory negligence was correct.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 908; Dec. Dig. § 265.\*]

### Error from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Sarah A. Davenport and others against the Houston & Texas Central Railroad Company. There was a judgment of the Court of Civil Appeals affirming a judgment for plaintiffs, and defendant brings error. *Affirmed*.

For prior report, see 110 S. W. 150.

Baker, Botts, Parker & Garwood, R. S. Neblett, and Supple & Harding, for plaintiff in error. Farrar & Pierson, C. B. Randell, and J. H. Wood, for defendants in error.

WILLIAMS, J. The judgment from the affirmance of which by the Court of Civil Appeals this writ of error is prosecuted was rendered in the district court of Ellis county against plaintiff in error in favor of defendants in error, the wife and children of D. Davenport, for damages resulting to them from his death alleged to have been caused by negligence of the plaintiff in error. The death was caused November 3, 1905, by the explosion of the fire box of an engine belonging to the railroad company, of which Davenport was in charge as engineer.

The writ of error was granted, upon the showing made in the application, in the belief that the plaintiffs had not adduced evidence legally sufficient to sustain the finding that the explosion resulted, as alleged, from defects in the fire box attributable to negligence on the part of the defendant. The decision of this question has required the examination and careful consideration of almost 1,000 pages of testimony presented in the stenographer's transcript of the evidence taken at the trial. Perhaps the greater part of the evidence, so far as it is of any value at all upon appeal, consists of the testimony of witnesses descriptive of the condition in which the fire box was found after the accident, with their opinions formed from the appearances it presented as to the cause or causes of the explosion; the theory of the one witness for plaintiffs to this point being that it resulted from weaknesses in the fire box due to several of the defects alleged, and that of defendant's many witnesses being that it was caused by the fault of the deceased in allowing the water in the boiler to sink below the crown sheet so as to expose it to the heat within the box, and weak-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

en it to such an extent as to soften the metal in the sheet and in the bolts which held it in position, and to allow it to sink down and produce the explosion. There is also the direct testimony of a witness for the plaintiff to the existence of a defective condition of the fire box a few days before the explosion occurred, and a great volume of evidence from employes of the defendant, boiler makers, engineers, and firemen to the contrary, some of the latter showing the making of some repairs upon it between the time referred to by plaintiffs' witness (Straughn) and the accident. The fact which the testimony of Straughn tended to show was that some of the bolts holding the fire box in place were either broken or loose to such an extent as to render its use dangerous, and the testimony of the other witness for plaintiffs (Duffey) who examined it after the explosion was to the existence of indications in it of the insufficiency of the staying or fastening by the bolts, from which he formed the opinion that this, and not that advanced by defendant, was the cause of the explosion. After the most careful and patient consideration of all of the evidence, we have found ourselves unable to say that there is none to sustain the judgment, and with this conclusion our power over the facts comes to an end. It may be true that Straughn's testimony is open to much question, and that Duffey's opinion is not very satisfactorily sustained by the facts which he himself states; but when both are considered together, and taken, as they must be, as strongly in favor of the verdict as can reasonably be done, it cannot be said that they are so entirely lacking in probative force as to authorize this court to say the case should have been taken from the jury, and this is what we should have to say before we could set aside the verdict for want of evidence. We at first thought that perhaps the evidence adduced by the defendant as to the repairs upon and the condition of the fire box after the time when Straughn saw it and before the explosion was reconcilable with his statements, and showed that any faults that may have been detected by him had been remedied; but, when the testimony is carefully compared, this cannot be said to be true. The repairs testified to by defendant's witnesses were not of the defects which some of the testimony of Straughn tended to show, and the general good condition to which the former swore could hardly have existed if the latter testified truly. There was such conflict between them as can hardly be reconciled without rejecting some of his statements, and whether or not this should have been done is not a question for this court. Duffey testified that the metal in the part of the sheet composing the fire box was crystallized at one place where it had been torn asunder in the explosion. It is conceded that this condition of metal can be seen in its edges after it has

been broken as this was. We must therefore accept this as a fact for present purposes; but it is hardly sufficient alone to establish negligence on the part of the defendant in failing to discover the condition before the explosion occurred, it being virtually admitted that crystallization cannot be detected by mere inspection before the breaking of the metal and that the proper test for it is by hydraulic pressure, which test had been applied by the defendant. The fire box had not been in use long enough for this condition to have come about merely from age and wear. Nor do we attach importance to Duffey's opinion that the sheet of which the box was constructed was too thin, for the reasons that he admitted his incompetency to judge of such matters, and that it was shown by uncontradicted evidence that it was of the standard thickness, and was to all appearances existing before the accident of the best material. But it remains true that a condition of the bolts holding the box in position was testified to by Straughn which would render the engine defective and dangerous, and which could have been discovered and remedied by careful inspection, and that Duffey testified to indications after the explosion that this was its cause. As to what the appearances upon the exploded box really were and what they indicated, the statements and opinions of the witnesses vary and conflict, and here a consideration very important in determining the question with which we have to deal is that the jurors were permitted by the consent of the parties to go in a body with the presiding judge and examine the remains of the box produced by the defendant. This gave them the opportunity, at least, to test the accuracy of the testimony of the different witnesses, and to judge as to the correctness of their statements and opinions. What they saw cannot, of course, be known to this court. Therefore, after a most careful consideration of the case, we have reached the conclusion that, whatever might be our action if we had control over the facts, we are not authorized to hold that there is no evidence. Nor do we find that the other assignments show error in the rulings of the court and in the instructions given.

The motion for new trial on account of newly discovered evidence does not present matter upon which this court can hold that the defendant was entitled to demand a new trial as a matter of law. The new evidence desired consisted of circumstances tending to show such conduct of Davenport in the management of his engine during the trip in which he was killed as to give rise to the inference that he was asleep or intoxicated, or both, and to strengthen defendant's theory that he had allowed the water to sink below the crown sheet of the fire box. The course of the trial shows that this was the defendant's theory throughout, and that the facts now presented could have been had by

simple questions addressed to the witnesses when on the stand or before they were put on the stand, and that such facts were not disclosed simply because they were not called for. It is true that some of the persons on whose affidavits the motion is based did not testify, but the facts known to them were also known to some who did testify concerning incidents of the very trip in question, and could easily have been learned in the way indicated either before or during the trial. The other new testimony is merely to the effect that plaintiffs' witness Straughn had stated in the presence of the two affiants that, though summoned as a witness, he knew nothing about the case. This is not of sufficient importance to entitle the defendant to a new trial as a matter of law. If the witnesses should testify to the statement and were believed, Straughn's credibility would hardly be affected for the reason that witnesses very often do not know the relevancy or importance of facts within their knowledge. This is not the kind of evidence to obtain which new trials are granted.

It is contended that the petition only claimed damages for the loss sustained by plaintiffs of the money which deceased would have contributed to them, and not for the wife's loss of his assistance and the children's loss of his care and attention in rearing them, and that the charge of the court erroneously authorized the recovery of both. We are not prepared to agree that the petition is so restricted. It states, it is true, the extent of Davenport's earnings for services rendered, and alleges that they have lost his "services and earnings," but it also alleges his death, his character, his relation to the plaintiffs, and their ages. The whole concludes with the averment that, "by reason of the premises," plaintiffs have been damaged in the sum of \$40,000. This was sufficient to authorize the recovery of all damages legally recoverable on the facts stated, which would include such as the law allows for the loss of the assistance, care, and nurture of husband and father. But, if this were not true, it is not believed that the charge would be affirmatively erroneous. It authorizes only the recovery of such a sum of money as would compensate for the pecuniary loss sustained by the death of Davenport. While loss of the character just referred to is compensated pecuniarily—that is, in money—it is not one which a jury would probably understand to be a "pecuniary loss." The most that could be said in any view would be that there is an indefiniteness in the language which could easily have been cleared up by a special charge entirely consistent with it. *Parks v. San Antonio Traction Co.*, 100 Tex. 225, 94 S. W. 331, 98 S. W. 1100. The case cited answers also most of the other objections to the charge, none of them showing positive error. One of them, that the court

erroneously put the burden on defendant to prove contributory negligence on part of the deceased, deserves some further discussion. The burden was on plaintiffs to prove that the negligence of defendant caused the explosion, and the trial court so instructed the jury. The peculiar facts of this case involved the question whether the explosion resulted from the one or the other of the two causes alleged by the parties, respectively, and therefore the burden on plaintiffs required them to make the evidence preponderate in favor of this contention that defects in the boiler rather than low water was the cause, and, in case they left the evidence in such condition that it could not be determined that this was the fact, they would not maintain their contention. *T. & P. Ry. Co. v. Shoemaker*, 98 Tex. 456, 84 S. W. 1049. It cannot truly be said, therefore, that the burden was on defendant to show affirmatively that low water was the cause. But there was a further supposable state of case in which the jury might find that both causes were present and in which plaintiffs would be precluded by negligence of deceased contributing with that of defendant. To this phase the charge that the burden was with defendant to show contributory negligence was applicable and correct. The charge of the court correctly put the burden on the plaintiffs to prove their case and on defendant to defeat that case, if shown, by the matter pleaded—contributory negligence. If further instructions were needed to develop the views just stated, they should have been requested.

Other specifications of error have been duly weighed, and found to present no ground for reversal.

Affirmed.

KALTEYER et al. v. MITCHELL et al.  
(Supreme Court of Texas. April 7, 1909.)

1. ALTERATION OF INSTRUMENTS (§ 27\*)—EXPLANATION—BURDEN OF PROOF.

Where an alleged alteration appears on the face of the instrument, the burden is on the party offering it to account for the alteration.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. § 242; Dec. Dig. § 27.\*]

2. APPEAL AND ERROR (§ 1042\*)—RULINGS ON PLEADING—PREJUDICE.

Where a note sued on was barred by limitations, the court's failure to strike out defendants' allegations as to homestead was not prejudicial to plaintiffs.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4113; Dec. Dig. § 1042.\*]

3. NEW TRIAL (§ 144\*)—MISCONDUCT OF JURY—DISCRETION.

Under Laws 1903, p. 21, c. 18, providing that if the misconduct of the jury proven, or the testimony received, or the communication made be material, a new trial may be granted in the discretion of the court, the refusal of a new trial was not an abuse of discretion, where only one of the jurors testified that it was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



agreed that the vote of the majority should constitute the verdict.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 290-298; Dec. Dig. § 144.\*]

Error to Court of Civil Appeals, Fourth Supreme Judicial District.

Action by F. J. Kalteyer and others against Wallace Mitchell and another. From a judgment for defendants, affirmed by the Court of Civil Appeals (110 S. W. 462), plaintiffs bring error. Affirmed.

R. B. Minor and Aug. E. Altgelt, for plaintiffs in error. Henry E. Vernor and Joseph Ryan, for defendants in error.

GAINES, C. J. This action was instituted August 23, 1904, by plaintiffs in error upon a promissory note for \$800 given by Wallace Mitchell and Mattie Mitchell to George A. Schoenert, purporting to be for a part of the purchase money of a certain lot, payable December 23, 1897. The plaintiffs also pleaded that on the 23d day of December, 1901, the said Wallace Mitchell and Mattie Mitchell, in order to secure said lien, executed to George C. Altgelt a deed in trust upon the said property, empowering him, in default of the payment of said note on or before the 23d of December, 1903 (to which time the payment had been extended in said instrument), to sell the property for the payment of the amount. The defendants answered, among other things, the statute of limitations of four years to the note, and that the words in said deed of trust "the payment of which said note has been extended for two years from December 23, 1901, all interest to that date having been paid, and the rate of interest reduced to 7 per cent.," were not in the deed of trust when it was signed by them, nor were they afterwards inserted by their knowledge or consent, but after the signing and delivery of said instrument were inserted by another person for the purpose of making it appear that the note secured thereby was not barred by the statute of limitations. This answer was sworn to by Wallace Mitchell and Mattie Mitchell.

The case was submitted to the jury upon special issues. The first issue submitted to the jury was as follows: "Were the following interlineations—'the payment of which said note has been extended for two years from December 23, 1901, all interest to that date having been paid, and the rate of interest reduced to 7 per cent.'—written into the deed of trust, which has been introduced in evidence, before the same was signed and acknowledged? Answer 'They were,' or 'They were not.'" Upon this issue the court gave the following instruction: "You are instructed that the burden of proof is upon plaintiffs to establish by a preponderance of the testimony that the pen interlineations in the deed of trust introduced in evidence were

made before the said deed of trust was signed and acknowledged by the defendants." It was for the giving of this charge that we granted the writ of error, but are now of the opinion that the charge was correct. In *Wells v. Moore*, 15 Tex. 521, and in *Muckleroy v. Bethany*, 27 Tex. 551, it was held that upon a similar issue the burden was upon the defendants. But in the former case the issue was whether the penalty of a bond, "eight thousand dollars," had been inserted before or after the bond was signed. We have examined the transcript of the case, and find nothing to show that the alleged insertion was apparent upon the face of the instrument. The same may be said of *Muckleroy v. Bethany*, supra. In that case the question was whether a seal had been added to the names of the makers of the note. We find nothing in the transcript to show that the alleged alteration appeared upon the face of the paper. So we may dismiss these two cases from further consideration, there being nothing in either transcript to show that the alleged alteration was apparent. On the other hand, it is expressly held in *Rodriguez v. Haynes*, 76 Tex. 225, 13 S. W. 296, and in *De Wees v. Bluntzer*, 70 Tex. 406, 7 S. W. 820, that a party who offers an instrument which appears upon its face to have been altered is bound to account for the alteration. See, also, *Park v. Glover*, 23 Tex. 469, and *Howell v. Hanrick*, 88 Tex. 383, 29 S. W. 762, 80 S. W. 856, 31 S. W. 611. We cannot hold that the burden of showing that the alteration was made after the instrument was signed by the parties was upon the defendants, without overruling these later decisions. There is a conflict of authority upon the question; but the weight of it, as we think, is in accordance with the later decisions of this court.

We incline to think that the plea of homestead, against which the exception complained of in the first assignment of error was leveled, was not good, as is intimated by the Court of Civil Appeals in its opinion; but if the note was barred by limitation, as it clearly was, and if the inserted words found in the deed of trust were written after the signing of that instrument, without the knowledge or consent of the defendants, then the note remained barred, and we fail to see that the failure of the trial court to strike out the allegations as to the homestead could have operated to the prejudice of the plaintiffs upon that issue.

In regard to the question of the misconduct of the jury: One of the jurors, upon whose testimony it was proposed to get a new trial for misconduct of the jury, swore that it was agreed to take a vote, and that, as a majority should vote, so should be their verdict; that upon taking a ballot a majority voted for the defendants; and that by reason of such ballot a verdict was rendered for the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendants. Another juror (there were but two examined) testified that when the jury retired they agreed to take a ballot, but declined to say that they agreed to be governed by the ballot; that the ballot was taken, and that they afterwards passed upon the special issues; but he again declined to say that any juror's vote was influenced by the ballot taken. The statute provides that "if the misconduct proven, or the testimony received, or the communication made be material, a new trial may in the discretion of the court be granted." Laws 1903, p. 21, c. 18. We cannot say that the action of the court in refusing a new trial shows such an abuse of discretion as to authorize us to hold that it was error.

The other assignments of error in the case, though not discussed in this opinion, we think were correctly overruled by the Court of Civil Appeals.

Finding no error in the judgment, it is affirmed.

#### RAILROAD COMMISSION OF TEXAS v. CHICAGO, R. I. & G. RY. CO.

(Supreme Court of Texas. April 7, 1909.)

RAILROADS (§ 58\*)—CONTROL AND REGULATION—RAILROAD COMMISSION—ESTABLISHMENT OF STATIONS—"STARTING PLACE."

Rev. St. 1895, art. 4494, requires railroad corporations to run cars at regular times and to furnish sufficient accommodations at the place of starting, the junction with other railroads, and at sidings and stopping places established for receiving and discharging way passengers and freights. Article 4519 requires every railroad company to erect at every station or place for the reception and delivery of freight suitable buildings to protect freight. Article 4562, subd. 12, requires every railroad company to maintain depot buildings at its several stations for passengers and to maintain freight depots. Article 4579, subd. 1, requires the Railroad Commission to enforce all laws in reference to railroads. *Held*, that the Railroad Commission is bound, not only to enforce the regular running of the trains, but also the requirement as to starting places, junctions, etc., and may require a railroad company to locate a station and construct a depot where the railroad company is bound under the law to locate a station, and that a place located on the state line through which a railroad runs, which is located more than nine miles from the nearest station in the state, is a "starting place" within the meaning of the statute, and the company may be required to locate a station there, although it has a station within 900 feet of the place in another state.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 136; Dec. Dig. § 58.\*]

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by the Chicago, Rock Island & Gulf Railway Company to restrain the State Railroad Commission from enforcing an order to construct a station. The trial court gave judgment for plaintiff, and defendant appealed (114 S. W. 192), and the judgment of the trial court was sustained, and defendant

brings error. Reversed, and judgment rendered dismissing the action.

R. V. Davidson, Atty. Gen., and Jas. D. Walthall, Asst. Atty. Gen., for plaintiff in error. N. H. Lassiter, Robert Harrison, and N. A. Stedman, for defendant in error.

WILLIAMS, J. This action was begun by the railway company to restrain by injunction the Railroad Commission from enforcing an order made by it requiring the company to construct at Texhoma, Tex., "a station on its line of railway in Texas, and its terminus, an adequate and sufficient passenger and freight depot building for the proper accommodation, as required by law, of the business of said station."

The railway company contends, in substance, (1) that the commission was without power to require it to place a station at any place other than those at which it had established them; and (2) that, if the power existed with reference to any place or to any condition of facts, the order in question requiring the station at Texhoma was an unreasonable and unjust exercise of it when applied to the conditions at that place. The district court and the Court of Civil Appeals sustained the latter contention. The terms of the order made by the commission, which we have quoted, indicate that it was based, not on an asserted power to determine the locations of stations generally, but upon the opinion that the law requires a station at Texhoma. As we concur in that view, it will be unnecessary to enter into a discussion of the question whether or not that body is clothed by the statutes with the power generally to require stations at points where the law has not required them and where railroad companies have not established them. We therefore proceed to the examination of the question indicated, whether or not the laws of this state have required stations, with the proper houses and their appurtenances, at such places as Texhoma is shown to be.

From the findings of the trial judge adopted by the Court of Civil Appeals and from evidence in the record, which is uncontradicted, it appears that Texhoma is a town partly in Texas and partly in Oklahoma, its population being 400 or 500, of which about 150 are in Texas. The track of the defendant in error connects at the state line with that of the Chicago, Rock Island & Pacific Railway Company, a foreign corporation, whose road runs through Oklahoma. The same trains are used by the two companies; their possession and control changing from one to the other as they cross the state line. They do not stop in Texas at Texhoma, but cross the line from and into Oklahoma, stopping for freight and passengers at a station in that state belonging to the Chicago, Rock Island & Pacific Railway Company which is situated

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about 870 feet from the state line. There is no municipal organization or post office in what is called Texhoma in Texas. The stopping place on defendant in error's road in Texas nearest to Texhoma is Stevens, distant 9.59 miles. At this point there is only a siding and a section house occupied by the sectionmen. Passengers may take passage and freight may be shipped to and from this place, but no station agent is kept there, and shipments of freight must be arranged for at other stations. The earnings of this company at Stevens amount to only \$500 or \$600 a year, while those at Texhoma for freight amounted for the year ending August 1, 1907, to \$20,300.51, and for the 10 months preceding May 1, 1908, for freight and passengers, to \$21,478.42. The earnings at the station for Stratford, the county seat, were not much greater. The average distance between stations established by this company on its road in Texas is slightly more than 10 miles. The cost of establishing a station with side tracks and appurtenances would be \$7,000 to \$7,500.

The statutory provisions upon which we think the question last stated should be decided in the affirmative are article 4494 as amended in 1903 (Act Sp. Sess. p. 21, c. 8), article 4519, subdivision 12 of article 4562, and subdivision 1 of article 4579.

"Art. 4494. Every such corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall within a reasonable time previous thereto offer or be offered for transportation at the place of starting, and the junction of other railroads, and at sidings and stopping places established for receiving and discharging way passengers and freights, and shall take, transport, and discharge such passengers and property at, from and to such places on the due payment of the tolls, freight or fare legally authorized therefor."

"Art. 4519. Each and every railroad company is hereby required to erect at each and every depot, station or place established by such company for the reception and delivery of freight, suitable buildings or inclosures to protect produce, goods, wares and merchandise and freight of every description from damage by exposure to weather, stock or otherwise, in default of which such railroad company shall be liable to the owner of such produce, goods, wares or merchandise for the amount of damages or loss sustained by reason of such improper exposure, together with all costs and expenses of recovering the same, including necessary attorney's fees."

"Art. 4562, subd. 12. It shall be the duty of each and every railway subject to this chapter to provide and maintain adequate, comfortable and clean depots and depot buildings at its several stations for the accom-

modation of passengers, and said depot building shall be kept well lighted and warmed for the comfort and accommodation of the traveling public; and all such roads shall keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing, and delivering of all freights, handled by such roads; provided, that this shall not be construed as repealing any existing laws on the subject."

"Art. 4579, subd. 1. It shall be the duty of the commission to investigate all complaints against railroad companies subject hereto, and to enforce all laws of this state in reference to railroads," etc.

From these it appears that the Railroad Commission is empowered and required to see to the performance of the duties therein imposed upon railroad companies, and, if that which the defendant in error has been directed to do is also required by these statutory provisions, no question can remain as to the power of the commission to exact obedience. It will be seen that article 4494 requires a number of things to be done by railroad companies, and one requirement is in no wise weakened by the presence of others. Hence we cannot agree with counsel for defendant in error in their contention that its purpose was merely to require the regular running of trains, with notice of the times thereof, so as to furnish sufficient train service for the transportation of passengers and property. It does require all that, but it also fixes, as the places at which passengers and property are to be received, (1) starting places, (2) junctions, and (3) sidings and stopping places established for receiving and discharging way passengers and freights. Nor can we agree that this has reference only to such places as the companies may have designated or established as their stations. The statute itself names and fixes starting places and junctions as points at which passengers and property must be received for transportation, and, in addition thereto, the points established by the companies for way passengers and freights. We see no room whatever for the construction contended for. It is true that this article does not say what the "sufficient accommodations" are to be. If it were the only provision, the case of *People v. Railway Co.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484, would be authority for the proposition that it would not specifically impose the duty to construct station houses in such way as to authorize the enforcement of it by mandamus. That decision was the result of omissions in the laws of New York, which, as will be shown, have been supplied in those of this state. The court construed a statute of that state, of which article 4494, as originally enacted, seems to be a literal copy. The court conceded that this statute absolutely required some things and forbade others, but concluded that it did not require the construction of station houses.

es. It may well be questioned if that was not too narrow a view; but, whether so or not, it cannot control this case. The court did not intimate that "places of starting" were not made points at which passengers and property must be received for transportation; that question not being involved in the case. The place in question there was an intermediate one, at which the company did receive for transportation, and the only question was whether or not the terms of the statute so required the building of houses as to warrant the enforcement of the duty by mandamus. In harmony with all that is there said, it may be held, as indeed the statute plainly requires, that the "starting places" are made points for receiving passengers and property for transportation; and, when that is ascertained, the omission which the New York court regarded as fatal to the case before it in the statutes of that state is supplied by our articles 4519 and 4562. Article 4519 imposes the duty there defined with reference to "every depot, station, or place established by such company for the reception and delivery of freight." If the phrase, "or place established by such company," were held to qualify the words "depot" and "station," as is assumed by counsel for defendant in error, but which is far from clear when it is remembered that this article is a part of the same statute with article 4494 that would not prevent the application of this provision to "starting places"; for by force of the last-named article the mere construction of a road with such points establishes them for the reception and delivery of freight, and brings them within the language of article 4519. It is inconceivable that the Legislature would provide the protection required at places only which the companies themselves have expressly designated, and withhold it from those at which such companies must also by force of the same statute receive and deliver property. Article 4562 makes like provision for the accommodation of both passengers and freight "at its several stations." "Stations," as here meant, are the places at which passengers and property are received for transportation, or delivered after transportation, and among them are included those places to which that character is given by article 4494. We really can see little room for contention about the meaning and purpose of these various provisions. It follows from what we have said that, if Texhoma was a starting place, it was the duty of the railroad company to establish a station there with such accommodations as are specified in these provisions. We do not mean to be understood as holding that the mere fact that the rails stopped at the state line makes the point of contact one at which a station must be maintained. The words used in article 4494 must be understood to mean what they meant when first adopted

into our legislation. They were so employed at a time when the chartering of railroad companies by private acts of the Legislature was just beginning in this state and in other parts of the country. The charter usually authorized the construction of the roads between points named as their termini, and these were referred to as places of starting. The thought was not in the legislative mind that a "place of starting" would be in an unbroken forest, a wild and unsettled prairie, a river swamp, or the middle of a stream forming a boundary of the state. The roads were to run from town to town, and these were their termini, their "places of starting." The state line is in law and in fact one terminus of the line of a railroad intersecting it constructed by a Texas corporation because its powers cease at that line; but, if there is no "place" there such as is meant by the language of article 4494, the mere ending of the track does not bring into existence the duty defined in these statutes. To hold that it does would wrench the law from its obvious meaning and purpose and carry it to absurd extremes. To avoid this and at the same time accomplish the good aimed at will not be found very difficult in practice if the true intent of the statute is kept in mind.

From the facts stated, we think it plainly appears that Texhoma is such a place as the statute contemplates. That the town is one at which passengers and freight should be received and discharged is confessed by the action of both railroads in establishing a station there. This further appears from the distance between it and the other station in Texas nearest to it if Stevens be considered a station; such distance being only slightly less than the average distance between the stations in Texas on defendant in error's road. It is further indicated by the fact that Texhoma in population, in shipments, in the company's earnings therefrom, and in the probability of growth and development in itself and in the country around it is about equal in importance to other points at which the defendant in error has established stations. In fact, there is no contention that its importance is not sufficient to entitle it to such provision if it had none. Regarding the place as one at which it is proper to have station facilities, the defendant in error asserts that those facilities are supplied by the station of a foreign company situated in another state. Whatever might be the weight that ought to be given to such a contention were the question only that which the courts below assumed it to be, and which was involved in the case relied on (*State v. Railway*, 76 Minn. 469, 79 N. W. 510), viz., whether or not the Railroad Commission, in exercising a judgment and discretion of its own in determining the locations of stations, had acted unreasonably and unjustly, it furnishes no reason

for the failure to do that which the law itself requires. The statutes which we have quoted deal with Texas railroads, and impose duties to be performed in Texas. The places at which stations are to be established are to be in Texas and not elsewhere, and it follows that this company does not meet this statutory requirement by using the station of another company in another state. The Railroad Commission having merely followed the statute discussed in making the order in question, the validity of its action must depend upon the validity of the statute, and not upon the powers of the commission outside that statute. There can, we think, be no serious question as to the validity of provisions under which all the railroads in Texas have been built, especially where they are construed as we have construed them, and applied to those places to which we have held them to be applicable. We have restricted our inquiry to the question whether or not Texhoma is a "place of starting," the further question whether or not it is also a junction in the sense of the statute, and is, because of that fact alone, a point at which there must be a station, involving other considerations which need not be discussed.

The judgment of the Court of Civil Appeals will be reversed and judgment will be here rendered that the injunction granted in this cause be dissolved, and that the plaintiff's cause be dismissed.

Reversed and rendered.

#### WALKER v. STATE.

(Court of Criminal Appeals of Texas. March 17, 1909.)

#### BURGLARY (§ 46\*)—INDICTMENT—TIME OF COMMITTING OFFENSE—INSTRUCTIONS.

Under an indictment charging that accused "did then and there unlawfully, by force, threats, and fraud, burglariously and fraudulently break and enter a house," the court need not limit the jury to the consideration of a daytime burglary, but may charge generally, without specifying a daytime or nighttime burglary.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 114; Dec. Dig. § 46.\*]

Appeal from District Court, Grimes County; S. W. Dean, Judge.

Tim Walker was convicted of burglary, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary. Omitting formal parts, the indictment charges as follows: "Did then and there unlawfully, by force, threats, and fraud, burglariously and fraudulently break and enter a house then and there occupied by one L. S. Stuart," etc.

1. The court charged the jury, generally,

in applying the law to the case, that if they should find that defendant Tim Walker, in Grimes county, either alone or acting with Dave Holiday, etc., with force applied to the building, did break and enter the house occupied by L. S. Stuart, he would be guilty. The charge of the court is not set out literally, and only the above statement is made to call attention to the point made by appellant; that is, that under the allegation in the indictment the court should have limited the charge to a daytime breaking. It will be noted that the court did not select either day or night breaking, and it may be stated, that the court's charge covered a daytime or a nighttime burglary. Appellant's contention is that under the peculiar allegation in the indictment the court should have limited the jury to the consideration of a daytime burglary. We are of opinion that the contention is not correct. This question was decided adversely to appellant in the case of Carr v. State, 19 Tex. App. 635, 53 Am. Rep. 395. The Carr Case has been followed in an unbroken line of decisions, of which there has been quite a number written.

2. The other questions suggested for revision cannot be revised, in the absence of the evidence. The record does not contain a statement of facts.

As the record is before us, there is no sufficient reason shown for a reversal of the judgment, and it is therefore affirmed.

#### ROWLAND v. STATE.

(Court of Criminal Appeals of Texas. March 10, 1909.)

#### CRIMINAL LAW (§ 1087\*)—APPEAL—NECESSITY FOR NOTICE—SHOWING BY RECORD.

A notice of appeal is indispensable to the jurisdiction of the Court of Criminal Appeals, and where it does not appear in the record the appeal will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2776; Dec. Dig. § 1087.\*]

Appeal from Parmer County Court; R. W. McConnell, Judge.

Elmer Rowland was convicted of malicious mischief, and appeals. Dismissed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the county court of Parmer county on a charge of malicious mischief, in that he willfully and mischievously injured and destroyed certain personal property. His punishment was assessed at a fine of \$50.

The record comes to us without any notice of appeal appearing in same. This is an indispensable jurisdictional fact. The state moves to dismiss the appeal, and the motion must be, and is hereby, granted, and the appeal dismissed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**DALY v. STATE.**

(Court of Criminal Appeals of Texas. March 23, 1909.)

**LARCENY (§ 55\*)—SUFFICIENCY OF EVIDENCE.**

Evidence in a prosecution for larceny held sufficient to support a conviction.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 164; Dec. Dig. § 55.\*]

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Tom Daly, alias Tom Bailor, was convicted of theft, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with the theft of 42 diamonds, of the value of \$75 each, and of the aggregate value of \$3,150. The evidence shows that appellant was the hired employé or servant of the alleged owner, and worked about the premises, especially attending to the buggy horse and other little matters, and in driving the buggy or carriage when the wife of the alleged owner desired his services. The employment was at the rate of \$15 per month. He was poor, and had no property with which to purchase diamonds; and in fact he does not set up any defensive matter at all, but relies simply upon the fact that the evidence was not sufficient to prove the case. The diamonds were stolen by somebody. Appellant had about the number of diamonds corresponding with those missed by the wife of the alleged owner. He hypothecated one of them for a small sum of money and some drinks. The diamonds were taken from the wardrobe, the secret place where they were kept. Appellant was placed in such position about the premises that he could have taken them. We are of opinion, without going into the details of the evidence, that the facts are sufficient to show that appellant took the diamonds, and that those he was seen with were hers. It was a case of circumstantial evidence, but sufficiently cogent to exclude every other reasonable hypothesis, except the guilt of appellant.

The judgment is affirmed.

**FARRIS v. STATE.**

(Court of Criminal Appeals of Texas. March 10, 1909.)

**1. LARCENY (§ 12\*)—TAKING OF PROPERTY—WHAT CONSTITUTES.**

In a prosecution for cattle theft, where accused was alleged to have sold the animal while it was running the range, it was not necessary to the transfer of title that a bill of sale was made out and acknowledged by him.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 29; Dec. Dig. § 12.\*]

**2. CRIMINAL LAW (§ 789\*)—INSTRUCTIONS—REASONABLE DOUBT—SUFFICIENCY.**

In a prosecution for theft of a cow by selling it to another on the range, where the court

gave a general charge on reasonable doubt and instructed that the jury must find that the animal belonged to the alleged owner in order to convict, and the alleged owner's evidence as to his ownership was not contradicted, accused not testifying, the question of reasonable doubt was sufficiently presented.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1906, 1907; Dec. Dig. § 789.\*]

**3. CRIMINAL LAW (§ 784\*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—NECESSITY OF CHARGE.**

Where the evidence showed that accused sold the cow alleged to have been stolen as it ran on the range, pointing it out to the purchaser at the time, and the purchaser took it pursuant thereto, a charge on circumstantial evidence was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1883; Dec. Dig. § 784.\*]

**4. LARCENY (§ 27\*)—PARTIES—PRINCIPAL—THEFT THROUGH INNOCENT AGENT.**

Under Pen. Code 1895, art. 77, providing that any one, by employing another who cannot be punished to commit an offense, as by laying poison where it can be taken, etc., by the use of such indirect means becomes a principal, one who fraudulently sold another's cow on the range by pointing it out to the purchaser, who was ignorant of its true ownership, would be guilty of theft of the cow as principal, upon the purchaser taking possession.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 55; Dec. Dig. § 27.\*]

**5. CRIMINAL LAW (§ 59\*)—PARTIES—"PRINCIPAL."**

One using an innocent party to consummate a crime would be a "principal," whether present or absent, under Pen. Code 1895, art. 77, making one a principal who employs another who cannot be punished to commit an offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 71; Dec. Dig. § 59.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5552-5557; vol. 8, p. 7763.]

**6. LARCENY (§ 27\*)—PERSONS LIABLE—PRINCIPAL.**

If accused conspired with the alleged purchaser of another's cow in consummating its theft, or used him as a guilty instrument for that purpose, he would be guilty as principal.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 55; Dec. Dig. § 27.\*]

Appeal from District Court, Grimes County; S. W. Dean, Judge.

G. W. Farris was convicted for cattle theft, and he appealed. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for cattle theft; the punishment assessed being two years' confinement in the penitentiary.

The alleged purchaser testified, in substance, that he bought from appellant the head of cattle in question, as well as a cow at the same time. The yearling was claimed by Hamilton. The cow and yearling were running on the range at the time of the sale and purchase. Appellant sold the yearling to the witness as his property. The identification of the animal is sufficient as belonging to Hamilton. Appellant did not introduce

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

any evidence. It will be observed that the witness does not testify, nor does the evidence show, that appellant was in actual manual possession of the property. In fact, he seems to have sold the animal on the range, and the purchasing witness subsequently took charge of it.

Appellant requested the court to instruct the jury that, before the title to an animal running on the range can be conveyed, there must be a bill of sale, signed and acknowledged by the seller, or it must be shown that the accused had actual manual possession of the cattle at the time of the sale. This charge was refused, and correctly. It is not necessary to the transfer of title to property, in prosecutions for theft of animals, that a bill of sale be either written, or written and acknowledged.

The charge of the court is criticised because it failed to charge that, if the jury should have a reasonable doubt that the animal claimed to have been sold by appellant to the purchaser was the animal claimed by Hamilton, they should acquit. The court gave a general charge on reasonable doubt, and also instructed the jury that they must find the animal belonged to Hamilton before they could convict. The charge as given, under the facts of this case, sufficiently presented the question referred to in appellant's exception. There seems to be, so far as the testimony is concerned, no reasonable doubt of the fact that the animal was Hamilton's. Appellant introduced no evidence at all, and all the evidence upon which the verdict was predicated was introduced by the state. This sufficiently shows that the animal appellant sold to the alleged purchaser was the animal of Hamilton. At least, Hamilton so testifies, and he is uncontradicted.

It is urged that the court erred in not charging the law with reference to circumstantial evidence. The case has been sufficiently stated, in substance, and this shows substantially that appellant sold the animal to the alleged purchaser as it ran upon the range, and indicates sufficiently that the animal was pointed out or identified by appellant to the purchaser at the time, and that the purchaser took up the animal under this purchase. This, then, is a case, not of circumstantial, but of positive, evidence. If appellant pointed out and sold the animal to the alleged purchaser as it ran upon the range, and the purchaser in accordance with the trade took it, this would not be a case of circumstantial evidence. This would be a taking through the purchaser by the seller. See *Doss v. State*, 21 Tex. App. 505, 2 S. W. 814, 57 Am. Rep. 618; *Dale v. State*, 32 Tex. Cr. R. 80, 22 S. W. 49; *Lane v. State*, 41 Tex. Cr. R. 558, 55 S. W. 831. Where the accused uses an innocent party to consummate a crime, if present, he would be a principal; if not present, he would still be a principal.

If the seller, as in this case, was in a conspiracy with the purchaser, or used him as a guilty instrument in consummating the theft, then appellant would be an accomplice; but that question is not raised.

This character of case is brought strictly within the rules prescribed by the Legislature in Pen. Code 1895, art. 77, where the following language is used: "If any one by employing a child or other person who cannot be punished to commit an offense, or by any means, such as laying poison where it may be taken and with intent that it shall be taken, or by preparing any other means by which a person may injure himself, and with intent that such person shall thereby be injured, or by any other indirect means cause one to receive an injury to his person or property, the offender by the use of such indirect means becomes a principal." Under the provisions of this article, applied to the facts, appellant would be the principal in selling the animal to the alleged purchaser, the purchaser being ignorant of appellant's fraud in the sale, and the theft would be complete upon the taking in charge of the animal so sold by the purchaser.

We are of opinion there is no such error in this record as requires a reversal of the judgment, and it is affirmed.

#### DOBBS v. STATE.

(Court of Criminal Appeals of Texas. March 17, 1909.)

##### 1. CRIMINAL LAW (§ 575\*)—TRIAL.

It was error to force accused to go to trial at a term fixed by the commissioners' court for accepting pleas of guilty only; no provision having been made for the selection and impaneling of a jury in the manner provided by law.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 575.\*]

##### 2. LIBEL AND SLANDER (§ 152\*)—VARIANCE.

There was a variance, where the information charged accused with saying that one B. was a woman of bad character, and that she had at some time been an inmate of a house of ill fame, and the proof was that accused, without mentioning names, asked witness if he "thought Mr. J., if he knew it, would let a woman stay at his house who was all wrong, or all out of order, and who was a whore," etc.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 427; Dec. Dig. § 152.\*]

##### 3. LIBEL AND SLANDER (§ 159\*)—INSTRUCTIONS.

Under Pen. Code 1895, art. 751, providing that the state need not show that the imputation was false, but defendant may in justification show the truth of the imputation, and the general reputation for chastity of the female alleged to have been slandered may be inquired into, where, in a prosecution for slander of a female, there was evidence requiring the general reputation for chastity of prosecutrix to be submitted to the jury, it was error to refuse a charge that, if the jury found that the general reputation of prosecutrix for chastity was bad, they should acquit.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 159.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Randall County Court; A. N. Henson, Judge.

R. A. Dobbs was convicted of slandering a female, and appeals. Reversed and remanded.

J. C. Hunt and Bule & Scott, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. It appears that when appellant was brought to trial before the county court of Randall county at the March term, 1908, he protested and objected to going to trial at that term of the court, because the same was not the regular term of court fixed and provided by law for the trial of criminal cases, and that he desired a trial by a jury, and that no jury had been selected as required by law, and that the court had no jurisdiction to try him at said term of court. This protest and plea was overruled by the court, to which action of the court the appellant reserved a bill of exceptions. The bill of exceptions shows that on August 12, 1907, the commissioners' court of Randall county had fixed the terms of court to be in February, April, June, August, October, and December, which terms were fixed for the trial of all causes, civil and criminal and that the first Monday in January, March, May, July, September, and November were fixed as terms of the court for accepting without the intervention of a jury, pleas of guilty only in criminal cases, and no provision was made for the trial of cases except on pleas of guilty. The appellant was entitled to a trial in the mode and manner provided by law, and by a jury selected under the law; and a trial in any mode, except as provided by law, would not be authorized. We therefore hold that the court below erred in forcing the defendant to go to trial at a term of the court, which term of court had been fixed by the commissioners' court for accepting pleas of guilty, and when no provisions are made for the selection and impaneling of a jury in the mode and manner provided by law. We have held that it was error for the court to force the defendant to trial before a jury summoned by the sheriff, where the court had refused to have the jury summoned that had been selected by a jury commission in the manner pointed out by law. The trial of the appellant in this case was at a term not authorized by law. We therefore hold that the court erred in placing the appellant on trial at the term of the court at which he did.

The information charges that R. A. Dobbs did falsely, maliciously, and falsely and wantonly impute to one Sallie Barnard, then and there a married female in this state, a want of chastity, in this, to wit: "He, the said Dobbs, did then and there, in the presence and hearing of H. E. Wessley and divers other persons, falsely, maliciously, and wantonly say of and concerning the said Sallie Barnard that she, the said Sallie Barnard, was a wo-

man of bad character, and that she had at some time been an inmate of a house of ill fame in Waco, Texas, meaning thereby that the said Sallie Barnard was a woman, a common prostitute, and one whose want of chastity was notorious." On the trial of the case the state introduced the witness H. E. Wessley, who testified that on the 29th day of June, 1907, in Randall county, Tex., in a conversation with defendant, Dobbs, Dobbs asked witness if he thought that Mr. James if he knew it, would let a woman stay at his house, and with his wife and daughter, who was all wrong, or all out of order, and then afterwards said, "who was a whore." And defendant further stated that there is a man here, or this man here, has seen her in a whorehouse a hundred times, and Henry Porter has seen her in a whorehouse at Waco a number of times. And the defendant further stated that he had thought of seeing and talking to Mr. James about the matter; that witness knew that Mrs. Sallie Barnard was staying at Mr. James' at the time of the conversation; and that he understood the defendant to refer to her. Defendant requested a charge in the court below that the jury should acquit, on the ground that there was a variance between the allegation and proof. We are inclined to think that this contention is correct, and that there is a variance between the proof and allegation. As said by this court in *Frizby v. State*, 26 Tex. App. 183, 9 S. W. 464: "In all cases of this character the rule is that the language or whatever else constitutes the imputation or want of chastity must be substantially set forth in the indictment and must be substantially proved. This means that the essential, important, material portions of the slander, as alleged, must be proved. All the words alleged need not be proved, but enough of them must be proved as laid to constitute the offense. It will not do to allege one imputation and prove another. Proof must correspond with the allegation." See, also, to the same effect *Conlee v. State*, 14 Tex. App. 222; *Humbar v. State*, 21 Tex. App. 200, 17 S. W. 126. Applying this well-established rule to the case before us, has the prosecution proved the slanderous words substantially? The exact words used in the information are "that Sallie Barnard was a woman of bad character, and that she had at some time been an inmate of a house of ill fame in Waco, Texas." The proof is, as made by the witness Wessley, that the defendant asked him (witness) if he "thought Mr. James, if he knew it, would let a woman stay at his house who was all wrong, or all out of order, and who was a whore; that there is a man here who has seen her in a whorehouse a hundred times, and Henry Porter has seen her in Waco a number of times." The defendant called no names, was simply making an inquiry, and the testimony is not similar or substantial to the language charged in the



information, and for this reason the court should have given the charge requested.

The court in its main charge to the jury charged them that the defendant in a slander case, in justification of slanderous imputations charged to have been made by him, may prove, first, that the slanderous imputation made by him was true, and, second, that the general reputation of the alleged slandered female was bad and stated to the jury that "if you believe, from the evidence adduced in this trial, that he has established either the grounds of defendant's defense mentioned in this paragraph, then you will acquit him, and so say by your verdict." The appellant requested the court by written instructions to charge the jury that, if they found that the general reputation of Sallie Barnard for virtue and chastity was bad, they would acquit. This charge was refused by the court. This, we think, was error. Article 751, Pen. Code 1895, provides: "In any prosecution under this chapter, it shall not be necessary for the state to show that said imputation was false; but the defendant may, in justification, show the truth of the imputation, and the general reputation for chastity of the female alleged to have been slandered may be inquired into." In *Crane v. State*, 30 Tex. App. 464, 17 S. W. 939, this court held that where, on a prosecution for slander, an inquiry into the reputation of the female for chastity establishes that such a reputation is bad, the defendant is entitled to an acquittal. Now, the inquiry before the jury was, not the general character of the party slandered, but her general character for chastity. There was proof sufficient in the case to require this issue to be submitted to the jury. The defendant not only complained of the charge of the court given, but requested a charge in compliance with the statute which was refused. The general character of a prosecuting witness was not an issue in the case; but her general reputation for chastity was, and the court committed material error in omitting to instruct the jury on this question.

There are a number of interesting questions presented in the brief of counsel that we deem unnecessary to mention, as we are inclined to believe that they are not likely to arise upon another trial.

For the errors above pointed out, the judgment is reversed, and the cause remanded.

#### SPILLMAN v. STATE.

(Court of Criminal Appeals of Texas. March 17, 1909.)

**CRIMINAL LAW (§ 1182\*)—APPEAL AND ERROR—RECORD—BILL OF EXCEPTIONS.**

Where the record on appeal contains neither bill of exceptions nor statement of facts, and the indictment is in proper form, and no

error is apparent from the record, the judgment will be affirmed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3203-3205; Dec. Dig. § 1182.\*]

Appeal from Dallas County Court at Law; W. M. Holland, Judge.

William Spillman was convicted of theft, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft of chickens, and his punishment assessed at a fine of \$25 and one day in jail.

The record contains neither bill of exceptions nor statement of facts. The indictment is in proper form. Finding no error in the record, the judgment is affirmed.

#### BUCHANAN v. STATE.

(Court of Criminal Appeals of Texas. March 10, 1909.)

**CRIMINAL LAW (§ 1094\*)—APPEAL AND ERROR—RECORD—ABSENCE OF STATEMENT OF FACTS OR BILLS OF EXCEPTION—EFFECT.**

Where the record on appeal in a criminal case is without a statement of facts or bills of exception, no question is presented for revision, and the judgment will be affirmed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3204; Dec. Dig. § 1094.\*]

Appeal from Criminal District Court, Harris County; E. R. Campbell, Judge.

T. J. Buchanan was convicted of murder, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at seven years' confinement in the penitentiary.

The record is before us without a statement of facts or bills of exception. In this condition of the record, there is no question presented for revision, and the judgment is in all things affirmed.

#### TERRY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 24, 1909. Rehearing Denied March 20, 1909.)

**1. INTOXICATING LIQUORS (§ 40\*)—LOCAL OPTION LAW—EFFECT.**

Thirty days having elapsed after local option went into effect in a county, its adoption was not open to attack.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 34; Dec. Dig. § 40.\*]

**2. CRIMINAL LAW (§ 958\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—AFFIDAVITS.**

A new trial was properly refused in a criminal case on the ground of newly discovered evidence, where the motion was not accompanied

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by an affidavit of the absent witness whose testimony was sought, and did not conform to the law in other respects.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2401; Dec. Dig. § 958.\*]

Appeal from Jones County Court; Jas. P. Stinson, Judge.

Will Terry was convicted of violating the local option law, and he appeals. Affirmed.

G. L. Davenport, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** This is a conviction for violating the local option law; appellant's punishment being assessed at a fine of \$75 and 50 days in the county jail.

Appellant has a bill of exceptions to the introduction of the orders of the commissioners' court proving up the local option law. This matter cannot be raised in this court. Thirty days having expired after the local option law in said county went into effect, no contest of the same could be made anywhere.

Appellant in his motion for new trial insists same should be granted on the ground of newly discovered evidence. The motion is not accompanied by an affidavit of the absent witness, and in other respects does not comply with the law.

Finding no error in the record, the judgment is affirmed.

#### BUCKNER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 2, 1908. On Rehearing, March 17, 1909.)

##### 1. CRIMINAL LAW (§ 1144\*) — APPEAL — REVIEW — PRESUMPTIONS.

In reviewing a ruling refusing a continuance, the Court of Criminal Appeals will presume that the application was at least a second application, in the absence of a contrary showing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3022; Dec. Dig. § 1144.\*]

##### 2. CRIMINAL LAW (§ 594\*) — CONTINUANCE FOR ABSENT TESTIMONY — RIGHT TO.

A continuance for absent testimony was properly refused, where the witness was outside the state and his testimony on a former trial was read.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1322; Dec. Dig. § 594.\*]

##### 3. CRIMINAL LAW (§ 596\*) — CONTINUANCES — CUMULATIVE ABSENT TESTIMONY.

A continuance asked for absent testimony is properly refused where the testimony is cumulative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1328; Dec. Dig. § 596.\*]

##### 4. CRIMINAL LAW (§ 822\*) — INSTRUCTIONS — CONSTRUCTION.

A charge must be construed as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1990; Dec. Dig. § 822.\*]

##### 5. HOMICIDE (§ 49\*) — PROVOCATION — INSULTS.

Shooting by decedent towards a house in which accused's wife was not an insult to

her as affecting the question whether the homicide was manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 73; Dec. Dig. § 49.\*]

##### 6. HOMICIDE (§ 250\*) — EVIDENCE — SUFFICIENCY.

Evidence held to sustain a conviction of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 516; Dec. Dig. § 250.\*]

#### On Rehearing.

##### 7. HOMICIDE (§ 300\*) — INSTRUCTIONS — THREATS.

The law of threats is a substantive defense that should be presented in the charge in a homicide case wherever threats are shown, regardless of whether they were made or communicated.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 622-623; Dec. Dig. § 300.\*]

##### 8. HOMICIDE (§ 116\*) — COMMUNICATED THREATS — RIGHT TO RELY ON.

One may act upon threats communicated to him, if he believes they were made, regardless of whether they have been in fact made.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 163; Dec. Dig. § 116.\*]

##### 9. HOMICIDE (§ 300\*) — INSTRUCTIONS — THREATS.

Instructions in a murder trial that if decedent made threats against accused, and at the time of the killing did any act manifesting an intent to execute them, or did some act which reasonably tended in the circumstances to induce accused to believe that decedent was about to execute them, the killing would be self-defense, etc., were erroneous for ignoring accused's right to acquittal if he believed the threats had been made and acted upon the belief, though in fact they had not been made.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 300.\*]

Appeal from District Court, Shelby County: S. W. Blount, Special Judge.

Nathan Buckner was convicted of murder, and he appeals. Reversed and remanded.

Tom C. Davis, Bryarly & Walker, and Geo. S. King, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** This is the second appeal and second conviction with life imprisonment. The former opinion will be found in 52 Tex. Cr. R. 271, 106 S. W. 363.

The evidence in the case shows that appellant and deceased lived near each other in the country in Shelby county, and for quite a while prior to the homicide there had been between them many quarrels based upon, in some instances, family disputes, and, in some instances, on questions of fence, cattle, and trespassing of one or the other, and on one occasion they came very near having blows. The state's evidence presents the theory that appellant killed deceased without word or warning on account of these previous animosities. Appellant's theory was that he killed deceased in self-defense. He testified to threats having been made against his life by deceased, which threats had been communicated to him. Other witnesses testified

to having communicated the threats to appellant. There were two eyewitnesses to the killing outside of the deceased, appellant, and his son. Appellant and his son testify substantially to the same facts in reference to the immediate killing, and appellant states the same in the following language: "When we got through fishing up there, I thought it was about 12 o'clock, and we were not catching anything, and I just remarked to my little boy to come on and let's go to the house, we were not going to catch anything, and we turned around. I gave my pole to my little boy, and then stepped back to where I had my gun laying on the roots of this tree, and picked my gun up and started to the house. After I picked my gun up, I turned around and started back east towards this ford to the house. We started by the ford because it was the way out to the house. It was the only way we could go that was without putting a pole across the creek at the water gap and walking a pole. I had gone from that magnolia tree to the house before that, and we went from the magnolia tree out by the wash place. It was a plain view out that way and the nearest way to the house. We started from that tree home, and after we turned and started I didn't go but a little ways until I saw Mr. Treadwell riding around behind some dry kilns coming right towards me. There were some dry kilns there at that time. It is my recollection that there were three dry kilns there. The dry kilns were between 10 and 12 feet high. They might not have been that high, but they were at least 8 feet high. They were planked up from the ground up. I saw Mr. Treadwell riding around those dry kilns. When I saw him I went right on meeting him, and just as I walked up on the bank of the creek Mr. Treadwell rode right down in the water. I had my gun down in my hand just like I picked it up and walked off with it aiming to go to the house, and didn't go but a few steps until I saw Mr. Treadwell. I did not change the position of my gun when I saw him. Of course, I usually carried my gun on my shoulder, but just a short distance that way I very often will pick up my gun and walk with it just down in my hand. My gun was not cocked. When I came up on the bank of the creek I was about 15 feet, I reckon, from Mr. Treadwell, from where he stopped; might probably have been a little further, but I was pretty close to him. Mr. Treadwell was riding. He was riding what I would call a bay horse. When I first saw him, he was riding straddle on the horse, and immediately after I saw him, and he saw me, he threw his right leg over the horse's shoulder and turned sideways on the horse and rode down in the creek a little sideways towards me. His right leg was over the neck of the horse. I walked up on the bank of the creek and said, 'Good morning, Mr. Treadwell.' He never spoke, just dropped his head like, and I replied to him: 'Mr. Treadwell, I suppose

you said you were going to turn those cattle back in that pasture if you had to kill every one on the place.' About the time I got that out of my mouth, he threw his hand back and dropped off of his horse at once. He dropped off on the right side of the horse on the opposite side, on the left side of the horse. The right side of the horse was towards me. The horse's head was up the creek. He dropped off of the horse on the opposite side from me. As he dropped off of his horse, he says: 'Look out here, Buckner. God damn you! Don't you come down here on me with that gun.' He never said anything else, never said a word. He then got down under the horse's neck in a doubled-up position and threw his hand from under his horse's neck with his pistol in his hand as though he was going to shoot me, and I shot him at once. His pistol was in his right hand. His body was back sorter behind the horse's shoulder with his right hand under the horse's neck like, his right hand up in a raised position, when I shot. He had a pistol in his right hand. I know he had a pistol in his right hand simply because I saw it. The pistol was pointing right at me, and I shot him immediately. His horse's neck and head were up the creek at the time I shot him. He was right down by his horse's shoulder along in under the horse's neck like when I shot him. When I fired the first shot, the horse wheeled over at once and I fired again. I couldn't tell to save my life what position he was in when I fired the second shot. I fired the second time because I didn't know whether I hit him or not, and I didn't know but what he should shoot me still. I fired the first time because I thought he was going to shoot me. I thought he was going to shoot me because he had his pistol drawn. I had heard previous to that that he said he intended to kill me. When I fired the first shot, I could see part of Mr. Treadwell's bowels and his hand and arm. That was the part of him I shot at. I shot at him right there."

The second ground of the motion complains that the court erred in overruling appellant's application for continuance for the want of the testimony of Jack Anderson and wife and Porter Davis. The bill of exceptions does not show whether it is the first, second, or third application, and, in the absence of any statement to the contrary, we will presume it is at least the second application. Appended to the bill is this qualification: "The witness Jack Anderson was present and testified, and the witness Porter Davis was shown to be out of the state, and his testimony had at a former trial of the case was read to the jury as his evidence in the case, and it further appeared that the testimony of Mrs. Anderson was not material." Being a second application, if material, it clearly was cumulative of that of the children who were with her and appellant's wife at the time the circumstances expected to be proved by her occurred, and therefore her testimony under any theory was cumula-

tive. The court therefore did not err in overruling the application for continuance.

The third ground of the motion insists that the court erred in his charge to the jury in stating the effect of threats made by deceased, Treadwell, against the life of appellant: Because the appellant, under the law, would have the right to act upon communicated threats, whether in fact deceased had made them or not. Second, it is not necessary, in order to justify a defendant in acting upon communicated threats, that the threats in fact have been made. If appellant had been told that the deceased had threatened to take his life and intended to shoot him, he would have the right to act upon such information, if he believed the same to be true, whether in fact the deceased had made them or not. Third, the court erred in his written charge to the jury qualifying the right of the defendant to act upon communicated threats, upon the proposition that, before he could act upon such threats communicated to him, the jury must find affirmatively that the threats were in fact made by the deceased; that this was material error and prejudicial to the rights of the defendant, because John Buckner testified that he told the defendant on Monday, before the killing, that Jack Anderson had told him that he heard the deceased threaten to take the life of the defendant, and he intended to do it, and the court permitted the reputation of Jack Anderson for truth and veracity to be impeached by the state, and then, in his written charge to the jury, told the jury that, before they could consider the threats, which Anderson had testified the deceased had made, and which John Buckner had communicated to the defendant, they must believe from the evidence that the deceased had in fact made the threats to Anderson; that this was material error and prejudicial to the rights of the defendant to act upon communicated threats, viewing the matter from his standpoint. The charge complained of is as follows: "When a defendant seeks to justify a killing upon the ground of threats against his own life, he is permitted to introduce evidence of such threats, whether they were communicated to him before the killing or not; but such threat, if made, would not be regarded as affording a justification for the killing unless it be shown that at the time the person killed by some act then done by him manifested an intention to execute the threats so made. And if you believe the deceased had made such threats against defendant, and at the time of the killing did any act manifesting an intention then to execute such threats, or did some act which was reasonably calculated, in view of all the circumstances, to produce in the mind of the defendant the belief that deceased was then about to execute the threat, the killing would be in self-defense. And if you so believe the facts to be, or if you have a reasonable doubt as to whether or not such

is the truth of the case, you will acquit the defendant."

In the case of *Bryant v. State*, 47 S. W. 373, this court had under consideration a similar charge, and, in passing on the question, used the following language: "The court gave appellant the full benefit of a charge on the appearance of danger, which was all he was entitled to in that connection. The charge on self-defense sufficiently covered all of the evidence relating to what had passed between the parties previous to the homicide, including threats, and the fact that the court gave a charge on threats, in the following language, to wit: 'Threats made by the deceased against the life of the defendant are not to be regarded as affording justification for the killing, unless at the time of the homicide the person killed, by some act then and there done, manifested an intention to execute the threats'—was, in connection with the general charge on self-defense, sufficient." So we have in this case the court charging in every possible way on actual and apparent danger. The court, in its general charge, among other things, charged as follows: "If you believe from the evidence that defendant with a gun shot James H. Treadwell, and thereby killed him, but also believe that the killing took place under circumstances from which it reasonably appeared to the defendant, as viewed from his standpoint, by the acts or by words, coupled with the acts of Treadwell, that it was the purpose and intent of Treadwell unlawfully to shoot the defendant with a pistol or otherwise to inflict upon him death or some serious bodily injury, and that the killing took place while Treadwell was, or reasonably appeared to be, in the act of inflicting such death or injury upon defendant, or after some act done by him showing evidently, as it reasonably appeared to defendant from his standpoint, that it was his intent and purpose to inflict such death or injury upon defendant, or if from the evidence you have a reasonable doubt as to whether or not such is the truth of the case, you will find the defendant not guilty." Furthermore: "You are further instructed, as a part of the law of self-defense, that it is not essential to the right of self-defense that the danger should in fact exist. If to defendant it reasonably appeared that the danger in fact existed, he had the right to defend against it to the same extent and under the same rules which would obtain in case the danger had been real. The defendant may always act upon reasonable appearances of danger, and whether the danger is apparent or not is always to be determined from the standpoint from which the defendant viewed it at the time he acted." Again: "If defendant, having his gun, met with deceased, and deceased by some act then done by him, or by his words, coupled with his acts, made the first hostile and threatening demonstration, then defendant had the right

to stand and act on his right of self-defense as hereinbefore explained to you unimpaired by the fact that he had a gun."

It is a rudimentary principle of law in this state that the charge must be taken as a whole, and, when this charge is measured by this rule, it cannot seriously be contended that the charge complained of is error. It is certainly true that defendant had a right to act upon the threats whether they had actually been made or not, and while the charge complained of might appear to put a limitation upon this proposition, yet, when it is considered in the light of the excerpts from same above quoted, it clearly shows that the court in fact amplified upon both real and apparent danger to defendant by the threats he relied upon as a defense. The truth of the matter is, there was no manslaughter in this case under the evidence of defendant and his son. It was either self-defense or murder in the first degree. The jury have seen fit to believe the state's theory of the evidence; but the court, through extra caution, charged the jury on manslaughter, presenting every phase, as stated, of real and apparent danger. The case cited above, as stated, is decisive of this question. In addition thereto, we will add that, under article 723 of the Code of Criminal Procedure of 1895, we are not authorized to reverse a case unless the error complained of was calculated to injure the rights of appellant. The evidence in this case clearly shows, and the uncontradicted testimony demonstrates, that deceased rode down to the edge of the water, having on no coat, to water his horse after plowing during the morning. Appellant accosted him in a manner that was not calculated, to say the least of it, to bring about a harmonious settlement of anything. He says deceased rolled off of his horse and stooped under the neck of the horse, and was in the act of shooting when he killed him. No pistol was found near the deceased. Now, can it be seriously contended, in the light of this character of record, that a bare omission of the statement on the charge of threats that the jury must look at the facts from defendant's standpoint, and that defendant had a right to act on the threats whether they were actually made or not, could possibly have injured appellant? We say no. This statement, as above suggested, was rendered doubly impossible by the other portions of the charge that it told the jury that they must look at all the facts from defendant's standpoint, and that he had a right to act upon the appearances of danger as they occurred to him, and could kill the deceased whether the danger was real or apparent. It follows therefore there is no error in this charge to authorize a reversal of this case.

The last ground of the motion complains that the court erred in failing to charge on the theory of manslaughter suggested by insulting conduct by deceased towards a female

relative of defendant. There is nothing in this record suggesting any insult to a female relative within the contemplation of the manslaughter statute. The bare fact that deceased shot towards the house is not an insult, even conceding that he intentionally shot towards the house. It might be an assault upon the wife, but it is not an insult to her. Instead of forming a basis for a charge on that matter, it would simply be a predicate for additional malice on the part of appellant.

We have carefully examined this record in all of its details. As stated above, the appellant had been twice convicted of murder in the first degree with life imprisonment, and there is nothing in this record that suggests there was any possible error in the verdict of the jury or the trial court.

The judgment is therefore affirmed.

#### On Rehearing.

This case comes before us on motion for rehearing, appellant insisting that this court was in error in holding that the trial court did not err in its charge to the jury, on the effect of threats made by Treadwell against the life of the defendant, because: First, the defendant under the law would have the right to act upon communicated threats, whether in fact the deceased had made them or not. Second, it is not necessary, in order to justify a defendant in acting upon communicated threats, that the threats have in fact been made. If the defendant had been told that the deceased had threatened to take his life and intended to shoot him, he would have the right to act upon such information, if he believed the same to be true, whether in fact the deceased had made them or not. Third, the court in his written charge to the jury qualified the right of the defendant to act upon communicated threats, upon the proposition that, before he could act upon such threats communicated to him, the jury must find affirmatively that the threats were in fact made by the deceased. This was material error and prejudicial to the rights of the defendant, because John Buckner testified that he told the defendant on Monday, before the killing, that Jack Anderson had told him that he heard the deceased threaten to take the life of the defendant, and that he intended to do it, and the court permitted the reputation of Jack Anderson for truth and veracity to be impeached by the state, and then in his written charge to the jury told the jury that, before they could consider the threats, which Anderson had testified the deceased had made, and which John Buckner has communicated to the defendant, the jury must believe from the evidence that the deceased had in fact made the threats to Anderson. This was material error and prejudicial to the rights of the defendant to act upon communicated threats viewing the matter from his standpoint; the law being that the defendant would have the right to act upon

communicated threats, whether the jury believed in fact the threats had been made or not. The defendant's right to act, viewing the matter from his standpoint, was not dependent upon whether Jack Anderson had told the truth or had told a falsehood about what he had said as to Treadwell having told Anderson, but was dependent alone upon the defendant's belief that Treadwell had threatened him.

After a careful review of the original opinion and the authorities cited, in connection with other authorities, we believe this court was in error in holding that the charges on threats were not erroneous and harmful. The doctrine of threats is a statutory doctrine that must be given by the court, although the court should subsequently or prior thereto charge upon the doctrine of real and apparent danger. In other words, the law of threats is a substantive defense matter that should be presented wherever the doctrine of threats is proven in the trial of a case, and the law of this state is: It is immaterial whether the threats were in fact made or communicated, that they become pertinent testimony in the trial of a case upon which the court must give the law pertaining thereto. In this case the appellant relied upon threats purported to have been communicated to him. It was controverted by the state in the way of impeachment of appellant's witnesses and otherwise as to whether or not the threats in fact were actually made. The charge of the court tells the jury, in substance, that, if they believe deceased had made such threats against defendant, and at the time of the killing did any act manifesting an intention then to execute such threats, or did some act which was reasonably calculated, in view of all the circumstances, to produce in the mind of the defendant the belief that deceased was then about to execute the threat, the killing would be in self-defense; and if they so believe the facts to be, or if they have a reasonable doubt as to whether or not such is the truth of the case, they will acquit the defendant. This eliminates, as appellant insists, the question that the jury must pass on, to wit, the mental status of the defendant. Whether threats had been made or not, if defendant believed they had been made, and, so believing, acted upon said threats, then the law would justify him in so acting. The charge is clearly defective along this line. It is immaterial what the jury believed about the threats, but the charge should clearly inform them that if they believed the defendant thought the threats had been made, and, so believing, acted upon same, etc., then they will acquit the defendant. See *Huddleston v. State* (Tex. Cr. App.) 112 S. W. 66; *Lockhart v. State*, 53 Tex. Cr. R. 589, 111 S. W. 1026; *Watson v. State*, 95 S. W. 115, 16 Tex. Ct. Rep. 599; *Cohen v. State*, 53 Tex. Cr. R. 422, 110 S. W. 68; and

various other authorities that might be noted. It follows therefore that we were in error in the original opinion in holding that the error of the court below on the question of threats was not sufficiently erroneous to require a reversal of this case.

The motion for rehearing is granted, the former conviction is set aside, and the judgment is reversed, and the cause remanded.

## FIELDS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1909. On Rehearing, March 17, 1909.)

### 1. CRIMINAL LAW (§ 1169\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for violation of the local option law, there was evidence to show that defendant, after the sale for which he was being prosecuted, had purchased a bottle of whisky for the complaining witness at a nearby city. On cross-examination defendant was asked how much whisky other than that he sold to the complaining witness he bought while he was in the city, and, over the objection of defendant's counsel, he answered that he bought a pint of whisky and drank it on the road coming home. *Held*, that this answer had no substantial bearing on defendant's guilt in the transaction that was the subject of the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.\*]

### 2. CRIMINAL LAW (§ 1169\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for the violation of the local option law, there was evidence to show that, after the sale for which defendant was being prosecuted, he had brought a bottle of liquor from a neighboring city to the complaining witness. A witness for defendant was asked on cross-examination how much whisky, other than the whisky that the complaining witness got, did he (the witness) take out home for defendant at the time he carried the whisky for the prosecuting witness, and, over the objection of defendant's counsel, he answered that he carried three other quarts of whisky to the defendant's house at the same time he carried the whisky to the complaining witness. *Held* that, if this testimony relates to the bringing of the whisky from the neighboring city by defendant, it had little bearing on the question of the sale for which defendant was being prosecuted.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.\*]

### 3. INTOXICATING LIQUORS (§ 233\*)—CRIMINAL PROSECUTION—ADMISSIBILITY OF EVIDENCE.

In a prosecution for the violation of the local option law, there was evidence to show that, after the sale of liquor for which defendant was being prosecuted, he had brought a bottle of liquor from a neighboring city to the complaining witness. A witness for defendant was asked on cross-examination how much whisky, other than the whisky that the complaining witness got, did he (the witness) take out home for defendant at the time he carried the whisky for the prosecuting witness, and, over the objection of defendant's counsel, he answered that he carried three other quarts of whisky to the defendant's house at the same time he carried the whisky to the complaining witness. *Held* that, if the evidence related to the time when it was alleged that defendant sold whisky to the prosecuting witness, it was admissible, as the possession by defendant of a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

considerable quantity of whisky contemporaneous with the alleged sale is a circumstance to be considered by the jury and admissible to show possession by defendant of intoxicating liquors, and his ability as well as inducement to make a sale.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 233.\*]

**4. CRIMINAL LAW (§ 1172\*)—HARMLESS ERROR—INSTRUCTIONS.**

Code Cr. Proc. 1895, art. 723, provides that, though the record in a criminal action may show that some of the requirements of the preceding articles have been disregarded, the judgment shall not be reversed unless the error was calculated to injure the rights of the defendant. In a prosecution for violation of the local option law, the jury were instructed that defendant was presumed to be innocent until his guilt was established beyond reasonable doubt, that if there was a reasonable doubt as to his guilt they should acquit him, and that they must find beyond a reasonable doubt that the defendant did sell the liquors substantially as charged in the indictment. *Held*, that the error, in also instructing the jury that evidence of any other transaction which may have been offered in evidence could not be considered for any other purpose than to assist in determining the guilt "or innocence" of the defendant in the case upon trial, was harmless.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1172.\*]

**5. CRIMINAL LAW (§ 778\*)—INSTRUCTIONS—SHIFTING BURDEN OF PROOF.**

In a criminal prosecution, an instruction, that evidence of any other transaction which may have been offered in evidence can be considered for no other purpose than to assist the jury in determining the question of the guilt "or innocence" of the defendant in the case upon trial, is erroneous.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1849; Dec. Dig. § 778.\*]

Appeal from Ellis County Court; J. T. Spencer, Judge.

Roger Fields was convicted of violating the local option law, and appeals. Affirmed.

T. H. Collier and S. B. Farrar, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This is an appeal from a conviction in the county court of Ellis county on an indictment duly preferred for a violation of the local option law; the punishment assessed being \$100 fine and 60 days' confinement in the county jail.

The facts show, in substance, that in the latter part of April or first of May, 1907, the witness G. P. Zellner bought a quart of whisky from appellant. He states the facts thus: "I had been up to my mail box after the mail, which is just a short distance up the road above Roger Fields' house, and as I came back down the road by Roger Fields' house he came out to the fence, and I stopped and talked to him awhile, and during the conversation he asked me if I would like to have some whisky. I asked him what kind of whisky it was, and he said it was 'Paul Jones.' I told him I would take a quart, and he called to one of his children

and told it to tell his mother to send him a quart of 'Paul Jones' whisky, and in a few minutes the child brought out the whisky, and I asked him how much it was worth, and the defendant said \$1.25. I started to pay him, and he told me to credit his account with that amount. He owed me \$1.27 for a piece of ham and 2½ dozen of eggs that I had let him have some time before this. I told him that would be all right and settled his account with the whisky." On cross-examination the witness reaffirmed the substantial correctness of the facts in respect to the matter on which the prosecution rests by stating: That, some time after this, he had got another bottle of "Paul Jones" whisky at another time, but that this was after he got the first bottle; that in this case Fields was going to Dallas; and that he went over to where he was and asked him to bring him (witness) a bottle of whisky, and gave him \$1.25 with which to get it. Appellant denied selling the prosecuting witness the whisky, but admitted that on one occasion Mr. Zellner had asked him to bring him a bottle of whisky from Dallas, where he was going, and also that on another occasion he gave him a bottle of whisky. He denied having got any eggs from Zellner or having bought any ham from him, explaining that, while his mother was sick on one occasion, Zellner gave him a small piece of ham. There was considerable testimony pro and con of bad blood between the prosecuting witness Zellner and appellant, but the above are substantially the important and controlling facts touching the sale.

1. The court, in his general charge, gave, in a general way, a fairly correct charge, submitting the contested issue to the jury. If it could in any way be held to be erroneous, any error in it was corrected by the following special charges given at the request of appellant: "It is not violation of the local option law to give away intoxicating liquor in local option territory, and if you believe from the evidence, if any, that Roger Fields delivered, or had delivered, to G. P. Zellner intoxicating liquor, but intended at the time not to receive any money or any compensation therefor, then he would not be guilty, even though said Zellner in fact gave him credit on a pre-existing debt, if he did; and if you have a reasonable doubt as to defendant's guilt under the above proposition, you will acquit him." Special charge No. 4: "You are instructed that one who purchases intoxicating liquor for another, and delivers it to him, is not guilty of violation of the local option law; nor does the purchaser have to get the money or purchase price from his principal before making the purchase to remain guiltless in a purchase and delivery. He may advance the purchase price and thereafter collect the purchase price so advanced either at the time or after

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

delivery of the intoxicant, and collect it either in money or by crediting a pre-existing debt, and in neither event will he be guilty of a violation of the local option law. Now, you are instructed, if you should believe from the evidence, if any, that Roger Fields, at the request of G. P. Zellner, bought a quart of whisky for G. P. Zellner and advanced the purchase price therefor, and afterwards delivered, or had delivered, said whisky to Zellner, and Zellner credited a debt Roger Fields owed him for the purchase price so advanced, then Roger Fields would not be guilty of selling intoxicating liquor in violation of the local option law, and you must acquit him; and if you have a reasonable doubt as to defendant's guilt as herein instructed, you must acquit him."

2. There are but two bills of exception in the record, neither of which is important, and in respect to neither of which do we believe there was any substantial error, if error at all. It is complained, in the first place, that the court erred in permitting the county attorney to ask appellant, while on the witness stand, the following question: "How much whisky, other than the whisky you sold Zellner, did you buy while you was in Dallas?" This was objected to on the ground that it was immaterial how much other whisky the defendant bought while in Dallas, or elsewhere, and was calculated to injure appellant's rights and prejudice his case before the jury. The objection being overruled, the witness answered that he bought a pint bottle of whisky to drink, and which he did drink on the road coming home. This answer was of no such importance as could have, in the nature of things, had any substantial bearing on appellant's guilt in regard to the particular transaction.

3. Again, complaint is made of the alleged error of the court in permitting the witness Charley Fields to be asked and required to answer the following question: "How much whisky, other than the whisky Zellner got, did you take out home for Roger Fields, at the same time you carried the whisky for Zellner?" To which appellant objected on the ground that same was immaterial and was calculated to prejudice the defendant's rights before the jury, which objections were thereupon overruled by the court, and the witness required to answer, and he did answer that he carried three other quarts of "Paul Jones" whisky to the defendant's house at the same time he carried the whisky for Zellner. As we understand from the bill, though it is quite vague, this transaction relates to the incident and matter, and was at the same time, that appellant bought, while in Dallas, a quart of whisky for Zellner. If so, it could have little bearing on the question of the sale testified to by Zellner at another time. If it related and had reference to the time when it is alleged that appellant sold the whisky to Zellner, it was admissible under the authority of *Wagner v.*

*State*, 53 Tex. Cr. R. 306, 109 S. W. 169, where we held, in substance, that possession by appellant of a considerable quantity of whisky contemporaneous with the time of the alleged sale was a circumstance to be considered by the jury and admissible to show the possession by a defendant of intoxicating liquors and his ability as well as inducement or motive for making a sale.

We think there was no error of any moment committed on the trial of the case, and that the judgment should be affirmed, and it is so ordered.

#### On Rehearing.

A motion for rehearing, discussing at some length some of the questions treated in the original opinion, has been filed, and also calling special attention, with some emphasis, to what is claimed to be an error in the court's charge in respect to some other transactions testified about, and which were not immediately involved in the particular transaction for which appellant was convicted.

Among other things, the court charged the jury that "evidence of any other transaction which may have been offered in evidence before you, you can consider for no other purpose than to assist you in determining the question of the guilt or innocence of the defendant in the case upon trial." It is urged that this paragraph of the court's charge is erroneous, in that it was no part of the duty or province of the jury to determine the innocence of appellant, but that, unless the evidence showed his guilt, he was entitled, as a matter of law, to an acquittal; that the charge of the court was upon the weight of evidence, in that the court instructs the jury that the matters referred to could be considered among other things for the purpose of establishing the innocence of the defendant; that this charge inferentially requires him to produce evidence to show his innocence and makes the proof important as showing this fact; and, further, that the evidence of the transactions other than the transaction for which he was being prosecuted and other than the transaction elected by the state, being introduced by the state both in cross-examination of appellant and the other witnesses, should have been excluded by the court in his charge to the jury, but, instead of doing so, the jury were in effect told in the charge that they could consider such evidence for the purpose of determining the guilt or innocence of the defendant. There would seem to be no doubt that this charge is erroneous under the decisions in the cases of *Patterson v. State*, 12 Tex. App. 222; *Hackett v. State*, 13 Tex. App. 406; *Smith v. State*, 13 Tex. App. 507; *McNair v. State*, 14 Tex. App. 78; *Holland v. State*, 14 Tex. App. 182; and *Lewis v. State*, 29 Tex. App. 105, 14 S. W. 1008. The cases cited, however, were cases where the substantial issue was submitted to the jury to determine from the evidence the guilt or innocence of the ac-



cused. In none of them was such a charge given in respect to the other transactions which might have been appropriated by the jury in a way adverse to appellant. The error is not, it seems to us, a substantial one, or one which in the nature of things could have injured appellant. Article 723 of the Code of Criminal Procedure of 1895 reads as follows: "Whenever it appears by the record in any criminal action, upon appeal of the defendant, that any of the requirements of the eight preceding articles have been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of the defendant, which error shall be excepted to at the time of the trial, or on motion for a new trial." Now in this case the court, on the general issue of the guilt or innocence of the defendant, had in terms instructed the jury that appellant was presumed to be innocent until his guilt was established by legal evidence beyond a reasonable doubt, and that, in case the jury had a reasonable doubt as to the defendant's guilt, they would acquit him and say by their verdict not guilty. In addition to this, under the charge of the court the jury were required to find beyond a reasonable doubt that the appellant did sell the liquors substantially as charged in the indictment. So that, considering the charge altogether, it seems to be placed beyond doubt or controversy that on the main issue the guilt and the guilt alone of appellant was submitted, and the jury were required to find such guilt beyond a reasonable doubt. It will be noted, further, that the cases cited were all rendered long before the passage of the article of our Code of Criminal Procedure above, which was approved March 12, 1897. If in our judgment it were debatable as to whether this charge did or could in the nature of things have injured appellant, we would not hesitate to set aside the judgment of conviction. *Nowlen v. State*, 33 Tex. Cr. R. 141, 25 S. W. 774.

The motion for rehearing is therefore overruled.

#### UNDERWOOD v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1908. Rehearing Denied March 20, 1909.)

#### 1. CRIMINAL LAW (§ 775\*)—ALIBI—INSTRUCTIONS.

In a prosecution for theft, accused's evidence held not to exclude the theory that he was present at the time of the theft, so as to require a charge on the subject of alibi.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 775.\*]

#### 2. CRIMINAL LAW (§ 396\*)—EVIDENCE AS TO CONVERSATION—RIGHT TO ENTIRE CONVERSATION.

In a prosecution for the theft of a watch, where the state, on cross-examination of a witness who had testified that he saw accused on the evening before the watch was alleged to

have been stolen, and while he was exhibiting a watch, asked him what was the first thing said about the watch, to which he answered that accused said that he had swapped for it, it was error to refuse to permit the defense to prove by the witness the entire conversation relating to accused's possession of the watch.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 862; Dec. Dig. § 396.\*]

#### 3. CRIMINAL LAW (§ 1170\*)—APPEAL—HARMLESS ERROR—EXCLUSION OF TESTIMONY.

The part of a conversation proved by the state being of itself exculpatory and consistent with accused's defense, the exclusion of the remainder of the conversation was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1170.\*]

Appeal from District Court, Wood County; R. W. Simpson, Judge.

Bedford Underwood was convicted of theft, and appeals. Affirmed.

M. D. Carlock, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**RAMSEY, J.** Appellant was indicted in the district court of Wood county, charged with theft of a certain watch from one Thad Gray. On his trial he was convicted of the offense charged, and his punishment assessed at confinement in the penitentiary for two years.

The facts are briefly, as claimed by the state, that in March, 1907, appellant and Gray came to Mineola; that along about midnight of the same night they went down to the depot—Gray, at least, intending to take passage on the train going west about 3 o'clock that night. Gray testifies that he went to sleep with the watch in his breast pocket and the chain fastened to his overalls; that when he woke up, about 3:30 o'clock, his watch was gone; that it had been taken out of his pocket and unsnapped from the chain; that at the time several parties were sitting in the waiting room of the depot, and he immediately left the waiting room at the depot and started to town to look for an officer, when appellant overtook him and asked him where he was going; that at first he told appellant that he was just going to knock around some, when appellant again asked him where he was going, and he said to appellant that some one had stolen his (Gray's) watch, and he was going to hunt an officer and get him to search the crowd in the depot; that at this time appellant asked him if he could have an officer to search the people, and wanted to know whether the officer had a right to do so; that he (appellant) went a little piece further and stopped, when Gray asked him to come and go with him to hunt an officer. Appellant replied that he could not go; that he had a chill, and wanted to go back to the depot, where there was a fire, and warm; that appellant returned to the depot, and Gray, in a short while, returned with an officer, and appellant pointed out two men

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

whom he said he saw sitting by him (Gray) while he was asleep, and further said, if he wanted to, the officer might search him also, as he had sat beside him while he was in the depot asleep; that they searched some other persons, but did not search appellant at the time. Gray's watch was some time after this found in the possession of J. T. Roberson, who testified that he received the watch from one Brandon some time in the summer of 1907. Brandon testified that he bought the watch from appellant in the last of March or first of April of the same year. Without going into details, we think the testimony of the state abundantly identifies the watch, which Brandon bought from appellant and afterwards sold to Roberson, as the watch which Gray lost. Appellant denies stealing Gray's watch, and claims that he had swapped a pistol which he owned to a black negro, wearing a blue ducking suit of overalls and riding a bay horse, for a watch which he claimed was the watch he had sold to Brandon, and introduced his father and mother to support this contention, and also testified himself on the trial to the same facts. The testimony of the state showed a number of untrue and contradictory statements made by appellant, as well as an offer on his part, if not prosecuted, to pay for the watch. This is a very brief summary of the evidence, and is perhaps sufficient to illustrate the questions that arise in the case.

There were a number of special instructions requested by appellant, which we think need not be noticed. The appellant assigns as error the refusal of the court to give the following special charge, requested by him: "Among other defenses set up by the defendant is what is known in legal phraseology as an 'alibi'; that is, that if the offense of theft from the person, as alleged, was committed, the defendant was at the time of such offense at another and different place from that at which such offense was committed, and therefore was not and could not have been the person who committed the offense, if such offense was committed. Now, if the evidence raises in your mind a reasonable doubt as to the presence of the defendant at the place when the offense, if any, was committed, and if from the evidence you retain a reasonable doubt that he might not have been elsewhere, he is entitled to the benefit of such doubt, and you will acquit him." The testimony found in the record, and the only testimony as to the whereabouts of appellant, except the statements made by him to Gray at the time the watch was taken, is that of himself. Touching this matter he testifies as follows: "The witness Gray was on the train with me. I ate supper at the same restaurant, but was not with him. During the night I went to the depot and met the witness Gray going away from the depot. I had been up on the show grounds and taking in the various shows, and when I met the witness Gray he told me that he went to sleep in

the depot and somebody had robbed him of his watch. I told him to find a policeman, that he could find one up on the show grounds, and that I would go on up to the depot and stay there until he came back; told him that I was cold and would go to the fire. I thought he could find an officer without my assistance." In his general charge the court instructed the jury as to the constituents of the theft herein charged, and that if they believed from the evidence beyond a reasonable doubt that appellant fraudulently and privately stole said watch from Gray without his consent, and with the fraudulent intent to appropriate same to his use and benefit, they would find him guilty, and unless they so found they would acquit him. He also charged upon the doctrine of recent possession of stolen property and the effect of appellant's explanation thereof. The court also charged that, if the watch had been stolen from Gray under the circumstances, this would make the offense theft from the person; but if they believed that appellant got the watch from a negro in exchange for a pistol, or if they had a reasonable doubt as to whether he got the same from a negro, they would acquit, or if they believed that the watch which appellant sold to Brandon was not the watch taken from Gray, or if they had a reasonable doubt as to this fact, they would acquit appellant. The court also charged upon the question of circumstantial evidence, as well as the presumption of innocence.

The authorities are not entirely clear as to when this court should or will reverse a case for the refusal of the court to charge on the subject of alibi. In the case of *Byas v. State*, 41 Tex. Cr. R. 51, 51 S. W. 923, 96 Am. St. Rep. 762, Judge Henderson says: "We do not understand that appellant offered any affirmative proof that he was elsewhere at the time of the alleged attempt at burglary, further than that he denied being at the place when it was committed. He was evidently in that vicinity, according to the testimony of his own witnesses. The general charge of the court that they should acquit defendant unless they believed 'from the evidence, beyond a reasonable doubt, that defendant did by force attempt to enter the house mentioned in the indictment, and that it was then and there his intention to have carnal knowledge of the said Ella Garrett by force and without her consent,' and the court's charge on reasonable doubt, we think, were sufficient." In *Padron v. State*, 41 Tex. Cr. R. 548, 55 S. W. 827, this case, however, is in terms overruled. In that case Judge Brooks, speaking for the court, says: "Appellant testified to a state of facts showing clearly, if true, that he was not at the place where the homicide is alleged to have been committed. This being the case, we think the issue of alibi is raised. We held in *Wilson v. State*, 41 Tex. Cr. R. 115, 51 S. W. 916, that the charge on alibi should be given where defendant swears

that he was at another place at the time of the alleged crime. We do not understand it is necessary for appellant to swear in so many words that he was at another and different place than that of the homicide, in order to raise the issue of alibi; but if the evidence shows that he was at another or different place from the scene of the homicide, then the issue of alibi is raised, regardless of how this statement is made. It is the province of the jury to pass upon the sufficiency and truthfulness of the defenses urged by appellant. It is the province of the court to charge, under the statute, all the law applicable to the facts. We do not think this was done in this instance."

It seems to us that the reasoning of the court in the case last cited is very strong; but the decision in each case must, to a large extent, depend upon its particular facts. We believe that the true distinction is laid down in the case of *Parker v. State*, 40 Tex. Cr. R. 119, 49 S. W. 80, where it is held, in effect, that unless the testimony fails to exclude the idea of his presence at the homicide a charge upon the subject of alibi need not be given. In no case should a cause be reversed for the refusal of such a charge unless in the light of all the testimony the evidence excludes the theory of appellant's presence at the place of the crime. It will be noted that the opinion in the *Parker Case* was delivered by Judge Brooks, who also wrote the opinion in the *Padron Case*, and the two opinions are, as we believe, not only consistent, but, construed together, state the true rule. Now, then, does appellant's testimony in this case exclude the idea of appellant's presence at the time of the theft? He says he was in the town of Mineola at the time of the theft; that he went there with the witness Gray; "that he had supper at the same restaurant, but was not with him." Not with him where? At the restaurant? Gray says they took supper together. We understand the above language, "was not with him," to refer to and mean that he was not with him at the restaurant. Appellant was in the town of Mineola during most of the night, and was confessedly at the depot in said town at the time, or about the time, Gray missed his watch. Gray had been asleep, according to his testimony, quite a while. Where was appellant during this time? The record is silent as to this. His testimony does not exclude the idea that he was not there when the watch was taken; nor do we believe that, where appellant has had a fair submission of his case in respect to the matter of guilty participation in the theft under the evidence as here presented, the case should be reversed because of the failure of the court to charge on the subject of alibi.

It appears on the trial of the case, that while the witness Lewis Curtis was on the stand, and after he had testified that he saw

appellant on the evening before the watch was alleged to have been stolen from the prosecutor, Thad Gray, and while appellant was exhibiting the watch which he claims was thereafter sold to Brandon, counsel for the state thereafter on cross-examination asked the witness what was the first thing said about the watch, to which the witness answered that he (appellant) said he swapped for it; that thereupon his counsel asked the witness Curtis to state all the appellant told him about how he came by the watch, to which question and answer the state objected, and which objections were by the court sustained. It is shown in the bill that, if the witness had been permitted and allowed to answer, he would have testified that the defendant at the time told him that he swapped the pistol for the watch about two weeks previous, and that he had swapped with a black negro riding a bay horse with a blue suit of ducking overalls on, and that the negro gave him the watch for the pistol. We think that under the general rule that, where part of a conversation is admitted in evidence all the conversation relating to the same matter should be admitted, this witness should have been permitted to give in evidence the entire conversation had at the same time and in reference to the same matter. The action of the court was not hurtful to appellant. The conversation proven by the state was of itself exculpatory and consistent with appellant's defense, and the details of how he obtained the property, while perhaps admissible, lend little additional force to the general statement that he had traded for the watch. Therefore, in view of the fact that appellant, on the witness stand, gave testimony himself as to the circumstances of his possession of the watch, we do not believe that the refusal of the court to admit this testimony was of such gravity as to work a reversal of the case.

There are a number of other questions raised on the appeal; but they are, as we believe, without merit.

Finding no error in the judgment of the court below, the same is hereby in all things affirmed.

#### HOBBS v. STATE.

(Court of Criminal Appeals of Texas, Feb. 17, 1909. Rehearing Denied March 17, 1909.)

#### 1. HOMICIDE (§ 338\*)—APPEAL—HARMLESS ERROR—PREJUDICIAL EFFECT—ADMISSION OF EVIDENCE.

In a homicide prosecution, accused's wife was questioned only as to what she told accused as to the insults offered her by decedent, which the evidence showed provoked the killing; but the state's attorney cross-examined her as to what the alleged insults were, the details of which she told her husband, which evidence accused claimed was immaterial. The court charged that, if accused unlawfully killed decedent, he would be guilty of manslaughter.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ter. *Held*, that the charge gave accused the benefit of the facts reducing the killing to manslaughter, and, the jury having imposed the lowest punishment for manslaughter, error in admitting evidence of the actual facts as to the alleged insults was not prejudicial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 710, 712, 713; Dec. Dig. § 338.\*]

## 2. CRIMINAL LAW (§ 366\*)—EVIDENCE—RES GESTÆ.

Declarations made by decedent after he had regained consciousness, which was 5 or 10 minutes after the attack on him, expressive of its character, motive, or object, are considered verbal acts indicating a present purpose and intention, and are admissible as *res gestæ*, though they were in response to questions; that fact being important only as determining the spontaneity of the declarations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 819; Dec. Dig. § 366.\*]

## 3. CRIMINAL LAW (§ 543\*)—EVIDENCE AT INQUEST—ABSENCE OF WITNESS BEYOND JURISDICTION.

As a general rule, testimony taken at the examining trial is admissible, if the witness is beyond the jurisdiction at the time of trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1233; Dec. Dig. § 543.\*]

## 4. CRIMINAL LAW (§ 543\*)—EVIDENCE AT INQUEST—ABSENCE OF WITNESS.

An absent witness, whose testimony given at the examining trial was read at the trial, returned after the trial to the state and to the county where the killing occurred and remained there from January 1, 1908, until September 10, 1908, when he again removed from the state. The judgment was reversed and the cause remanded on June 6, 1908; the mandate for a new trial being filed June 23d. No process was asked to procure the witness at the second trial, which occurred in October, 1908, but it did not appear that the prosecuting attorney knew of the return of the witness, or that his presence could be procured at the second trial. *Held*, that the testimony taken at the examining trial was admissible on the second trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1233; Dec. Dig. § 543.\*]

## 5. HOMICIDE (§ 101\*)—JUSTIFIABLE HOMICIDE—JUSTIFICATION—INSULTS TO WIFE.

Insulting conduct towards accused's wife by decedent would not justify killing him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 131; Dec. Dig. § 101.\*]

## 6. HOMICIDE (§ 49\*)—MANSLAUGHTER—PROVOCATION—INSULTS TO WIFE.

Insults to accused's wife would reduce the killing by her husband of the person giving such insults to manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 73; Dec. Dig. § 49.\*]

## 7. HOMICIDE (§ 297\*)—INSTRUCTIONS—DEGREE OF OFFENSE.

The evidence showed that accused killed decedent because of insults by the latter to accused's wife, which she communicated to accused. The court charged that, if accused unlawfully killed decedent, he would be guilty of manslaughter; but, if the jury had a reasonable doubt as to whether he did so, they should acquit, but that "the fact that accused was informed that decedent had insulted his wife would not prevent the killing from being unlawful," that accused could seek decedent to demand an explanation of his conduct, though he would not be justified in killing him, unless decedent's acts or conduct caused accused to reasonably fear death or great bodily harm from decedent, and it was not necessary that accused should have been in any real danger, but only

that decedent's conduct reasonably caused accused to fear death, etc. *Held*, that the part quoted was not objectionable; and the instructions, construed as a whole, properly presented the issues.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 611; Dec. Dig. § 297.\*]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Earl Hobbs was convicted of manslaughter, and he appeals. Affirmed.

Collins & Cummings, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the district court of Hill county of the crime of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of two years.

This is the second appeal of this case. The first appeal will be found reported in 53 Tex. Cr. R. 71, 112 S. W. 808, where a fairly complete statement of the facts will be found. On the trial from which this appeal is prosecuted, the court submitted the issue of manslaughter as a basis for a conviction, and also charged fully the law of self-defense. The appeal raises several questions which we will now consider.

1. In the first place, it is urged that the case should be reversed because the court, over objections of counsel for appellant, permitted the county attorney to interrogate the wife of appellant as to the facts and details of an insult and an assault made and offered her by deceased, and in permitting the county attorney to comment on this evidence and to urge the improbability of such an assault being offered. This complaint is made in view of the fact, as stated, which the record confirms, that counsel for appellant had not interrogated his wife as to what in fact occurred, but that her examination in chief was confined solely and only to what she told her husband. The contention therefore is that where, as in this case, the examination of the wife had been confined alone to the statement made by her to her husband, it was not competent for the state, on cross-examination, to interrogate her as to what in fact had taken place touching the matter, the details of which she had communicated to her husband. The contention of appellant is that if the wife made the statement which she claims she did make to her husband, and if he believed this statement, it would be immaterial as to what in fact did occur between deceased and appellant's wife. This presents an interesting question, and one of some difficulty; but in view of the fact that the court instructed the jury that, if the killing was unlawful, the offense would be manslaughter, it is not seen how this question could, in any event, become important. In this case the court did instruct the jury as follows: "If you believe from the evidence beyond a reasonable doubt

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the defendant, in the county of Hill and state of Texas, on or about the time charged in the indictment, with intent to kill, did with a shotgun unlawfully shoot and thereby kill the said Ed Kelley as charged in the indictment, then and in that case you will find the defendant guilty of manslaughter and assess his punishment at confinement in the penitentiary for any period of time not less than two nor more than five years. If you have a reasonable doubt as to whether he did so, you will find him not guilty and so say." It will thus be seen that under the charge of the court, by necessary implication, appellant was given the full benefit of the facts reducing the killing to manslaughter, and the jury was charged, as a matter of law, that the adequate cause named in the statute did exist as completely as if the unequivocal admission had been made that his wife did communicate the facts of the insult to him, and that he (appellant) believed her statements to be true, and that they were in fact true; and in view of the fact that the jury gave the appellant the lowest term fixed by law for this offense, it is apparent that, whatever may be the correct rule touching the matter raised, the whole question becomes and is utterly immaterial.

2. Again, it is urged that the court erred in admitting in evidence the testimony of P. J. Morris, who testified, in substance, that after the deceased was shot by the defendant he was unconscious for a few minutes, and that after he regained consciousness, and about 5 or 10 minutes after the shooting, and after the defendant had left the scene of the shooting and had gone a distance of 500 or 600 yards therefrom, then the witness Morris asked the deceased where he (deceased) came from to this country, and the deceased replied and told him that he came from the territory, and that the witness further asked the deceased why the defendant shot him, and deceased replied that he did not know of any reason why the defendant shot him, because he had given him no cause to shoot him. This testimony was objected to on the ground that the statement of the deceased was not voluntary, that it was elicited by questions propounded to him by the witness, and was therefore not a part of the *res gestæ*, and was not a part of the transaction itself, speaking through the mouth of deceased, and would not have been made but for said questions propounded by said witness, and that the same was asked and the declarations made and done in the absence of the defendant, and for the further reason that said declarations were not admissible as dying declarations because no predicate had been laid to make them admissible as dying declarations. It will be seen from the facts stated in the above bill that the declarations of deceased were made about 5 or 10 minutes after the shooting. It will also be noted that, between the time of the shooting and the ut-

tering of these statements by the deceased, a few minutes of unconsciousness had elapsed. Just how long does not appear, but the inference is fair, indeed the conclusion seems inevitable, that the declarations in question were made by deceased almost immediately after regaining consciousness. Certainly a very short time must have elapsed. Now, the objections made by appellant proceed, not upon the theory that the time which elapsed between the assault and declarations was of such great duration as to take the declarations out of the rule of *res gestæ* testimony, but upon the theory that, in order to make such declarations *res gestæ*, they must be voluntarily made at the instance only of the party making them, and must not be induced by the act or intervention of any third party, as was done in this case.

The doctrine of *res gestæ* has frequently been the subject-matter of discussion in this court, and it has been found quite difficult to lay down a general rule applicable to all the cases. It has been held that the surrounding circumstances constituting the testimony part of the *res gestæ* may always be shown to the jury along with the principal facts, and their admissibility is determined by the judge according to the degree of their relation to that fact and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limit of a more particular description. Declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as verbal acts indicating a present purpose and intention, and are therefore admitted in proof like any other material facts. *Waechter v. State*, 34 Tex. Cr. R. 297, 30 S. W. 444, 800; *Pilcher v. State*, 32 Tex. Cr. R. 557, 25 S. W. 24. The fact that the declarations are made in response to questions is, indeed, an important fact to be considered in determining whether they are spontaneous, and evidences the facts speaking through the witness; but the mere fact that such declarations are made in response to a question or questions does not, and should not, of itself, justify us in holding that necessarily such declarations are not part of the *res gestæ*. This seems to have been held distinctly in the case of *Johnson v. State*, 46 Tex. Cr. R. 291, 81 S. W. 945. The following appears in that case: "Appellant reserved a bill of exceptions to the testimony of the witness Dillard, a deputy sheriff. At the time of the killing, this witness stated: He was at the sheriff's office, about 100 yards from the scene of the killing. That upon hearing the shot, he started towards the square, and en route met a man by the name of Fox and defendant. He asked them what was the trouble, and they told witness about it. That he then told defendant to step inside the sheriff's office, and he did so. He and defendant had a few words behind the door, and he told defendant he would have

to take him to jail. Defendant said, 'All right.' Witness turned and went to jail with defendant. That Fox and defendant began talking, and witness told defendant not to talk; that he did not want to take the stand against them. That witness just remarked to defendant, they wanted to tell him something about it. Witness told Fox not to say anything to him; that he did not care to hear anything about it. That defendant said a few words to him, and witness told him not to say anything about it; that he did not want to know anything about it at that time. That witness was boarding with defendant. That when defendant said something about the blood on his hands, defendant was under arrest. That witness asked defendant how the blood came on his hands, and defendant replied he did not know. Witness then said, 'Uncle Frank, come on to jail.' They then started to go to jail, and as we were passing down the steps of the court-house, defendant remarked he was not sorry he shot deceased; saying he was not sorry he shot the 'damn son of a bitch.' Objection was interposed to the testimony because there was no warning given; defendant being under arrest, and no sufficient predicate being laid for this statement. It appeared to the court that the statements made by defendant were within a few minutes after the homicide, while defendant was still excited from the occurrence, were freely and voluntarily made by him, and were clearly *res gestæ* and admissible. This bill was prepared by the court. Of course, this evidence was not admissible as a confession, because defendant was under arrest and had not been warned. This is recognized by the court, and therefore he certifies it was *res gestæ*. It is not clear from the statements of the bill how long this occurred after the transaction, but it could not have been a very great while, for the court says a very few minutes. We are of opinion the admission of this testimony was correct. *Bateson v. State*, 46 Tex. Cr. R. 34, 80 S. W. 88, 10 Tex. Ct. Rep. 208." We think there was no error in the admission of this testimony, and this assignment cannot therefore be sustained.

3. The next ground for reversal relates to the action of the court in admitting in evidence the written testimony of one John T. Morris. The facts in respect to this matter are thus stated in the bill of exceptions evidencing the action of the court, which bill also sets out quite fully the facts in respect to the matter, the objections interposed by appellant, and the testimony given by said witness. The testimony shows: That when this case was formerly tried, the witness, said John T. Morris, before said former trial had removed to the state of Oklahoma, with the intention of making it his home, and that he resided in the state of Oklahoma at the time of said former trial. That about the 1st day of January, 1908, the said John T.

Morris returned to Hill county, Tex., for the purpose of making his home in said Hill county, Tex. That he resided in said Hill county, Tex., in the immediate neighborhood where the homicide occurred during the entire year of 1908, up until about the 10th day of September, 1908, and that his presence and residence in said Hill county, Tex., during all of said time was well and generally known in his community. That about the said 10th day of September, 1908, the said John T. Morris left the state of Texas, and went to the state of Tennessee, for the purpose of making his home in said state of Tennessee, and that since said time and now the said John T. Morris has resided and does now reside in said state of Tennessee. That this cause was reversed and remanded by the Court of Criminal Appeals of the state of Texas on the 6th day of June, 1908, and the mandate from said court filed in the district court of Hill county, Tex., on the 23d day of June, 1908. That during the period embraced between January 1, 1908, and the time this case was called for trial in October, 1908, no process was applied for or issued to procure the presence of the said witness John T. Morris at the trial of this cause. That neither the county attorney nor any of his assistants knew that said John T. Morris had returned from Oklahoma to reside in Hill county, Tex., until after said John T. Morris had removed to the state of Tennessee. That the testimony also showed that, when the said John T. Morris delivered said testimony before said magistrate holding said inquest, the defendant was present in person and by attorney, and he had the opportunity to cross-examine said witness, and that his attorney did in fact cross-examine said witness John T. Morris, at said inquest proceeding. That the testimony of the said John T. Morris, at said inquest proceeding, and the testimony introduced at the trial of this case, shows that the said John T. Morris was present at the time and place of the homicide, and that one P. J. Morris was also present at the time and place of the homicide, and that the said witness P. J. Morris was present upon the trial of this cause, and testified to the facts and circumstances immediately attending the homicide, and that the said testimony of the said John T. Morris, taken before said magistrate at said inquest proceedings, also purported to state the facts and circumstances immediately attending the homicide. That when the said written testimony of the said John T. Morris above referred to was so offered by the state, the defendant by his counsel then and there in open court objected to the admission of same on the grounds that same was an effort to introduce the testimony of a witness before the jury without the said witness being present at the trial, and without the defendant or his attorney having an opportunity to cross-examine said witness in the presence of the jury, and that it was a violation of section

10, art. 1, of the Bill of Rights of the state Constitution, which provides that the accused in all criminal prosecutions shall be confronted with the witness against him. The defendant objected to the admission of said testimony for the further reason that no sufficient diligence was shown to have been used by the state to procure the presence of the said John T. Morris as a witness. In that, although he had been absent at the former trial, and although said written testimony had been used at said former trial, and although said witness had returned to Hill county, Tex., and to the immediate scene of the homicide, and had there resided for the first eight months of the year 1908, and although it was generally known in the community that he was in Hill county, Tex., no process was applied for or issued or served to procure the presence of said witness, although it was known for a period of three months prior to this time that the same had been reversed by the court, and that it would be necessary to try said cause again, and the mandate was on file during said time in the district court of Hill county, Tex., and that therefore it was not beyond the power of the state to procure the presence of said witness at the trial thereof, and therefore no sufficient predicate was laid for the introduction of said testimony. Defendant further objected to the admission of the said written testimony for the reason that there was present at the time of the killing, with the deceased and with the said John T. Morris, to wit, P. J. Morris, who was present in person at the killing, and who had already been placed upon the witness stand by the state and had testified to the facts testified to by the said witness John T. Morris, in the said written testimony, and it was only cumulative of the testimony of the said P. J. Morris, who had testified upon the stand. All of which objections so urged by the defendant were overruled by the court, and the counsel for the state did read the said purported written testimony of the said John T. Morris, so taken upon said inquest proceedings, in the presence and hearing of the jury, the said witness testifying, among other things herein, that the defendant approached to within 12 or 15 steps of the deceased and fired upon him with a shotgun while the deceased was picking cotton and, P. J. Morris having testified in the previous trial to the same facts, all of said written testimony of the said John T. Morris was permitted by the court to be introduced as evidence in this cause in behalf of the state.

We held on the former appeal that this testimony was admissible. On that appeal, however, it appeared that the witness was then residing in Oklahoma, and had been for some while before the case was called for trial. It will be noted that it distinctly appears that it was not known to the county attorney or any of his assistants that this witness had at any time returned to Hill county or

was subject to the process of the court; nor does any fact appear in the record which would have indicated to the county attorney or his assistants the probability that the witness would return; nor was any fact shown which would excite inquiry, or put them on notice of the witness' return to Hill county, or call upon them to make an investigation touching the residence of said witness. It further appears that at the trial the witness had permanently removed from the state and was then living in the state of Tennessee. We think that the rule is, ordinarily at least, that if, at the time of the trial, the witness whose testimony is sought to be introduced is beyond the jurisdiction of the court, a sufficient predicate is laid for the admission of his testimony regularly and properly taken in writing at the examining trial. A case might arise where there was a suggestion of collusion in which we might not feel authorized to hold such testimony admissible, if the ordinary process could, while the witness resided in the county of the prosecution, have secured his attendance; but that case we have not before us. Here there was no pretense that the officers representing the state knew of the return of the witness to Hill county, nor was there any fact shown by which his return from Tennessee could have been procured by the state, nor any fact except the single one of his return to Hill county after his removal to Oklahoma and his subsequent and definite removal to Tennessee as a permanent place of residence. We think it clear therefore that there was no error in admitting this testimony.

4. Complaint is made of the following paragraph of the court's charge: "In this connection you are charged that the fact that the defendant was informed that the deceased had been guilty of insulting conduct or the use of insulting words towards the defendant's wife would not prevent a shooting, if there was such shooting, from being unlawful." The paragraph complained of and assailed is a part of the first subdivision of the court's charge in which he instructs them, in substance, that if appellant unlawfully killed the deceased, he would be guilty of manslaughter, and in which paragraph they were instructed that, if they have a reasonable doubt as to whether he did so, they would find him not guilty and so say, and is immediately followed by the second paragraph of the court's charge where the issue of self-defense is submitted, in which the jury are instructed that it is not necessary that there should have been any real danger in order to entitle defendant to a verdict of not guilty; but it is only necessary that, viewing the matter from his standpoint, and from his standpoint alone, the acts and conduct, or either, of the deceased caused the defendant to have a reasonable expectation or fear of death or serious bodily injury, and that he acted at the time under such reasonable expectation or fear. It is

undoubtedly true, as the court charged, that insulting conduct towards one's wife will not justify killing the person offering the insult. The principal effect of such insult is to reduce the killing to the grade of manslaughter. It should be further stated that the court charged the jury that defendant had the right to arm himself and seek the deceased for the purpose of an explanation of his conduct, but that he would not be justified in law in killing the deceased, unless at the time he did so the deceased, by his acts and conduct, or either, caused the defendant to have a reasonable expectation or fear of suffering death or serious bodily injury at the hands of the deceased. We think the charge of the court, construed altogether, is substantially unassailable and presents in a clear and lucid manner the issues raised by the testimony.

We have been led, by carefully examining the record and a patient consideration of appellant's brief and argument, to conclude that there is no error in the record for which the case should be reversed.

It is therefore ordered that the same be, and it is hereby, in all things affirmed.

#### CRAIGHEAD v. STATE

(Court of Criminal Appeals of Texas. March 10, 1909.)

#### HIGHWAYS (§ 164\*)—OBSTRUCTION—PROSECUTION—EVIDENCE—INSTRUCTIONS.

Where, on a trial for willfully obstructing a public road across the land of accused, he testified that he had obtained permission from the commissioners' court to survey the land at his own expense and locate the boundary lines of the road, and that he surveyed the land and placed a fence five feet from the line on his own land, leaving that much land for the benefit of the public not called for by the field notes, the refusal to charge that if accused, when he built the fence, believed that it was built on his own land, or on the boundary line of the road, he should be acquitted, was erroneous.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 453; Dec. Dig. § 164.\*]

Appeal from Stephens County Court; A. J. Power, Judge.

W. A. Craighead was convicted of obstructing a public road, and he appeals. Reversed and remanded.

W. P. Sebastian, for appellant. Stubblefield & Patterson and F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a companion case to the case of Edgar Craighead v. State (No. 4,442, decided at the present term of the court) 116 S. W. 579.

Appellant was the father of Edgar, and is charged with obstructing the same road. It is disclosed by the evidence that there had been a road laid out some years prior to the alleged obstruction, known as the "Breckenridge and Albany Road," which ran across

appellant's land in part, and it is this particular portion of the road which is charged to have been obstructed. The exact boundaries of the road at this point seem to have been somewhat uncertain. Two parties, who had obtained authority from the commissioners' court to put up a telephone line along this public road, testified to having been obstructed, and to conversations they had with appellant. At the same meeting of the commissioners' court at which these gentlemen obtained permission to construct the telephone line, appellant requested the commissioners' court to survey accurately and ascertain definitely the boundary lines across his land on this public road. This they declined to do, as they were satisfied with the road as originally viewed by the jury. However, they agreed that appellant might survey the land at his own expense. Being a surveyor himself, he obtained the necessary instruments and the field notes as run by the jury of view, and surveyed the south line of the road across his land, as shown by the field notes as originally run by the jury of view and recorded in the records of the commissioners' court. In doing so, he states that he ran the line according to the field notes, and placed his fence five feet outside of this surveyed line, leaving that much of his land in the public road. There seems to be no controversy in regard to this testimony.

The court charged the jury in a general way that in order to constitute this offense the obstruction must be willful; that is, with legal malice and evil intent. He further charged the jury that a public road may be not less than 40 nor more than 60 feet in width, and that a public road may be established by a petition being presented to the commissioners' court and by the said commissioners' court making and entering upon the minutes of the court an order appointing five freeholders as a jury of view, who acted in accordance with and by authority of the commissioners, and their written report describing said road being duly approved by the commissioners' court and recorded in the minutes of the commissioners' court. However, if the road actually located on the ground and traveled by the public for a period of 10 years or more under a claim of ownership by the county, the said county being in peaceable and adverse and open possession of same, and appointing hands and appointing overseers for said time and by said county, varies and is different from the one described by the jury of view, and the one described by the jury is not used for a public road, and has not been for 10 years or more, then and in that event the one actually traveled and located and worked by the road hands is the true road. Bearing all the foregoing in mind, if the jury should believe from the evidence beyond a reasonable doubt that the defendant did, on or

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



about the 9th day of September, 1908, unlawfully and willfully obstruct the road in question as charged, they should find him guilty and assess his punishment at a fine not exceeding \$500. This, in a general way, is the substance of the court's charge.

The court refused to give the following requested instruction: "You are charged that if you believe from the evidence in this cause that the defendant, at the time he built the fence alleged in this case to be an obstruction, believed that it was being built upon his own land, or that it was being placed upon the south boundary line of said road, or if there is a reasonable doubt in your minds from the evidence in this case as to whether the defendant thought he was placing said fence on his own land, or on the south boundary line of said road, you will give the defendant the benefit of the doubt, and acquit him." These charges should have been given. They present definitely and specifically the issue, raised by appellant's testimony, to the effect that he had obtained permission to run the line accurately at his own expense, and that having done so, and having placed the fence five feet away from this line on his own land, leaving that much land for the benefit of the public not called for by the field notes, that he was not guilty, or, if there was a reasonable doubt on this question, he would be entitled to a verdict of not guilty. His testimony went directly to two crucial points of the case, to wit: First, whether the road was obstructed at all; and, second, that, if it was, under the circumstances it was not willful. If the jury believed either proposition, he was entitled to a verdict of not guilty. See *Farrier v. State* (Tex. Cr. App.) 113 S. W. 763; *Craighead v. State* (decided at the present term) 116 S. W. 579.

For the errors pointed out, the judgment is reversed, and the cause remanded.

### PUGH v. STATE.

(Court of Criminal Appeals of Texas. March 10, 1909.)

#### 1. DRUNKARDS (§ 10\*)—CRIMINAL DRUNKENNESS—"PUBLIC PLACE."

Where those who were at an entertainment at a private residence, where accused was claimed to have been drunk, were there by invitation of the owner, who had had only two such entertainments within eight months, when only invited guests were present, the place was not a "public place," so as to sustain a conviction for being drunk in a public place.

[Ed. Note.—For other cases, see *Drunkards*, Cent. Dig. § 10; Dec. Dig. § 10.\*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5806-5812; vol. 8, p. 7773.]

#### 2. GAMING (§ 72\*)—OFFENSES—PUBLIC PLACE.

A mere gathering of invited guests at an entertainment at a private residence would not make it a public place, within the gaming laws.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 168-186; Dec. Dig. § 72.\*]

Appeal from Stephens County Court; A. J. Power, Judge.

Jesse Pugh was convicted of being drunk at a public place, and he appeals. Reversed and remanded.

W. P. Sebastian, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of being drunk in a public place. The facts, without dispute, show that, if appellant was drunk, it was at the private residence of Charley Knox. The facts further show, without dispute, that Knox resided about five miles east of the town of Breckenridge; that on the night of the 1st of February, 1907, Knox and his wife gave an entertainment to a few friends, and only to those who were invited. It was an exclusive affair, and confined only to those invited. Among the families invited were those of Mr. Goodwin and Mr. Pugh, father of appellant. These guests met at the residence of Knox, as before stated, at the invitation of Knox and wife; and Knox and wife did not, on this or any other occasion, throw open the doors of their residence for public entertainment of any sort, and it was not a place where such entertainments were given, nor where people commonly resorted for the purpose of recreation, entertainment, or amusement, and had never been. This is the testimony of Knox and wife. They further stated that they had never given any social entertainment, except on one occasion, prior to the occasion mentioned, which had occurred about eight months before appellant was charged with being drunk. In regard to appellant's condition it was shown by the testimony that, some time after the parties had assembled, appellant was seen lying down in the yard apparently sick; and some of the evidence shows that he vomited, and there is also evidence to the effect that one or more of the witnesses detected the odor of intoxicating liquors about his person. No witness testified to having seen, or even known, of his taking a drink of intoxicating liquor; nor was he seen in possession of any.

There are several interesting questions presented for revision, which we deem unnecessary to discuss, inasmuch as, under our view of the law and the evidence, if it be conceded that appellant was drunk, this did not occur at a public place. The private residence of Knox and his wife was not a public place, under the statute; nor was there any fact introduced in evidence which shows, or tends to show, that it was such public place. See *Bordeaux v. State*, 31 Tex. Cr. R. 37, 19 S. W. 603. A private residence is not a public place, but may be made to partake of the nature of a public place if resorted to in such manner as is prohibited by the gaming laws; but in such case it

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
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must be resorted to as prohibited by the statute, and thereby constitute a place whereat gaming is prohibited. The definition of "public" under the gaming statutes has been held to apply to this offense. *Murchison v. State*, 24 Tex. App. 8, 5 S. W. 508. There had been but two entertainments at this residence; the interval between them being eight months. The testimony is conclusive that no one was authorized to be at this residence at either time, except the invited guests, and these were constituted by the invited friends of Knox and wife. See, also, *Gomprecht v. State*, 38 Tex. Cr. R. 434, 37 S. W. 734; *Galloway v. State* (Tex. Cr. App.) 26 S. W. 67; *Hipp v. State*, 45 Tex. Cr. R. 200, 75 S. W. 28, 62 L. R. A. 973; *White's Ann. Pen. Code*, art. 150, §§ 229, 230. If gaming had occurred at the time and place appellant was charged with being drunk, under the facts of this case, there could have been no punishment under our gaming laws. It would be rather an anomaly to hold that this was a public place, where a man could be found drunk in violation of the statute, and yet not a common resort at a private residence, for gaming. A private residence cannot be a public place within the terms of our statute, nor at any time, unless it is made public by being thrown open for access to the public. There is no statute under our Codes that would make a private residence, under the facts stated, a public place. Nor does the mere fact that a few invited guests attended the gathering of a friend at the private residence of their friend constitute that gathering a public one, or the residence a public place. *Terry v. State*, 22 Tex. App. 679, 3 S. W. 477. It may be questioned that the evidence is sufficient even to show that appellant was drunk; but clearly it excludes the idea that, if he was drunk, it was a public place.

The judgment is reversed, and the cause is remanded.

#### JACKSON v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1908. Rehearing Denied March 23, 1909.)

#### 1. LICENSES (§ 19\*)—OCCUPATION TAX—BARBERS—CONSTITUTIONAL LAW—"MECHANICAL PURSUIT."

The trade of a barber is a "mechanical pursuit," within the meaning of Const. art. 8, § 1, exempting persons engaged in mechanical pursuits from an occupation tax; and hence Acts 30th Leg. 1907, p. 273, c. 141, imposing a license tax on barbers, is invalid, as contravening such provision.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 19.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4462.]

#### 2. CONSTITUTIONAL LAW—(§ 208\*)—OCCUPATION TAX—BARBERS—DISCRIMINATION.

Acts 30th Leg. 1907, p. 273, c. 141, imposing a license tax on barbers, but exempting

from the tax (1) students of the State University and other schools of the state who are making their way through school by serving as barbers; (2) those serving as barbers in eleemosynary institutions of the state; and (3) those following the occupation of barbers in towns of 1,000 inhabitants or less—is unconstitutional, as discriminating.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 208.\*]

#### 3. CONSTITUTIONAL LAW (§ 205\*)—OCCUPATION TAX—BARBERS—SPECIAL PRIVILEGES.

The act is also void as violating Bill of Rights, § 8, in that it grants special privileges to certain individuals.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.\*]

Ramsey, J., dissenting.

Appeal from Dallas County Court, at Law; W. M. Holland, Judge.

W. A. Jackson was convicted of an offense, and appeals. Reversed, and prosecution ordered dismissed.

Crawford & Crawford and W. I. Ford, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for violating the act of the Thirtieth Legislature regulating the practice of barbering, the registering and licensing of persons to carry on such practice, etc.

The facts show that on the 21st of October last appellant was following and had been pursuing his trade or occupation as a barber for about six years, and by this means earned support for himself by cutting the hair and shaving the beards of those who patronized his shop, and on the particular date in question he had cut the hair of S. D. Williams, as well as shaved him, for which he charged the price of 35 cents for the hair cutting and 15 cents for shaving him. In other words, the agreed statement of facts shows that he was a barber following that business, and was at the time of the passage of the law with the violation of which he is charged, and had been for six years, and that under the law he would have been entitled to a certificate of registration upon his making the proper affidavit for that purpose, and that he had not made such affidavit, and that the barber's certificate of registration had not been issued to him by the board provided for by the act of the Legislature. The agreed statement of facts is sufficient to show a violation of the act.

Motion was made to quash the complaint and information, in that the law was unconstitutional, being in contravention of article 8, § 1, of the Constitution, which provides that the Legislature "may tax incomes of both natural persons and corporations other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax"; the contention under this

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ground being that the occupation of a barber is a mechanical pursuit, and therefore protected by said provision of the Constitution, and the fees required to be paid by him before he can pursue said occupation are a tax within the meaning of said section of said Constitution. The authorities are somewhat divided as to whether or not the profession or trade of a barber is a mechanical pursuit. In Texas it has been held in *Fore et al. v. Cooper* (Tex. Civ. App.) 34 S. W. 341, that the tools, implements, and appurtenances of a barber shop are exempt from execution. This ruling seems to have been followed in Tennessee in the case of *Terry v. McDaniel*, 103 Tenn. 415, 53 S. W. 732, 46 L. R. A. 559. For some of the decisions of the different courts of the Union, see *Terry v. McDaniel*, supra. In Louisiana the Supreme Court held, in *State v. Hirn*, 46 La. Ann. 1443, 16 South. 403, that the pursuit was mechanical, and that the barber was not subject to pay an occupation tax. The Constitution of Louisiana provides "that the Legislature may levy an occupation tax upon all occupations, except \* \* \* mechanical pursuits. \* \* \*" See article 206, Const. La. 1879. Passing upon that question, this language is used by the Supreme Court of that state: "The Constitution of the state exempts from license tax persons engaged in mechanical pursuits. Defendant is a barber, and the sole question is whether the trade of a barber is a mechanical pursuit, within the meaning of the Constitution. We think it is. The labor of a barber is manual. His work is mechanical. Hair cutting is as much a mechanical pursuit as wood cutting." See, also, *State v. Dielenschneider*, 44 La. Ann. 1116, 11 South. 823. This court, in *Mullinnix v. State*, 42 Tex. Or. R. 526, 60 S. W. 768, held that "in its broadest sense a mechanic is any one who is a skilled worker with tools." See, also, *City of New Orleans v. Lagman*, 43 La. Ann. 1180, 10 South. 244; *Theobalds v. Conner*, 42 La. Ann. 787, 7 South. 689; *City of New Orleans v. Bayley*, 35 La. Ann. 545. If we are right in the contention that appellant's business was a mechanical pursuit, the Legislature was powerless to levy a tax upon it, although they might call it a license fee. This license fee does not apply to all barbers alike, even in the same classification, if classification is authorized.

The second proposition relied upon by appellant is that the act is unconstitutional, in that it is discriminating, and not equal and uniform, in that said law exempts from said license fee (1) students of the State University, and other schools of the state, who are or may be making their way through school by serving as barbers; (2) it exempts those who may be serving as barbers in any of the eleemosynary institutions of the state; and (3) it exempts persons following the occupation of barber in towns of 1,000 inhabitants or less; and it is further claimed, in this connection, that the law is void because in the

particulars above mentioned it violates section 3 of the Bill of Rights of Texas, in that it grants special privileges to certain individuals and denies such privileges to this defendant, all of whom follow the same occupation. We believe these propositions are well taken, and have been so recently discussed by this court in the cases of *Ex parte Woods*, 108 S. W. 1171, and *Owens v. State*, 112 S. W. 1075, decided at the Dallas term, 1908, we deem it unnecessary to go into an elucidation of them. The eighth section of the act (Acts 30th Leg. 1907, p. 275, c. 141) reads as follows: "Nothing in this act shall prohibit any person from serving as a barber apprentice under a barber authorized to practice his trade under this act: Provided, that any person desiring to so work as an apprentice must apply to said board to have his name entered in a register kept by the board for such purpose, giving the date of his apprenticeship, and after serving two years in the trade he will then be eligible to become a registered barber, by complying with the provisions of section 7 of this act: Provided, that nothing in this act shall apply to the students of the State University or other schools of the state who are or may be making their way through school by serving as barber, or those serving as barber in any of the eleemosynary institutions of the state; nor shall the provisions of this section apply to persons serving as barber in towns of 1000 inhabitants or less." Section 6 of the same act requires every person engaged in the business of barbering, within 90 days after the approval of the act, to file with the secretary of the board of examiners an affidavit setting forth his name, residence, and length of time during which, and the place in which, he has practiced such occupation, and shall pay to the treasurer of said board \$2, and a certificate of registration entitling him to practice said occupation in this state shall be issued to him subject to the provisions of this act.

It would hardly be contended that under the exemptions of section 8, supra, the students of the University, the pupils of other state schools, those who may be serving as barbers in eleemosynary institutions, and those who follow the occupation of a barber in towns of 1,000 inhabitants or less, are not subject to the provisions of this law. All other barbers are. The intention of this act, it would seem, from its caption, is to regulate the practice of barbering, registering and licensing persons to carry on such practice, and to insure better education of the practice, and to insure better sanitary conditions in barber shops, and to prevent the spread of disease in the state of Texas, and declaring an emergency. If the Constitution, requiring all taxes to be equal and uniform, provided such a tax or license fee may be levied as provided by this bill, and it would make no difference whether it is a license fee or a tax, so far as these provisions are concerned, then barbers

at the University and other schools, in eleemosynary institutions, and in towns of 1,000 inhabitants or less, are not brought within its provisions, and are not subjected to the same penalties, regulations, or control as are those who come within its provisions. It may not be readily perceived, nor intelligently understood, why a barber or a lot of barbers in the various towns of Texas of 1,000 inhabitants or less could not as easily spread contagious or infectious diseases from their shops as could the barbers in towns of 1,000 or more. There is nothing expressed in the law, nor in fact, which would indicate that the smaller towns and barber shops therein are less liable to spread infectious or contagious diseases than are the barber shops in the larger towns. Nor is there anything patent on the face of the law, nor to be perceived from occult vision beyond the law, why a barber in a school or University or eleemosynary institution would not as readily spread from his shop diseases as barbers who do not operate in such places. It may or may not be a fact that the great student body of our State University will confine themselves entirely to barbers inside the institution, and may not go upon the streets of the city of Austin, and into the barber shops, and catch contagious diseases, and then visit the institution, and be operated upon by the student barber, and thus spread disease; and so as to the other public schools of the state scattered around in villages and hamlets of 1,000 or less inhabitants, and thus spread the disease. But, whatever may have been the thought in the legislative mind as to why these classes or persons should be exempted, in violation of the provisions of the Constitution, we are of opinion that such intent cannot operate, and we are of opinion that the favored and exempted classes mentioned, especially with reference to the barbers in schools and eleemosynary institutions, cannot be exempt, and this law remain constitutional. Sanitary regulations should operate upon all alike, when subject to same conditions.

There are other questions raised, perhaps, that might be equally fatal to the law; but, whatever else may be said of this act, we are of opinion that the recent cases of *Ex parte Woods*, 108 S. W. 1171, and *Owens v. State*, 112 S. W. 1075, decided at the Dallas term, are conclusive against the validity of this law. For those who feel sufficiently interested to follow up the question we refer to those cases for authority.

The law, therefore, is held unconstitutional; and the judgment is reversed, and the prosecution is ordered dismissed.

**RAMSEY, J.** (dissenting). I am unable to agree to the opinion or judgment of the majority of the court. If it be conceded that the small sum required to be paid for cer-

tificates is a "tax," in the sense in which that word is used in the Constitution, then it would follow logically that the law is invalid, since it contains numerous exceptions not based on any reasonable or rational classification. However, I do not believe the \$2 required to be paid under the terms of this act is in any proper sense a tax, or any part or portion of the taxing system of the state. I deem it unnecessary to elaborate my views. My sole purpose is to state my position. With great reluctance, I respectfully enter my dissent.

The following authorities, I believe, abundantly sustain my position: *Geib v. State*, 31 Tex. Cr. R. 514, 21 S. W. 190; *Twin City Bank v. Nebeker*, 167 U. S. 196, 17 Sup. Ct. 766, 42 L. Ed. 134; *Harper v. Elberton*, 23 Ga. 566; *State v. Bernhelm*, 19 Mont. 512, 49 Pac. 441; *State v. Wright*, 14 Or. 365, 12 Pac. 708; *Brown v. Galveston*, 97 Tex. 17, 75 S. W. 488; *Johnson v. Loper*, 46 N. J. Law, 325; *State of Minn. v. Zeno*, 79 Minn. 80, 81 N. W. 748, 48 L. R. A. 88, 79 Am. St. Rep. 422; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893; *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 219. In the last three cases cited quite similar statutes were upheld. 25 Cyc. 605; *People v. Naglee*, 1 Cal. 232, 52 Am. Dec. 312; *Terre Haute v. Kersey*, 159 Ind. 300, 64 N. E. 469, 95 Am. St. Rep. 298; *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581; *Ex parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516. Many others might be cited.

#### EVANS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 24, 1909. Rehearing Denied March 23, 1909.)

##### 1. CRIMINAL LAW (§ 1156\*)—MOTION FOR NEW TRIAL—REVIEW ON APPEAL.

Accused moved for a new trial on the ground that an important witness, who had appeared at the trial, before the case was reached became intoxicated and was locked up in the city jail, but there was no motion made to continue the case on account of the absence of the witness, nor was any process asked to secure his attendance, and the court refused to grant a new trial. *Held*, that this matter cannot be revised on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3069; Dec. Dig. § 1156.\*]

##### 2. CRIMINAL LAW (§ 941\*) — GROUNDS FOR NEW TRIAL—CUMULATIVE EVIDENCE.

A new trial will not be granted on the ground of newly discovered evidence, merely cumulative of that introduced at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2328; Dec. Dig. § 941.\*]

##### 3. CRIMINAL LAW (§ 939\*) — MOTIONS FOR NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

A motion for new trial on the ground of newly discovered evidence is properly refused, where an inquiry of the witnesses who testified at the trial would have shown the presence of the newly discovered witnesses, and there was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

no showing that accused did not know of their presence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318, 2319; Dec. Dig. § 939.\*]

Appeal from Criminal District Court, Dallas County; W. W. Nelms, Judge.

Fred Evans was convicted of murder in the second degree, and appeals. Affirmed.

Hemphill & House, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and given eight years in the penitentiary.

The first contention in the motion for new trial is that appellant should be awarded such new trial because a material witness in his behalf, to wit, Zedwick Lister, has by force been prevented from attending this trial; that the said witness was duly summoned and did appear on the original date of the trial, but for the failure of the court to reach the case on that date it was passed upon the following morning, when it was found, after entering into the trial of the case, that the said witness was absent on account of being drunk the night before, and being locked up in the city jail, and not in a condition to testify. By this witness appellant had expected to prove that he heard the deceased, Baker, threaten to kill the defendant a short while before the cutting occurred. There was no motion to continue or postpone the case on account of the absence of Lister, nor was any process asked to secure his attendance. This matter cannot be revised, as presented in the motion for new trial.

It is also alleged that since the trial appellant had discovered material testimony unknown to him prior to the trial, and attaches the affidavits of witnesses who he alleges would testify to the newly discovered facts. The affidavit of George Johnson is to the effect that he was present on the date of the disturbance which ended in the death of the deceased, on the corner of Swiss and Central avenue; that it was during the Dallas Fair, in October, 1907, but he does not recollect the date; that he knew the deceased, but did not know appellant, only as the man who stabbed Baker, the deceased; that he was standing on the Houston & Texas Central Railway track between 7 and 8 o'clock in the evening, and saw deceased going towards Alf Martin's saloon; that he passed witness going in the direction of Martin's saloon, and seemed like he was excited or mad, and that he heard him say, "I am going to kill that son of a bitch;" that witness did not know whom deceased had reference to; that he (witness) went into the saloon shortly afterwards and heard Baker say, "You

have to pay for my beer," and Evans said, "I have not the money," and Baker said, "You are a God damn liar," and made a motion with his right hand and struck Evans on the head; that deceased had a knife in his hand, but he did not know whether he cut appellant or not; that there were several people in the saloon at the time, and all seemed drunk and rowdy. In the affidavit of Williams it is stated that he was present at the saloon of Alf Martin when the disturbance occurred between R. M. Baker and Fred Evans; that he will swear that he heard deceased curse appellant, and the statement made by deceased that he was going to kill him if he did not pay for the beer that he was then drinking. This affiant further swears that appellant did not attempt to pull his knife until after he was cut by the deceased; that he knew deceased, but did not know appellant. He further states that there were several persons in the saloon at the time, and there was considerable drinking, and that all of them were drunk, and that the deceased followed the defendant in the saloon, and attacked and cursed him. One of the counsel filed an accompanying affidavit that he did not know of this testimony until after the trial, and that he obtained it through the witness Lister; that he made every available effort before the trial to secure the evidence, and did secure all that he could ascertain; that appellant was in jail, and a stranger in the city of Dallas, and could not give the names of the parties who were present. The other counsel for appellant filed no affidavit.

This testimony is cumulative of that testified by appellant's witnesses. Besides, it shows a want of diligence. An inquiry of the witnesses who testified in the case to the details of the disturbance and trouble would have shown the presence of the witnesses who filed affidavits, if any were in fact present. The barkeeper who witnessed the trouble testified in the case for the state, as did Lily Kelly, Eliza Collier, and Bettie Douglass. Appellant is not shown to have been drunk, and was himself present and knew of the presence of the other witnesses, if they were in fact present. While he may not have known the names of the witnesses, he knew of their presence, and could easily have had the matter investigated as to who they were. Under the rules prescribed by our Code of Criminal Procedure and the decisions of this court, the diligence was not sufficient. The witnesses Lily Kelly, Eliza Collier, and Bettie Douglass testified, in substance, practically the same as is set out in the affidavits of Johnson and Williams.

We do not believe, as this case is presented, there is any such error as would require a reversal of the judgment; and it is therefore affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**LEARY v. STATE.**

(Court of Criminal Appeals of Texas. March 20, 1909.)

**1. CRIMINAL LAW (§§ 763, 764\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.**

An instruction, in a prosecution for manslaughter, that the jury must not consider evidence as to defendant having assaulted members of his family as any incriminating circumstance, but only on the issue as to the sanity or insanity of the defendant, is not objectionable as being on the weight of evidence, but was a proper limitation upon the bearing of testimony that might have been misconstrued by the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748; Dec. Dig. §§ 763, 764;\* Homicide, Cent. Dig. §§ 579, 603, 631, 648.]

**2. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—EVIDENCE.**

Where hearsay evidence is admitted without objection, the court must predicate a charge thereon, and error in such a charge cannot be based on the erroneous introduction of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1982; Dec. Dig. § 814.\*]

**3. CRIMINAL LAW (§ 761\*)—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE—INSANITY.**

An instruction which allows the jury to consider two facts as to which there was some evidence, and two facts as to which there was no evidence, in considering the question of defendant's insanity, is erroneous, as the court must not assume a state of facts not proven.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1731; Dec. Dig. § 761.\*]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Lem Leary was convicted of manslaughter, and appeals. Reversed and remanded.

V. L. Shurtleff and Morrow & Smithdeal, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** Appellant was convicted of manslaughter, and his punishment assessed at five years' confinement in the penitentiary.

Appellant relied upon the issue of self-defense and insanity to exculpate him from this prosecution. In the long and able brief filed by appellant's counsel there is but one insistence upon which he asks for reversal; that is, to the twenty-eighth paragraph of the court's charge, which reads as follows: "You cannot and must not consider the evidence as to the defendant having assaulted his father, or his son-in-law, or his son, or as to his slapping his grown daughter, as any incriminating circumstance against the defendant in this case; but it was only admitted, and can be considered by you only, on the issue as to the sanity or insanity of the defendant, and can be considered by you for no other purpose; and as to whether it tends to show whether he was sane or insane is a question altogether for your consideration." Appellant insists that this charge was error, because there was not a syllable

of testimony that the appellant had assaulted his father; and, further, because, if there had been such testimony, the charge was on the weight of evidence; furthermore erroneous, because the court singled out from the great mass of evidence particular facts prejudicial to the defendant, and called them to the jury's attention, thus indicating to the jury that in the mind of the court the matters specially called to its attention were of extraordinary weight. In the first place, we do not believe the charge is upon the weight of evidence. These circumstances about the assault upon his father, son-in-law, and son, and slapping his grown daughter, were matters that might be appropriated by the jury to indicate the general viciousness and cruel disposition of appellant. Therefore it was proper to limit the testimony to one specific purpose, to wit, insanity. There are other matters proved in this record going to show insanity, or introduced at least for that purpose, not calculated to be so appropriated by the jury, and therefore it was not necessary to limit the other facts; and hence it follows that it was necessary to limit those facts above stated that could be used injuriously to appellant.

Appellant further contends, however, that there is no evidence in this record that appellant assaulted his father or his son-in-law. On this matter the only fact in the record is the testimony of Dr. Pitts, to be found on page 84 of the statement of facts, who, on cross-examination by state's counsel, having been introduced by defendant as a witness, testified as follows: "I did hear of the circumstances of Mr. Leary going down into the field before this bullet was in his head with a shotgun to kill his son, who was picking cotton in his own field. That was before the bullet was in his head. I understood that was how he got that bullet in his head. I heard of him getting so mad as to slap his own daughter, when she was grown. That was before he had the bullet in his head, and that was some of the evidence on which I based my conclusion of insanity. I do not think that he was at that time just as insane as he was after he got the bullet in his head." We have searched the record in vain for any additional fact upon which the court could predicate the statement that the defendant had assaulted his father or his son-in-law. It will be noted that the testimony of the witness Pitts is hearsay testimony. There is no bill reserved to its admission by appellant, and, although hearsay evidence, it becomes evidence upon which the court must predicate a charge, in the absence of objection thereto, since appellant cannot complain of the accuracy of a charge predicated upon the erroneous introduction of evidence. Then we have before us the question as to whether or not the court, in addition to the fact that the evidence suggested in-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sanity, authorized the jury to predicate insanity upon two facts, to wit, assault on his father and his son-in-law, in addition to what the record shows; or does said fact become erroneous and harmful? We say, yes. We have in this charge the court not only authorizing the jury to appropriate the fact that appellant attempted to shoot his son and slapped his grown daughter as a basis upon which to find insanity, but in addition to said two facts further authorized the jury to find appellant insane upon two facts not in the record, to wit, assault on his father and son-in-law. We cannot say that this evidence was not hurtful to appellant. It was introducing for the consideration of the jury the fact of the assault upon his father and son-in-law, which two facts were not in evidence before the jury, which they might appropriate for the harmful purpose of increasing appellant's punishment in this case. The charge must be applicable to the facts, and the court must not in his charge assume a state of facts that was not proven. This was clearly done in this case, as stated above, and we accordingly hold that it probably injured the rights of appellant to such an extent as requires a reversal of this case.

There are no other questions requiring a review; but, for the error pointed out, the judgment is reversed, and the cause remanded.

#### HILL v. STATE.

(Court of Criminal Appeals of Texas. March 3, 1909. Rehearing Denied March 20, 1909.)

##### 1. CRIMINAL LAW (§ 608\*)—CONTINUANCE—ABSENT TESTIMONY—PROBABLE TRUTH.

Evidence held to sustain a finding that testimony sought to be shown by witnesses for whose absence accused asked a continuance was probably not true.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 608.\*]

##### 2. LARCENY (§ 47\*)—EVIDENCE—OWNERSHIP.

In a trial for theft of property in the possession of the owner's employé, the state could show the ownership, and that the property was in the employé's possession, subject to the owner's orders, since it was essential to prove the employé's relation to and possession of the property.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 47.\*]

##### 3. CRIMINAL LAW (§ 655\*)—REMARKS OF JUDGE.

No ground for reversing a subsequent conviction was presented by the trial judge's remarks to the jury summoned for the week, on impaneling it, that in criminal trials the jury would be kept together until a verdict should be reached, that a verdict could not be determined by lot, that they could not discuss any failure of accused to testify, that they could not consider testimony outside of that offered under oath, that they would be bound by the instructions, that special instructions were as much part of the law as general instructions, that either party could submit special charges, that

the court was bound to submit controverted issues, however flimsy the evidence supporting them, and that the jury, as exclusive judges of the credibility of the witnesses and of the weight of the testimony, were bound to pass on the testimony under the instructions given.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 655.\*]

Appeal from District Court, Scurry County; Cullen C. Higgins, Judge.

Wiley Hill was convicted of theft, and he appeals. Affirmed.

Smith, Hutcheson & Taylor, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant appeals from a conviction had in the district court of Scurry county on the 26th day of September, last year, on a charge of the theft of a certain mule, and for which his punishment was assessed at confinement in the penitentiary for a term of three years.

1. The evidence shows that one S. W. Grimes, who resided at Snyder, owned, among other things, a sorrel mare mule, about 15 hands high with a white spot on her left side about the size of the bottom of a teacup. This animal was taken from his pasture a few miles from Snyder on the evening, or night, of Tuesday, March 3, 1908. Appellant was at or near Snyder on this day. A day or two before this he was shown to be at or near Grimes' pasture, and is shown to have had some knowledge and familiarity with Grimes' stock. A few days after this, and as the witnesses claim on March 5th, he sold this mule to W. R. Hilton at Stamford, Tex., to whom he stated his name was Jack Willis. The identification by Hilton and others of appellant was clear, positive, and unequivocal. Appellant undertook to show that he was not in or near Stamford on March 5th. He so testified in person on the witness stand, and produced other witnesses, who, in a general way, accounted for his being at other and different places than Stamford on the date mentioned; but much of the testimony on this question is uncertain, and to some extent contradictory. When his case was called for trial he made application for a continuance on account of the absence of Sullie Vaughn and J. W. Thompson. Vaughn was alleged to reside in Pecos City, and Thompson in Ft. Worth. He avers, in substance, that he expected to prove by the witness Vaughn that he ate dinner at Vaughn's restaurant in Pecos City on the 6th of March, 1908, and that he met Thompson on the train on the evening of the 5th of March, 1908, at Loraine, Tex. and went with him to Pecos City. He does not aver any former or prior acquaintance with either of these witnesses, or any facts showing their acquaintance with him, or to what extent or in what manner they would identify him as the person present at the places above named and at the times above stated. The testi-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mony is, as stated, of the other witnesses, somewhat contradictory, and certainly very uncertain. The court, in approving the bill in reference to this matter says, in substance, that this testimony, as shown on the trial, is not probably true, and that the court believes that the application for continuance was made especially for delay and that only. The court further states that this was, in substance, a second application for a continuance; that on an earlier day of the same term appellant filed his first application for a continuance for a number of witnesses, including those named above, and the court had process duly issued, and all the witnesses appeared, except Thompson and Vaughn. There was also some question raised as to the subpoena for Vaughn being for "Sallie" Vaughn, instead of "Sullie" Vaughn, as originally issued; and the court states that this was due to the carelessness and neglect of appellant and his counsel. From a careful inspection of the statement of facts, we believe it is manifest that this testimony is not true; that is, in the sense that appellant was not at Stamford at the time testified to by Hilton and other witnesses, and was not the person who sold Hilton the mule in question. It should be stated that Grimes subsequently identified and recovered the mule. Its mark was of such a character, so unusual, as to make its identification easy and certain. If testimony of witnesses can be believed, appellant sold this mule to Hilton, and, we think, in view of the entire record, the court below was correct in holding that the testimony sought was not probably true.

2. Again, exception was urged on the trial to the admission of the testimony of the witness Grimes to the following effect: "That the mule alleged in the indictment to have been stolen by this defendant was owned by said Grimes; that it was in the possession of one N. G. Henderson, who was hired by the said Grimes by the month and who was living on said Grimes' farm, on which said Grimes did not live; that said Henderson had the care, management, and control of said mule, and was working and feeding the same; but that the said mule was at all times subject to the orders of said Grimes." This testimony was objected to for the reason that the indictment did not contain any allegation that the mule was owned by said Grimes and kept, managed, and controlled for him by said Henderson. In admitting this testimony the court explains that the indictment in the case in one count charged the ownership and possession in S. W. Grimes, who was real owner, and in the other count the ownership and possession was laid in N. G. Henderson, who was the special owner. An inspection of the indictment verifies the truth of this explanation. In submitting the matter to the jury, the first count, alleging ownership and possession in Grimes, was withdrawn, and the case went to them on the count charging the theft from Henderson.

Under the statute and decisions it was essential to prove the relation and possession of Henderson with reference to this property, and it was competent for the court to hear any and all testimony touching this matter. The facts undoubtedly show such possession of the mule in question in Henderson as to make it proper, if not, indeed, indispensable, to prove possession in Henderson.

3. Another matter raised on the appeal is the objection of counsel to an oral charge to the jury summoned for the week during which appellant was tried. We deem it unnecessary to set out the language attributed to the court in the bill of exceptions, since the court, in approving the bill, undertakes to state, and does state clearly, just what he did say to the jury. It seems that in impaneling the jury the court, in substance, made the following statements: "The jury were told that in the trial of civil cases they would be permitted to separate until the charge of the court was given to them, but in the trial of criminal cases they would be kept together and free from the intrusion of any and all parties at all times until a verdict was rendered; that they were not authorized to arrive at a verdict by lot in criminal cases, nor to discuss the fact, if such be the fact, that a defendant failed to testify in any case; that it was not a subject of discussion, nor a presumption of guilt; and that jurors could take no testimony on the outside of the testimony offered on the witness stand in any case, either civil or criminal, but would be required to try the case upon the sworn testimony of witnesses from the witness stand, and would be bound by the law given them in charge by the court; and the special charges given by the court were as much a part of the law as the general charge of the court, and were directly applicable to some feature of the testimony not clearly presented by the court's general charge, and that either party had the right to prepare special charges in both civil and criminal cases, and that it was the duty of the trial court to submit all controverted issues in charge to the jury, however slight or flimsy the testimony that was offered upon the issue might be; that it was the duty of the jury, who were the exclusive judges of the credibility of the witnesses and of the weight to be given to the testimony, to pass upon such testimony under the instructions given by the court; and that, if the court failed or refused to give a charge upon any issue raised by the evidence, the higher court was bound to reverse him." There was no objection made at the time to the language used by the court; but after the court had used the language above quoted, and long prior to the time appellant's case was tried, counsel representing him did object for the following reasons: "That it would not be proper to give to the jury after the evidence and argument of counsel had been heard;



second, because it might tend to minimize any issues that the defendant might raise in his favor; third, because it would tend to prejudice a jury against a defense of the defendant before the testimony in the case had been heard by them; fourth, because the law directs as to the manner and time that the charge in criminal cases be given to the jury, and does not direct that it be given in the manner herein set out." We think it is obvious that most of the language addressed by the court to the jury was not only proper, but timely, and that none of it was of such a character as to justify us in reversing the judgment of conviction thereafter had.

4. The only other ground of the motion, which, in the light of the record, can be considered by us, is the assignment that the verdict of the jury is not supported by the evidence. To this we cannot agree. It seems to us that the evidence is so overwhelming and conclusive as to establish the guilt of appellant to a moral certainty.

5. Finding no error in the proceedings, the judgment is in all things affirmed.

#### HENDERSON v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1908. On Rehearing, March 20, 1909.)

##### 1. HUSBAND AND WIFE (§ 25\*)—HUSBAND'S AGENCY FOR WIFE—NECESSITY FOR PROOF.

Though a husband may be appointed by his wife as her agent, the relation must be proved, not being presumed.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 25.\*]

##### 2. HUSBAND AND WIFE (§ 25\*)—HUSBAND'S AGENCY FOR WIFE—EVIDENCE—SUFFICIENCY.

Evidence held to show that a husband was authorized to place his wife's property with one charged with its embezzlement.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 25.\*]

##### 3. EMBEZZLEMENT (§ 14\*) — NATURE OF OFFENSE—PROPERTY EMBEZZLED.

One who was intrusted with property to be sold for at least \$125, and who sold or pledged it for \$60, retaining the proceeds, embezzled the property, and not the proceeds.

[Ed. Note.—For other cases, see Embezzlement, Dec. Dig. § 14.\*]

##### 4. CRIMINAL LAW (§ 829\*) — INSTRUCTIONS COVERED BY OTHERS GIVEN.

In a trial for embezzling a horse, it was proper to refuse to instruct that, though accused was in possession as agent with authority to sell, and sold and misapplied the proceeds, he could not be convicted unless when he sold he intended to convert the proceeds, and that he could not be convicted unless he sold the horse as his own, where the court instructed that if H. owned and had actual possession of a horse, and delivered it to accused under his agreement to sell it and pay over a specified sum from the proceeds or to sell to the best advantage and account for the proceeds, and that if accused sold or pledged the horse fraudulently intending to appropriate the proceeds, and did appropriate them, he was guilty, but that, if he

acted in good faith when he sold or pledged the horse, he must be acquitted.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 829.\*]

##### 5. CRIMINAL LAW (§ 814\*) — INSTRUCTIONS — CONFORMITY TO ISSUES.

In a trial for embezzling property, it was unnecessary to instruct that the jury must find that accused sold it as his own property, where the evidence did not tend to show that he dealt with the property other than as owner.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979-1985; Dec. Dig. § 814.\*]

##### 6. EMBEZZLEMENT (§ 5\*)—INTENT.

The essential issue in a trial for embezzling property is whether accused intended to defraud the owner.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 3; Dec. Dig. § 5.\*]

##### 7. EMBEZZLEMENT (§ 14\*) — NATURE OF OFFENSE.

One who sells property as an agent, and who subsequently conceives an intent to and does misappropriate the proceeds, embezzles the proceeds, and not the property.

[Ed. Note.—For other cases, see Embezzlement, Dec. Dig. § 14.\*]

##### 8. CRIMINAL LAW (§ 763\*)—INSTRUCTIONS—PROVINCE OF JURY.

An instruction that if accused was an agent to sell property, and sold it intending to misapply the proceeds, he was guilty of embezzlement, was not erroneous for failing to leave it to the jury to determine on a finding of such facts whether he was guilty.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 763.\*]

Appeal from District Court, Titus County; P. A. Turner, Judge.

A. L. Henderson was convicted of embezzlement, and he appeals. Affirmed.

Rolston & Ward, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged by indictment in the district court of Titus county with the embezzlement of a certain horse alleged to be the property of one J. J. Huggins; same being of the alleged value of \$125. Appellant was put upon trial at the October term, 1907, of said court, and was by the jury convicted, and his punishment assessed at confinement in the penitentiary for a period of two years.

The facts, briefly, show that appellant and Huggins were intimate friends; Huggins having married a cousin of appellant's wife who had been raised by them from her earliest infancy. Mrs. Huggins owned a horse, which had been given to her by her father some three or four weeks before he was intrusted to appellant to be sold. It seems that, a short time before the horse was sold, appellant, with his wife, was at the residence of Huggins, and at the table one day Huggins said to appellant that he believed he would get him to sell Old George, to which appellant replied, "All right," and wanted to know what Huggins would take for him, to which it was replied that he would take \$125.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appellant said that he could get \$150 for him from one Fitzpatrick to-morrow if the horse was not afraid of the train. Thereupon Huggins said to him, if he could get \$150, he could have all over \$125. At this time appellant was a live stock insurance agent, and the horse was accordingly turned over to him, with authority to drive around getting him accustomed to the train, and with the expectation that he could and would be sold to Fitzpatrick for the sum of \$150. While Huggins testified, both on direct and cross-examination, that appellant was not authorized to sell the horse to any one except Fitzpatrick, he did say that, if appellant had brought him \$125 as a result of the sale to any one else, it would have been satisfactory. Mrs. Huggins testified that appellant had stated at the table that he could sell the horse, Old George, for \$150 to one Mr. Fitzpatrick, provided he was not afraid of the train, and that her husband thereupon told him to sell him if he could get \$125, and all over that he could have; that that was the trade, providing if he did not sell him before we wanted him to work we could have him. She further states: "He was to deliver him back to us. The horse belonged to my father. He gave him to me. It was really my horse." She further adds that the trade was made at the eating table, and that they had sat down to dinner at their house, at Mr. Huggins' house. Appellant and his wife were both sworn as witnesses, and both agreed that all the conversation with respect to the horse was had at the house of Huggins and in the presence of his wife. The authority to sell was recognized by both appellant and his wife, but they differ as to the amount for which he was to sell him. The evidence shows that, some time after this, appellant took the horse to Pittsburg, in Camp county, and there sold him to one Kesterson for \$60. When next heard from, appellant was in Laredo in a hospital, as he claimed, and very sick. His claim when first heard from was that he had not sold the horse to Kesterson, but had pledged him for \$60, and that Huggins could get his horse, in which he manifested a willingness to aid him. He also agreed later to pay for the horse, but in view, as he claimed, of Huggins sending some newspaper clippings to his mother, he afterwards repudiated this agreement and declined to come to any accommodation about the matter. Appellant on the witness stand testified that while in Pittsburg he got drunk and was placed in jail by the officers, and he let Mr. Kesterson take the horse, on which he loaned him some money, but that he was to have the horse back when he returned and paid him the money and paid for keeping the horse. It seems, however, according to his testimony, he got drunk again and went to Jefferson intending to go to Marshall, where his mother lived, but he got drunk at Jefferson, and the next thing he remembered he was in a hospital in Laredo,

where, it seems, he had been some two or three weeks. Several reasons are suggested why the judgment of conviction should be reversed.

1. Among other things, it is urged that, inasmuch as the horse in question belonged to Mrs. Huggins, the facts do not show such authority on the part of her husband as to have lawfully placed him in the possession of appellant with authority to sell him, and that the act of Huggins in so doing was without authority, and, as a corollary of this, that the possession of appellant was not under a valid agency. We think this position cannot be sustained. It is said that the husband may be appointed as the wife's agent, though he is not necessarily such. It cannot be presumed that, because he is her husband, he is likewise her agent, for this relation of principal and agent is one of fact to be proved, and not presumed. *Magee v. White*, 23 Tex. 180. Again, it is said a husband has no authority to act for his wife in such manner as to bind her separate interests, unless he is expressly or impliedly authorized to do so, and that there is no implication of law that he is so authorized in fact. *Ethridge v. Price*, 73 Tex. 597, 11 S. W. 1039. It is said, however, by Mr. Speer, in his valuable work on the Law of Married Women (page 36), that, "in the very nature of things, slight proof would be sufficient to establish between the husband and wife the further relation of principal and agent." *Mobley v. Leophart*, 47 Ala. 257; *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 293; *American Express Co. v. Lankford*, 1 Ind. T. 233, 39 S. W. 817. Such agency is, we think, a question of fact proven, as any other fact in the case, by such legal evidence as pertinently establishes such relation. In this case there can, as we conceive, be no sort of doubt that such agency existed. The statements of Huggins, his direction and authority for selling the horse, were made in the presence of the wife. The matter was discussed between all the parties, and with her knowledge and consent the property was taken away to be sold on terms agreed upon. We think the true test of such agency and the proof thereof would be: Would a purchaser have been protected where the sale was confessedly made in accordance with the terms and authority given? If so, it must result in the finding of such agency. This view is strengthened by the fact that there is no evidence disputing the authority to sell, or the presence of Mrs. Huggins, her participation in the conversation, and her ready acquiescence in all that was said and done.

2. Again, it is suggested that the embezzlement, if such there was, was an embezzlement of the money the proceeds of the sale of the horse, and not an embezzlement of the horse. This contention is unfounded and has been directly decided adversely to this view. The case of *Epperson v. State*, 22 Tex. App. 694, 3 S. W. 789, is a case somewhat similar to the one at bar. The following charge was

given: "If you believe from the evidence that the defendant received from the said Caylor the organ in question, under an agreement that the defendant should act as the agent of the said Caylor in the sale of said organ, and that defendant should sell said organ, and pay over to and deliver to said Caylor a certain sum in money, or notes, that defendant should secure from the sale of said organ; and you further believe that defendant sold said organ as his own property, and not as agent for said Caylor, and that at the time of said sale the defendant had the fraudulent intent to appropriate the proceeds of said sale to his own use, and that in pursuance of said intent the defendant afterwards appropriated the proceeds of said sale to his own use and benefit, without the consent of said Caylor—the defendant would, under such circumstances, be guilty of embezzling the organ. But, if you believe it was the intention of the defendant to act in good faith towards said Caylor, and carry out his alleged agreement, and that he, after said sale, conceived for the first time the intention to appropriate the proceeds of the sale, he would not be guilty of embezzling the organ." In discussing this charge, Judge Wilson says: "We do not think the exceptions to this paragraph of the charge are well grounded. As we understand the law, it clearly and distinctly states the correct rule, as announced in the decisions upon this subject." Quoting from the earlier case of *Leonard v. State*, 7 Tex. App. 417, the opinion proceeds: "We are of the opinion that, notwithstanding appellant may have had authority to make a sale of the cotton alleged to have been embezzled, yet if he sold the same with the formed intention to defraud the owner and to convert it to his own use and benefit, he is as much guilty of embezzlement of the cotton as if he had no authority to make such sale." Further, Judge Wilson, in the case first cited, says: "We are of the opinion that said paragraph of the charge is not only correct in principle, but that it was applicable to and demanded by the evidence in the case, and that there is sufficient evidence to warrant the finding of the jury that at the time defendant sold the organ he entertained the fraudulent purpose of appropriating the proceeds of such sale to his own use." It cannot therefore, we think, be contended that there was, as applied to the facts of this case, an embezzlement of the proceeds; that is, the \$60 arising from the sale of the horse. If the amount received for the property is the test, and if that is what is embezzled, and not the property the possession of which is intrusted in confidence, then it would follow that, if the property had been sold for less than \$50, the offense would be a misdemeanor, and not a felony; or if it is covetously alienated under the guise of a gift to secure some sinister benefit to the agent, it would not be a crime at all, because this doctrine would lead to such absurdity,

as we conceive, as to make the adoption of such a view impossible.

3. On the trial the court, among other things, charged the jury as follows: "Now, if you believe from the evidence, beyond a reasonable doubt, that J. J. Huggins owned and had the actual possession of a horse, and that on or about the 1st day of September, 1906, in Titus county, Tex., he delivered the same to the defendant, and that the defendant received the actual possession of said horse from the said Huggins on or about the 1st day of September, 1906, in Titus county, Tex., and that said horse was delivered by said Huggins to defendant, as his agent, and was received by defendant from said Huggins, as his agent, under and by virtue of an agreement to the effect that defendant would sell said horse and pay \$125 to said Huggins and keep for himself as his property the excess over said \$125 that he may sell said horse for, or that he was to sell said horse and pay Huggins \$100 and keep for himself any excess for which he might sell said horse, or that he was to sell or dispose of said horse to the best advantage and account to Huggins for the proceeds of such sale; and if you further believe from the evidence, beyond a reasonable doubt, that after defendant received possession of said horse as such agent, if you so find, that he sold the same or pledged him for money, and that at the time of such sale or pledge the defendant had the fraudulent intent to appropriate the proceeds of said sale or pledge to his own use, and that in pursuance of said intent the defendant afterwards appropriated the proceeds of said sale or pledge to his own use and benefit, without the consent of said J. J. Huggins—then the defendant would be guilty of embezzlement of a horse, as charged, and you will so find and assess his punishment at confinement in the penitentiary for not less than 2 nor more than 10 years. But if you believe from the evidence, or have a reasonable doubt, that it was the intention of the defendant, at the time he sold or pledged said horse, to act in good faith towards said J. J. Huggins, and carry out his alleged agreement, and that he, after said sale or pledge, conceived for the first time the intention to appropriate the proceeds of the sale or pledge, then he would not be guilty of embezzlement of the horse, and you will find him not guilty." In this connection appellant requested the court to instruct the jury as follows, which was refused by the court: "You are instructed in this case that if you believe from the evidence beyond a reasonable doubt that the defendant was, at the time alleged in the indictment in this case, in possession of the horse of J. J. Huggins by virtue of a contract of agency, and was authorized by the said Huggins to sell the said horse, and if you find that the defendant did sell the said horse and misapply and convert to his own use and benefit the proceeds of the sale of the said horse, then

that would not justify you in convicting the defendant for embezzlement in this case, unless you further find and believe from the evidence in this case, beyond a reasonable doubt, that at the time of the sale of the said horse, if you find that he did sell him, the defendant then intended to convert the proceeds of the said sale to his own use and benefit and deprive the said Huggins of the value of the said horse. And if you fail to believe, beyond a reasonable doubt, that he so intended to deprive the said Huggins of the value of the said horse, then you will find the defendant not guilty. And if you fail to find from the evidence in this case, beyond a reasonable doubt, that the defendant sold the said horse as his own property, if you find that he did sell him, then you will find the defendant not guilty, and so say by your verdict." We think that the charge of the court is a fair presentation of the law applicable to the facts, and that it was not error to refuse the special charge asked.

4. The questions of fact in the case have been passed on by the jury, nor do we believe that any reason has been suggested why their verdict should be set aside.

Finding no error in the record of the court below, the judgment is affirmed.

#### On Rehearing.

The motion for rehearing filed in this case challenges the correctness of the opinion of the court affirming the judgment of conviction on the ground, substantially, that the charge of the court below, held by us to be good, was fatally defective, in that, as a necessary fact on which to base a conviction, the jury should have been required to find, as a fact, that, when appellant sold the horse in question, he sold him as his own property. The charge of the court in the case of *Epperson v. State*, 22 Tex. App. 694, 3 S. W. 789, contains such clause, and the jury, by the terms of the charge, was required to find in that case that Epperson had sold the organ alleged to have been embezzled as his own property and not as agent for the owner. The charge in the case of *Huggins v. State*, 42 Tex. Cr. R. 384, 60 S. W. 52, contains a similar clause, and is substantially identical with the charge in the *Epperson Case*. We have been cited to no authority, however, which holds that it is essential that the charge should so instruct the jury, nor can we conceive how or why it should be essential so to do. In this case there was no suggestion either in the testimony of Kesterson, the person to whom the horse was sold, or the appellant himself, that the animal in question was dealt with in any other respect than as his own property. Kesterson testifies to an absolute sale of the property by appellant. Appellant denies the sale, but in substance affirms that he had hypothecated the horse for \$60 and intended to redeem him. Therefore, under the facts of this case, the issue, in any event, seems hardly to be rais-

ed; but we do not believe it important in any case. It seems to us that the vital question and the true criterion in every case is: Did the party charged, at the time of the conversion, then have the specific intent to defraud the owner of the property? If he did, he would seem under the law to be guilty. If at the time, however, he sold the property, he did so in pursuance of his agency and in recognition of the right of ownership of the real owner, and he subsequently conceived the fraudulent intent to convert, misapply, and embezzle the moneys derived from the sale of such property, he would be guilty of embezzlement of the money, and not the property sold. In the celebrated case of *Leonard v. State*, 7 Tex. App. 417, Judge Clark, in his usual clear and lucid manner, in discussing the general question of embezzlement, uses this language: "Addressing ourselves to the points presented, we are of opinion that notwithstanding the appellant may have had authority to make a sale of the cotton alleged to have been embezzled, yet if he sold the same with the formed intention to defraud the owner, and to convert it to his own use and benefit, he is as much guilty of embezzlement of the cotton as if he had no authority to make such sale. What is embezzlement? A fraudulent appropriation of the property of another, by a person to whom it has been intrusted. There is no settled mode by which this appropriation must take place, and it may occur in any one of the numberless methods which may suggest itself to the particular individual. The mode of embezzlement is simply matter of evidence, and not pleading, and the appellant in this case was charged in the usual form that he 'did embezzle, fraudulently misapply, and convert to his own use' the particular property described. If he sold it with the honest purpose of delivering the proceeds to the owner, and after such sale conceived the fraudulent intention, he would not be guilty of embezzlement of the cotton at least; but if the sale was simply a means to effectuate his fraudulent purpose to convert the property to his own use—in other words, to steal it—it is as much an act of conversion as if he had shipped it clandestinely to a foreign port, and there disposed of it. This distinction is not unsupported by authority, and we are referred to none of a contrary effect."

The rule there laid down is indeed the true test: Did appellant at the time of the sale have in his mind the specific intent and purpose to misappropriate and misapply the proceeds thereof? This issue was expressly submitted to the jury in the court's charge, and they were instructed if such was not his purpose, or if they had a reasonable doubt thereof, they should acquit. The argument is made, however, that, if in making the sale appellant did so in recognition and in subordination of the owner's right in the prop-

erty, the purchase price would be and remain the money of the true owner. Undoubtedly so. And if there had been a repudiation of such ownership and a sale by the appellant, the proceeds would not of necessity be the property or money of appellant. At least the owner would have the right to ratify the sale and to recover the purchase price. The adoption of any other rule would make it rest in the power of the appellant, notwithstanding that at the very moment of the sale he had the fraudulent intent to misapply the funds, to make an election as to whether his crime should be that of embezzlement of the property delivered into his custody, or the proceeds thereof. If this power existed, and the subsequent appropriation would be of the money and not of the property, it would place it within the power of a dishonest agent, by selling valuable property for less than \$50, to bind the state to prosecute for an offense less than a felony. If a guilty purpose exists in the mind of the agent at the time of the sale to misapply and misappropriate the proceeds thereof, he is under all rules of law and justice, all rules of law and reason, guilty of the offense of embezzlement of the property. Nor can he change this rule of law by statement, suggestion, or claim that he is selling the property in recognition of the owner's right, and thereby change and alter the nature of his crime, if in fact he then has the guilty purpose to misapply and embezzle the proceeds thereof. The argument of counsel for appellant is put with much skill and force, and may find some support in the language of the cases referred to, but, it seems to us, it is illogical and fallacious.

It is claimed that the court erred in grouping facts, and in instructing the jury that, if the facts so stated were true, the appellant would be guilty of the crime of embezzlement, and in not leaving the jury to determine whether, if the facts so found were true, appellant would be guilty of such an offense. The charge of the court, in substance, instructed the jury if they found the agency as charged, and possession of appellant under such agency, and the subsequent sale by him with the guilty purpose of misapplying the proceeds, then, if these facts were found to be true beyond a reasonable doubt, that he would be guilty of the crime of embezzlement. In this there was no error. It was left to the jury, under an appropriate charge, to find the facts. If these facts existed, the law fixes the nature, the name, and the punishment for the offense.

We have carefully considered the able argument of counsel for appellant, and upon the most mature reflection find there was no error in the proceedings of the court below.

It is therefore ordered that the motion for rehearing be, and the same is hereby, in all things overruled.

## SCHOENNERSTEDT v. STATE.

(Court of Criminal Appeals of Texas. March 3, 1909. On Rehearing, March 20, 1909.)

### 1. INTOXICATING LIQUORS (§ 239\*)—CRIMINAL PROSECUTION—INSTRUCTIONS.

In a prosecution for violating the local option law by selling bottles of beer, accused testified that, about two weeks before he let the prosecuting witness have the beer, he was told by such witness to order him beer, and that he signed an order for the same; that the witness paid accused the money at the time to cover the order; that he at once mailed the order and the money to the persons addressed; that he afterwards received the beer and stored it on his place for the witness until he should call for it, and that the beer received by the witness on the occasion in question was part of the beer he ordered, but he did not sell the witness any beer, nor did the witness pay for any beer at the time in question; that he made the order simply as an accommodation for the witness, and received no profit on it whatever. *Held*, that it was error not to charge the jury that if they should find accused's testimony to be correct, or if there was a reasonable doubt of his guilt, they should acquit, as a party accused of a violation of the law is entitled to an instruction covering his defense.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 334, 337, 343; Dec. Dig. § 239.\*]

On Rehearing.

### 2. CRIMINAL LAW (§ 828\*)—NECESSITY FOR WRITTEN INSTRUCTIONS.

Instructions orally requested are properly refused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2007; Dec. Dig. § 828.\*]

### 3. INTOXICATING LIQUORS (§ 233\*)—CRIMINAL PROSECUTION—ADMISSIBILITY OF EVIDENCE OF UNITED STATES LICENSE.

In a prosecution for violation of the local option law, accused was asked on cross-examination if he had a United States malt liquor dealer's license posted on a house on his premises where beer was stored, and if he got the beer out of this house that he sold the prosecuting witness; and he answered that there was such a license posted on a certain house on his premises, and that he got the beer he let the prosecuting witness have out of this house. *Held*, that the evidence was admissible, in view of the fact that a liquor dealer is required by law to post his license in a conspicuous place in his place of business, and, if the license did not cover the time in question, such fact cannot be availed of by stating it as a ground of objection, but can be shown by evidence.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 298½; Dec. Dig. § 233.\*]

Appeal from Jones County Court; Jas. P. Stinson, Judge.

William Schoennerstedt was convicted of violating the local option law, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law, in that he sold six or seven bottles of beer to B. E. Frazier. Frazier testified that appellant lived

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

about 2½ miles south of Stamford; that he and Walker drove out to appellant's residence, and bought of him about six or seven bottles of beer, for which he paid him (appellant) 75 cents at the time he received the beer. He testified on cross-examination that about two weeks prior to the time he received the beer he told appellant to order him some beer, but had no recollection of signing a written order for it, nor did he recall how much he had requested appellant to order. Appellant testified, in his own behalf, that Frazier and Walker came to his residence, and that while there he let Frazier have the beer, about six or seven bottles. He further testified that about two weeks before this occurrence Frazier told him to order him two dozen bottles of beer, for which Frazier signed an order, and this was addressed to Bush & Co. at Waco, Tex.; that Frazier paid him (appellant) the money at the time to cover the order; that he at once mailed the order and the money to Bush & Co. at Waco, and some time afterwards received the beer and stored it in a little house on his place for Frazier until he should call for it; that the beer Frazier received from him on the occasion in question was part of the beer he ordered; that he did not sell Frazier any beer, nor did Frazier pay for any beer, at the time testified by Frazier; that he made the order simply as an accommodation for Frazier, and received no profit on it whatever.

The court charged the state's theory in regard to the transaction, but failed to charge the law applicable to appellant's view of the case. Exception was reserved by appellant to the failure of the court to present his theory, to the effect, that if they should find defendant's testimony to be correct, or there was a reasonable doubt of it, they would acquit. This phase of the law, under the facts, should have been given. A party accused of a violation of the law is entitled to an instruction to the jury covering his defensive matters.

The judgment is reversed, and the cause is remanded.

#### On Rehearing.

At a recent day of the present term the judgment in this case was reversed and the cause remanded, on the failure of the court to charge upon one of the phases of the law suggested by the evidence. The state files a motion for rehearing on the ground that appellant did not present written instructions covering this theory of the evidence. An inspection of the record discloses that this contention is correct, and the record does not contain any written requested instructions. The case was not briefed by either party, and this suggestion is made by the state on motion for rehearing. We find that the authorities sustain the contention of the state.

See *Woods v. State* (Tex. Cr. App.) 75 S. W. 37.

There is another question, not passed on in the former decision, which, perhaps, in view of granting the rehearing, it would be well enough to notice. Appellant took the witness stand in his own behalf, and was asked by the county attorney on cross-examination the following question: "Have you United States malt liquor dealer's license posted or tacked on a certain house on your premises, where beer is stored, and did you get the beer out of this house that you sold B. E. Frazier?" Appellant replied: "There is a United States malt liquor dealer's license posted or tacked on a certain house on my premises, and I got the beer I let Frazier have out of this house." Various objections were urged to the introduction of this testimony—that it is immaterial, irrelevant, and inadmissible for any purpose, and, further, that there was no evidence whatever that said United States malt liquor dealer's license was issued to the defendant, nor was there any evidence whatever as to the date of the sale or the expiration of the license, and the admission of the testimony was clearly prejudicial, etc. The fact that a United States liquor dealer's license was tacked up in the premises owned or operated by the accused is admissible. The objections stated, that appellant was not shown to have taken out a liquor dealer's license, or the date of it, if he did take out such license, are matters of fact, and cannot be urged simply as grounds of exception. If appellant desired to prove in this connection the fact, if it was a fact, that appellant had or had not taken out license, it should have been shown by the bill of exceptions, and not urged as a ground of exception.

We are of opinion, however, inasmuch as liquor dealers are required by law to post their license in a conspicuous place in their house of business, that it is a fact that it may be proved such license was so posted. If as a matter of fact the license was not taken out for the time involved in this transaction, then that could as well be shown. Such a statement would not be taken as a ground of objection, unless the facts showed that the license did not cover the specified time. Of course, the license would not be admissible as evidence, or the fact that it was posted up would be equally inadmissible, if, as a matter of fact, the license did not cover the time involved in this transaction. In order to make the posting of the license a fact introducible in evidence, such license would have to involve the time, or cover the time, so as to bring this transaction within it; but this cannot be availed by simply stating it as a ground of objection.

The motion for rehearing is granted, the reversal set aside, and the judgment is now affirmed.

## SAWYER v. STATE.

(Court of Criminal Appeals of Texas. March 23, 1909.)

## CRIMINAL LAW (§ 1087\*)—APPEAL—RECORD—CONTENTS—NOTICE OF APPEAL.

Where no notice of appeal appears in the record, the appeal will be dismissed on motion. [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2776; Dec. Dig. § 1087.\*]

Appeal from Hill County Court; N. J. Smith, Judge.

Earle Sawyer was convicted of abandoning his wife, and he appeals. Dismissed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted of abandoning, neglecting, and failing to maintain and provide for his wife, and his punishment assessed at a fine of \$200.

The record comes to us without any notice of appeal appearing in same. This is an indispensable jurisdictional fact. The state moves to dismiss the appeal, and the motion must be, and is hereby, granted, and the appeal dismissed.

## McDOWELL v. STATE.

(Court of Criminal Appeals of Texas. March 20, 1909.)

## 1. INDICTMENT AND INFORMATION (§ 14\*)—ARRAIGNMENT AND PLEA—LOSS OF ORIGINAL INDICTMENT.

Where the original indictment is lost, and accused is never arraigned upon that indictment, and does not plead to it, he may be required to plead to a substitute indictment, and be tried thereon.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 78; Dec. Dig. § 14.\*]

## 2. HOMICIDE (§ 308\*) — INSTRUCTION AS TO MURDER IN SECOND DEGREE.

An instruction as to murder in the second degree should charge that the killing must be unlawful, and that it must be done on malice aforethought.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 642-648; Dec. Dig. § 308.\*]

## 3. HOMICIDE (§ 115\*)—SELF-DEFENSE—APPREHENSION OF DANGER.

A person has the same right to defend himself from serious bodily injury as he would to protect his life.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 155; Dec. Dig. § 115.\*]

## 4. HOMICIDE (§ 300\*) — INSTRUCTIONS AS TO SELF-DEFENSE.

Under evidence, in a prosecution for homicide, showing threats to take the life of accused, and that accused would never win another lawsuit over deceased, and showing an attack by deceased on accused, who was younger and smaller than deceased, and that deceased was armed with a knife at the time, the jury should have been instructed as to self-defense generally, both as to the right to protect life and the right to prevent serious bodily injury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 622; Dec. Dig. § 300.\*]

## 5. HOMICIDE (§ 236\*)—INSTRUCTIONS—WEAPONS.

Pen. Code 1895, art. 717, provides that the instrument by which a homicide is committed is considered in judging of the intent, and if it is one not likely to produce death it is not to be presumed that death was designed, unless from the manner of its use such intention evidently appears. The evidence showed that while defendant was whittling with an ordinary pocketknife, he was violently attacked by a man of superior strength, age, and weight, and in resisting this attack he struck one blow at random, which struck a vital point, resulting in death. There was testimony that usually a knife of this character would not be a deadly weapon. *Held*, that the provisions of article 717 should have been given in a charge to the jury, and the jury should have been charged on the issue of aggravated assault.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 236.\*]

Appeal from District Court, Jack County; J. W. Patterson, Judge.

Sid McDowell was convicted of murder in the second degree, and appeals. Reversed and remanded.

Nicholson & Fitzgerald, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for murder in the second degree; the punishment being assessed at five years' confinement in the penitentiary.

The evidence substantially shows: That appellant and deceased were raised boys together, and their families had intermarried. Deceased was 19 and appellant 17 years of age. They had made a horse trade some time prior to the difficulty. The mother of appellant, becoming dissatisfied with the transaction, brought suit ultimately to rescind the trade. On the trial it resulted in her favor, and this enraged and angered deceased. On the day of the trial, the parties interested, as well as quite a crowd of people, congregated at the county seat where the trial occurred and were in and about the courthouse. Deceased had asked for damages. The jury brought in a verdict rescinding the trade, but said nothing in their verdict in regard to damages. They retired to consider that matter and subsequently returned a verdict in favor of the mother of appellant refusing to award damages to deceased. This seemed to have angered deceased to considerable extent. Just about the time, or perhaps a little before, the jury returned the verdict in the lawsuit, deceased spoke to appellant's mother, Mrs. Bowlen, and threatened to take the life of appellant, whereupon she took her son to one side and requested him to go home. That he then left the courthouse in obedience to instructions in a frightened condition of mind. Frank Turner testified: That he was with deceased on the day of the killing and drank whiskey with him out of the same bottle. That while together they talked about the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

civil case. The deceased asked him how he thought the case would come out. Turner replied that he did not know, whereupon deceased said: "There is one thing, if he wins that case, the son of a bitch will never win another." This statement was at once communicated to appellant. In a subsequent conversation between the witness and deceased, the witness borrowed the knife of deceased. Upon handing the knife to the witness, the deceased remarked: "You want to be careful with that knife. It is sharp, and I expect to use it." When appellant left the courthouse, in obedience to his mother's instructions, for the purpose of going home, he went out where the horse was tied, and was standing there, when deceased approached him. Deceased's course of conduct and manner of movement indicated anger and determination. That he rapidly approached appellant, passing the parties near by until he reached appellant. Upon reaching appellant he put his clinched fist under the nose of appellant and pushed his head back. There is some confusion as to the position or condition of the other hand of the deceased. The remark made by deceased to appellant's mother was, referring to appellant: "I will kill him! God damn him!" Appellant had his knife out and had been whittling at the time he was approached by deceased, and was holding it in his hand at the time deceased made the assault, and when the assault was made appellant struck one blow, which the physicians indicate severed the artery just under the ear, from which the deceased bled to death. The knife was a pocketknife; the blade being something like  $2\frac{1}{2}$  or 3 inches in length. There had also been a previous conversation between appellant and deceased in the courthouse before appellant left that building. This testimony also showed anger and was of threatening nature on the part of deceased. At the time deceased approached appellant, he remarked in an angry tone of voice: "You have walked my log this time, but you can't do it again." And it was at this juncture that he pushed his closed fist against appellant's chin or under his nose and shoved his head back, at which juncture appellant used his knife. There was but one blow struck. Deceased fell. Appellant stood there and made no further attempt or demonstration. He was arrested and carried to jail. This, perhaps, is a sufficient summary of the testimony to review the questions suggested for revision.

When the case was called for trial, it was made to appear to the court that the indictment had been lost, and motion was made by the prosecution to substitute the lost instrument. Appellant had not been arraigned, nor had he pleaded to the indictment prior to its loss, and in fact never pleaded to the original indictment, but was forced to trial on the substitute indictment, and to this he did not plead. This is assigned as error. Under the decisions in this state the court's

action was correct in permitting the substitution of the indictment. Without reviewing the question, we cite in support of this conclusion the case of *Withers v. State*, 21 Tex. App. 210, 17 S. W. 725.

Criticism is made of the charge on murder in the second degree. The charge criticised is as follows: "If you believe from the evidence, beyond a reasonable doubt, that the defendant, with a knife, and if you believe same was a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use, in a sudden transport of passion, aroused without adequate cause, and not in defense of himself against an unlawful attack, reasonably producing a rational fear or expectation of death or serious bodily injury, with the intent to kill, did in Jack county, Tex., cut and stab and thereby kill the said Jim Paschall, etc., you will find him guilty of murder in the second degree." The criticisms are: First, that it omits to tell the jury that the killing must be unlawful; and, second, that it must be done on malice aforethought. Upon another trial these matters should be included in the charge submitting the issue of murder in the second degree. While it may be doubtful, under the construction placed on article 723, Code Cr. Proc. 1895, that these omissions were of such serious character as to require a reversal of the judgment, in view of the other charges given defining "malice aforethought," yet all the necessary ingredients of murder in the second degree, when that issue is submitted to the jury, should be embodied in the charge applying the law to the facts.

It is claimed that the court's charge with reference to the law of threats is too meager and restrictive, in that it confines the right of self-defense under the law of threats to a purpose and intent to kill. Appellant asked special instructions in regard to this matter which were refused, embodying the further proposition that he had the same right to defend against apprehension of serious bodily injury. We are of opinion that appellant's contention in this respect is correct. A party has the same right to defend his person from serious bodily injury under the law of threats as he would to protect his life. Without reviewing the court's charge, and special charges asked and refused, we are of opinion upon another trial the court should instruct the jury as well in regard to the defense against apprehension of serious bodily injury as against his life.

The court failed to charge self-defense from any other standpoint than that of resistance of an attack made by reason of threats to kill. Appellant reserved exceptions and requested instructions, which were refused, to the effect that he had a right to defend his life against an attack threatening death or serious bodily injury. We think this contention is sound. Deceased had made qualified threats directly to appellant, and in addi-



tion had informed the mother of appellant that he intended to take his life, as well as stating to Turner that he would never win another lawsuit over him. Deceased had attacked appellant in the manner indicated in the statement in the early part of this opinion. He was superior to appellant in age, strength, size, and weight, as all the testimony concedes, weighing some 15 or 30 pounds more than appellant. The record fails to show that deceased had his knife in his hand at the time he made the attack, and rather excludes that fact. In view of the vigorous attack made, the superiority of age, strength, and size, and of the threats, appellant had reason to believe that the attack had begun which might end in his life. Deceased was armed with a knife shown by the testimony to be superior in size to that owned by appellant, and further shown to be very sharp. Under these facts, appellant had a legal right to have the jury instructed in regard to self-defense generally.

There is another question suggested for reversal, to wit, the failure of the court to charge article 717 of the Penal Code of 1895, which is as follows: "The instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears." While the evidence shows that the pocket-knife used by appellant was an ordinary pocketknife, the blade being perhaps  $2\frac{1}{2}$  or 3 inches in length, he was violently attacked by a man of superior strength, age, and weight, and in resisting this attack he struck one blow, and, as the witnesses indicate, rather at random. It happened to strike a vital point, and death resulted shortly afterwards from bleeding. The physicians testify, in substance, that usually the knife would not be a deadly weapon, but might, of course, if a vital point was reached. This was the only blow given by appellant, and deceased fell, and the difficulty ended. Under the circumstances of this case, we are of opinion that the provisions of article 717 should have been given in the charge to the jury. A charge was asked by appellant submitting this issue to the jury that, if they should so find, he would be guilty of an aggravated assault. The charge was refused, and it is properly presented for revision. In this connection, perhaps, it may be well enough to state a little more fully the facts. Dr. Wade testified that the knife used was an ordinary pocketknife, and that the same blow on any other part of the body would not have produced death unless some artery or vital organ was struck. He further testified there were more chances for death not to result from such a stroke with this knife in defend-

ant's hand than chances for fatal results. Massengale testified that the knife defendant used was an ordinary pocketknife, that he had measured the blade, and the length was  $2\frac{1}{2}$  inches. He further testified that he saw defendant strike deceased, and that deceased threw up his arm, knocking the lick to deceased's neck. Kemp testified that he saw defendant at the time the blow was inflicted, and deceased had one fist in defendant's face with his head shoved back, and, when defendant struck, deceased threw up his left arm and deflected the blow upwards towards his neck. Considering the manner of the assault, and how the course of the blow was deflected, we think it was important to appellant that the substance of the requested special charge should have been given. Whether, in the absence of such testimony, the refusal to so charge would be reversible error when a knife of the character and size shown in this case was used, we need not now determine.

For the errors pointed out, the judgment is reversed, and the cause is remanded.

#### JARRETT v. STATE.

(Court of Criminal Appeals of Texas. March 3, 1900. Rehearing Denied March 23, 1900.)

#### 1. INDICTMENT AND INFORMATION (§ 129\*)—JOINDER OF MISDEMEANORS.

A count for drunkenness and one for disturbing the peace may be joined in the same indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 414-418; Dec. Dig. § 129.\*]

#### 2. INDICTMENT AND INFORMATION (§ 132\*)—ELECTION BETWEEN COUNTS.

The prosecution need not elect between counts charging separate misdemeanors.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 438; Dec. Dig. § 132.\*]

#### 3. CRIMINAL LAW (§ 1128\*)—REVIEW—RECORD—MISCONDUCT OF JURY.

To be available on review, evidence showing misconduct of the jury must be filed during the term.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1128.\*]

#### 4. CRIMINAL LAW (§ 1160\*)—REVIEW—EVIDENCE ON MOTION FOR NEW TRIAL.

The finding of the court on conflicting evidence on a motion for a new trial will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]

#### 5. CRIMINAL LAW (§ 1159\*)—REVIEW—CONFLICTING EVIDENCE.

The verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076; Dec. Dig. § 1159.\*]

Appeal from Ellis County Court; F. L. Hawkins, Judge.

John Jarrett, having been convicted of drunkenness, appeals. Affirmed.

E. P. Anderson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

BROOKS, J. Appellant was convicted of drunkenness, and his punishment assessed at a fine of \$25.

The indictment charges drunkenness and disturbing the peace in two different counts. Appellant filed a motion to quash the indictment on this account. An indictment may contain several counts charging different misdemeanors. See *Waddell v. State*, 1 Tex. App. 720; section 404, subd. 4, Code Cr. Proc. 1895; also *Alexander v. State*, 27 Tex. App. 533, 11 S. W. 628.

Appellant insists the court erred in failing to require the county attorney to elect which count he would prosecute on. This does not apply in misdemeanor cases. Code Cr. Proc. 1895, § 405, subd. 4; *Brown v. State*, 38 Tex. Cr. R. 597, 44 S. W. 176.

The record contains a long rehearsal of supposed misconduct of the jury in the shape of evidence filed after term time. Evidence of this character must be filed during term time. See *Black v. State*, 41 Tex. Cr. R. 185, 53 S. W. 116. However, by an examination of the evidence, we find there is a clear conflict, and the court found against appellant's contention. The evidence amply authorized the finding of the court. See *Mayes v. State*, 33 Tex. Cr. R. 34, 24 S. W. 421; *Driver v. State*, 37 Tex. Cr. R. 160, 38 S. W. 1020.

The evidence in this case is quite conflicting as to whether or not there was any drunkenness or disorderly conduct; but this was a matter left to the discretion of the jury, and they have seen fit to believe the prosecuting witness. We are not authorized to disturb their finding.

The judgment is affirmed.

#### FORCY v. STATE.

(Court of Criminal Appeals of Texas. March 17, 1909.)

##### 1. FORGERY (§ 28\*)—PASSING FORGED INSTRUMENT—SUFFICIENCY OF INDICTMENT.

An indictment for passing a forged instrument, which undertook to set out the instrument by its tenor, but included in the tenor clause the meaning of the instrument, was defective, since the tenor and purport clauses of an indictment should be separate and distinct.

[Ed. Note.—For other cases, see *Forgery*, Dec. Dig. § 28.\*]

##### 2. FORGERY (§ 34\*)—PASSING FORGED INSTRUMENT—VARIANCE.

There was a variance between the allegation and the proof, in a prosecution for passing a forged instrument, where the indictment alleged that accused passed as true a false instrument upon J., and the evidence showed that the instrument was passed upon J. & Sons.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. § 95; Dec. Dig. § 34.\*]

Appeal from District Court, Caldwell County; L. W. Moore, Judge.

Isaac Forcy, alias Will Jones, was convicted of passing a forged instrument, and

appeals. Reversed, with instructions to dismiss.

Ellis & Groves and O. Ellis, Jr., for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of passing a forged instrument, and his punishment assessed at two years' confinement in the penitentiary.

The charging part of the indictment is as follows: " \* \* \* Did then and there unlawfully, willfully, knowingly, and fraudulently pass as true to J. R. Jacobs a false and forged instrument in writing, which had theretofore been made, without lawful authority, and with intent to defraud, and was then of the tenor following: 'June the 10, 1908. to Mr. Jacob (meaning Jacobs) and sons pleas fill this order (meaning order) for me 17 \$ 35 c (meaning seventeen dollars and thirty-five cents) Harvey romal (meaning Roamell)'—all of which meant that R. Jacobs & Sons should fill an order and deliver to the bearer thereof goods, wares, and merchandise of the value of seventeen dollars and thirty-five cents, and that Harvey Roamell would become liable to pay for same, which said instrument in writing the said Isaac Forcy, alias Jones, then and there well knowing to be false and forged, did pass as true, with intent to injure and defraud."

It will be seen, from an inspection of the above-quoted indictment, that the pleader attempted to set the instrument out by its tenor, which means an exact description of the instrument itself, and incorporates, in his effort to set out the tenor of the instrument, the meaning of the instrument. The tenor and purport clause of an indictment should be separate and distinct. It appears from the evidence in this case the indictment was predicated upon a forged order, signed by Harvey Roamell and addressed to Jacobs & Sons, requesting them to fill an order for \$17.35. The amount is in figures, as stated above, and the explanatory and innuendo averments, with reference to this amount and with reference to other matters, going to explain what the instrument purports to be, should have been in the purport clause of the indictment, and not in the tenor clause.

Furthermore, there is a variance between the allegation and the proof in this: The indictment alleges that there was passed as true a false instrument upon J. R. Jacobs, when the evidence shows the forged order was passed upon Jacobs & Sons. If J. R. Jacobs is a member of the firm of Jacobs & Sons, then this fact should be alleged in the purport clause of the indictment, and a statement thereby made to the effect that by passing it upon said J. R. Jacobs that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said Jacobs was then and there a member of the firm of Jacobs & Sons.

It follows, from the above suggestions, that the indictment is defective, and the judgment is reversed, and the prosecution ordered dismissed.

### BILLS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 24, 1909. On Rehearing, March 17, 1909.)

#### 1. INTOXICATING LIQUORS (§ 236\*)—PROSECUTION—SUFFICIENCY OF EVIDENCE—SALE.

In a prosecution for a violation of the local option law, evidence held to sustain a finding that there was a sale as alleged.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 313; Dec. Dig. § 236.\*]

#### 2. CRIMINAL LAW (§ 1170\*)—HARMLESS ERROR — PREJUDICIAL EFFECT — RECALLING WITNESS.

In a prosecution for illegally selling intoxicants, after the witness who testified as to the sale was cross-examined at length and had left the stand, the defense requested leave to recall him to ask him if he was not mad at accused and did not say to a depot agent that he would get even with accused, as a foundation for testimony impeaching him by the agent. It did not appear when defendant's counsel learned of the alleged statements, or that the witness sought to be recalled was accessible, or that the trial would not be unduly delayed by recalling him, and the depot agent testified fully at trial. Held, that accused could not have been prejudiced by the court's refusal to permit the witness to be recalled for the purpose stated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3133, 3145; Dec. Dig. § 1170.\*]

#### 3. WITNESSES (§ 332\*)—RECALLING WITNESS FOR PURPOSE OF IMPEACHMENT—DISCRETION OF COURT.

Recalling a witness after he has been on the stand and fully examined and cross-examined by accused, for the purpose of getting him to contradict an alleged statement made by himself so as to impeach him by another witness, is a matter peculiarly within the trial court's discretion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1109; Dec. Dig. § 332.\*]

#### 4. INTOXICATING LIQUORS (§ 39\*)—LOCAL OPTION—ADOPTION OF LAW—PROOF.

While, under the statute, contests of local option elections must be taken in due time, the court should, in every prosecution for violating the local option law, require the introduction of formal orders of the commissioner's court adopting the local option law in the county.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 33; Dec. Dig. § 39.\*]

#### 5. CRIMINAL LAW (§§ 1054, 1063\*)—PRESENTATION OF QUESTIONS BELOW—EXCEPTION—MOTION FOR NEW TRIAL.

Where accused, in a prosecution for violating the local option law, does not except to proof of the adoption of the law by parol evidence, and did not raise the question in its motion for new trial, an objection to proving the adoption of the law in that manner will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2662, 2679; Dec. Dig. §§ 1054, 1063.\*]

### On Rehearing.

#### 6. CRIMINAL LAW (§ 304\*)—EVIDENCE—JUDICIAL NOTICE—ADOPTION OF LOCAL OPTION LAW.

The Court of Criminal Appeals cannot take judicial notice that the local option law has been adopted in any county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 706; Dec. Dig. § 304.\*]

#### 7. CRIMINAL LAW (§ 1141\*)—APPEAL—PRESUMPTIONS—ADOPTION OF LOCAL OPTION LAW.

The Court of Criminal Appeals cannot assume, in a prosecution for violating a local option law, that the law has been adopted in any county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3014; Dec. Dig. § 1141.\*]

#### 8. INTOXICATING LIQUORS (§ 39\*)—LOCAL OPTION — EVIDENCE OF ADOPTION — SUFFICIENCY.

In a prosecution for violating the local option law, a statement by a witness that there was a local option law in the county was insufficient to show that fact so as to sustain a conviction for its violation.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 33; Dec. Dig. § 39.\*]

Appeal from Jones County Court; Jas. P. Stinson, Judge.

Walter Bills was convicted of selling intoxicants in violation of the local option law, and he appealed. Reversed and remanded for further proceeding.

See, also, 86 S. W. 1012.

Jno. W. Scott, J. W. Boynton, and J. B. McMahon, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the county court of Jones county on a charge of selling intoxicating liquors therein in violation of the local option law. The jury assessed his punishment at a fine of \$100 and 60 days' confinement in the county jail.

1. The testimony in the case is quite conflicting. The witness H. Starbeck testified directly and positively to a sale by appellant to one Kelly of two quarts of whisky for \$5, and that while the parties were in a room in a hotel playing cards the whisky was delivered and the money paid. Other witnesses testify that the whisky was in fact produced by appellant, but it was a matter of accommodation, and was not a sale. Some of them say that Kelly did give appellant \$5 about the time the whisky was brought in, but that it was in the nature of a gift or loan to enable him to take part in the gambling then in progress. We deem it unnecessary to review the facts in detail. The testimony of Starbeck makes a clear case. It must be confessed that the testimony of the other witnesses is calculated to challenge belief, and it is not to be wondered that the jury credited the testimony of Starbeck.

2. During the progress of the trial, and after he had testified and had been dismissed from the stand as a witness, counsel for

appellant requested the court to permit them to recall the witness Starbeck, and ask him if it was not true that he was mad at the defendant, and if he did not say at the depot on the Monday morning after he and appellant played cards in the hotel that he would get even with the defendant; that at the time counsel informed the court that they wished to ask said witness this question for the purpose of impeaching said witness, who would say that he did not make any such statement, and that they proposed to show, and could show by the express agent at Hamlin, that he did make the statement above referred to, and that the court refused to permit the witness to be recalled. The bill does not show when this matter occurred, or how it arose. Starbeck was examined at considerable length both on direct examination, cross-examination, and re-examination. It is not shown when counsel came into possession of information touching the conversation inquired about, nor is it shown in the bill that Starbeck was accessible, or that the proceedings of the court would not have been delayed perhaps unnecessarily to have had him recalled. Matters of this sort are so peculiarly within the discretion of the trial judge that we feel we should not reverse a case unless all the facts were shown and it were apparent that there had been such an abuse of the court's discretion as would authorize and justify us in interfering. In this connection it is to be noted that the express agent named in the bill was in fact introduced and testified on the stand to all the matters referred to in the bill, so that in any event we feel that there could have been no injury done appellant by the refusal of the court to permit the recall of Starbeck.

3. Counsel further raise the question in their brief that there was no proof offered that the local option law was in effect in Jones county. This matter was not raised or hinted at in their motion for a new trial. There were no formal orders, judgments, or decrees of the commissioners' court of Jones county admitted in evidence putting local option in effect therein. It was proven by the witness Starbeck, without objection, that local option was in effect in Jones county. We have heretofore held (*Manning v. State*, 46 Tex. Cr. R. 326, 81 S. W. 957) that even a charge of the court which misdirects the jury in regard to the punishment is not reversible error unless excepted to, and this case has been followed, and generally we have disregarded grounds of reversal and refused to reverse where the matter is not called to the attention of the court below, either by exception or in the motion for new trial. In this connection we feel that we should say that, while, under the provisions of the law enacted by the last Legislature, contests of local option elections must be timely had, and in the absence of such contest their regularity would be presumed, the court should, never-

theless, in every case require the introduction of formal orders of the commissioners' court of their several counties putting local option into effect. However, where a party stands by and permits the proof without objection to be made by parol testimony, and makes and raises no question touching the matter in his motion for a new trial or by exception, and waits to raise the matter on appeal, we do not feel that he should be then heard to complain.

The judgment is affirmed.

#### On Rehearing.

The grounds urged in appellant's application for rehearing are meritorious, and it is obvious, upon further reflection, that the motion must be granted. As stated in the opinion in this case, there was some proof that local option was in effect in Jones county. There was no evidence introduced in the case of any orders, judgments, or decrees by the commissioners' court of that county putting local option in effect. The only proof that the sale of intoxicating liquors had been prohibited in that county rests upon this statement in the testimony of the witness Starbeck: "Yes, sir; there is a local option law in Jones county." It is well settled that we are not authorized to assume, nor can we judicially know, that the local option law is in effect in any county in this state. As stated by Judge Davidson in the case of *Craddock v. State*, 88 S. W. 347, 13 Tex. Ct. Rep. 637: "These local option laws are special laws and must be put into operation in the territory in the manner specified in the statute, and the court does not judicially know when these laws are put into operation. These are matters to be proved." It is not contended by counsel for appellant that this might not, in the absence of an objection, be shown by parol testimony; but their objection goes rather to the sufficiency of the evidence, or, as they put it, "the quantum of the proof." To say that there is a local option law in Jones county is not of necessity to affirm that there is, throughout the entire county, or in the particular portion where this alleged offense was committed, a law prohibiting the sale of intoxicating liquors, since there might be a local option law in some political subdivision of the county less than the whole. Besides, local option elections may be held for other purposes than to prevent the sale of intoxicants. Again, the fact that a witness testifies that there is a local option law in force in a county does not carry with it the proof that such law was in existence at the date of the alleged offense. The whole case was tried as if the law were in effect in the county. The court so instructed the jury. In making up the statement of facts, however, whatever proof there may have been in respect to the matter was omitted, except the single declaration above referred to. This is so indefinite, slight, and meager as, we think, furnishes no

just basis upon which to rest a conviction.

It is therefore ordered that the judgment of conviction be set aside, and the cause remanded for proceedings in accordance with law.

### PEMBERTON v. STATE.

(Court of Criminal Appeals of Texas. March 10, 1909.)

#### 1. CRIMINAL LAW (§ 595\*)—CONTINUANCE—SUFFICIENCY OF APPLICATION.

An application for continuance, in a prosecution for assault to murder, alleged: That the only persons present at the time the offense was committed were the injured man and wife, accused, and a small boy; that the injured persons had not recovered; that the wife was unable to stand a cross-examination, and her appearance on the stand would prejudice accused; that the offense was of such recent occurrence that the minds of the jurors were not in condition to give an impartial trial; that certain persons were absent who would testify to bad feeling between accused and others who had sent threatening communications through the mail to accused, and would testify that accused was the first to arrive after the commission of the offense, and cared for the injured wife's wounds, that they seemed to be on the best of terms, and that she told accused that she did not know who committed the offense; and alleged that accused believed that the injured persons would testify that accused committed the offense. *Held*, that the application was insufficient, as the testimony of the absent witnesses was too remote.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1323; Dec. Dig. § 595.\*]

#### 2. HOMICIDE (§ 174\*)—ASSAULT TO MURDER—ADMISSIBILITY OF EVIDENCE.

In a prosecution for shooting a man and wife while in bed, with intent to murder them, where the testimony showed that shots of different sizes were found in the bed clothing as well as in the bodies of the injured persons, testimony was admissible to show that a battered piece of lead was found on the bedclothes the morning after the shooting, though it was not shown that it touched either of the injured persons, nor that it was fired from accused's gun, nor that he had any connection with it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359, 364; Dec. Dig. § 174.\*]

#### 3. CRIMINAL LAW (§ 459\*)—EVIDENCE—OPINION EVIDENCE—RECENT FIRING OF GUN.

Where a witness properly qualified, he was competent to testify that he had, the day after a shooting occurred, examined the shotgun of the person accused of the shooting, and that it appeared to have been recently fired.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1048-1050; Dec. Dig. § 459.\*]

#### 4. CRIMINAL LAW (§ 419\*)—EVIDENCE—HEARSAY.

In a prosecution for assault to murder, testimony of a proffered witness living near accused that another neighbor was absent from home on the night of the assault, and, upon being asked by witness where he was, became embarrassed and answered that he was at the home of a certain person, which witness knew was not true, was properly excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 973; Dec. Dig. § 419.\*]

#### 5. CRIMINAL LAW (§ 723\*)—CONDUCT OF TRIAL—ARGUMENT OF COUNSEL.

It was not ground for reversal that the state's counsel, in his closing argument in a prosecution for assault to murder, said: "Are you going to turn this defendant loose? If you do not convict the defendant in this case, then you had as well close the doors of justice, burn up the law books, tear down the courthouses, and let anarchy reign in this country"—though the court refused to reprimand him and to charge the jury not to consider the statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1676; Dec. Dig. § 723.\*]

#### 6. HOMICIDE (§ 257\*)—ASSAULT TO MURDER—EVIDENCE.

Evidence *held* sufficient to sustain a conviction of assault to murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 543; Dec. Dig. § 257.\*]

Appeal from District Court, Jack County; J. W. Patterson, Judge.

H. Pemberton was convicted of assault to murder, and appeals. Affirmed.

Nicholson & Fitzgerald, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of assault to murder, and his punishment assessed at confinement in the penitentiary for five years.

The facts in this case show, in substance, that appellant owned a farm in Jack county and had rented the same, or part thereof, to Will Camp and his wife, the injured parties. One Sunday night after 12 o'clock, while Camp and his wife were sleeping in their bed, some one from a window shot into the room, wounding both Camp and his wife. The shots appeared to have been on a line with the bed, entering from the foot, passing up between Camp and his wife, wounding one in the right side and the other in the left side. They were both asleep at the time, lying upon their backs. Mrs. Camp identifies appellant as the man who did the shooting. When the shot or shots were fired, Camp and wife jumped up, ran into a small side room, and Camp, rushing on out, ran over to where a man named Cody lived. As he passed out at the gate, he passed appellant, who had a gun, and holloed back to appellant that he was going after a doctor. Will Camp says that appellant stated, as he (witness) started to leave the room, "I be damned if I don't finish the job," and this statement of appellant scared him, and he ran off. After Will Camp left the place, appellant administered to Camp's wife as best he could, binding up the wounds. She swears positively and unequivocally that appellant shot her; that she saw him standing at the window when he did so. There are some contradictions of her testimony in the record; some testimony to the effect that she did not know who shot her. The physical facts somewhat contradict her testimony also, but these questions have been passed upon by the jury.

Bill of exceptions No. 1 shows that appellant made his first application for continuance, which states, among other things: That this is a prosecution against him for assault with intent to murder; said offense being alleged to have been committed on the night of the 24th day of August, 1908. That on Monday, August 25, 1908, defendant was arrested and placed in the county jail at Jacksboro, Tex., and has been so confined ever since. Defendant further states: That the facts complained of in the indictment were alleged to have occurred at 1 o'clock of the morning of the 24th day of August, 1908, at the house of appellant; that the only persons present at said time and place to testify in this case were the injured parties, Will Camp and his wife, and a small boy, and the appellant; that the said witnesses Will Camp and his wife have not yet recovered from the injuries inflicted upon them at the said time; that the said witness Mrs. Camp has not yet sufficiently recovered to be able to sit up all the time; that the wounds received from said gunshot are not yet healed, and she is yet weak, pale, and emaciated; that she is unable to stand the ordeal of a rigid cross-examination, such as defendant in this case has a right to; that she is still under the treatment of the doctor, and no longer than yesterday, September 15th, had a doctor visit her and administer to her ailments and afflictions; that her condition and appearance upon the witness stand would greatly prejudice the rights of appellant before the jury and would tend to and would inflame their passions and prejudices against him; that it would be unjust and inequitable to require defendant to go to trial at this term of court; that the offense herein charged was of such recent origin that the minds of the jurors of the county had not sufficiently recovered from the shock and horror of such an offense as to calmly, coolly, fairly, and justly weigh the facts and circumstances connected therewith as to give the defendant herein that fair and impartial trial contemplated by the Constitution and laws of Texas; and, furthermore, that he cannot go to trial for the want of the testimony of F. W. Comstock, Frank Comstock, Mrs. M. J. Deck, Mrs. Cody, all of whom are very material and important witnesses to the defendant herein, and all of whom reside in Jack county, Tex.

Upon the point of diligence appellant shows: That on the 11th day of September, 1908, he applied for and had issued a subpoena for the witnesses. That said subpoena was duly served by a proper officer of Jack county, Tex., on said witnesses. That defendant expects to prove by the witness W. F. Comstock: That he resided near the home of defendant, and was well acquainted in that community; that he knew of a bad feeling that existed between the defendant and one Jim Deck and one A. L. Standard, and certain other parties in that community; that he knew of certain threatening letters, cards,

and communications that had been sent through the United States mail to defendant; that these parties had threatened to take the life of the defendant in the nighttime if he did not leave the community; that these parties had told him that they expected to take the life of the defendant or injure him by shooting him some night while he was asleep at his home. That defendant expected to prove by the absent witness Frank Comstock: That he was the first person to arrive at the house where the shooting occurred after the shooting; that he had a conversation with prosecuting witness, Mrs. Camp; that in said conversation he inquired of the said Mrs. Camp if she knew, or had any idea, who did the shooting, and that in reply thereto she stated to him that she did not know. That defendant expected to prove by the witness: That he found defendant and said prosecuting witness and her little boy at said house where the shooting was done; that the defendant was administering to her wounds, caring for and looking after her; that defendant was the only one that remained with her after the shooting the remainder of the night; that they seemed to be on the best of terms; that said witness knows of an ill feeling that then existed between the defendant, Jim Deck, A. L. Standard, and Albert Prevo; that he was present when defendant received a threatening letter through the mail. That defendant expected to show by Dr. Greer: That he is a regular practicing physician; that as such he was called on the morning of the 24th of August, 1908, to the home of Mr. Cody to dress the wounds of the witness Will Camp; that he examined said wounds; that they were made by a gunshot; that the shot ranged from the hip towards the face and head of said prosecuting witness. That he expects to prove by Mrs. Deck a bad feeling existing between appellant and Jim Deck, A. L. Standard, Albert Prevo, and Charlie Comstock, and that the said Jim Deck wanted to get possession of defendant's property. That he expects to show by Mrs. Cody that Will Camp came to her house and said that he did not know who did the shooting. That he verily believes and understands that Will Camp and his wife will testify that he (appellant) did the shooting. Frank Comstock testified in the case.

There is no merit in this motion for continuance. The absent testimony is too remote. See *Kunde v. State*, 22 Tex. App. 65, 3 S. W. 325.

Bill No. 2 shows: That the state proved by Dr. Ledbetter that he found a certain piece of lead on the foot of the bed on which the prosecuting witnesses slept, the next morning after the shooting occurred, and the witness also exhibited said piece of lead; that said piece of lead was a flat piece of lead, very much battered and old. Appellant objected to the same, because it was not shown that said piece of lead ever touched either of the prosecuting witnesses, or that

the same was fired from appellant's gun, or that appellant ever had any connection therewith. This testimony was admissible. The testimony shows that shot of different sizes were found in the bed clothing as well as in the bodies of the man and his wife. The mere fact that this particular piece of lead did not enter the bodies, but was found on the clothing of the bed, would not render it inadmissible.

Bill No. 3 shows that the state proved by J. S. Newman that he examined appellant's shotgun the next day after the shooting occurred, and that the same showed to have been recently fired, to which counsel for appellant objected because it was a conclusion and an inference of the witness and prejudicial to appellant and invaded the province of the jury, in that the facts upon which the witness based said inference and conclusion should have been stated, and the jury have been allowed to draw their own conclusion. The record shows that the witness qualified to testify, and the testimony was admissible.

Bill No. 4 shows: That appellant offered to prove by the witness Ed Brown that he lived in the neighborhood and near appellant's home; that one Charlie Comstock also lived near appellant's home, where the shooting occurred; that there was bad feeling existing between prosecuting witness and said Charlie Comstock; that said Charlie Comstock was away from his home on the night of the shooting; that, on being asked by said witness where he was at the time of the shooting, said Comstock became very much embarrassed and excited, and finally answered that he was at the home of one Deck; that said witness knew that he was not at said Deck's home when the shooting occurred; that said witness would have testified to all of said facts. State's counsel objected on the grounds that same was hearsay and immaterial. There was no error in the ruling of the court.

Bill No. 5 shows that state's counsel in his closing argument used the following language: "Gentlemen of the jury, are you going to turn this defendant loose? If you do not convict the defendant in this case, then you had as well close the doors of justice, burn up the law books, tear down the court-houses, and let anarchy reign in this country." To which counsel for appellant objected because said remarks were outside of the record, highly prejudicial to the rights of appellant, were inflammatory, and well calculated to, and did, excite and inflame the prejudices and passions of the jury against appellant, and that the court refused to reprimand counsel for making the remarks, and refused to instruct the jury not to consider same. The above is a pretty strong statement to make in argument, that justice should be dispensed with, and the courthouses burned up, rather than to turn the appellant

loose, or rather than find appellant not guilty; but we would not be justified in reversing cases because state's counsel use extreme illustrations in enforcing the fact that the evidence authorizes the conviction of a defendant.

Appellant's counsel strenuously insist that the evidence is insufficient to support this verdict. We have carefully reviewed all of the evidence, and must say that we believe the jury were amply warranted in their verdict.

Finding no error in the judgment, the same is in all things affirmed.

## HARRIS v. STATE.

(Court of Criminal Appeals of Texas. March 10, 1909.)

### 1. INDICTMENT AND INFORMATION (§ 125\*)—DUPLICITY—ROBBERY.

An indictment for robbery, alleging in one count that by threats of personal violence, after inducing the prosecutor to come to his house, defendant took from him \$12, and that defendant then compelled the prosecutor to go with him to a bank some 16 miles distant and draw therefrom and give to him \$100, charges two distinct offenses.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 125.\*]

### 2. ROBBERY (§ 23\*)—EVIDENCE—PUTTING IN FEAR.

On a trial for robbery in compelling the prosecutor to draw money from a bank and give the same to defendant, evidence is admissible that, just before going to the bank, defendant had, by putting the prosecutor in fear, taken a sum of money from him, and that defendant continued in control of the prosecutor until after the money was procured from the bank.

[Ed. Note.—For other cases, see Robbery, Dec. Dig. § 23.\*]

### 3. INDICTMENT AND INFORMATION (§ 132\*)—DISTINCT OFFENSES—ELECTION.

Though an indictment does not show on its face that it embraces distinct and severable offenses, where the evidence discloses distinct offenses, the prosecution should be required to elect on which offense it will rely.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 132.\*]

### 4. CRIMINAL LAW (§ 1167\*)—REVIEW—FAILURE TO REQUIRE ELECTION—CURING ERROR BY VERDICT.

The imposition of the lower punishment allowed by law does not cure the error of refusing to require the prosecution to elect between distinct offenses shown by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1167.\*]

### 5. CRIMINAL LAW (§ 369\*)—EVIDENCE—DISTINCT OFFENSES.

On a trial for robbery from the person by threats and putting in fear, evidence is not admissible of subsequent acts of defendant which constitute distinct robberies.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

### 6. CRIMINAL LAW (§ 783\*)—TRIAL—INSTRUCTIONS—LIMITING PURPOSE OF EVIDENCE.

Where the evidence in a prosecution for robbery shows that just prior to the offense charged, but as a distinct transaction, defendant

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

robbed the prosecutor of another sum of money, such evidence should be limited by instructions to the intention and purpose of defendant, and as explanatory of the conduct and state of mind of the prosecutor.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 783.\*]

**7. CRIMINAL LAW (§ 778\*)—INSTRUCTIONS—BURDEN OF PROOF.**

An instruction, which shifts the burden of proof by requiring the jury to believe affirmatively as true the facts recited before they can acquit defendant, is erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1849; Dec. Dig. § 778.\*]

**8. CRIMINAL LAW (§ 782\*)—INSTRUCTIONS—FACTS TO BE FOUND.**

An instruction reciting facts as developed by the evidence, and requiring the jury to believe all of such facts before defendant would be entitled to an acquittal, is erroneous.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 782.\*]

Appeal from District Court, Howard County; James L. Shepherd, Judge.

John M. Harris was convicted of robbery, and appeals. Reversed.

Goodson & Goodson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Howard county upon a charge of robbery. There were two counts in the indictment. The first only was submitted to the jury. This count, omitting the formal parts thereof, was as follows: "That John Harris on or about the 4th day of February, 1907, and anterior to the presentment of this indictment, in the county of Howard and state of Texas, did then and there unlawfully and willfully make an assault upon the person of J. J. Burleson, and then and there by said assault, and by violence to the said J. J. Burleson, and by putting the said J. J. Burleson in fear of life and bodily injury, did then and there fraudulently take from the person and possession and without the consent and against the will of the said J. J. Burleson, \$12 in money of the value of \$12, and \$100 in money of the value of \$100, the said property then and there being the corporeal personal property of the said J. J. Burleson, with the fraudulent intent then and there of him the said John Harris, to deprive the said J. J. Burleson of the value of same and to appropriate the same to the use and benefit of him the said John Harris." On a trial had in the court above named on the 11th day of March, 1908, the jury found appellant guilty and assessed his punishment at confinement in the penitentiary for a term of five years.

The facts of the case are very unusual and are, indeed, strangely singular. Burleson was shown by the evidence to have been quite an old man, almost 70 years of age. He resided some 16 or 18 miles from the town of Big Springs on a farm and had suffered some years before from something in the nature of

paralysis and perhaps some form of rheumatism. The rigid cross-examination to which he was subjected impresses us that his memory as to many of the details of the events described by him was very hazy and uncertain, though his testimony touching the substantial facts of the robbery was not so variant or confusing as perhaps to destroy the effect of the weight to be given the evidence. He testified, in substance: That on the day of the robbery the appellant, who had been working for him, and to whom he had recently sold his cotton crop, came to his place, and after some conversation said to him that he had some liniment at his house, and that if he (Burleson) would come down he would rub his back. That he went to appellant's house with him and sat down by the stove. That appellant presented a gun that he had just before borrowed from Burleson, and said to him, in substance, that he had tried to disgrace his family, and that he had to pay for it, and demanded his money. That he finally produced his pocketbook, which contained a \$10 bill and some silver, and appellant's wife took the pocketbook and got the money out of it. That appellant then asked him for a check which had recently been given him in payment of some corn, and this was obtained from the pocketbook by appellant's wife. Thereupon appellant said to him that he had to give him a check for \$100 which he had in the bank at Big Springs. That he could not write, and appellant turned the gun over to his wife, who still held it pointed on him, and appellant wrote the check for \$100 and compelled him (Burleson) to sign it. That after this, and by the use and exhibition of the weapon, accompanied by threats of taking his life, appellant compelled him to get in the wagon on the front seat, with his wife driving and appellant sitting or standing behind him with the gun, and go to the town of Big Springs, some 16 or 18 miles distant. That after they got to Big Springs, which was at about 12 o'clock, or probably some time thereafter, they drove to near where the bank was, and appellant and Burleson went into the bank, Burleson got the \$100, came out to the front of the bank, and gave it to appellant. That after this they went around town together, going upstairs to one place, and later to a saloon, where they took a drink, and, after something like a half hour or an hour, got in the wagon and drove home. On this drive appellant and Burleson sat together in the seat. That after they had returned to Harris' house, appellant compelled him to give him (appellant) a bill of sale to a couple of mules that he owned, and that after this was done, and after refusing the request of Burleson to turn his gun over to him, Burleson was permitted to go to his house. But during all this time Burleson says that he was in fear of his life and did and performed all and singular the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



acts and things, which we have briefly stated here, in fear and on the belief that his refusal so to do would end in his death.

In his charge to the jury, the court instructed them, among other things, that if appellant "did then and there fraudulently take from the person and possession and without the consent and against the will of the said J. J. Burleson \$12 in money, of the value of \$12, and you further believe that he continued to put the said J. J. Burleson in fear of his life and bodily injury, and did then and there fraudulently take from the person and possession and without the consent and against the will of the said J. J. Burleson \$100 in money of the value of \$100, the said property then and there being the corporeal personal property of the said J. J. Burleson, with the fraudulent intent then and there of him, the said Jno. Harris, to deprive the said J. J. Burleson of the value of the said \$12, and the said \$100, and to appropriate the same to the use and benefit of him, the said John Harris, then you will find the said John Harris guilty of robbery and assess his punishment at confinement in the state penitentiary for life, or for a term of not less than five years."

The questions raised on appeal are presented under many forms, are well raised, and on oral argument before the court were discussed with such clearness as to be of much assistance to us in their determination. Except the last matter discussed, all the questions revolve around the same general subject. The first four bills of exception relate to and present different views and aspects of the same general question. It is stated in the first bill of exceptions that, when the state had begun its testimony, it put as its first witness on the stand the alleged injured party, J. J. Burleson, and the said Burleson testified as follows: "The defendant told me that morning that he had some liniment, and if I would come to his house he would rub my back, and I went to his house and went in and took a seat by the stove and talked to his wife until he came. At the time of telling me to come to his house, defendant had borrowed my shotgun. I had been to his house but a very short time, when defendant came to the door opposite where I was sitting and squatted down on his feet in front of the door and threw down on me, and right in my face, the shotgun he had borrowed from me, which was loaded with duck or rabbit shot, and said to me: 'You God damned old son of a bitch, you have tried to disgrace my family, and you have got to pay for it. I want your money.' I said to him: 'Mr. Harris, what do you mean? What have I done?' And he said: 'By God, I want your money.' And he came in the house, still holding his gun cocked on me, and told me to hand over my money to his wife, and I pulled out my purse and handed it to her, and she took out of it a \$10 bill and a silver dollar and some smaller silver change and kept pos-

session of it and handed the purse back to me. The defendant then said to me: 'You have got a check. By God, hand that over.' And I turned over to him the check for \$47.50 that had been given me on the First National Bank of Big Springs, Tex., by a party some days before, and which the defendant knew of. He then said: 'You have got \$100 in the bank, and I must have that.' And I had \$100 in the bank, and he then said: 'Write me a check on the bank for that \$100.' And I told him I could not write, and he said, 'By God, he could,' and he then handed the gun, which was still cocked, and which up to this time he had kept leveled at me, to his wife, and she then held it on me while the defendant sat down and wrote out a check on the bank for \$100, and told me to sign it, which I did. After signing this check, he told me, by God, I had to go to Big Springs with him to cash the check, and that he was going to take me along in his wagon, and he was going to take the gun along, and if on the road there or while in Big Springs, or on the way back, I in any way tried to raise an alarm, or give him away, or not do just as he told me to, that he intended to kill me, and he made me get in his wagon and his wife sit on the front seat by me and did the driving, and he and his girl sat behind, where he had the shotgun and his pistol, which in the house I had seen him, before we started, place in the waistband of his pants. And in that way we came to Big Springs, a distance of about 16 miles, and drove the wagon to a point near the West Texas National Bank across the street just opposite the First National Bank, when he made me get out, and he went right along with me, and we both entered the outer door and into the First National Bank, and the defendant stood somewhere close to the other door, and I went either to the cashier's window, or into the private office of the president, or through that on into the main room where the employes worked, and had Mr. Price, the cashier, to write me out a check on my account for \$100, and I signed it, and Mr. Price gave me the \$100, and I went on out, and the defendant was standing about where I had left him, and I gave him this \$100, and he put it in his pocket, and then told me to come with him, and we went down the street about 50 yards perhaps, and at the foot of a stair steps there we met the defendant's wife and child, and we all went up the steps to the upstairs and stood around there a few minutes, when the defendant and me came down the steps and crossed over the street and went into John Bond's saloon, where the defendant bought a bottle of whisky, and then we went out and walked on up the street to where the wagon was, and in passing a bank corner Mr. Nowlin spoke to me, at which time the defendant said, 'Come on,' and I went on with him, and we got in the wagon; the defendant getting in on the seat with me, and the wife and child sitting behind; and we drove back home, a

distance of about 16 miles. When we got home and got out of the wagon, the defendant said I had to give him a bill of sale to one pair of my mules, and the defendant took some paper and a pencil and, leaning against a wagon bed, wrote out the bill of sale offered in evidence. I signed it, and he put it in his pocket, and then he told me I could go on over to my house, telling me in parting that if I ever said anything about what occurred, or in any way give him away, that he would kill me."

The witness testified that all of the acts and things of every kind covered by this testimony above, from the time Harris threw the gun down on him in the morning at his door, until he got back home and signed and delivered the bill of sale, was done and submitted to by him by reason of the assault made upon him and the threats towards him of the said Harris, and for fear that if he did not obey him in all of the particulars named that the said Harris would kill him, as he had threatened to do, and that none of the acts were done with his consent, but all against his consent and against his will and through fear of his life from the acts and threats of Harris, and that in going to Big Springs and going to the different places named in his testimony above, and doing all the acts stated in his testimony while there, and in coming back home and in signing and delivering the bill of sale, he was under arrest and duress, and was obeying the threats and directions of the said Harris through threats on his life, and that while at Big Springs, and after Harris had gotten the money, he asked the said Harris, as he had got the money, to release him and let him go, which Harris refused to do, but with further threats on his life told him that he had to keep with him and go back home with him, and that if he tried to get away, or made any effort to get away, he would kill him. And at the time of the testimony of the said Burleson as above stated, the district attorney and private counsel for the state engaged in said prosecution agreed and stated to the court that in fact the \$12 in the first count in the indictment alleged to have been taken from the said Burleson was the \$12 taken out of his purse in the defendant's house by the defendant's wife, and the \$100 alleged in said count to have been taken from said Burleson was the \$100 got by said Burleson on his check in the First National Bank at Big Springs and handed to the defendant, as shown in his testimony, and that the indictment in his case in the count on which this trial is being had, by the use of the \$12 and the \$100 alleged to have been taken, covered and intended to cover the respective takings of said sums as is above stated.

Thereupon, at the conclusion of this testimony, appellant moved the court to quash, set aside, and dismiss the said first count on which this prosecution was being had, be-

cause, as shown by the evidence and the admitted facts, there is included within the same two separate and distinct offenses, and that such separate and distinct offenses cannot be prosecuted against the defendant in one trial under said count in the indictment. This being overruled, counsel for the appellant then moved the court to require the state to elect on which one of said two separate offenses the state would prosecute him, so that in this case he might only be prosecuted for one of said offenses and might be informed as to which one of said offenses he was being prosecuted for; or, in the event the court would not so require such election, that the court would make such election by announcing that he would only submit one of said offenses in its charge to the jury and would state which one of said claimed separate offenses it would submit, in order that the defendant might be informed as to which offense he was on trial for, and that he might know what evidence as to other or different claimed offenses, that he might object to the evidence being introduced against him on this trial, stating to the court that he desired to object to the introduction of any evidence of any other or further offenses than the evidence of the one on which he is upon trial, and that the evidence of the said Burleson discloses three separate offenses, and, unless he knew just which offense would be submitted, he would not know how to object to the evidence of the other offense, and that the evidence of no other offense than that for which he was on trial would be admissible against him. The court refused to grant the motion and refused to state or indicate that it would by its charge submit the matters covered by Burleson's testimony as separate offenses, or treat them as separate offenses, or submit in its charge one of said transactions as a separate offense. This motion being overruled, counsel for appellant thereupon moved the court that, in so far as the charge submitted to the jury on what the defendant claimed to be the separate offenses committed as to the \$12, it withdraw and strike out from the consideration of the jury any and all of the evidence of the said Burleson that related to what the defendant claimed to be the separate offense committed by the taking of the \$100 at Big Springs, Tex., and what he claimed to be the separate offense committed on the return home in the taking of the bill of sale; and in so far as the court intended to submit what the defendant claimed to be a separate offense committed in the taking of the \$100 at Big Springs, that the court strike out and withdraw from the consideration of the jury all the evidence of the said witness relating to what he claimed to be the separate offense in taking the \$12 in the defendant's house, and all evidence in relation to the taking of the bill of sale on the return home, because and for the reason that, as to said matters or other claimed separate offenses, the same

were not admissible on the consideration by the jury of the offenses as above respectively stated, and as the same were separate and distinct offenses, and were not *res gestæ* of either of the other said offenses, nor necessary to identify the defendant, nor necessary to explain and illustrate the intent with which either of said other offenses were committed, but as to any particular offenses submitted, all three of said transactions were distinct and independent crimes, not a part of the *res gestæ* of each other, nor so connected with each other as to be illustrative of the intent of the defendant in committing either one of said offenses, and that the intent of the defendant could not be a question at issue, and that such evidence was calculated to and would prejudice the defendant before the jury in making his defense and would inflame the minds of the jury against giving him a fair and impartial trial in arriving at the conclusion as to whether or not he was in fact guilty of the offense submitted and each of said matters, and the evidence so erroneously submitted would be considered by the jury as evidence of his guilt of the particular transaction of which he would be placed on trial. This motion was by the court overruled, and thereupon, and in connection therewith, counsel for appellant asked the court that, in so far as the evidence of the said Burleson related to each one of the said claimed distinct offenses, that he would in his charge to the jury instruct the jury that, in considering the defendant's guilt or innocence as to either one of said offenses claimed to be distinct crimes by him, as would be and were afterwards submitted by the court to the jury, that the court should limit the jury in its consideration of the said evidence as to said other offenses, and instruct them that they could not consider the same for the purpose of determining the fact of his guilt as to the \$12 transaction, and could consider the same alone for the purpose of determining the intent of the defendant, if they believed from the evidence that it would illustrate said intent, or prove the identity of the appellant, if his identity was in question, and that the court should limit the consideration of the jury to the only purpose for which they could consider the same as contemporaneous offenses. A similar charge was requested to be applied to the matter of the alleged robbery of the \$100 at Big Springs, as well as the act and transaction touching the securing of the bill of sale, which motion was by the court overruled.

The action of the court and the error claimed to exist therein is well analyzed and stated in the argument filed herein on behalf of appellant. It is, in part, as follows: "There was no question of identity at issue, either as to the identity of the defendant or the identity of the property alleged to have been taken. There was no question at issue as to the intent of the defendant in the

acts alleged. Each were too widely dissociated in point of place, time, and all other elements for one to be a part of the *res gestæ* of the other. The proof of the commission of either one of them does not of itself furnish any evidence as to the commission of either of the others, and neither is a component or relative circumstance connecting the defendant with the commission of either of the others. There was no question of system, and the matter of system, as meant by the decisions, could not apply. According to Burleson's testimony, a separate and distinct robbery was committed upon him early in the morning at appellant's residence 18 miles from Big Springs, and this robbery committed in appellant's house early in the morning is complete within itself, a perfected crime, and does not depend upon or require any aid from any of the other matters about which Burleson testified. Having completed said robbery, and being fully guilty of a completed and perfected crime, the appellant (according to Burleson's testimony) committed the further crime of false imprisonment, as defined by the statutes of this state, in taking charge, under threats of death, of Burleson's person, and holding him under duress and arrest and taking him to the town of Big Springs, 18 miles distant, and which travel covered a period of several hours. Arriving at Big Springs, and having committed another distinct crime, that of false imprisonment, the appellant (according to Burleson's testimony) exhibits to him and threatens to use deadly weapons, and by such assault and violence and use and exhibition of said deadly weapons commits another separate and distinct crime by compelling Burleson to go into the bank and get him \$100 out of the bank, and delivering it to the appellant. Now this robbery committed at the bank, in order to make it an offense complete within itself, required no aid or assistance from any of the matters that preceded it or followed it. Waiving the question as to whether a separate offense of false imprisonment was committed in taking Burleson back 18 miles to appellant's home that evening, or whether that and the arrest during the entire day was one offense, it does appear that the robbery committed on Burleson, according to his testimony, of the bill of sale to the mules late that evening at appellant's house, after they had spent several hours in traveling 18 miles from Big Springs to appellant's home, was a separate offense requiring no aid to make it such from any of the facts or transactions preceding it. Why, then, can it be said that, on a trial for either of these offenses, evidence of the other offenses is admissible? And if for any reason these other offenses can be said to have been admissible, why should the court refuse to instruct the jury as to the purpose for which they could be considered? It is true that the jury gave the defendant the

lowest punishment, but the recital of this terrific abuse and long-continued criminal aggression on Burleson may have been forceful in the minds of the jury in arriving at his conviction. It is a part of the philosophy of human nature that the very atrocity of a crime, by prejudicing the mind against the alleged author, becomes a powerful adjunct in bringing the mind to a belief of his guilt."

It will be noted, as stated above, that the questions raised are presented in many forms and from different angles. We have been somewhat surprised at how slight is the discussion in the books of what constitutes separate offenses, and of what may constitute one and the same offense. A discussion of these matters has usually arisen in cases where pleas of former conviction or former acquittal have been interposed and in respect to the doctrine of carving, as understood in this state. However, it seems to us on principle, and we find no authority to the contrary, that it is clear that the robbery, if there was a robbery, of the \$12 at appellant's house, was in and of itself a complete and completed transaction for which, under a proper indictment and on sufficient testimony, a conviction would have been as inexorable as any fact can be and a conviction which, under the law, must have been held sufficient and authorized. It seems equally certain that on a proper charge, and on legal proof, that the fact of the robbery of \$100 at Big Springs was of itself and within itself a complete and completed transaction. It is also true that, unless defeated by the fact that there was no actual possession taken thereof, the transaction of the taking of the mules by appellant was a complete and completed transaction, for which on a proper charge a conviction could have been sustained. It seems clear in reason, and this is well supported by authority, that, in view of all the circumstances of the transaction in respect to the \$100 taken at Big Springs, it may be competent and would be permissible, if the charge of robbery had been laid in respect to that transaction, to have introduced in evidence the former robbery of \$12, the antecedent circumstances, the putting in fear of his life, and the arrest and detention of Burleson, and all the circumstances, as bearing on or having a relation to the transaction at Big Springs, and as in a measure, explanatory of Burleson's failure to make an outcry for the reason that the transactions at appellant's home preceded and led up to the robbery at Big Springs. We think that, the indictment on its face, showing the transaction not to be severable and distinct, when the proof disclosed this fact, the indictment would not necessarily be defeated; but it is equally clear that on timely demand the court should have required an election. Nor can it be said that, because appellant received the lowest punishment allowed by law, he was not injured by the failure of the court to require an elec-

tion. Where the statute gives a legal right, and where the insistence on same is timely made, the court ordinarily will not speculate as to what the result of an invasion or deprivation of such right would amount to.

Again, if we are correct in what we have said, it would seem necessarily to follow that if, under any condition of affairs, proof of the separate and severable offenses were admissible, they should have been limited, as requested by counsel for appellant; but as we view the matter they were not admissible as presented for any purpose. It is inconceivable that, if the jury had believed Burleson's testimony in respect to the taking at his home, they could have doubted for one moment the intent and purpose for which his money was taken from him. There was no question of the identity in the case, as stated by counsel for the appellant, either of the person taking or the thing taken. It often happens that, in developing the particular facts of the charge raised against one on trial, it is essential in developing the res gestæ, the details of the particular transaction, that proof of some related matters be put in evidence to fully and clearly inform the jury in respect to facts of the crime charged; but that is not true in this case—certainly not true in respect to the robbery of the \$12 at appellant's house. We think therefore, and hold: First, that under the charge, under the facts developed, there were two separate offenses, that an election should have been required, and if such election should hereafter be made in respect to the alleged robbery of the \$12, the proof should be confined to that, and that alone, and that no testimony should be heard touching the robbery of the \$100 or concerning the bill of sale to the mules. We hold, again, that if the state elects to try with respect to the robbery of \$100 at Big Springs, proof of the transaction in respect to the \$12, as well as the continuing facts up to the date of the robbery and on the journey to Big Springs, may be received in evidence, but, when received, should be limited by proper instructions to show the intention and purpose of appellant and as explanatory of the acts and conduct and state of mind of Burleson. The transaction in respect to the mules after they left Big Springs would not seem to be, if we are correct, admissible in any event.

Complaint is made of the following paragraph and portion of the court's charge: "Now, bearing in mind the definition as given you in the preceding paragraph, if you find from the evidence that John Harris, on or about the 4th day of February, A. D. 1907, in Howard county, Tex., did not unlawfully and willfully make an assault upon the person of J. J. Burleson, and did not put the said J. J. Burleson in fear of his life and bodily injury, and did not then and there fraudulently take from the person and possession and without the consent and against the will of the said

J. J. Burleson \$12 in money of the value of \$12, and \$100 in money in the value of \$100, and if he did take it, he did not do so with the fraudulent intent then and there of him, the said John Harris, to deprive the said J. J. Burleson of the value of same and to appropriate the same to the use and benefit of him, the said John Harris, then you will acquit him." This instruction is followed immediately by a charge to the effect, in substance, that the appellant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and that in case the jury have a reasonable doubt as to the guilt of the defendant they will acquit him and say by their verdict "not guilty." The correctness of the paragraph of the court's charge quoted above is challenged on the ground that same is erroneous, in that it was not the law, and in order to acquit appellant the jury did not have to find from the evidence that he did not do all or either of said matters before they could acquit him, and that they did not have to find as a conclusion from the evidence any and all of said matters before they could acquit him; but, on the contrary, under the law, the jury must find and believe from the evidence beyond a reasonable doubt that he did in fact do all of said things before they could convict him. Again, said charge was complained of and is alleged to be erroneous because, if the jury, as a matter of fact, had found, as instructed by the court, from the evidence, that John Harris did not do either one of the unlawful things recited in said charge, and each of which enter into and constitute the crime of robbery, and which crime cannot be completed without the presence of all of said elements, then they should have acquitted appellant without reference to what they may have found with respect to the other ingredients of the offense, and that the charge was erroneous and hurtful, in that under this charge the jury were instructed that, before they could acquit appellant, they had to find from the testimony that he did not do all of said matters recited therein, and it was necessary for them to find that he did not do each and every one of said matters before they could acquit him. Again, the paragraph complained of was alleged to be contradictory of the sixth paragraph of the court's charge, which instructed the jury under what circumstances they would convict appellant, and that these charges are so radically contradictory as to mislead and confuse the jury and in effect furnish them no legal standard whatever under which they could either convict or acquit appellant, and practically left the jury without any instructions whatever as to the law of the case applied to the facts in evidence.

Under the authorities it is clear that the charge complained of is erroneous. Its vice is that it shifts the burden of proof and requires the jury to believe affirmatively as true all the facts therein contained before

they could acquit appellant. A charge not unlike that is considered by this court in the case of *Johnson v. State*, 29 Tex. App. 150, 15 S. W. 647. In that case the court instructed the jury as follows: "If you believe from the evidence that the defendant, acting either alone or in concert with Jeff Wood, did not poison Elizabeth Rucker as explained in paragraph 3, or if you believe that deceased was poisoned by accident or by her own voluntary act, or if you believe that deceased died from natural causes, or if you believe that deceased was poisoned by some other person than the defendant, acting alone or in connection with Jeff Wood, then you will find the defendant not guilty." In passing on this charge, the court said: "We think the paragraph is subject to the exception that it requires the jury to believe from the evidence the existence of the conditions which entitled him to acquittal. It virtually requires the jury to believe from the evidence that he is innocent before finding him not guilty; whereas, the correct rule is that the jury must presume his innocence until his guilt has been established by the evidence beyond a reasonable doubt. If the jury entertained a reasonable doubt upon the whole evidence of the defendant's guilt, it was their duty to acquit him, although they might not believe from the evidence the existence of the facts and conditions, or any of them, mentioned in said paragraph. It is true that in concluding his charge the learned judge gave the usual instruction as to the presumption of innocence and as to reasonable doubt, and ordinarily such instruction is sufficient; but in this case we do not think it was sufficient to correct and counteract the error in paragraph 5. Said paragraph would have been unobjectionable if it had merely instructed that if the defendant, either alone or in concert with Wood, did not poison the deceased, or if deceased was poisoned by accident, from natural causes, or was poisoned by some other person than the defendant, or the defendant and Wood acting together, defendant would not be guilty. The vice of the paragraph is in requiring the jury to believe from the evidence that some one of said conditions existed in order to warrant a verdict of acquittal because thereof."

The charge of the court here considered is, it seems to us, quite as objectionable as the charge discussed in the *Johnson Case*, supra, in that it shifts the burden of proof, and has the added and further objection that, as framed, it seems to require the jury to believe all the facts therein grouped before appellant would be entitled to an acquittal. The rule here laid down is so well supported by the authorities that a further discussion seems to be unnecessary. *Moore v. State*, 28 Tex. App. 377, 13 S. W. 152; *Smith v. State*, 9 Tex. App. 150; *Robertson v. State*, 9 Tex. App. 209; *Blocker v. State*, 9 Tex. App. 279; *Wallace v. State*, 9 Tex. App. 299; *Graham v. State* (Tex. Cr. App.) 61 S. W. 714;

Henderson v. State (Tex. Cr. App.) 101 S. W. 245; Stewart v. State (Tex. Cr. App.) 101 S. W. 800. And authorities might be multiplied indefinitely.

For the errors pointed out, the judgment of conviction is set aside, and the cause is remanded for another trial.

#### VINSON v. STATE.

(Court of Criminal Appeals of Texas. March 17, 1909.)

##### 1. HOMICIDE (§ 116\*)—PROSECUTION—FELONIOUS INTENT.

The punishment of a person charged with homicide must be predicated upon his intent and felonious purpose at the time he acted, and not upon what appears to be the real facts in the light of subsequent developments.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.\*]

##### 2. HOMICIDE (§ 300\*)—MANSLAUGHTER—INSTRUCTIONS—SELF-DEFENSE.

In a prosecution for manslaughter, where it appeared that just before the killing decedent had assaulted accused with his fists, a charge that if an attack is not made with a deadly or dangerous weapon, or is not such as threatens death or serious bodily injury, before the person attacked can claim self-defense for killing he must have resorted to all other means reasonably effective for the purpose, except retreat, to protect himself from the injury, and if he does not do so, and there were other means, except retreating, which would have been reasonably proper and effective, and he failed to resort to such other means, then the killing would not be in perfect self-defense, was erroneous as limiting the doctrine of necessity to what may appear to be known to other people instead of what accused believed was necessary when he committed the act.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.\*]

##### 3. HOMICIDE (§ 300\*)—MANSLAUGHTER—INSTRUCTIONS—SELF-DEFENSE.

In a prosecution for manslaughter, a charge that if accused cut decedent with a knife, not intending to kill him, but only to cut him to prevent him from doing accused some serious bodily harm as viewed from accused's standpoint, accused should be acquitted, was erroneous as predicating his right of self-defense from serious bodily injury upon the fact that he did not intend to kill, while if he was defending against an assault threatening serious bodily injury from his standpoint he was entitled to acquittal regardless of whether he intended to kill or not.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.\*]

##### 4. HOMICIDE (§ 307\*)—MANSLAUGHTER—INSTRUCTIONS—AGGRAVATED ASSAULT.

In a prosecution for manslaughter, where the evidence from defendant's standpoint showed that the difficulty occurred upon a sudden impulse of passion, and that the knife used was an ordinary pocketknife with a blade  $1\frac{1}{2}$  or 2 inches long, it was error to refuse a charge on aggravated assault and battery, in view of Pen. Code 1895, art. 717, providing that the instrument by which a homicide is committed is to be considered in judging of accused's intent, and article 719, providing that, where a homicide occurs under the influence of sudden passion by the use of means not in their nature calculated to produce death, accused is not deemed guilty of the homicide, unless it appear that there

was an intention to kill, but he may be prosecuted for any grade of assault and battery.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 307.\*]

Appeal from District Court, Angelina County; James I. Perkins, Judge.

Reece Vinson was convicted of manslaughter, and appeals. Reversed and remanded.

W. J. Townsend, Jr., for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at four years' confinement in the penitentiary.

The evidence shows that appellant killed Lee Bise by cutting him with a knife. The evidence is quite conflicting. The state's testimony, in substance, shows that deceased was working for the Lufkin Foundry & Machinery Company. One of the main witnesses, Floyd Pullen, testified, in substance, as follows (and his testimony presents the state's theory of this case, and we here state it): "I know the defendant. Deceased and defendant were at a show on the night of the difficulty. I saw the difficulty that took place between them. It occurred on the outside of the tent. Deceased and I walked up to the tent, and appellant walked up to Lee Bise, the deceased, and deceased caught him around the shoulder and says, 'Reece, are you going to the show?' and deceased says, 'Go on, God damn you, and don't f—k with me;' and deceased says, 'You need not get on your head about it.' Reece says, 'I will get on my head as much as I damn please;' and deceased says, 'You will, I will be damned.' And Joe Miller stepped in between them and pushed deceased back, and says, 'Don't you boys be fussing; you will be fighting in a minute,' and he told deceased to come on and let's go in the show, and Joe Miller, deceased, and myself started in the show; and deceased says, 'I am not scared of you;' and Reece says, 'Nobody wants you to be afraid of me,' and called deceased a son of a bitch; and deceased says, 'I will not take that;' and he turned back, and Reece was coming toward deceased, and deceased told him, 'I will not take that off of you;' and they started to fighting, and the crowd come in between me and deceased and I couldn't see them, and when I got to deceased he was falling, and appellant came right out by me. I was in four feet of them when they commenced striking at each other. I don't know that either one started at each other first; they were both going towards each other. When appellant called him a son of a bitch he was coming towards deceased, going towards the show. I could not tell which one struck at the other one first. I did not see anything in the hand of deceased. He did not have anything in his hands; he didn't have a stick or beer bottle or knife. I

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

couldn't see anything that appellant had in his hands. When I got to deceased he was falling—he had been cut; he was falling towards the ground, and I went to him."

This presents the state's case, with this addition: The sheriff testified: "Some time during the night of the difficulty or early the next morning, I couldn't say which, appellant gave me a knife. I had the knife in my office laying there on the desk, and I went to look for it yesterday and couldn't find it, and I don't know where the knife is. It was what I would call a physician's knife—a long knife. The blade of the knife was between 2½ and 3 inches long. The knife looked like what I would call a physician's knife."

Appellant testified that he was listening to the band play at the show tent, when "deceased walked up behind me and caught me around the waist and lifted me up and dropped me on the ground; and I asked him what did he mean by that, and he says, 'I don't reckon it is any of your damn business,' and I says, 'I don't want you to do it any more,' and in the meantime while we were talking the band went back to the little tent, and I turned and walked over to the other tent, and in a few minutes he walked up and commenced cursing at me again and called me a son of a bitch. Deceased said, 'God damn you, you son of a bitch,' and hit me a glancing lick, and he kept hitting at me, and I was backing off and we got in the guide rope. He was hitting me when I was backing, hitting me in the face and on the head, and when we got to the guide rope I went under the rope, and when he got to the rope I caught hold of it and stopped. When so pressed I cut him. I was just cutting to keep him off of me. I just cut him one time. Before the night of the trouble I did not know deceased personally. Knew him when I saw him. Never had had any ill will or difficulty with the deceased before, and don't know that I ever spoke to him. Only struck deceased with my knife one lick. When I struck him I did not intend to kill him. The knife I had was just a medium-size knife; the blade was not longer than 1½ or 2 inches long."

Appellant in his brief insists the court erred in the following charge: "The killing of another person is in self-defense and justifiable when committed in the protection of the person of the party killing against any unlawful and violent attack then being made by the party killed; but if the attack being defended against is not being made with a deadly or dangerous weapon, or is not such as threatens death or serious bodily injury to the person thus attacked, then the person so attacked, before he can claim perfect self-defense for killing, must have resorted to all other means reasonably proper and effective for the purpose, except retreat, to protect himself from the injury before killing, and if he does not do so, and it is shown that

there were other means (other than retreat) which would have been reasonably proper and effective to protect himself from the injury, and he failed to resort to such other means, then the killing, because of the use of such greater force than was necessary, would not be in perfect self-defense, but would be manslaughter." The principle in this charge has been expressly approved by this court in the case of *Freeman v. State*, 40 Tex. Cr. R. 551, 46 S. W. 641, 51 S. W. 230. Appellant cites us to a long array of authorities, among others, *Ennis v. State* (Tex. Cr. R.) 38 S. W. 998. None of these authorities, however, we think are in point. In this case we have deceased assaulting appellant with his fist. When so assaulted, the law of this state is properly embodied in the charge complained of. As early in the jurisprudence of this state as the case of *Kendall v. State*, 8 Tex. App. 569, a charge to this effect was laid down as proper. Again, in the case of *Hunnicut v. State*, 20 Tex. App. 632, the same doctrine was approved. The statute of this state provides that if an assault is made upon another that does not threaten death or serious bodily injury, before he can claim perfect self-defense of killing, he must have resorted to all other means reasonably proper and effective for the purpose, except retreat, to protect himself from the injury before killing, and if he does not do so, and it is shown that there were other means, other than retreat, than cutting deceased with a knife, then he must resort to such other means before killing deceased, and under such circumstances he cannot use any greater force than appears to him to be necessary at the time. The trouble with the charge is, it lays down an abstract proposition correctly, but it limits the doctrine of necessity to what may appear to be known to other people. Appellant is entitled to a charge telling the jury that if he (appellant) believed that he could have protected himself by other means than stabbing the deceased, then he would be guilty of some grade of homicide. Certainly, it is not the law of this state that, because subsequent events develop the fact that appellant could have protected himself against serious injury by resorting to other means than stabbing the deceased, this fact should make him guilty in the eyes of the law; but the jury must pass upon the matter from appellant's standpoint. It follows that the court placed an unwarranted limitation upon the right of self-defense in not so defining appellant's rights. Under the law of this state the punishment of a defendant must be and is predicated upon his intent and his felonious purpose, if any, at the time he acts, and never is predicated upon what appears to be the real facts in the light of subsequent developments. It is his intent, and his alone, that the law makes him punishable for. It follows that the court's charge was in error in the matter pointed

out. See *Richardson v. State*, 7 Tex. App. 486; *Weaver v. State*, 19 Tex. App. 547, 53 Am. Rep. 389; *Dyson v. State*, 14 Tex. App. 463; *Prye v. State* (Tex. Cr. R.) 113 S. W. 938; *McGlothlin v. State* (Tex. Cr. R.) 53 S. W. 869; *Lilly v. State*, 20 Tex. App. 1; *Sims v. State*, 36 Tex. Cr. R. 154, 36 S. W. 256; *Ross v. State*, 10 Tex. App. 453, 38 Am. Rep. 643; *Hopkins v. State* (Tex. Cr. R.) 53 S. W. 619; *Woodring v. State*, 33 Tex. Cr. R. 26, 24 S. W. 293; *Morrison v. State*, 39 Tex. Cr. R. 519, 47 S. W. 369; 3 Greenl. Ev. (16th Ed.) 125, § 117; 1 Bishop's Cr. Law (7th Ed.) §§ 857-860.

The court refused the following charge asked by appellant: "In this case, if you believe from the testimony that defendant cut deceased with a knife, as alleged in the indictment, but that defendant did not intend to kill deceased, but only cut him to prevent deceased from doing him (defendant) some serious bodily injury, as viewed from his (defendant's) standpoint, then you will find the defendant not guilty." This charge is not correct, in that it predicates appellant's right of self-defense from serious bodily injury upon the fact that defendant did not intend to kill when he stabbed deceased. If appellant was defending against an assault threatening serious bodily injury from his standpoint, he is entitled to an acquittal, regardless of whether or not he intended to kill at the time he stabbed deceased.

Appellant insists the court erred in failing and refusing to charge on the issue of aggravated assault and battery. The testimony of appellant shows that the difficulty occurred upon a sudden impulse of passion, and, in addition thereto, the evidence from the defendant's standpoint shows that the knife used was an ordinary pocketknife with a blade  $1\frac{1}{2}$  or 2 inches in length, and suggests the issue of aggravated assault from that standpoint. See articles 717, 719, Pen. Code 1895; *Thompson v. State*, 24 Tex. App. 383, 6 S. W. 296; *Martinez v. State*, 35 Tex. Cr. R. 386, 33 S. W. 970; *Connell v. State*, 46 Tex. Cr. R. 264, 81 S. W. 746; and various other authorities could be cited.

For the errors pointed out, the judgment is reversed and the cause remanded.

#### FRENCH v. STATE.

(Court of Criminal Appeals of Texas. March 17, 1909.)

#### 1. HOMICIDE (§ 302\*)—MURDER—INSTRUCTIONS—DEFENSE OF HOME.

In a murder case, where the evidence showed that after a quarrel in a saloon, during which accused had forbidden decedent to come to accused's home, decedent had followed him to the home, which was over a mile from the saloon, and had attempted to enter it with a knife in his hand, with which he was trying to assault accused, and that accused had pushed him from the gallery one or more times, telling him that

he must not come into the house, before he shot decedent, it was error to refuse to charge the statute (Pen. Code 1895, art. 677) authorizing a defense of one's home.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 634; Dec. Dig. § 302.\*]

#### 2. CRIMINAL LAW (§ 763\*)—MURDER—INSTRUCTIONS—WEIGHT OF EVIDENCE.

A charge that an attempted unlawful entry of the house by decedent over accused's protest might constitute adequate cause to reduce the killing to manslaughter was erroneous as upon the weight of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1763, 1770; Dec. Dig. § 763; \* Homicide, Cent. Dig. §§ 581-656.]

#### 3. CRIMINAL LAW (§ 634\*)—TRIAL—CONDUCT OF TRIAL—ABSENCE OF JUDGE FROM BENCH.

In all criminal cases the judge should remain in complete control of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1461-1464; Dec. Dig. § 634.\*]

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Walter French was convicted of murder, and appeals. Reversed and remanded.

Hart, Mahaffey & Thomas, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at five years' confinement in the penitentiary.

The second ground of the motion for a new trial complains that the court erred in failing to charge the jury the law with reference to defendant's right to defend his home against the unlawful entry of the same by deceased, appellant insisting that the evidence clearly raised this issue and imperatively demanded the submission of the same by the court to the jury. The facts relied upon by appellant suggesting the issue contended for are as follows: The undisputed facts in the case show that deceased was shot and killed by the appellant on the front porch of appellant's home, in the city of Texarkana. The facts are further undisputed that deceased and appellant had a quarrel or altercation, on the morning deceased was killed, at the City Hall Saloon in said city; that appellant told deceased to stay away from his home, and left the saloon and started home. It was further undisputed that on the way home appellant met the constable, and complained to him that deceased had been following him around town that morning and trying to have trouble with him, and asked the constable for protection. Appellant testified: "When I got to Olive and Twelfth, I met Mr. Hargett. I holloed at him, and he stopped, and I told him, 'There is a fellow downtown who has been following me all over town, and give me a genteel good cursing. I can't afford to fight him. I want to know if I can get some protection.' He asked me to tell him who the fellow was, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



I told him. He said: 'I will go back. If I can find him, I will arrest him.' I told him I wish he would. I was in no shape to have any trouble of any sort. Mr. Hargett said he would do that, and left me. Just as he turned the corner, I saw Dave coming out of State street into Pine. I holloed at him. He was then on the corner, coming into Pine street. I holloed at him and stopped him. He was then just coming out of State street into Pine—just turned about two or three steps, may be. Q. Which direction, with reference to your house? A. On out in the direction of my house. I holloed at him and stopped him. When I holloed at him, he had both hands out of his pocket. When he looked back and recognized me, he put his hand in his pocket, and pulled out his knife. I said: 'Now, Dave, you have cursed me plenty this morning. I don't think you ought to follow me to my house. I have forbidden you to go there. You go back to town and quit following me.' He said: 'God damn you, you wouldn't fight me downtown; maybe, you cowardly son of a bitch, you will fight me in the house.' I said: 'If you follow me to my house I am going to hurt you.' He said: 'You have got to do it. My heart is right for you.' So I walked on—maybe three or four steps ahead of him—just far enough to keep him from cutting me in the back with his knife. Q. What direction? A. The direction of my house. Just kept far enough to keep out of arm's reach—maybe further at times. At one time he got pretty close to me. Just as I was crossing Thirteenth street I made a leap or two and got out of the way of him. I walked into my house, and in the north room. Q. Now stop right there. When you went into your house, where was Totton? A. Maybe just about the gate; maybe he hadn't reached the gate. It was about six or seven steps from the gate into the house. I went into the door of the north room, where my mother slept. The south room is the room where my wife was in bed. Her and the children slept in there. I went in the room and got my pistol out of the tray of my trunk. By that time Dave was upon the porch. I came to the door and reached out and caught him in the collar on the left-hand side and shoved him back, and said: 'You get out of here.' He said— I just didn't hear what he said. He walked up on the porch and struck at me with the knife, and I shot at him. He bowed himself to make another lick, and I shot the other two shots, like that." The witness further testified: "Q. Just as he stepped up on the porch, you came out with the pistol in your hand? A. No, sir. When he came on the porch, I shoved him off the porch. Then he opened his knife and come on the porch again, and walked up and struck at me before I shot him." He further testified: "I just caught him in the collar and shoved him off, and said, 'I told you to keep away from here.'" The witness further testified with reference

to the quarrel at the City Hall Saloon that morning, as follows: "I peeped in the door, and saw Louis (the evidence shows that Louis was appellant's son, a boy about 16 years of age) standing up at the bar. I heard Dave say, 'God damn you, give me two drinks.' I just walked up to Louis and touched him and said, 'You get out of here. You skin your nut home and do it quick,' and gave him the bottle I had got at the drug store. When Louis left, Dave come up to me and said, 'God damn you, you don't want your children to associate with me.' I said, 'You know, Dave, I can hardly control that boy as it is. You are a man—call yourself my friend—and you brace that boy up to come here. I consider you my enemy. Don't you ever put your foot in my house no more.'" He further testified: "I had been living there nearly two years, and my wife and family lived there. That was my home." The undisputed facts further show that appellant's wife was at the time in the last stages of consumption, at their home, where the killing occurred, and that she died within a month or two after the killing. It was further undisputed that, from the City Hall Saloon, where the difficulty occurred, to appellant's home, it was about 16 blocks, or a little over a mile. The witnesses Ed Williams and Lula Duckett also testified as to seeing deceased following appellant home.

The charge of the court did not submit the issue asked by appellant, but did tell the jury that an attempted unlawful entry of the same by deceased, over the protest of the appellant, might constitute adequate cause to reduce the killing to manslaughter. The latter charge, we do not think, should have been submitted. It is a comment upon the weight of evidence. It is true it is favorable to appellant, but not a proper charge. The charge on the issue above contended for by appellant wherein the court was asked to charge the article authorizing a defense of his home was a pertinent issue presented by the evidence and should have been submitted to the jury. The evidence shows clearly that appellant had a right and was defending an unwarranted intrusion upon his home. He pushed deceased back off the gallery of the home one or more times before any shots were fired, telling him he must not come into his home. The statute of this state (Pen. Code 1895, art. 675) authorizes one to act immediately in defense of his person against murder, maiming, castration, etc., without retreating, and to act instantly where his life is threatened or serious bodily injury. The other article (677) of the Code says that appellant has a right to defend his person or his property against any other unlawful violence than those enumerated above. The following are authorities on this question: *Bryant v. State*, 51 Tex. Cr. R. 66, 100 S. W. 371; *Richardson v. State*, 7 Tex. App. 486; *Waver v. State*, 19 Tex. App. 547, 53 Am. Rep. 389; *Dyson v. State*, 14 Tex. App. 454;

*Pryse v. State* (Tex. Cr. App.) 113 S. W. 933; *McGlothlin v. State* (Tex. Cr. App.) 53 S. W. 869; *Lilly v. State*, 20 Tex. App. 1; *Sims v. State*, 36 Tex. Cr. R. 154, 36 S. W. 256; *Ross v. State*, 10 Tex. App. 455, 38 Am. Rep. 643; *Hopkins v. State* (Tex. Cr. App.) 53 S. W. 619; *Woodring v. State*, 33 Tex. Cr. R. 26, 24 S. W. 293; *Morrison v. State*, 39 Tex. Cr. R. 519, 47 S. W. 869; 3 Greenl. on Ev. (16th Ed.) 125, § 117; 1 Bishop's Crim. Law (7th Ed.) §§ 857-860. And for discussion of a cognate question, see *Reece Vinson v. State* (this day decided) 117 S. W. 846.

There are other questions presented in this record; among others, the absence of the judge from the bench. This matter and the complaint of appellant of the organization of the jury will not likely occur on another trial. We do not deem it necessary here to pass upon same, but suggest that in all cases the judge should remain in complete control of the trial. For authorities on this question, see *Bateson v. State*, 46 Tex. Cr. R. 34, 80 S. W. 88; *Evans v. State*, 46 Tex. Cr. R. 476, 80 S. W. 1017; *Goodman v. State*, 47 Tex. Cr. R. 388, 83 S. W. 196; *Carney v. State* (Tex. Cr. App.) 85 S. W. 7; *Anderson v. State* (Tex. Cr. App.) 95 S. W. 1037; *Williams v. State* (Tex. Cr. App.) 99 S. W. 1000.

For the error pointed out, the judgment is reversed and the cause is remanded.

#### STEEL v. STATE.

(Court of Criminal Appeals of Texas. Jan. 20, 1909. Rehearing Denied March 20, 1909.)

#### 1. CRIMINAL LAW (§ 1091\*)—BILL OF EXCEPTIONS—FORM.

The bill of exceptions to refusal of application for continuance, though not even giving the substance of the application, but referring to it only as defendant's first application for continuance, will be considered; there having been but one application for continuance.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1091.\*]

#### 2. CRIMINAL LAW (§ 917\*)—NEW TRIAL—ERROR IN DENYING CONTINUANCE—EVIDENCE.

Though on an application for continuance for absence of a witness, Rev. St. 1879, arts. 564, 565, while authorizing affidavits controverting diligence, do not permit inquiry into the truthfulness or materiality of the absent testimony, yet the continuance having been denied, and defendant having moved for new trial because of denial of the continuance, and the state having, in opposition to the motion, introduced the affidavits of a number of persons showing that the absent witness, according to her statement, made shortly after the commission of the alleged offense, would not have testified to the facts stated in the application for continuance, and that she did not see the matters which it is claimed she saw, and that, if she had testified as the application claimed she would, her testimony would have been untrue, and the affidavit of such witness not having been obtained, and defendant's testimony on the trial not indicating that the absent witness saw anything of the affair, and the court in its order denying new trial having recited that it heard the evidence on the motion and the contest

thereof, its conclusion will be sustained; the overwhelming weight of the testimony carrying certain conviction that the absent witness would not have given the testimony expected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2162; Dec. Dig. § 917.\*]

Appeal from District Court, Bosque County; O. L. Lockett, Judge.

Ed Steel appeals from a conviction. Affirmed.

J. P. Word, for appellant. E. B. Robertson, Co. Atty., H. S. Dillard, and F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged in the district court of Bosque county, Tex., with the offense of assault with intent to murder one Henry Gray. On trial he was convicted, and his punishment assessed at confinement in the penitentiary for three years. Thereupon he appealed to this court, and submits in effect one proposition and assigns one error on which a reversal is sought. That error is to the effect, in substance, that the court erred in overruling his application for a continuance.

The indictment in the case was returned into court on the 25th day of March, 1908. On the 21st day of September, 1908, the appellant filed his first application for a continuance for want of the testimony of one Bettie McLennan, who was alleged to reside in Bosque county. The diligence used to obtain the attendance of this witness is sufficient. The facts which it was stated in the application were expected to be proved by said witness are as follows: "That she is well acquainted with the defendant, and also with the prosecuting witness in this case, Henry Gray, and knew him well on March 4, 1908, and that on or about said date she was living in about 150 yards from the home of defendant, in plain view of defendant's house, and that she was at home on the day that Henry Gray will claim that Ed Steel, the defendant, shot him, and that it was about the middle of the afternoon of March 6, 1908. She saw Henry Gray, on the inside of the defendant's yard, with a gun in his hands pointed towards the front door of the defendant's house, and had gone from his buggy on into said yard, some eight or ten yards, and that Gray had his gun pointed towards defendant's door in a shooting position all the time while he was advancing towards defendant's house; and she saw Ed Steel making motions with his hands towards the said Henry Gray, and heard defendant telling the said Henry Gray not to come any further, but to go back, as he didn't want to hurt him; and about this time she heard a shot, but could not tell who shot it." This testimony was alleged to be material, and was material, in this: That the assaulted party, Gray, testified, in substance, that he was not out of his buggy when he was shot, but was sitting in his buggy,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

waiting for the appellant to go to his house and get some money that Gray claimed he owed him; and that he (Gray) had no gun when he was shot. The appellant in his testimony stated, in substance, that Gray was approaching him in a threatening and menacing attitude, and was in the act of firing upon him when he shot. So there can be no substantial room for doubt or controversy that this testimony, if same could have been produced, and if the witness would have so testified, was of the highest importance. The state objects to a consideration of this assignment on the ground, as claimed, that the matter is not presented by proper bill of exceptions. There is a bill of exceptions which states merely that the court erred in not granting appellant's first application for a continuance. The application for continuance is not embodied in the bill of exceptions, nor does the bill state the substance of the application, or refer to it in any other way except in general terms. The bill is not prepared in such form as we think is best always to be done; but, as there was one application for continuance only, we think the general reference to it in the bill is such that we must consider the question.

The application for a continuance being overruled, and after conviction, appellant filed his motion for a new trial, in which, among other things, the action of the court in overruling his application for a continuance was urged. This motion was contested by the state, and it was urged as a ground why said motion should be overruled that the missing witness, Bettie McLennan, if present, would not have testified to the facts stated in the application for a continuance, but, on the contrary, would have testified that she was in her house at the time of the difficulty between appellant and Gray; that she heard the report of a gun, but saw no part of the difficulty, or either of the participants until after the difficulty had ended. It was likewise stated in said contest of the motion that she had repeatedly stated that this was the substance of all she knew about the matter, as will appear from the affidavits of said witnesses named in the contest, all of whom it was alleged were credible persons, and all of whom enjoyed in their several vicinities the reputation of being good citizens and reliable persons. Attached to this contest of the motion was the affidavit, among others, of D. W. Gray, father of Henry Gray, the assaulted party, who deposes that in company with James Rogers and John Capps he talked with the missing witness, and that she stated that she did not know anything about the difficulty, and did not see any part of it; that she was in her house at the time, and heard two shots fired in the direction of appellant's house, and that when she looked up that way she saw Henry Gray in the public road, walking and leading his horse down said road to her house; and that she saw neither Gray nor Steel at the time of or immediately before

the shooting took place, and that this was all she knew about it. Affidavits to the same effect, substantially, were made by James Rogers, Charley Romine, J. F. Capps, H. J. Gibbs, and J. L. Downing. In the order of the court overruling the motion for a new trial it is recited that the court heard said motion, and the contest thereof by the state, read, and the evidence thereon submitted. What this evidence was is not shown by the record, and the presumption is that it was such as justified the action of the court.

A question similar to this has been before this court not infrequently, and usually we have held adversely to the state; but, as will be seen by an inspection of the opinions in the several cases, every decision has to some extent been based upon the particular facts of the case. In the case of Lane v. State, 28 S. W. 202, this matter came before the court, and in referring to it this language was used: "Appellant contends that the court erred in permitting affidavits to be filed by the state contesting, not the diligence, but the fact that the absent witness would testify as stated in the motion for a continuance. It is true the statute permits only the question of diligence to be controverted, and the court erred in permitting the affidavits complained of to be filed; but we see no reason to reverse this cause for this error, because the testimony of the absent witness, if, indeed, he would have testified as stated, would have been simply defendant's explanation to the effect that the stolen property, 154 pounds of bacon, found buried in his garden, was placed there with his consent by two parties." Again the court say: "We can see no reason to disturb the verdict upon the ground stated, overruling the motion for a continuance. It is not such exculpatory evidence as would probably affect the result of the trial in any way." Inasmuch as the court determines in this case that the testimony produced would not have affected the result, it was unnecessary for the court to determine the question as to whether it was permissible to file the affidavits referred to. Nor can we say to what extent this case is an authority applicable to the case at bar, for the reason that the nature and contents of the affidavits are not set out. In the case of Attaway v. State, 31 Tex. Cr. R. 475, 20 S. W. 925, it is held that the materiality and truthfulness of the alleged absent testimony often become very important in considering the motion for a new trial, based upon the action of the court in overruling an application for continuance. In a contest over the motion for continuance, the statute authorizes affidavits controverting diligence, but does not permit an inquiry into the truthfulness or materiality of the absent testimony. Rev. St. 1879, arts. 564, 565. But, when the new trial is sought because of the supposed error of the court in overruling such application, the materiality and truthfulness of such absent testimony may become matters of first importance, and

we see no valid reason why the state should not be permitted to contest these questions. Willson's Cr. St. 1888, arts. 2553, 2554.

In *Roquemore v. State*, 114 S. W. 140, we had before us a question very similar to the one here under discussion. In that case the state resisted the appellant's application on the ground that the missing witness had made statements contradictory to those to which it was claimed she would testify. Discussing this matter, we say: "As to the second ground of the motion, that the testimony was not probably true, we can only look to the record to determine upon what ground the judge predicated this finding; and when we examine the evidence that is offered we find that the state offered certain witnesses to prove by them that the witnesses Weaver, Davis, and Bowling made statements to them that would contradict what the appellant set up in his application for a continuance that he could prove by them. We are of opinion that the court would not be authorized, in passing upon an application for a continuance, to pass upon the truth of what a witness would testify to on the trial by proving contradictory statements by witnesses. The law in Texas has wisely left the trial of all issues of fact, as well as the credibility of witnesses, to a jury, and this court is of opinion that this province of the jury cannot be invaded by the court, and would be establishing a precedent that would ultimately result in confusion and a state of affairs that could not be easily remedied." It will be observed, however, that in the case last mentioned there was no contention made that the absent witnesses, if present, would not have testified to the facts stated in the application for a continuance; but the motion for continuance was resisted on the ground that these missing witnesses had made statements contradictory to the matters set out in the application for a continuance.

In the case of *Hardin v. State*, 40 Tex. Cr. R. 208, 49 S. W. 607, in discussing this matter, the court uses this language: "In connection with this application for continuance, appellant also objected to certain proof, offered by the state, to the effect that certain of said witnesses were not present, and could not have seen or heard what it is alleged in the application it was expected to be proved by them that they did see and hear. It seems that this testimony was submitted on the trial for the purpose of meeting the allegations in the application for continuance, and for no other purpose pertaining to the trial. We do not believe this is a proper practice. In the motion for new trial, it might be proper then to show the improbability of the truth of said application by affidavits showing that said witnesses were not present as stated in the application, and certainly it would be competent to produce the affidavits of the witnesses themselves, showing that they would not testify

what it was alleged they would. We would suggest here that legislation on this subject would be very appropriate. If, after the trial, process were authorized for absent witnesses, and their affidavits secured, proving the application, it would greatly strengthen it; and if, on the other hand, they disprove it, the court would not be left to speculate on the probable truth of the matters alleged in the application."

This case was tried and appellant convicted something like 10 days before his motion for new trial was acted upon. The affidavit of the missing witness was not procured by counsel for the appellant; nor is it shown that any effort was made to procure same, or that it could not be procured. The testimony of these witnesses, six in number, show that, if present, the witness, according to her statement, would not have testified to the facts stated in the application, that she did not see the matters which it is claimed she did see, and that if she had given the testimony contained in the affidavits it would have been untrue. While, as stated in the last-cited case, the affidavit or testimony of the absent witness would often be more satisfactory as proving the fact as to whether he would give the testimony expected, there is no special virtue or sanctity in the testimony of such a witness, and no reason why the same fact could not be proved by other credible persons having information in respect thereto. Again, the record shows that the court investigated this matter. The presumption is that the court acted on sufficient testimony, and his finding should be sustained, if in the light of the entire record it can in fairness be sustained. Again, in this case appellant testified, and it does not appear from his testimony that this missing witness either saw or heard any part of it. He does not testify to having seen or heard of this witness on the day of the difficulty; nor does the record anywhere show that he (appellant) ever talked with her since the difficulty occurred, or any fact on which he based his statement that she would give the testimony expected from her. Again, it appears from the affidavits of these witnesses that the statements of the missing witness were made very soon after the commission of the alleged offense; and, in view of the certainty and particularity of their statements, we are led to the conclusion and are firm in the belief that the witness, if present, would not have testified to the facts claimed, and that, if she had so testified, the facts are not true. In this connection it will be conceded that this practice of filing affidavits contesting the statement as to what the missing witness would testify should not be sustained, except in a case like the present, where the overwhelming weight of the testimony carries certain conviction that the absent witness would not give the testimony expected. When this is done, as in this case, and where we cannot

doubt as men, we should not falter or hesitate as judges.

Finding no error in the judgment of the court below, it is hereby in all things affirmed.

### MUCKENFUSS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 3, 1909. Rehearing Denied March 23, 1909.)

#### 1. INDICTMENT AND INFORMATION (§ 114\*)—PROSECUTION FOR SECOND OR SUBSEQUENT OFFENSES—INFORMATION—"SAME OFFENSE"—"FORMER CONVICTIONS."

An information charging accused with opening his theater for public amusement on Sunday, and alleging that accused theretofore had on designated dates been tried and convicted of offenses of like character, charges "former convictions," within Pen. Code 1895, art. 1014, authorizing increased punishment on a second and third conviction for the "same offense"; the words "same offense" not meaning the identical offense, but one of like character.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 304; Dec. Dig. § 114.\*

For other definitions, see Words and Phrases, vol. 3, p. 2914; vol. 7, pp. 6323-6325; vol. 8, p. 7794.]

#### 2. CRIMINAL LAW (§ 1202\*)—FORMER CONVICTIONS—EVIDENCE—"SAME OFFENSE."

The records of the corporation court of a city, showing that accused on designated dates was charged with violating the Sunday law and that he pleaded guilty and was fined, show the conviction of accused, on trial for opening his theater for public amusement on Sunday, of a similar offense, within Pen. Code 1895, art. 1014, authorizing increased punishment for the second and third conviction for the "same offense."

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1202.\*]

#### 3. CRIMINAL LAW (§ 1202\*)—PUNISHMENT—SIMILAR OFFENSES.

Under Pen. Code 1895, art. 1014, authorizing increased punishment on a second and third conviction for the same offense, a prior conviction for the violation of the Sunday law, without indicating the nature of the offense, is a conviction of an offense similar in character to the charge that accused opened his theater for public amusement on Sunday, authorizing increased punishment on his conviction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1202.\*]

Appeal from Dallas County Court, at Law; W. M. Holland, Judge.

B. S. Muckenfuss was convicted of violating the Sunday law, and he appeals. Affirmed.

See, also, 116 S. W. 51.

Walker & Williams, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged in the county court of Dallas county, at law, with the offense of unlawfully opening and permitting to be opened on Sunday a theater for public amusement. In addition to the usual allegations and statements in the affidavit, it was recited, in substance, that appellant had theretofore, on, to wit, the 15th day

of October, 1906, been tried and convicted in the corporation court of the city of Dallas for an offense of like character as that charged against him in this cause, and also that on the 22d day of October, 1906, he had suffered a similar conviction in said court. On trial, appellant was found guilty as charged, and his punishment assessed at a fine of \$200.

In the charge given by the court the jury were instructed in substance, among other things, that if they believed that appellant had been theretofore, as charged, convicted of an offense similar to the one herein laid against him, they would assess his punishment at a fine of not less than \$80 nor more than \$200. It is evident, therefore, under this charge, that unless the affidavit and information containing averments of former convictions are good under the law, and unless legal proof of such convictions was properly made on the trial, the judgment must be reversed. We think, however, and hold, that the affidavit and information in this respect are good, and the proof offered on the part of the state was both admissible and sufficient to attest the former convictions. Article 1014 of the Penal Code of 1895 of this State, which applies to misdemeanors, is as follows: "If it be shown on the trial of a misdemeanor that the defendant has been once before convicted of the same offense, he shall, on a second conviction, receive double the punishment prescribed for such offense in ordinary cases, and upon a third or any subsequent conviction for the same offense the punishment shall be increased so as not to exceed four times the penalty in ordinary cases." Article 1015, Pen. Code 1895, which refers to felonies, is as follows: "If it be shown, on the trial of a felony less than capital, that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases."

It will be noted, in the article of our Penal Code having reference to felonies, that the term "or one of the same nature" appears, which is omitted in the preceding article, having special reference to misdemeanors. It is the contention of the appellant that by contrast, and having in mind the omission of the phrase "or one of the same nature" in article 1014, Pen. Code 1895, relating to misdemeanors, it must and should be held that by the words "same offense" is meant not mere similarity, but identity, of the offense. The phrase "same offense" has not infrequently been construed by the courts of the land. Where this phrase occurs in the provisions of Constitutions that no person shall be subject, for the same offense, to be twice put in jeopardy of limb or life, is meant to be applied to the same identical offense. Mr.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Blackstone says: "The pleas of a former acquittal and former conviction must be upon a prosecution for the same identical act and crime." *Commonwealth v. Roby*, 29 Mass. 496. Again, it is held by the federal courts that the words "same offense," within the meaning of the fifth amendment of the Constitution of the United States, means one which is the same both in law and in fact. Such, also, is the construction of our own court. In *Hirshfield v. State*, 11 Tex. App. 207, it is held the term "same offense," in Const. art. 1, § 14, providing that no person for the same offense shall twice be put in jeopardy of life or liberty, does not signify the same offense *eo nomine*, but the same criminal act or omission. However, in respect to a statute similar to our own, a different rule seems to obtain. In *Re Dougherty*, 27 Vt. 325, it was held that "same offense," as used in the act of 1852 relating to conviction for illegal sale of intoxicating liquor, and authorizing an increased punishment on a second conviction for the same offense, means "similar offense," and not the identical offense for which the first conviction was had, and a conviction in the language of the statute will stand. A somewhat different rule obtains in Massachusetts. *Com. v. Fountain*, 127 Mass. 452.

This identical statute, too, has been carefully construed and exhaustively considered in a learned opinion by Judge Henderson, of this court, in the case of *Kinney v. State*, 45 Tex. Cr. R. 500, 78 S. W. 226, 79 S. W. 570. In that case it is held, for the state to avail itself of Pen. Code 1895, art. 1014, authorizing an increase in punishment where defendant has previously been convicted of the same offense, the indictment must aver that defendant had been previously convicted of an offense of like character to that for which he is on trial, and it is not sufficient to allege, in the language of the statute, that defendant has previously been convicted of the "same offense," as the statute does not mean the identical offense, but one of like character, and that this article of our Penal Code, which authorizes an increased punishment where a defendant has previously been convicted of the same offense, when construed with other provisions of the Penal Code and the Code of Criminal Procedure, is a reformatory statute, and does not warrant the cumulation of a number of cases occurring simultaneously, in order to add to the punishment, of the case on trial, but contemplates an enhanced punishment for a party who, after one conviction, does not reform, but persists in committing other offenses of a like character.

Objection was also made to the proof on the trial to show the former conviction. The clerk of the corporation court of Dallas was introduced, who produced the records of the cases in which the convictions were alleged to have been obtained. The entries in respect to these matters were as follows:

"Minutes of the corporation court, 15th day of October, 1906: Court met in regular session. Present and presiding, Hon. H. R. Williams, judge; John C. Robertson, deputy city attorney; Ben F. Brandenburg, chief of police; and Frank M. Rainey, clerk. Whereupon the following proceedings were had: No. 9,225. *State of Texas v. B. S. Muckenfuss*. Charge, violating Sunday law. Plea, guilty. Fine, \$20.

"Minutes of the corporation court, 22d day of October, 1906: Court met in regular session. Present and presiding, Hon. H. R. Williams, judge; John C. Robertson, deputy city attorney; Ben F. Brandenburg, chief of police; and Frank M. Rainey, clerk. Whereupon the following proceedings were had: No. 9,279, *State of Texas v. B. S. Muckenfuss*. Charge, violating Sunday law. Plea, guilty. Fine, \$20."

It is objected that this proof is insufficient, in that there was no testimony in the record of any witness to the effect that any fine was ever paid, or any testimony which showed whether said judgment were ever set aside or not; nor did the record disclose whether an appeal had ever been prosecuted in these cases; and, further, that no formal judgment was ever entered up in either of said cases. When this testimony was offered, therefore, counsel for appellant promptly objected to its admission, substantially on the grounds above referred to. This precise matter has, as we believe, been ruled adversely to the contention of appellant in the case of *Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650. In that case it appears that no judgments of conviction were entered, except the simple notation of "Guilty" or "Plead guilty," and the fines assessed and costs taxed. The suit involved the right of the city attorney to receive fees in respect to cases in which such informal judgments were rendered. The ordinance touching this matter contained, among other things, the following provision: "He shall also receive such fees as may be allowed by ordinance." An ordinance of the city of Houston allowed appellee, Stewart, "a fee of one dollar in each case tried before the recorder for violation of city ordinances, to be taxed against defendants and collected as costs." It appeared that the parties against whom fines and costs were entered and taxed in the causes referred to in the opinion were committed by the recorder to the custody of the county jailer, and were subsequently employed upon the public works of the county, in accordance with the state laws regulating such proceedings concerning county convicts, and they worked out the sums so charged against them. It will be noted that the judgments in the case above referred to were very informal, quite as much so as the ones under discussion in this case. Discussing this matter, in the course of an opinion, Judge Brown says: "No formal judgment was necessary in the justice's court, and none would be re-

quired in the recorder's court, which must be governed by the same rules of procedure. Any entry showing the result is a sufficient judgment."

We think in this case, as the matter is here presented, that the memoranda and records produced in evidence are sufficient to show a conviction. The records do show that a prosecution was, in said court, pending against appellant. They show an appearance for him. They show a plea of guilty by him, and that a fine was assessed against him. It is possible that, if the enforcement of that judgment had in those cases been resisted, some further and more formal entry might have been demanded. But, as presented in this case, the conclusion is irresistible, and the record seems sufficient to attest the fact, that there was an adjudication, on his plea of guilty, that he was guilty, and the assessment of a penalty conformable to the law. We think, having in mind the informal character of proceedings in such tribunals, that they are not courts of record, that they have no seal, and that pleadings in them are oral, these entries were sufficient to show a former conviction.

It is insisted, however, most earnestly and with much plausibility, that these records do not show a conviction for the same offense. The charge in these cases was violating the Sunday law. The particular charge here is for permitting to be opened a theater on Sunday. In their brief, counsel for appellant say that this is in no sense the same offense; that the conviction for violating the Sunday law might have been for selling goods on Sunday, laboring on Sunday, or running a horse race on Sunday, as well as permitting a theater to be opened. That is true; but in each case there would be a conviction for violating the sanctity of the Sabbath by doing some of the acts named in the particular cases assumed. The statute should receive a reasonable and sensible interpretation. It was meant, evidently, to authorize courts and juries to inflict punishment on persons who had shown a flagrant disregard, or exhibited a contemptuous defiance, of the law in respect to particular offenses. There would be no reason why, in respect to violations of the Sabbath, that the court should not be authorized to multiply the punishment, whether these violations shape themselves in one rather than some other form; and so in this case we can see no reason why, if appellant had violated the Sunday law in any of the forms assumed, being similar in character in the sense that they were violations of the general prohibition against work, labor, or the conduct of business on Sunday, he should not be visited with the same punishment.

There are a number of other questions discussed, relative to the charge of the court and remarks of counsel for the prosecution,

which we have carefully considered, and with respect to which we think there is no substantial merit.

On the whole of the case, we think there is no error requiring a reversal of the case; and it is therefore ordered that the judgment of conviction be, and the same is hereby, in all things affirmed.

## MANTEL v. STATE.

(Court of Criminal Appeals of Texas. March 10, 1909.)

### 1. MUNICIPAL CORPORATIONS (§ 592\*)—POLICE POWER—CONCURRENT AND CONFLICTING EXERCISE—PUNISHMENT OF OFFENSES.

Dallas City Charter (Sp. Laws 1907, p. 580, c. 71) art. 2, § 3, subd. 37, and Code Cr. Proc. 1895, art. 931, prohibit ordinances fixing a less penalty for an offense than is fixed by statute for a like offense. The state pure food law makes violations of some of its provisions punishable by imprisonment, and others by a maximum fine of \$500; the penalties being graduated. A Dallas city ordinance covers the state law and prescribes a punishment of not less than \$25 nor more than \$200 for violation of its provisions. *Held*, that the ordinance is invalid, under the charter and under article 931.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1313; Dec. Dig. § 592.\*]

### 2. MUNICIPAL CORPORATIONS (§ 57\*)—POWER.

Municipal corporations have only such power as is granted by the Legislature, unless otherwise provided in the Constitution.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 144; Dec. Dig. § 57.\*]

### 3. MUNICIPAL CORPORATIONS (§ 58\*)—POWERS—CONSTRUCTION.

A grant of power to a municipal corporation by the Legislature will be construed most strongly against the corporation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 145; Dec. Dig. § 58.\*]

### 4. ADULTERATION (§ 3\*)—STATUTORY PROVISIONS—CONSISTENCY.

Pure Food Law (Gen. Laws 1907, pp. 71, 72, c. 39) § 37, provides that one who adulterates by himself, or by a servant or agent, or who sells, exchanges, or delivers, or has in his possession with intent to sell or exchange, or expose for sale, adulterated milk, etc., shall be punished by fine not exceeding \$100 or by imprisonment not exceeding 3 months. Section 43 provides that any one who removes the cream, or any part thereof, from milk sold as pure milk to any factory in which milk is used as a material, or who in any manner adulterates such milk, shall be punished by fine not exceeding \$100 or by imprisonment not exceeding 90 days. *Held*, that these sections are valid, and not in conflict.

[Ed. Note.—For other cases, see Adulteration, Dec. Dig. § 3.\*]

### 5. STATUTES (§ 58\*)—VALIDITY—DETERMINATION.

A statute will not be held invalid, in a proceeding involving the validity of a municipal ordinance, merely because the ordinance is not in harmony with the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 53; Dec. Dig. § 53.\*]

**6. MUNICIPAL CORPORATIONS (§ 592\*)—CURRENT EXERCISE OF POLICE POWER BY STATE AND MUNICIPALITY — ORDINANCE YIELDING TO STATUTE.**

Where there is a conflict between the statute and an ordinance, the ordinance must yield, if it be necessary to hold either invalid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1311; Dec. Dig. § 592.\*]

**7. MUNICIPAL CORPORATIONS (§ 592\*)—POLICE POWER—EXERCISE IN CONFORMITY TO STATE LAWS.**

The city of Dallas may adopt appropriate ordinances to protect the public health, provided they conform to the state law on the same subject.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1311; Dec. Dig. § 592.\*]

Appeal from Dallas County Court, at Law; W. M. Holland, Judge.

J. Mantel was convicted of violating a pure food ordinance, and he appeals. Reversed and remanded.

Barry Miller, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for violating an ordinance of the city of Dallas prescribing a punishment for the exposure for sale and prohibiting the sale of unwholesome and adulterated food.

The complaint charges the adulteration of milk. The ordinance is very general, and reads as follows: "That no person or persons, firm or corporation, within the city of Dallas, shall manufacture, offer or expose for sale or exchange or sell any article of food or drink which is adulterated or misbranded under the meaning of this act." The punishment prescribed is not less than \$25 nor more than \$200. The state law prescribes different punishments for different violations of what is known as the "Pure Food Law," some of which require punishment in the county jail and some reaching a maximum punishment of \$500. The state law is so framed that the punishments prescribed in it are of different grades, owing to the character of the foods adulterated. The city ordinance seems to be sweeping enough to cover all the provisions of the state law, without drawing any distinction as to the character of foods which may be adulterated or the manner of adulteration, in so far as punishment is concerned. It will be observed, then, that the punishment under the city ordinance will apply alike to any or all violations of city ordinance where food or drink has been adulterated. This ordinance seems to undertake to cover in a few lines the various offenses denounced by the statute, and inflict the same punishment for a violation of each or all, without reference to the punishment prescribed by the state law, and without reference to the definitions given in the statutory pure food law.

For this reason we are of opinion that the ordinance is invalid, in that the punishment for violation of the city ordinance is different from that prescribed for violation of the state law. It is expressly stated in the charter granted the city of Dallas, as evidenced by the language of section 3, subd. 37, that "the city shall have power to enforce the by-laws and ordinances for the city by fine not to exceed two hundred dollars, provided that no ordinance or by-law shall provide a lesser penalty than is prescribed for a like offense by the laws of the state." Sp. Laws 1907, p. 580, c. 71, art. 2. Therefore as this provision of the charter reads, compared with the ordinance, it will be seen that the ordinance is within the interdiction contained in the charter and in article 931, Code Cr. Proc. 1895, which provides " \* \* \* that no ordinance of a city or town shall be valid which provides a less penalty for any act, omission or offense than is prescribed by the statutes, where such act or omission is an offense against the state." So here we have another direct inhibition by the Legislature against a city or town providing ordinances with penalties other than those prescribed by the state for a like offense. Municipal corporations have only such powers as may be granted by the Legislature, unless otherwise provided in the Constitution; and wherever the question of a grant of power is at issue, the grant will be taken more strongly in favor of the granting power, and against the grantee, when application of this principle is made to municipal corporations. This provision of the Code of Criminal Procedure has received construction in many cases and is of uniform ruling. These cases all hold that, where the ordinance is in conflict with the statute, it is invalid in regard to punishment under such conditions as are stated in this record. *McClain v. State*, 31 Tex. Cr. R. 558, 21 S. W. 365; *Ex parte Sundstrom*, 25 Tex. App. 152, 8 S. W. 207; *Bohmy v. State*, 21 Tex. App. 597, 2 S. W. 886; *Flood v. State*, 19 Tex. App. 584; *Angerhoffer v. State*, 15 Tex. App. 613; *Lynn v. State*, 33 Tex. Cr. R. 159, 25 S. W. 779; *Ex parte Ogden*, 43 Tex. Cr. R. 531, 66 S. W. 1100; *Ex parte Fagg*, 38 Tex. Cr. R. 587, 44 S. W. 294, 40 L. R. A. 212; *Ex parte Cross*, 44 Tex. Cr. R. 376, 71 S. W. 289; *Clark v. State*, 46 Tex. Cr. R. 566, 81 S. W. 722; *Ex parte McHenry*, 103 S. W. 390, 19 Tex. Cr. R. 233; *Ex parte Boland*, 11 Tex. App. 159; *Ex parte Slaron*, 3 Tex. App. 662; *Ex parte Coombs*, 38 Tex. Cr. R. 648, 44 S. W. 854; *McNell v. State*, 29 Tex. App. 48, 14 S. W. 393; *Ex parte Gregory*, 1 Tex. App. 753; *Arroyo v. State* (Tex. Cr. App.) 69 S. W. 503. We deem it unnecessary to cite further authorities.

It is urged, however, by the city, when

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



properly construed, there is no conflict between the act of the Legislature and the ordinance of the city of Dallas; and it is further insisted that the provisions of the state law relating to the sale of milk are unenforceable on account of the different penalties prescribed in that act for the same offense. We are of opinion these contentions are not valid. The sections referred to by counsel representing the city of Dallas are Gen. Laws 1907, pp. 71, 72, c. 39, §§ 37, 43. Section 37 provides that whoever shall adulterate by himself, or by his servant or agent, or sell, exchange, or deliver, or have in his custody or possession with intent to sell or exchange the same, or expose or offer for sale, adulterated milk, or milk to which water or any foreign substance or substances in any state of fermentation or putrefaction, or from sick or diseased cows, shall be guilty of a misdemeanor, and shall, for every offense, be punished by a fine not exceeding \$100, or by imprisonment in the county jail not exceeding 3 months. Section 43 provides as follows: "Any person who shall remove the cream or any part thereof from milk, to be sold as pure milk, to any factory in which milk is used as a material in the process of production, and any person who shall, in any manner, adulterate such milk, either by addition of water or otherwise, shall be guilty of a misdemeanor, and shall for every such offense be punished by a fine not exceeding \$100, or by imprisonment in the county jail not exceeding 90 days." We are of opinion that there is no merit in the contention that these laws are in conflict, when properly construed; and we are further of opinion that these provisions of the pure food law relating to the sale of milk are enforceable, and that the Legislature had authority to make the penalties different. While, technically speaking, there may be a slight difference between the expression "3 months" in section 37 and "90 days" in section 43, yet, under the view we take of it, it would make no difference if there were entirely different punishments. Under section 37 the party is punished for adulterating, either by himself or through his agents or employes, or selling, exchanging, or delivering, or having in his custody with intent to sell, exchange, etc., adulterated milk, or milk to which water or any foreign substance or substances in any state of fermentation or putrefaction, or from sick or diseased cows; while in section 43 the person punished is he who shall remove the cream, or any part thereof, from milk, to be sold as pure milk, to any factory in which milk is used as a material in the process of production, and any person who shall in any manner adulterate such milk either by addition of water or otherwise. These are different matters, different definitions, and

refer to different conditions, which the Legislature had a right to designate and provide. The objects of the two sections are different, and the purposes are not the same.

Nor do we believe, nor are we of opinion, that this court is called upon to hold, nor would we be justified in litigations of this character to hold, invalid the acts of the Legislature because a city ordinance may be out of harmony with such legislation. Nor would we be justified under such circumstances in holding invalid the statutes passed by the Legislature in order to uphold the city ordinance, where there is a conflict. If there is a conflict between the acts of the Legislature and the city ordinance, the city ordinance must give way and be held invalid, if it be necessary to hold either invalid. The city ordinances are justified by virtue of the authority granted in the charter. This charter is derived from the Legislature, and the power of the city government to create or ordain ordinances is by virtue of authority granted by the Legislature. As before stated, municipal corporations have only such power as may be granted by the Legislature, unless otherwise ordained in the Constitution; and, whenever there is a question of the grant of this power, it will be taken more strongly in favor of the granting power, and against the grantee or municipal corporation, and it will not be nor would it be maintainable as a sound proposition to hold that, where there is a conflict between the act of the Legislature and the city ordinance, the act of the Legislature must be held invalid. It does not need to be added that it is well within the power of the city of Dallas, by ordinance duly passed, to adopt such ordinances as may be appropriate to protect the public health, subject, always, that they be in conformity with the state law on the same subject.

For the reasons indicated, the judgment is reversed, and the cause is remanded.

#### SUE LUNG v. STATE.

(Court of Criminal Appeals of Texas. March 10, 1909.)

Appeal from Dallas County Court, at Law; W. M. Holland, Judge.

Sue Lung was convicted of violating the pure food law, and he appeals. Reversed and remanded.

Clint & Daugherty, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged with and convicted of violating the pure food law, his punishment being assessed at a fine of \$105.

This is a companion case to cause No. 4,546, J. Mantel v. State (this day decided) 117 S. W. 855. The record herein is in the same condition as in that case, and for the reasons therein stated the judgment in this case is reversed, and the cause remanded.

**WILLIAMS v. STATE.**

(Court of Criminal Appeals of Texas. March 17, 1909. Rehearing Denied April 14, 1909.)

**INTOXICATING LIQUORS (§ 236\*)—VIOLATION OF LOCAL OPTION LAW—EVIDENCE—SUFFICIENCY.**

Evidence held to sustain a conviction of violating the local option law.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 236.\*]

Appeal from Johnson County Court; F. E. Adams, Judge.

Henry Williams was convicted of violating the local option law, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** This appeal is from a local option conviction.

The contention of appellant is that the evidence is not sufficient to sustain the conviction. The witness Pollard, for the state, testified that she had known appellant for about 10 years, and that on the 1st day of December, 1908, she saw him down on Henderson street, in the city of Cleburne, by the side of a little storeroom. There was a tent where they took pictures, and the next house was a little storeroom in which was a side door near the tent; that she went to the store and knocked on the side door. Appellant came to where she was, and asked her what she wanted. She told him that she wanted some whisky, and gave him 50 cents. He turned, went back in the house, and in a few seconds brought witness a pint of whisky. Appellant's version of it is that he had known the witness Pollard ever since she was a little girl; that they had been friends; that he had frequently gone to her house, and had been with her a great deal; that he remembered several weeks ago of getting some whisky for her, and describes the place as did the witness Pollard. The house was closed when the witness Pollard came and knocked on the door; that he was in the house cleaning up. Upon answering her call, she informed him she wanted some whisky, and gave him half a dollar with which to get it. He took the money, went back through the house, called a man by the name of Marshall, and obtained a pint of whisky; that he paid the identical money that witness Pollard had given him for the whisky; that he had no interest in the trade, and that his getting whisky for her was but a matter of friendship and accommodation; that he made nothing by the trade; that he took the whisky out, and immediately gave it to the witness Pollard; that the whole transaction covered two or three minutes—just long enough, at least, to go through the house, call Marshall, and get the whisky. He says he and the wit-

ness Pollard were good friends, and he got it for her as an act of friendship; that Pollard and Newberry, for whom he was cleaning up, had been running a cigar, tobacco, and frosty business. He says that he had gotten whisky from Marshall before, and that Marshall had informed him that he could get it, as he (Marshall) had some to sell; that he had seen Marshall a few moments before the witness Pollard came, and that when she asked him to get her some whisky he knew he could get it from Marshall, so he took her money, went to Marshall, and obtained the whisky, and gave it to the witness Pollard.

This is the substance of the testimony. Both theories were submitted in the charge by the court, and then an additional instruction was given, at the request of appellant, pertinently submitting his theory of agency and friendship for the witness Pollard in obtaining the whisky. The jury found adversely to appellant's contention. Under the authorities, we would not feel justified in reversing the judgment.

We therefore order that the judgment be affirmed.

**TUBB v. STATE.**

(Court of Criminal Appeals of Texas. Dec. 12, 1908. Rehearing Denied March 20, 1909.)

**1. CRIMINAL LAW (§ 1150\*)—MOTION FOR CHANGE OF VENUE—DISCRETION OF COURT.**

An application for a change of venue on the ground of prejudice of the people against accused being addressed to the discretion of the court, a conviction will not be set aside because of the denial of the application unless the court abused its discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3044; Dec. Dig. § 1150.\*]

**2. CRIMINAL LAW (§ 1059\*)—REVIEW—OBJECTIONS TO INSTRUCTIONS.**

An assignment of error that the court erred in failing to charge the law applicable to the facts as presented by accused will not be considered, where the exception taken to the charge is so general that it would not direct the court's attention to the respect wherein the charge was thought to be insufficient.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2671; Dec. Dig. § 1059.\*]

**3. CRIMINAL LAW (§ 1092\*)—RECORD—BILL OF EXCEPTIONS—APPROVAL—NECESSITY.**

An assignment that the court erred in not charging the law applicable to the facts presented by accused, will not be considered, where the bill of exceptions was in fact never approved by the court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2836; Dec. Dig. § 1092.\*]

**4. CRIMINAL LAW (§ 1064\*)—MOTION FOR NEW TRIAL—GROUNDS.**

A ground of motion for new trial because the court erred in failing to charge on the phase of insanity presented by accused, relying on insanity, and failed to charge the peculiar phase of monomania which rendered accused irresponsible, the court's attention having been called by special exception at the time, challenges the charge of the court and furnishes a basis for

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

review of the contention by the court on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676-2684; Dec. Dig. § 1064.\*]

**5. CRIMINAL LAW (§ 773\*)—INSANITY—EVIDENCE—INSTRUCTIONS.**

Where accused, relying on insanity, did not claim that he had any special delusion in respect to decedent, but the evidence showed that he suffered from such impairment of mind as rendered him insane as to the particular act done, an instruction that evidence to establish the defense of insanity must show that accused was laboring under such defective reason from disease of the mind as not to know the nature or quality of the act, or if he did know that he did not know that he was doing wrong, etc., sufficiently presented the defense of insanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821-1828; Dec. Dig. § 773.\*]

**6. CRIMINAL LAW (§ 1063\*)—APPEAL—QUESTIONS REVIEWABLE.**

Where accused saved his objection to the admissibility of evidence by bill of exceptions, he was not required to set forth the same matter in his motion for new trial to make the ruling open for review on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2679; Dec. Dig. § 1063.\*]

**7. CRIMINAL LAW (§ 483\*)—EVIDENCE—ADMISSIBILITY.**

Where accused, relying on insanity, showed by his witnesses that he was suffering from paranoia, the testimony of a physician called by the state that a paranoiac would denounce the witnesses testifying in his presence that he was insane was not objectionable as referring to the failure of accused to testify, but was admissible as the expression of opinion of an expert bearing on the conduct of accused then present.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 483.\*]

**8. CRIMINAL LAW (§ 695\*)—EVIDENCE—OBJECTIONS—SUFFICIENCY.**

Where an objection to the answer of a witness containing a number of statements, some of which are admissible and some inadmissible, is to the whole testimony and does not single out the objectionable part, the objection is too general to be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1637; Dec. Dig. § 695.\*]

**9. CRIMINAL LAW (§ 490\*)—EVIDENCE—ADMISSIBILITY.**

Where counsel for accused, relying on insanity, went into the matter of the compensation of a physician testifying for the state, when cross-examining the physician, the state on redirect examination was entitled to show that his compensation was suggested by counsel for the state, and that it was unconditional and was without reference to whether his testimony should be favorable or unfavorable to the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1078; Dec. Dig. § 490.\*]

**10. CRIMINAL LAW (§ 1169\*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.**

The error, if any, in permitting a physician testifying for the state as an expert on the question of the sanity of accused, relying on insanity, to state, in connection with his explanation involving the agreement for his compensation, that counsel for the state informed him that the prosecution would be stopped if he would testify that accused was insane, was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.\*]

**11. JURY (§ 103\*)—COMPETENCY OF JURORS.**

Where the only issue was the sanity or insanity of accused at the time of the commission of the offense charged, a juror, who stated that he had formed an opinion of the guilt or innocence of accused, but who testified that he had no prejudice against insanity as a defense, and that he would give accused an impartial hearing on that issue, was not disqualified.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 461-479; Dec. Dig. § 103.\*]

**12. CRIMINAL LAW (§ 695\*)—WITNESSES—COMPETENCY.**

An objection to the testimony of a witness that in his judgment accused, relying on insanity, was sane, based on the ground that the facts stated by the witness did not justify the court in receiving the opinion, went mainly to the weight to be given to the opinion and not to its competency.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 695.\*]

**13. CRIMINAL LAW (§ 1169\*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.**

The error, if any, in permitting the jailer, in whose custody accused, relying on insanity, had been, to testify that he had often talked to the prisoners, that he had fed them twice a day, that accused was clean shaven when he first came to the jail, that his appetite had been good, that his rest had been tolerably good, that accused had frequently talked about farming, and on one occasion about shaving, and that he stated that he might need his whiskers, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.\*]

**14. HOMICIDE (§ 308\*)—MURDER IN SECOND DEGREE—EVIDENCE.**

Where a witness testified that accused, who relied on insanity, was about half an hour before the homicide in a state of great excitement with reference to what he believed was an invasion of his rights and an unlawful sequestration of his property by some one, probably decedent, and a third person accompanying him, the court properly submitted the issue of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 308.\*]

**15. HOMICIDE (§ 340\*)—HARMLESS ERROR—ERRONEOUS SUBMISSION OF ISSUE OF MANSLAUGHTER.**

One convicted of murder in the first degree cannot complain of the error of the court in submitting the issue of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715, 716; Dec. Dig. § 340.\*]

**16. CRIMINAL LAW (§ 1160\*)—APPEAL—VERDICT—CONCLUSIVENESS.**

A verdict on conflicting evidence, and approved by the trial court, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]

Appeal from District Court, Anderson County; B. H. Gardner, Judge.

Sam Tubb was convicted of murder in the first degree, and he appeals. Affirmed.

Miller & Royall and Campbell, Sewell & Strickland, for appellant. F. J. McCord, Asst. Atty. Gen., T. J. Harris, Dist. Atty., H. I. Myers, and N. B. Morris, for the State.

RAMSEY, J. Appellant was indicted in the district court of Anderson county on a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

charge of murder, and on trial was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life.

That he shot and killed Dave Pierce on the 30th day of January, 1907, is not denied, nor is there any pretense of justification for his having so done. The facts are: That he lived, and had lived for many years, near the town of Frankston, in Anderson county. That some time in the fall of 1907 he had bought from the Campbell Machinery Company a gasoline engine and wood-sawing outfit, under an agreement that he should pay \$125 in cash on the machinery being set up in a good working order, and the remainder of the purchase price in consignments of cordwood. About the 26th or 27th of January, D. W. Huff went to the town of Frankston to see appellant in regard to a settlement of the outfit so purchased. Mr. Huff called on appellant and, as he states, showed him that the machinery was in perfect working order, and that appellant seemed well pleased with it. That he then asked him about the payment of \$125. That appellant did not seem to want to make any settlement, and he asked him if he was going to fulfill his contract, to which appellant replied, "Not now, not yet," but that he would see him up at the hotel, and that he did come there to see him. That he went up to his room in the hotel, and that Huff fixed up the note for him to sign, and appellant said he would have to see his son before he could do anything and would see him in the morning, and that if he did not see him in town he could come out to the mill where the machinery was. That he went out next morning and found him nailing up the doors and windows of the house containing the machinery, when he asked appellant if he did not think he ought to make a settlement of some kind, or turn the machinery over to him, to which appellant replied that he could not do it, as he had sold it. That in accordance with instructions received from the house, with the necessary accompanying papers, he called on Mr. Pierce and gave him the sequestration writ and bond of indemnity, and that he started with Pierce to the house where the machinery was, but as it was raining they went to appellant's residence. That his son invited them in and asked them to have a seat by the fire. That they made some inquiry of the son as to where appellant was, and were advised that he was down in the field getting up some cattle. That they remained there some 15 or 20 minutes, about the expiration of which time, Mr. Huff says, he heard a noise which he took to be a dog running off the steps, and that just after this he heard what he thought was a key grating in the lock of a door through which they had just entered. That very soon after this appellant appeared in the doorway leading into the dining room. That he heard a quick tread at the door, and looking up saw appellant come in with a shot-

gun in his hands. That appellant said, "What are you sons-a-bitches doing in my house?" That the minute appellant came in he had a bead drawn on Pierce, and just the minute he made the above remark he fired. That after some other efforts to escape, witness jumped on a bed, and closing his eyes and ducking his head he rushed through a window and dropped to the ground and ran. That appellant pursued him with his gun and called on him to halt, which he finally did. That appellant came up where he was, and he told him that he had done nothing, and that that was his way of earning a living, and for him to remember that he (witness) had a wife at home. That appellant then said to him, "Well, damn you, then come back here, and I will not hurt you." That he marched witness in front of him, and when they got to the yard gate near the barn he told his son to open the gate and let him (witness) in, when he started to go, and appellant said to him, "Now you go," and he started to go, and appellant then said to him, "Hold on, come back here and pay me for that window you broke." Witness asked him how much he wanted, and he said it was \$2.00. That he took it out of his pocket and went to hand it to appellant, when he said, "Don't do that, lay it down on that stump." That he laid it down on the stump, and appellant said, "Now you go." That he continued pointing the gun at him as long as he was in sight, and that as soon as he got out of sight he immediately ran with all possible speed. Huff says that at the time Pierce was shot he had his hands folded in his lap and was reading a magazine, that he (Huff) did not have any weapon on his person, and that Pierce had the sequestration papers with him which he had given him. There was no evidence to disprove any part of the testimony of Huff in respect to the circumstances of the shooting. There was no plea or claim of justification, nor was there any evidence of ill will or malice on the part of appellant towards deceased.

The defense in the case was insanity, and to prove this much testimony was introduced. While it is claimed by the state that this testimony was largely that of kinspeople of appellant, and others open to attack, there was a great amount of testimony of numerous witnesses, which, as we view it, raised a serious question as to the insanity of appellant. This is rendered to our minds more cogent in view of the peculiar circumstances surrounding the homicide. That appellant was a singular and an eccentric man no one can read this record and not believe. That he was something more than this was stated by many of the witnesses and is strongly urged by appellant's counsel. Among other witnesses produced by appellant was Judge A. B. Watkins, who stated: That he knew appellant well; had represented him in court a number of times. That among other things that impressed him as strange and unusual

was the fact of appellant consulting him about the propriety of committing suicide in order to collect an insurance policy. That, as witness believed and had observed, appellant's controlling impulse had always been to swindle some one, anybody with whom he came in contact, at any time. That he seemed to want to get hold of anything, even if it was useless. That he did not discriminate between his friends and those to whom he was under no obligation. That he had said a hundred times in the last few years that appellant was a monomaniac on that one subject. That it was out of proportion to any other idea he had. That it was uppermost in his mind. That he believed appellant was sane on any other subject, except that one of swindling people out of their property. That he believed him to be a monomaniac. That he believed he had reached that point that he had come to feel that it was all right for him to beat anybody out of anything, and that he had a right to beat them out of it. That he believed that appellant's idea was that to interfere with him in that line was just like interfering with him in anything else that he had a right to do, as much as the plowing of corn, or the interference with any other property right of his. He further states that appellant appeared to him the whole time—that is, since 1884—to be almost as bad as a maniac upon that subject, and that he really looked upon him as an unfortunate person, a moral degenerate.

Many singular and peculiar acts of appellant were proven on the trial. It seems that on a couple of occasions he came to the house of one W. B. Beacham and got breakfast and woke up the family and announced that breakfast was ready, and that this was his conduct the first time he had ever been at his house; that in conversation he would change the subject a half dozen times in a short while, and that he could never understand what he wanted. It is shown by another witness, who had known appellant some 30 or 40 years: That in going in company and to church appellant would attire himself in a long linen duster and an old hat; that in working in the fields he had known him to sew up his trousers so tight than he could not get them off and would have to sleep in them; that he always seemed to have a desire to go up; that he wanted to go up to a higher pitch, and if his plans failed it seems that he just floundered, and would throw himself away, which caused the witness to believe that he was off and that something was wrong with him; that this peculiar disposition was noticeable even when he was a boy; and that his conduct led him to believe that his mind was impaired even then.

Another witness, who had known him for many years, testified that it was noticeable that in the midst of a conversation he would stop and stare out of the window, drop his head for a few minutes, and presently start off on a new subject.

Mrs. Cook testified to seeing him burn brush at night, and that when his wife was a corpse, and they were sitting up with her, she noticed that appellant would take his baby and walk around the room real fast, singing to the baby, and finally laid down on the floor and went to sleep, that the baby was not fretting, and that she did not commonly see people acting that way on such occasions.

W. A. Lamb testified to an incident in connection with a visit appellant paid him last winter, when he noticed that appellant had a string tied around his body, and that he asked him why he wore it there, and appellant replied that it was as warm as an overcoat, and that he believed that his mind was unbalanced.

Jim Owens testified to a number of unusual incidents, and, among other things, to the fact that appellant had quite a lot of goats at one time, and that he got bells for all of them and belled them; that he had 14 or 15 cows, and he put bells on all of them.

Henry Houston testified: That on one occasion he had met appellant on the public road going to Athens. That he was by himself driving in a buggy with no clothes on but an undershirt and drawers, and his drawers legs were rolled up. That about 15 years ago appellant came to his house one night where his father lived, who was a physician, and wanted his tooth pulled. That his father told him it was dark, and that he could not do it at night. That he insisted on having it pulled then, and that he took his pistol out of his pocket, and took one of the cartridges out, and suggested that he could cut a groove in that and attach one end of a fine piece of wire to the cartridge by that groove, and slip that back into the pistol, and tie the other end to his tooth, and, as he said, "shoot the damn thing out." That he never thought appellant was rational, but never decided what was the cause of his condition. That he was very peculiar about associating with other people. That he would have nothing to do with other people, but always stayed to himself. That he had been at appellant's house and saw there a great many unusual things for a man in his station, and that he told witness that he had beat people out of them. That he had such things as flower pots, crockery ware, farm tools, etc. That he never talked about anything else except beating people out of things. That if he was interfered with it seemed to bother him very much. That he never in his life knew appellant to be disturbed by anything else.

Another witness testified: That many years ago appellant told him one day that he wanted to get married, and was going to steal the girl, and wanted witness to get the license right away; that he went to Palestine and got the license, and when he returned he met appellant and the young lady, and, as he says, they gave him the

regular "horse laugh"; that he gave appellant the license, and he began to tear it up; that about this time appellant bought a very fine overcoat, for which he paid \$125 or \$150; that he would wear it around anywhere, sometimes wearing it with overalls and brogan shoes; that he was a great hunter and would sometimes be in the woods by himself two or three days, and when his provisions ran out, and the dogs got tired of hunting, he would shoot a cow and cut off its hind quarters and feed it to the dogs; that he would leave the balance of it there, and post up a notice on a tree that on that day Sam Tubbs had killed a cow, with a certain brand, and that the same would be paid for when the owner called on him; that about three years ago appellant visited him at Texarkana and on entering the house hugged and kissed him and his wife, though they were not related; that when bedtime came he showed appellant his room, but he said, "No," that he was going to sleep with me, and that if witness did not sleep with him that he would sleep with him and his wife; that this occurred the next night also; that he had a letter from him about a year ago in which he wanted witness to pick out some fine horses for him and send him their photographs; that he had worked with appellant in a store many years ago, and that during this time he made a pen out of one of his finger nails; that it was an actual pen, shaped just like a falcon pen, and split in the middle; that he would write with that as legibly as he could with anything else.

It was shown by other witnesses that he scarcely used this hand at all. Witness states: That on one of his visits to Texarkana he took him to church; that his daughter took a seat three or four rows ahead of them; that when he noticed her sitting where she was, appellant went to where she was, right over the benches, instead of going out into the aisle; that this was done right before the whole congregation.

Dr. A. S. Miller, who was a cousin of appellant, testified to some very singular incidents and gives a very full history of appellant and his antecedents. He knew appellant, it seems, as a boy, at which time he says he did not act, think, or talk like other boys; that he was always doing something erratic and out of the ordinary; that about the time he got grown he found that appellant was ordering goods, fine horses, fine dogs, fine guns, and everything in the world that he could get that was very fine, and that he got a great many of them; that he (witness) told him that he was doing wrong, but it did not seem to bother appellant; that he thought it was right to get them; that appellant once insisted on giving him two fine pigs; that he told appellant that he did not want them, but finally took them to please appellant; that in a day or two appellant sent him a bill for \$20 for them.

From his observation of appellant through many years, he says: "I cannot tell you when this condition of his mind first arose. I think he was born with it, and it has been with him all the time since then. It is a deficiency of some special faculty. It might be of the conscience—a deficiency in construction of mental character, or consciousness." It seems from Dr. Miller's testimony that appellant was reared by an uncle who had plenty of money, and who supplied him with everything he wished, that appellant was wasteful, and that when anything did not suit him he would break it and get another. He diagnosed the disease under which he claimed appellant was suffering as paranoia, and in conclusion stated that: "Under the circumstances, as developed by the evidence in this case, a paranoiac would kill one who was attempting to levy on some property. I think that he would kill a man, and if he did he would think it was right."

Another witness testified: That while at work plowing he would take off his clothes and put them on the gear for blinds and pads; that he had a great many dogs, and one time he bought some butter and eggs from him (witness) and said he was going to give his dogs a Thanksgiving dinner and invited him to come over and take dinner with him (appellant) and his dogs; that he frequently rambled around at night, and slept very little; that he would sometimes be out blowing his horn and sometimes on the road.

Sam Cooper testified to a conversation with appellant on the morning of the killing; that this occurred about 7:30 o'clock; that he drove by in a buggy going to mill; that appellant ran out of a little house where the machinery was and asked him if he was a lawyer; that he (appellant) said that these fellows were going to take his real estate; that he was going to box that house up and nail himself up in it, so that they could not get it away from him; that appellant seemed to be laboring under a terrible delusion of some kind; that he (witness) did not believe him to be a sane man; and that after this conversation appellant turned and ran away from him.

G. W. L. Smith testified to another singular incident. He states: That he lived at Henderson where he was deputy United States internal revenue collector. That quite a while ago he was at Frankston making some investigations and met appellant. That he was there again some time after that, and appellant came up and said, "You don't know me," and that he told him he did not remember him when he said his name was Tubbs. That some time after that he got a letter from Frankston from appellant, telling him that he was glad to know that he was not dead. That the letter was a very long rambling letter, in which he expressed a good deal of sympathy and solicitude for him.

William Cook testified that he had seen appellant in town bareheaded and wearing a strap around his waist, that he woke one night and saw a fire down in his clearing, and the next morning found that he had been burning brush all night.

Another witness testified that she had seen him plowing on Sunday morning; that she had seen him come to town bareheaded and barefooted.

S. H. Adams testified: That he had known appellant for some 25 years; that the first peculiar conduct on appellant's part was in 1884 or 1885, when he came one night to the town of Kickapoo to a Christmas tree on a very cold night, where there was a crowd, wearing a linen duster and no coat; that in 1895 he was in the hardware business at Athens, and appellant came in and said he wanted to see some coffins; that he showed him the best coffin he had, and he wanted it trimmed up; that he told appellant the ornaments would get soiled and not look nice, but he decided to take it, and witness started to close it up; that appellant said, "Hold on, I want to measure it," and stepped into the coffin and tried it; that appellant wanted him to keep it, which he did until he went out of business.

Mrs. Mary Goodson testified: That she had known appellant all of her life; that she had seen him take his dogs into his wife's room, and put them on her nice bed, and cover them up with her nice counterpanes, and take food from the table and give it to them, saying that they had a chill, or were sick; that she had talked to him about the way he would do, about getting things, but he did not seem to think it was wrong; that he seemed to think it was all right to get things and not pay for them; that he never talked about anything else, and seemed to derive a great deal of satisfaction from discussing that subject.

Another witness, who had known appellant many years, said: That one of his peculiarities was to go around at different times of the night to people's houses; that he had known him to come to his house when he was asleep; that once he came and wanted to get a handful of peas that he had promised him; that he (witness) told him they were in the smokehouse, and he went out there and got them and began shelling them before he could get up; that this was after midnight and a very cold night; that he had made such a visit to his house only about three or four weeks before the killing, coming before daylight and leaving before daylight; that he came on horseback and left afoot.

There was considerable evidence of insanity, at least in the collateral branches of appellant's family, and some slight evidence of insanity in the more direct line, which we deem it unnecessary to set out. Jim Burkett testified to an incident when he and other parties were out hunting, one of whom was riding what he calls a "fool mule"; that he

had some pine kindling tied on behind his saddle, and appellant said to strike a light, setting fire to this kindling as he said that; that, before the fellow knew anything about it, his mule was gone right down the bluff of the mountain.

S. J. Ayres, who had known appellant all his life, states: That he did not know that appellant could be compared with any other human being; that in his early life he had a mania for guineas, and collected some 150 guinea eggs, and after the guineas were hatched he would set his dogs on the guineas and run them; that he had often hunted with him, and on such expeditions, if it did not suit him to go home when he (witness) was ready, he would lie right down in the leaves and go to sleep; and that he had many similar eccentricities.

Joe Rowe testified: That many years ago appellant came to his house late at night, when it was very cold; that he got up, let him in, made a fire, and asked him what was the matter, and he said he came over to bring some nails, and he would have to get up and get them; that he told him to give them to the boy, and he said if he (witness) did not get up he would throw them into the fire, and took about a dozen nails out of his pocket, threw them into the fire, and bade them good night; that a few weeks before the homicide appellant came over to his house and said he wanted to see him (witness) on some business and for me to come over to his house; that when he went over appellant just told him "Howdy" and went on; that he went to the lot and came back and passed right by him (witness) on the gallery, and never came back where he was; that a few days after that witness passed appellant on his way to town, and appellant told him to wait, that he had never told him what he wanted to see him about; that he wanted to see him; that he was, at the time about 25 or 30 steps from the road and seemed to be digging in the ground with a hatchet; that he sat there on his horse for a half or three quarters of an hour; that appellant was bareheaded and digging in the ground; that finally he quit and passed right by witness without saying a word and left him there.

There are many other instances of a similar character narrated by several witnesses. Appellant introduced a number of experts, among others, Dr. W. L. Barker, superintendent of the Insane asylum at San Antonio, who concurred in the belief and opinion that appellant was a paranoiac, and who expressed the belief, basing his judgment upon all the testimony, which he had heard, that appellant was insane and not capable of distinguishing between right and wrong in respect to the particular act with which he was charged. Many of the nonprofessional witnesses gave a similar opinion, while others were not prepared to say that he was so insane as to be irresponsible; but some of them

at least, were inclined to the opinion that he would know the difference between right and wrong in respect to the matter charged.

The state introduced a number of witnesses who testified to a more or less intimate acquaintance with appellant, and who expressed the belief that he was sane and responsible for the act charged, and on the particular issue of the defense in respect to the form of insanity with which, as appellant's witnesses stated he was suffering, the state, it seems to us, met with much success; that is, the contention that appellant was a paranoiac. It seemed to have been conceded by all the professional witnesses that paranoia is a progressive disease, and, as stated by them, in harmony with medical authorities, is characterized by systematized delusions, and that the paranoiac ordinarily manifests a mental disorder, which is seen in three grades or phases. In the first place, it is said the patient passes through a period of disquietude, in which he begins to realize that he is out of harmony with his environment. He is uneasy and dissatisfied. He becomes introspective, and subjects himself to analysis in an attempt to interpret his disorderly feelings and thoughts. This, it is said, has been called the "hypochondriacal stage." That he is in possession of his intelligence and realizes that he is not in accord with others. In the second stage he passes on to the formation of delusions of suspicion and of persecution. He believes that he is the object of evil design of other persons, that he is talked about and maligned, that he is shunned, his plans thwarted, that he is unjustly dealt with, defrauded of his rights, tormented by unknown and unseen foes, and that tormenting voices call to him repeating aloud his innermost thoughts. In the third stage, it is stated, the patient undergoes what has been called the "transformation of personality; that he either gradually or quite suddenly conceives delusions of grandeur; that heretofore, persecuted and rejected of men, he now arises superior to fate, and his adverse fate becomes exalted. It was shown by the testimony of Judge Watkins, as well as others, that there had been little, if any, change in the attitude, demeanor, or conduct of appellant for something like a quarter of a century. There was some proof, including that of Dr. Miller, that there had been some change, but it was slight, and the testimony taken altogether, if the definitions agreed upon by the physicians are correct, seem to us, as laymen in that profession, to have given the state a strong position in the matter of the particular classification of the mental disorder agreed upon by them. But with all this it is clear to us that there was strong evidence by the nonprofessional witnesses of such mental unsoundness as to not only carry the case to the jury, but to demand in respect thereto the careful safeguarding of every right which the law ac-

cords to a defendant. We have made this probably unnecessary full statement of the case to the end that our remarks in respect to particular assignments may be understood and applied. There are many questions raised on the appeal, some of which relate to matters not likely to occur on another trial, and some of which are so unimportant that, in view of the necessary length of the opinion, we shall find it unnecessary to treat.

1. When the case was called for trial, appellant made an application for change of venue. This application contained both the statutory grounds that there existed in the county of Anderson, where the case was pending, so great a prejudice against him that he could not obtain a fair and impartial trial, and because there then and there existed against him a dangerous combination instigated by influential persons by reasons of which he could not expect a fair trial. There was not only no proof introduced in support of the second ground of the motion; but, on the contrary, the state taking the initiative, this allegation was substantially disproved. On the other issue in question, that there existed so great a prejudice against him that he could not obtain a fair and impartial trial in Anderson county, a considerable number of witnesses were introduced by appellant and the state, which testimony we do not deem it necessary to set out. That the case had been discussed to a considerable extent, and that there had been among some persons a judgment formed adverse to appellant in respect to the case, a reading of the record abundantly testifies. A considerable number of witnesses introduced by the state, and on cross-examination a number of witnesses introduced by appellant, testified that they believed that appellant could in said county secure a fair and impartial trial. Of necessity, in respect to a question of this kind, much ought to be left to the discretion and sound judgment of the court trying the case, and in no case should the judgment of conviction be set aside on account of the action of the trial court in refusing a change of venue, unless it is clear that such court has abused his discretion. This is the doctrine laid down in almost the precise terms above stated, by Judge Hurt, in the case of *Gaines v. State* (Tex. Cr. App.) 37 S. W. 331. See, also, *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746; *Bohannon v. State*, 14 Tex. App. 271; *Martin v. State*, 21 Tex. App. 1, 17 S. W. 430; *Connell v. State*, 45 Tex. Cr. R. 142, 75 S. W. 512; *Reeves v. State*, 47 Tex. Cr. R. 340, 83 S. W. 803; *Earles v. State*, 47 Tex. Cr. R. 559, 85 S. W. 1; *Adams v. State* (Tex. Cr. App.) 93 S. W. 116. After a careful inspection of the record, we do not believe that we could or would be justified, in view of the action of the trial court in conflicting evidence, in reversing the judgment on the failure of the court to grant a change of venue.



2. It is urged that the court erred in that he failed to charge the jury upon the phase of insanity presented by the defense in said cause, and failed to charge the peculiar phase or form of monomania which rendered the appellant irresponsible for his acts at the time of the killing of deceased, and that the court did not charge the law applicable to the facts, as presented by the appellant on the question of insanity. Objection is made to our considering this assignment for the reason that same is not properly presented. Appellant in the court below undertook to file an exception to the charge of the court on this question. It cannot be considered for two reasons: In the first place, the purported exception is so general as that it would not in the nature of things have challenged the attention of the court or directed his attention to the respect wherein his charge was thought to be insufficient. Again, an examination of the record discloses the fact that what is termed "a bill of exceptions," was in fact never approved by the court. However, the matter is, we think, properly raised in appellant's motion for a new trial.

3. In the third ground of the motion for a new trial, such new trial was sought because "the court erred in that he failed to charge the jury upon the phase of insanity presented by the defense in said cause, and failed to charge the peculiar phase of monomania, which rendered defendant irresponsible for his acts at the time of the killing of deceased; his attention having been thereto called by special exception at the time." While somewhat vague, we believe the effect of this ground of the motion is in such language as could not have been misunderstood to challenge the charge of the court and furnishes a basis for the review of this contention by us. The court in his general charge in respect to the law of insanity gave the following: "You are charged that only a person with a sound memory and discretion can be held punishable for a crime, and that no act done in a state of insanity can be held punishable as an offense. Every man is presumed to be sane until the contrary appears to the jury trying him. He is presumed to entertain, until this appears, a sufficient degree of reason to be responsible for his acts, and to establish a defense on the ground of insanity, it must be shown by a preponderance of the evidence that at the time of committing the act the party accused was laboring under such defect of reason, from disease or defect of mind, as not to know the nature or quality of the act he was doing, or if he did know that, he did not know he was doing wrong—that is, that he did not know the difference between the right and wrong as to the particular act charged against him. The insanity must have existed at the very time of the commission of the offense, and the mind must have been so dethroned of reason as to deprive

the person accused of a knowledge of the right and wrong as to the particular act done. You are to determine from the evidence in this case the matter of insanity; it being a question of fact controlled, so far as the law is concerned, by the instructions herein given you. In case you find from the evidence that the defendant was insane at the time of the commission of the act, and you acquit him, under the instructions heretofore given you, you will state in your verdict that you have acquitted the defendant on the ground of insanity, and the burden of proof to establish his plea of insanity devolves upon the defendant; but it is not necessary that insanity be proven beyond a reasonable doubt."

As authority for this contention, appellant relies upon the case of *Merritt v. State*, 39 Tex. Cr. R. 70, 45 S. W. 21, and it must be admitted that this contention is not without some weight. In that case, as we gather from the record, the appellant, Merritt, was under the impression that deceased, with others, was engaged as part of a mob bent upon killing him or doing him serious injury, and it was claimed that he killed deceased under this delusion. The charge as given in that case does not appear in the record, but in the course of the opinion it is stated: "No exception was reserved to the charge of the court on insanity, but, in view of another trial, we would observe that the charge of the court on this subject may be well enough as far as it goes, but it does not apply the law to the facts of the case. We think that the court should give the jury a charge on insanity as applicable to the facts proved. In this case appellant's proof tended to show that he was overwhelmed at the time of the homicide with an insane delusion that deceased was the leader of a mob that was seeking his life. If he was insane on that subject, and if, under that delusion, he was incapable of distinguishing the right and wrong of the particular act he was doing, and he believed that in slaying Brown he was preserving his own life from the mob, then he was not criminally responsible, and the jury should be instructed, if they believe the homicide occurred under such circumstance, to acquit him." This case has not, so far as we have observed, ever been followed or cited. We think the suggestions of the court are perhaps timely and appropriate, for the reason that there the delusion had reference to and gathered itself around the supposed attitude of deceased, and that he, in particular, was the leader of a mob seeking his life. The defense here raises the issue and contention of general insanity having the same relation to all persons. The opinion of the court in the case cited should, we think, be limited to the case then being considered.

In the later case of *Hurst v. State*, 40 Tex. Cr. R. 378, 46 S. W. 635, 50 S. W. 719, a

charge very similar to that given in this case was approved, and it was there, as here, objected that it was insufficient in that it erects a single standard, to wit: That if appellant at the time he committed the act knew the difference between right and wrong thereof, he was sane; if he did not know it, he was insane. It was urged that this charge was defective because this test was too circumscribed, in that it utterly ignored emotional insanity, or the inability of appellant to control his will power, on account of his insanity. In that case appellant requested certain special instructions presenting this view. This court held that the refusal of these charges was not error and rests its decision on the principle thus stated: "It occurs to us that, if he was insane at all, it was on account of the infirmity of his mind, which rendered him incapable of reasoning and knowing that the act he was then doing was wrong. This issue was fairly submitted to the jury, and we do not understand that any complaint is made in regard to its submission; but the charge is criticised only because the court did not give, in this connection, emotional insanity. As stated, we disagree with counsel in this contention."

So in this case, under the facts as introduced in evidence, if appellant was insane at all, he was insane in respect to all persons. It is not shown or claimed that he had any special delusion in respect to Pierce, the deceased; but, the whole evidence taken together and considered most favorably to appellant, the issue is: Was he suffering from such defect of reason and impairment of the mind as to render him, in respect to the particular act done, insane, and as to leave him in such condition as not to know the right or wrong of the particular act then done. The charge of the court complained of is, as we believe, substantially in harmony with the decisions of this court as laid down in the cases of *Sartin v. State*, 51 Tex. Cr. R. 571, 103 S. W. 875, *Nugent v. State*, 46 Tex. Cr. R. 67, 80 S. W. 84, *Kelley v. State*, 51 Tex. Cr. R. 151, 101 S. W. 230, and *Cannon v. State*, 41 Tex. Cr. R. 467, 56 S. W. 351.

4. Appellant complains of certain testimony, which will hereafter appear, adduced through Dr. B. M. Worsham, superintendent of the insane asylum at Austin, who was introduced as a witness on the part of the state. This witness had shown great familiarity with paranoia, the form of disease or mental derangement under which appellant's witnesses claimed he was laboring, and had testified at great length to the different stages through which one afflicted with this form of disease passed, and had in his testimony made a strong showing based on his knowledge and experience of the improbability, if not, indeed, the impossibility, of the existence of the particular form of mental trouble named by the witnesses for ap-

pellant. In this connection the following question was propounded to him by counsel for the state: "Suppose that a person has paranoia, does he admit that he has it, or does he dispute that he has it? Suppose that a man would submit to being called insane on a trial in court, and never disputed it, what do the books say about that? Will he denounce the witnesses who testify in his presence that he is insane, at the time they testify to such fact?" To this question counsel for appellant interposed this objection: "Because it is an effort on the part of the state to use the appearance and conduct of the defendant in the courtroom against him when he was not placed on the witness stand." This objection was by the court overruled, and the witness testified as follows: "If a defendant is on trial who is a paranoiac, and his insanity is pleaded, and the witness testify in his presence that he is insane, he will reject and denounce them in every instance that I have ever known. He will denounce them in the courtroom and elsewhere, even though he is on trial for his life. I have seen that personally." It is urged by counsel for the state that we should not consider this assignment for the reason that, while excepted to at the time it was offered, it was not brought forward and urged as a ground in appellant's motion for a new trial. The motion does raise the same point in respect to similar testimony of Dr. Parsons, but that there is no bill of exceptions in the record in respect to his assignment of error as to Dr. Parson's testimony, and that, by failing to urge the exception as to Dr. Worsham in his motion for new trial, appellant has entirely waived that point. We think that having duly saved the point by bill of exceptions, and it being a matter touching the action of the court, it was not required that the same matter should again be urged in the motion for a new trial to make its review by this court possible, but that we ought to, and indeed must, pass on the question. It is urged again that the assignment should not be sustained for the reason that Dr. Worsham was not asked, nor did any witness say, that appellant failed to dispute his insanity, nor that he did or did not denounce the witnesses that testified that he was insane, and that the answer in question was merely an answer to a hypothetical question, and that before appellant could receive any benefit on this point it was his duty to explain the proceedings in a bill of exceptions and show that he was injured thereby.

There is much force in the state's position in respect to this matter, and we are not sure but that we would be well justified in dismissing the assignment for the reason urged by the state. We have, however, considered the question and treated it, not as an abstract one merely, but, on the contrary, as one that must have been understood by the

jury and would have been understood by them as referring to the fact that the appellant, then present, and through his counsel interposing the plea of insanity, was remaining, and had remained, silent in opposition to the uniform practice of paranoiacs time out of mind. The position maintained by appellant was in effect decisively ruled adversely to him in the case of *Burt v. State*, 38 Tex. Cr. R. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330. In that case Dr. Davis was placed on the stand as a witness for the state and was permitted to testify that the defendant was simulating—that is, playing a part and not acting naturally. This testimony was held not inadmissible. Again in that case Dr. Wooten was permitted to testify that while Burt was in jail he had gone to the jail, had taken the dimensions of his skull, and while there examined the defendant, talked to him, looked at him, and observed him. This was held not to be error. Again in that case Jack Hughes was placed on the stand for the state, by whom it was shown that he had noticed the fact that defendant had struck his head against the window frame the day before as he passed through the window, and that it was the only time defendant had done so in the many times he had passed through said window during the trial. This was held not to be error. Summarizing on the question generally, the court uses the following language: "We are not informed of any case holding that because a prisoner is in jail, unwarned, therefore his conduct cannot be observed, so that the expert can give an opinion as to his sanity. It would be a remarkable case, indeed, in which the accused, if insane, would simulate sanity. We cannot comprehend how the fact that he was in jail could affect his conduct in this particular in any manner, and therefore the ruling of the court in regard to the testimony of Dr. M. M. Smith was correct. See *Adams v. State*, 34 Tex. Cr. R. 470, 31 S. W. 372." See, also, *Cannon v. State*, 41 Tex. Cr. R. 467, 56 S. W. 351. Again, as we have seen: "The conduct and acts of defendant while in jail may be given in evidence as a basis for an opinion by a nonexpert as to defendant's sanity, though defendant was not warned that his acts and conduct would be used as evidence against him, as they are not a confession." *Adams v. State*, 34 Tex. Cr. R. 470, 31 S. W. 372. The admission of this testimony could in no proper sense be held to be a reference to the failure of the defendant to testify, but was merely the expression of an opinion by the expert, based on the testimony developed at a hearing and having reference to the conduct, appearance, and demeanor of the defendant then present.

5. On the trial, on redirect examination, counsel for the state propounded to Dr. Worsham a question in respect to what had passed between himself and counsel in respect to his attendance as a witness for the state

herein. In response thereto Dr. Worsham testified as follows: "Mr. Morris wrote me that he would not ask me to come for only the compensation allowed by the state as witness' fees, because it would cost me more than that to come here. He wanted to know what I would charge to come here, and I answered him and named the fee, which he accepted, and had me subpoenaed. He told me that he wanted me to come to Palestine and pass on the sanity of this man, and if he was insane to say so, and he would immediately stop the prosecution, and the district attorney also joined in this agreement or statement." The bill of exceptions in respect to this matter recites that the defendant at the time said answer was given objected to the same for the following reasons: "Because the same was beyond the power of the witness, and the state's counsel, and prejudicial to the rights of the defendant." The bill is allowed, with the explanation of the court to the effect, in substance, that on cross-examination appellant's counsel went into the matter of Dr. Worsham's attendance at court and had him testify that the amount of such compensation was \$150, agreed to be paid by the prosecution. This testimony was offered in redirect examination to explain the position of the witness, Dr. Worsham, and to give all the correspondence in respect to the compensation and other matters relating to his contract and testimony, which matter had been gone into by defendant. The state objects to the consideration of this bill for the reason that it is too general, and that, if objectionable at all, it was on the ground of hearsay, and that no such objection was made. It is also claimed that the testimony is admissible over any objection for the reason that defendant on cross-examination went into the matter of the contract between Dr. Worsham and state's counsel and showed that he was to receive a fee of \$150, and that the answer complained of was merely stating the rest of the contract or correspondence between Dr. Worsham and the prosecuting attorney, and that, as stated in the court's qualification to said bill, defendant's counsel went into the matter of Dr. Worsham's attendance in court and had him testify about the amount of compensation, which was \$150, and that on redirect examination he gave the balance of the conversation and matters relating to his contract and testimony. The state claims that having gone into the contract, and having introduced part of the correspondence, themselves, it was entitled to all the correspondence on the same subject, and this was all that was introduced.

The bill of exceptions is very general and cannot be considered unless it is included under the general proposition that the testimony was prejudicial to the rights of the defendant. That a portion of the testimony was admissible, we think, there is no sort

of doubt. That it was competent for the witness to testify, as he had done, that he had not sought to be a witness, that the matter of compensation came, not as a suggestion from him, but from counsel for the state on the ground of the great expense to him of attending as a witness, that his compensation was unconditional and was without reference to whether his testimony should be favorable or unfavorable to the state, cannot be doubted for a moment. That it was proper or competent to prove the accompanying statement of counsel for the prosecution that, if he testified that appellant was insane, he would dismiss the prosecution, we may seriously doubt. But the objection interposed went to the whole testimony, and the rule seems to be well settled that where an objection, such as this, involving a number of statements given, a part of which are admissible, and some portions of which may be inadmissible, and there is nothing in the objection to directly challenge or single out the objectionable testimony, such a bill ought not in fairness to be considered. This proceeds upon the principle that it is not fair to a trial court, for that it must be assumed that, if the objectionable testimony were directly challenged by pointing it out and singling it out for decision, same would be sustained; and where counsel content themselves in a case where much of the answer and testimony is admissible, and only some features of it inadmissible, to make a general objection, this is not good practice or fair to the trial court. It proceeds also upon the principle that such practice would burden this court with many appeals and the consideration of many questions, when, if they had been presented fully and fairly to the trial court, such objection would be sustained and it would be unnecessary for us to review on appeal these matters. It is, as we think, undoubtedly true that, in view of the matters complained of by appellant to the effect that Dr. Worsham was to receive \$150, it was not only admissible but important to the state to show how he came to be a witness, and that, as we have no doubt is the case, his fee or compensation was not dependent upon the testimony to be given by him, but was a sum fixed without reference to the character of testimony he gave. That portion of the testimony carrying the statement of Mr. Morris that he would immediately stop the prosecution and the district attorney also joining in this agreement or statement, if the witness would testify that appellant was insane, we think, is subject to some criticism; but it was a mere expression after all of the high regard of counsel for the proficiency and skill of the witness and such a one as, if made in argument, would not have been reversible error, nor can we believe that the inclusion of such a statement in the testimony is of such gravity as would warrant us in reversing a case where the record is otherwise free from error.

6. Again objection was made to the action of the court in overruling the peremptory challenge of appellant to the juror Gore, and the action of the court in respect to this matter is urged as a serious invasion of his rights and as cause for reversal. On preliminary examination by counsel for the state, this witness had stated that he had no such opinion with reference to the guilt or innocence of the defendant as would influence his action in finding a verdict. On cross-examination he stated, in substance, in reply to questions by counsel for appellant, that he had from his conversations with his neighbors and what he had read formed an opinion as to appellant's guilt or innocence, that he had this opinion in his mind, and that it would require evidence to remove it. He also stated that he was a man of strong convictions, and that when his mind was once made up it was not changed unless there was evidence introduced to change the opinion then formed. Thereupon the court interrogated the witness, which appears by the following: "The Court: You understand that the law says that the defendant himself must prove the defense of insanity by a preponderance of the evidence, not beyond a reasonable doubt? A. Yes, sir; I understand that. Q. Will you require more proof than what the law requires or what the court will charge you? A. No, sir; I would not require any more than the law would require. Q. (By Mr. Campbell for the defendant) You have some little prejudice against insanity as a defense? A. No, sir; not that I know. Q. Would that proof have to be conclusive to your mind? A. It would have to be sufficient to establish the fact that he was insane. It would have to establish the fact that he was insane at the time of the killing. Q. Wouldn't that proof have to be convincing? Would that proof to establish his insanity have to be convincing? A. Yes, sir. Q. I believe you said you would give that defense a fair and impartial consideration in making up your verdict in this case, based on the evidence. A. Yes, sir." Whereupon he was further interrogated by the court as follows: "Q. Do you mean by 'convincing' that you would require any more than the law would require as charged by the court? A. No, sir; just enough to establish the fact. Q. You think you can try it according to the law and the evidence? A. Yes, sir. Q. As to whether or not you have formed any opinion as to his guilt, how did you get that opinion? Just hearsay? A. Just from what I have heard. If what I have heard were the facts, he is guilty. Q. He is guilty, provided it does not appear otherwise that he had his self-defense? A. Or, that he was insane, or something of the kind. Q. Do you feel able to discard everything you have heard, and try this case strictly according to the law and the evidence? A. Yes, sir."

As is shown above, substantially the only issuable fact in the case was defendant's

plea of insanity. There was no issue made or denial interposed that he killed the deceased, nor was there any semblance of justification, under the law of self-defense or otherwise. That this juror had formed no opinion upon the only issuable fact in the case was unquestioned. He states, in terms, in answer to the question, "Have you any prejudice against the plea of insanity in a murder case?" that he had not; and also stated that if he was taken in the case as a juror he would give the defendant the same fair and impartial hearing on that issue as he would on any other. If the trial had involved the issue of whether or not appellant was justified in killing deceased, then a more serious question would be presented; but under the authorities, in view of the entire examination, it is believed that, even if this were the issue, he was not disqualified from sitting as a juror in the case. In *Adams v. State*, 35 Tex. Cr. R. 295, 33 S. W. 354, the court say: "The answers of said jurors, in connection with the qualification of the court to the bill of exceptions, show that those of said jurors as had formed any opinion in the case had done so, not from having heard any witness state the facts, but from rumor and hearsay; and they further declare that, notwithstanding any opinion then entertained as to the guilt or innocence of appellant, they could give the appellant a fair and impartial trial on the evidence in the case." *Keaton v. State*, 41 Tex. Cr. R. 621, 57 S. W. 1125; *Sult v. State*, 30 Tex. App. 319, 17 S. W. 458; *Post v. State*, 10 Tex. App. 591; *Johnson v. State*, 21 Tex. App. 368, 17 S. W. 252; *Kennedy v. State*, 19 Tex. App. 629. In the case of *Wilkerson v. State* (Tex. Cr. App.) 57 S. W. 956, the court uses this language: "There is no evidence that any of the jurors talked to any of the witnesses, or heard any of the witnesses testify on the previous trial. Their opinion seems to have been made up of rumor, hearsay, statements, or reports other than the testimony of the witnesses. This conclusion we understand to be supported by the following authorities: *Suit v. State*, 30 Tex. App. 319, 17 S. W. 458; *Mayes v. State*, 33 Tex. Cr. R. 204, 24 S. W. 421; *Adams v. State*, 35 Tex. Cr. R. 285, 33 S. W. 355; *Trotter v. State*, 37 Tex. Cr. R. 468, 36 S. W. 279; *Hamlin v. State*, 39 Tex. Cr. R. 579, 47 S. W. 658; *Shannon v. State*, 34 Tex. Cr. R. 5, 28 S. W. 540." It is not shown that this juror had formed any opinion whatever as to defendant's right to plead insanity. In fact, his answer to the court showed that, if he should plead and prove insanity, he would acquit him, and that under such plea he would treat him fairly, as he had no prejudice against that defense. It must also be remembered that, at the time the juror received his information and impression with respect to the killing, so far as is shown by this record, the matter of appellant's insanity had not been discussed in his section of

the county so far as he was concerned, nobody had broached it, and it was not likely that this juror, a total stranger to all the parties, would have any information with respect to this issue or any occasion to have been unfair in respect thereto.

7. Again complaint is made of the admission of testimony introduced by the state to the effect, in substance, that in their judgment appellant was of sound mind, for the reason that the facts stated by them and the matters as testified to are not of such nature as would justify the court in receiving the evidence as to their opinion or conclusion in respect to his insanity. We have carefully examined the record in respect to all these matters and believe that no error was committed by the court in respect to these several bills. The objections, at best, go mainly to the weight to be given.

8. A particular objection of this sort is urged against the testimony of P. E. Smith, who it seems was jailer in Anderson county, and who had had appellant in custody since the 31st day of January, 1908. This witness testified: That he often went back and talked to the prisoners; that he fed them twice a day; that appellant was clean shaven when he first came to the jail; that his appetite has been very good since he has been in jail; that his rest has been tolerably good; that if he had ever failed to eat his meals he had not observed it; that he had frequently talked about farming and about his strawberries, and on one occasion about shaving, and he stated he might need his whiskers; that he asked him once if he did not want to go out and get shaved; and that he replied: "No, I might need these whiskers." It was held in the case of *Adams v. State*, 34 Tex. Cr. R. 470, 31 S. W. 372, that the conduct and acts of defendant while in jail may be given in evidence as a basis for an opinion by a nonexpert as to defendant's sanity, though defendant was not warned that his acts and conduct would be used as evidence against him, as they are not a confession. However, it is stated in that case that "no specific act or declaration of the defendant was adduced in evidence, nor were the contents of any letter alleged to have been written by defendant shown in evidence." We are not prepared to say that we understand just the significance of the testimony as to the declaration of appellant that he did not want to be shaved, and that he might need his whiskers. There is considerable testimony in the record that before the homicide appellant always went clean shaven, and we gather from the statement of facts that since the homicide he had let his whiskers grow out. We cannot see that if any of this testimony could be held to be, under any circumstances, inadmissible, it is of such gravity or importance as could possibly have injured appellant; nor, indeed, do we believe that it was subject to serious objection.

9. Again complaint is made that the court erred in charging the jury on the law of murder in the second degree and in submitting to the jury the issue of manslaughter, on the grounds, in substance, that the evidence did not raise either of these issues, and that the effect of including them in the charge was to confuse and possibly mislead the jury. It is conceded and stated in the brief by appellant that ordinarily this would not be error, but in view of the fact that there is no pretense that the killing was justified, in self-defense, or for any other reason, and that the sole defense is insanity, that the killing, if appellant was legally responsible, was unquestionably one of murder in the first degree. We do not think that the contention of appellant that he was prejudiced by the submission of these issues, or that the jury were thereby confused, can, in the face of this record and the finding of the jury, be sustained. But for one or two circumstances included in the record, we would have no hesitancy in holding that murder in the second degree was not in the case. It will be remembered, as noticed above, that one witness testified that only about a half hour before the homicide appellant spoke to him in a state of great excitement with reference to what he believed was an invasion of his rights and an unlawful sequestration of his property by some one, probably the deceased, and the witness accompanying him. This raises, to our minds, the issue of murder in the second degree, and we think it safer for the court to have pursued the policy, as was done in this case, and to charge on this degree of unlawful homicide. We do not think the court was required to charge on manslaughter, but the submission of the issue was favorable to appellant, and he cannot complain.

10. The record in this case is a very voluminous one, and many questions are urged on us with great vigor and earnestness as grounds for reversal of the judgment of conviction. That appellant is a singular and strange man is not to be denied. That he may be insane in the light of this record is possible. That issue, however, was submitted to the triers of all matters of fact. Under a charge, as we believe, not subject to substantial criticism, the jury have affirmed their solemn conviction that at the time he shot and killed the deceased he was laboring under no insanity or such infirmity of mind as would in law excuse him from his horrible act. Otherwise than insanity there is no possible defense in the case. Whatever view, as an original question, we might have in respect to the matter, a due observance of the well-settled law that, where there is a conflict in the evidence, the finding of the jury should not be disturbed, we would be utterly without excuse to place any impression or conviction of our own against that of the 12,

who, being sworn to try the case, heard the evidence, saw the witnesses, and had such opportunities as we cannot, in the nature of things, have for reaching a just verdict. Again, in such cases a high regard should be had for the action of the trial court. The law charges him, in the first instance, with the responsibility of setting aside verdicts of juries where the evidence is insufficient to sustain their action. The verdict comes to us with the sanction of the trial court, and we cannot believe that we should, in the light of this record, set aside and overturn the verdict of the jury having the sanction and approval of the trial court.

We have therefore, as we believe, but one duty to perform, and that is to decree, as we do, that the judgment be in all things affirmed.

#### GRAY v. PHILLIPS et al.†

(Court of Civil Appeals of Texas. Feb. 24, 1909. Rehearing Denied March 31, 1909.)

#### 1. DEATH (§ 14\*)—ACTION FOR UNLAWFUL DEATH—ELEMENTS.

To sustain an action by a widow for herself and as next friend for her minor children for the unlawful killing of her husband, it is only necessary to show an unlawful killing of decedent by defendant, and the grade of the offense is immaterial, and to defeat the action, defendant must show that the killing was in self-defense.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 16; Dec. Dig. § 14.\*]

#### 2. HOMICIDE (§ 23\*)—GRADE OF HOMICIDE.

Under White's Ann. Pen. Code, art. 703, providing that, though a homicide may show no deliberation, yet, if the person guilty thereof provoked a contest with the apparent intent of killing or doing serious bodily injury, the offense is not manslaughter, one provoking a contest with the apparent intent of killing or doing serious bodily harm to his adversary is not justified in the killing of his adversary even to save his own life, and on his killing his adversary, he is guilty at least of murder in the second degree, but if the slayer provoked the contest without any intention to kill, or inflict a serious bodily injury, and suddenly without deliberation killed his adversary, the killing may be of a lower grade than murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 39; Dec. Dig. § 23.\*]

#### 3. DEATH (§ 14\*) — ACTION FOR WRONGFUL DEATH—SELF-DEFENSE.

Where defendant, informed by his wife that decedent had insulted her, armed himself with a view of meeting decedent to abuse him, and on meeting decedent cursed and abused him and decedent walked away from defendant, who continued to use vile epithets, and decedent turned on defendant with a knife, whereupon defendant began to shoot him, and continued while decedent was running away, defendant was not entitled to the perfect right of self-defense, and he was civilly liable to the widow and children of decedent for the killing.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 16; Dec. Dig. § 14.\*]

#### 4. DEATH (§ 102½\*)—ACTION FOR WRONGFUL KILLING—ORDERING AUTOPSY.

Where, in an action by a widow for herself and minor children for the unlawful killing

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

of her husband by defendant, there was evidence that all of the shots entering the body of decedent did so from the rear, and witnesses testified that the firing was almost instantaneous, and that immediately after the first shot decedent was seen fleeing from defendant, the court properly overruled defendant's motion for an autopsy on the ground that an autopsy would show that defendant was acting in self-defense, and that he began to shoot when deceased was facing him with a knife in his hand.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 102½.\*]

**5. DEATH (§ 102½\*)—ACTIONS—EXHUMATION OF BODY.**

The court has inherent power to order the exhuming of a dead body on it appearing that justice and right will be defeated in case such order is not made.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 102½.\*]

**6. JURY (§ 67\*)—SUMMONING JURY—STATUTES.**

Rev. St. 1895, art. 3150, authorizes the court to supply jurors on the failure of the commissioners to select them. Article 3184 gives the court authority to direct the sheriff to summon jurors when none have been selected by the commissioners. The court of a county ordered the commissioners to select the jury for the first week of the succeeding term. Subsequently a cause was transferred to the county, and was not reached in the first week, and no trial during the week was demanded by defendant. During the second week, at which time no jury was in attendance, the case was called, and defendant demanded a jury. *Held*, that the court properly directed the sheriff to summon jurors for the case.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 67.\*]

**7. DEPOSITIONS (§ 81\*)—WITHDRAWAL FOR CORRECTION OF IRREGULARITIES.**

A deposition may be withdrawn and irregularities corrected by the officer taking it under the order of the court, and this can be done in the presence of the court.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 213; Dec. Dig. § 81.\*]

**8. DEPOSITIONS (§ 81\*)—WITHDRAWAL FOR CORRECTION OF IRREGULARITIES.**

Where depositions not properly returned by the officer taking them had not been tampered with, the court might permit their withdrawal for the correction of the irregularities, and then permit their use, on the officer making the required corrections.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 213; Dec. Dig. § 81.\*]

**9. WITNESSES (§ 37\*)—COMPETENCY—KNOWLEDGE.**

In an action for damages for an unlawful killing, witnesses acquainted with decedent, running a farm, and who of their own knowledge knew what returns decedent received from his work, might testify as to the average amount received by decedent from his work.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 80; Dec. Dig. § 37.\*]

**10. DEATH (§ 102½\*)—ACTION FOR UNLAWFUL DEATH—CONDUCT OF TRIAL.**

Where, in an action for negligent death, a motion for an autopsy of the body of decedent for the purpose of establishing defendant's theory of self-defense was properly denied, the refusal to permit the motion to be read to the jury was proper.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 102½.\*]

**11. DEATH (§ 60\*)—ACTION FOR WRONGFUL DEATH—EVIDENCE—ADMISSIBILITY.**

Where, in an action by a widow and her minor children for the unlawful killing of her husband by defendant, the evidence justified the jury in finding that decedent at the time of the difficulty was not facing defendant, but was fleeing from him, while defendant was pursuing, abusing, and shooting him, the refusal to permit an expert to give his opinion as to whether a pistol ball striking a body just below the point of the right shoulder blade would pass diagonally through and out of the body or would lodge therein, offered in support of defendant's contention that the first shot went into the breast of decedent and not into his back, was proper.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 79; Dec. Dig. § 60.\*]

**12. DEATH (§ 104\*)—ACTION FOR UNLAWFUL KILLING—EVIDENCE—INSTRUCTIONS.**

Where, in an action by a widow and her minor children for the unlawful killing of her husband, the evidence showed an actual attack by decedent on defendant at the time of the killing, a charge stating the law as to the right of defendant to defend against an attack, but omitting to state the right to defend against an apparent attack, was proper.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 142; Dec. Dig. § 104.\*]

**13. TRIAL (§ 256\*)—INSTRUCTIONS—REQUESTS—NECESSITY.**

A party complaining of an instruction correct as far as it goes, but not as full as might be desired, must present a special charge incorporating his view of the law on the subject.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 628; Dec. Dig. § 256.\*]

**14. DEATH (§ 95\*)—ACTION FOR UNLAWFUL KILLING—DAMAGES.**

The measure of recovery by a widow and minor children for the unlawful killing of decedent is such amount if paid now as will compensate the widow and children for the actual damages, and may include such pecuniary benefits as the widow had a reasonable expectation of receiving from decedent had he lived, and may include in addition to such pecuniary benefits to the children the reasonable value of the nurture, care, and education that they would have received from decedent had he lived.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 120; Dec. Dig. § 95.\*]

Appeal from District Court, Burnet County; Clarence Martin, Judge.

Action by Mrs. Emma Phillips, for herself and as next friend for her minor children, against Don F. Gray. From a judgment for plaintiffs, defendant appeals. Affirmed.

Ike D. White, T. E. Hammond, Flack & Dalrymple, and McLean & Spears, for appellant. Slator & Oatman, for appellees.

RICE, J. On the 12th day of January, 1907, Don F. Gray, appellant, shot and killed Will Phillips, in the village of Valley Springs, Llano county, and this action is brought by Mrs. Emma Phillips, surviving widow of Will Phillips, for herself and as next friend for her four minor children, joined by the father of Will Phillips, to recover damages for said killing, alleging the same to have been unlawfully, maliciously, and wrongfully done. Appellant answered by a gen-

eral demurrer, special exceptions, and plea of self-defense. There was a jury trial and verdict and judgment in favor of Mrs. Phillips and the children, the father of deceased having disclaimed any interest therein, for the sum of \$8,750, actual damages, which was prorated by the jury between the mother and the children in accordance with the charge of the court, from which this appeal is prosecuted.

Appellant seeks to justify said killing on the ground of self-defense, and by his first assignment of error urges that the trial court erred in overruling his motion asking that a committee of three reputable physicians be appointed to exhume the body of deceased and make an autopsy thereon for the purpose of ascertaining whether or not three bullets, which he claimed were fired by him into the body of deceased and did not pass through, could be found in said remains. It is shown by the evidence: That about the 3d day of January next before the killing deceased had been employed by the defendant to trap wolves for him, and, in the pursuit of such occupation, was staying at the house of defendant, and that during his absence from home deceased made indecent proposals to the wife of defendant, of which he was promptly informed by her. That thereupon defendant armed himself with a pistol for the purpose of going to Valley Springs, where he expected to meet deceased, saying that he intended to "call" him about such insult. That on Saturday, the day of the killing, defendant, accompanied by his brother-in-law, Gordon Mayes, did go to Valley Springs, where he met the deceased at a store in said village, and requested him to come out, saying that he wanted to see him, whereupon they both went out of the back, or south, door of the store a short distance away, and stopped, defendant preceding deceased. There were a number of persons in and about the gallery of the east door, and some at the north door, which was the front of the store, but none of them were in position to see what occurred between defendant and deceased. Defendant stated that, as he stepped out of the back door and looked around, he saw deceased with his knife in his hand. That "we went to a fence," and that he, defendant, asked the deceased if he had not always been treated right at his house. Deceased replied, "Yes." Whereupon defendant said: "Were you ever mistreated?" Deceased said, "No." That defendant then said: "G—— d—— your heart, what did you do Nora [meaning defendant's wife] like you did for?" Whereupon deceased said: "Don, I don't blame you for being mad; but I am not going to take any abuse off you." Then defendant said: "You G—— d—— s—— b——, you have got to take it. I have got it to give, whether you take it or not." Deceased then turned, and walked towards the back door of the store tolerably fast, defendant following him. When he

reached within three or four feet of the back door, deceased turned around and said to defendant: "G—— d—— you, shut up." Then defendant said: "You G—— d—— bastardly s—— b——, you will have to make me." Deceased, saying that he could do it, turned on defendant with his knife drawn, whereupon defendant grabbed his gun and shot him. He was then facing defendant, some six or ten feet away. That defendant fired three shots as fast as he could. At the first shot deceased turned and ran for the door, and, when he went out of sight, defendant stopped shooting.

The above recital of facts is taken from brief of appellant, and is his own statement of the occurrence. It was shown from the evidence that, while none of the parties at the store saw the first shot, still, after hearing the first shot, it appears that, upon looking up, two at least of the persons near the east door saw the deceased coming into the store in a bent posture, dragging his right leg behind him, with defendant following with a pistol in his hand. Those who dressed and examined the body of the deceased after the shooting say that they found four wounds upon his person—one just below the right shoulder blade, one back of the right hip, one in the left breast and one just above the right ear—that the one in the back of the shoulder and the hip appeared to be about the same size, smooth, round holes, with the flesh pressed in; that the one in the left breast was about five inches higher on the body than the one in the back, and this one presented a larger and rougher and more ragged appearance than did the one in the back, with the flesh pressed outward. While there was some testimony from defendant's witnesses that there was very little difference in the appearance of the wounds in the back and those in the front, still it appears that they made no special examination of these wounds. From this testimony it was contended on the part of plaintiffs that the defendant shot the deceased three times with a pistol, one of the balls entering the back near his shoulder blade and coming out through the breast, while the other entered the back part of the hip, but did not come out, and that the wound above the right ear was from one of the shots, thus accounting for all of said shots; while, on the other hand, the defendant testified and contended that the first shot was fired while the deceased was facing him and went into the breast and did not come out, and that the other two bullet holes were made by shots while the deceased was going from him, and that neither of said three balls came out, thus accounting for the three shots, and that the wound on the side of the head above the ear was not a gunshot wound, but was likely made in falling against some object inside of the store, probably a nail keg near by.

Defendant's motion asking for an autopsy set up these facts and was based upon them,



alleging that they supported his theory of self-defense, and that the autopsy would disclose three balls in the body of deceased, and, in addition thereto, stated that there was no other source from which said testimony could be procured, and proffered to pay and deposit in court whatever sum the court might determine to be necessary to defray the expenses of said autopsy. This motion was resisted by the plaintiffs, and was overruled, upon which ruling defendant predicates error. In order to sustain this prosecution, it is only necessary to show an unlawful killing of the deceased by the defendant. It is immaterial as to what the grade of the offense would be in a civil prosecution, such as this, so that if the evidence in this case failed to show that the killing was in self-defense, and also failed to show that it was murder, still, if from the evidence it appeared that the offense was manslaughter, then the defendant could not justify said killing, and the plaintiffs would have the right to recover.

In *Reed v. State*, 11 Tex. App. 511, 40 Am. Rep. 795, Judge White, in delivering the opinion of the court, quoting from Blackstone, says: "Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay, even for homicide, but care must be taken that resistance does not exceed the bounds of mere defense and prevention, for then the defendant would become the aggressor." But the right of self-defense," continues Judge White, "though inalienable, is and should to some extent be subordinated to the rules of law regulating its proper exercise, and so the law has wisely provided. It may be divided into two general classes, to wit: Perfect and imperfect right of self-defense. A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong—if he was himself violating or in the act of violating the law—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon him which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense. Whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, then, indeed, the law wisely imputes to him his own wrong and its consequences to the extent that they may and should be con-

sidered in determining the grade of offense, which but for such acts would never have been occasioned. Mr. Bishop says: 'The rule is commonly stated in the American cases thus: If the individual assaulted, being himself without fault, reasonably apprehends death or serious bodily harm to himself unless he kills the assailant, the killing is justifiable.' 1 *Bish. Cr. L.* 865. But a person cannot avail himself of a necessity which he has knowingly and willfully brought upon himself. *State v. Neeley*, 20 Iowa, 108; *Adams v. People*, 47 Ill. 376; *State v. Starr*, 38 Mo. 270. That is, it will not afford him a justification in law. See 2 *Cooley's Black. book* 4, c. 14, p. 180. How far and to what extent he will be excused or excusable in law must depend upon the nature and character of the act he was committing, and which produced the necessity that he should defend himself. When his own original act was in violation of law, then the law takes that fact into consideration in limiting his right of defense and resistance whilst in the perpetration of such unlawful act. If he was engaged in the commission of a felony, and to prevent its commission the party seeing it or about to be injured thereby makes a violent assault upon him, calculated to produce death or serious bodily harm, and in resisting such attack he slay his assailant, the law would impute the original wrong to the homicide, and make it murder. But, if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self-defense from an assault made upon him, would be manslaughter under the law."

With reference to provoking a difficulty, our Code (see *White's Ann. Pen. Code*, art. 708) provides that a homicide may take place under circumstances showing no deliberation, yet if the person guilty thereof provokes a contest, with the apparent intention of killing or doing serious bodily injury to the deceased, the offense does not come within the definition of manslaughter.

There are numerous decisions of our own courts construing this statute, all of them holding that, if a party provokes a contest with the apparent intention of killing or doing serious bodily harm to his adversary, then in no event is he justified in such case in killing his adversary, even to save his own life; and, if he kills his adversary under such circumstances, he would be guilty at least of murder in the second degree. But if the slayer provoked the contest without any intention to kill or inflict serious bodily injury, and suddenly, without deliberation, did the act of killing, while the act would not be justifiable homicide, still it might be of a lower grade of homicide than murder. See, in support of this doctrine, *Green v. State*, 12 Tex. App. 445; *Reed v. State*, supra; *King v. State*, 13 Tex. App. 277; *Cartwright v. State*, 14 Tex. App. 486, and other

cases cited in the note to said article in White's Penal Code. In discussing this provision of the Code in *Green v. State*, supra, Judge Wilson says: "But suppose the contest was provoked without any apparent intention of killing or doing serious bodily injury, what then would be the legal effect of the provocation? Looking at the question as affected by this statutory provision, we believe the true doctrine to be this: (1) If the slayer provoked a contest with the deceased with the apparent intention of killing him or doing him some serious bodily injury, he is guilty of murder, although he may have done the act of killing suddenly, without deliberation, and in order to save his own life. The law allows no justification in such a case and no reduction of the grade of homicide. (2) But if the slayer provoked the contest without any intention to kill or inflict serious bodily injury, and suddenly, without deliberation, did the act of killing, while the act would not be justifiable homicide, still it might be reduced to a lower grade of homicide than murder." The same doctrine is quoted with approval in *King v. State*, supra. In discussing this doctrine, especially with reference to the character of wrong that will abridge the right of self-defense, Judge Hurt in *Cartwright v. State*, supra, says: "What character of wrong acts must produce the necessity to take life? Suppose the wrong acts were not calculated to produce the necessity, but did have this effect. Again, suppose the wrong acts were not intended to produce the necessity by the wrongdoer. Would the party guilty of the wrong acts be guilty of culpable homicide who to save his own life takes the life of another under the supposed cases? Just here it is necessary for us to consider the nature and quality of the act, the doing of which will so far abridge one's right of self-defense that if he kill another, although to save himself from death or great bodily harm he will yet be guilty of a felonious homicide in some of its degrees. It would be quite difficult to lay down a general rule by which all wrongful acts could be tested, and judged sufficient or not sufficient to deprive one of the complete right of self-defense. This we will not attempt, but at present will confine ourselves to the conclusions reached by an examination of quite a number of cases. From these cases we conclude that the doing of the following acts is held so far to abridge a man's right of defense that, if he therefore kill another, he cannot be acquitted of all crime:

"(1) Using provoking language or resorting to any other device in order to get another to commence an assault, so as to have a pretext for taking his life, or to have a pretext for inflicting on him bodily harm. *Stewart v. State*, 1 Ohio St. 66; *Adams v. People*, 47 Ill. 376.

"(2) Provoking another for the purpose of bringing him into a quarrel, so that an affray

may be caused. *Selfridge's Case*, H. & T. on Self-Defense, page 24. But in *Selfridge's Case*, though this proposition is stated generally, it is most clearly stated that no words nor libelous publications, however aggravating, will deprive one of the right of self-defense, if in consequence of the same he is attacked.

"(3) Agreeing with another to fight him with deadly weapons. *State v. Hill*, 20 N. C. 629, 34 Am. Dec. 396. \* \* \*

"(5) Going to the place where another is with a deadly weapon for the purpose of provoking a difficulty, or with the intent of having an affray. *Neeley's Case*, 20 Iowa, 108; *Benham's Case*, 23 Iowa, 154, 92 Am. Dec. 416, and other cases.

"The doing of the acts contained in the former illustrations will deprive the party of the right of a complete or full defense. There is, however, another very important question presented in the fifth proposition. Suppose that a person should go armed to the place where another is, intending to provoke a difficulty, but says nor does anything to the other at all or says nor does anything to the other tending to show his purpose was to provoke him to a difficulty; will the intent with which he went, though nothing said or done by him was intended or calculated to provoke the other, deprive him of the right of self-defense? By consulting the cases we will find that there was some act or word done or said tending to provoke the other."

After discussing the *Neeley Case* and *Benham Case*, above cited, continuing, Judge Hurt says: "That he who resorts to such means or to any means to provoke a difficulty, with a view to take the life of his victim, is not only guilty of murder, but murder of the first degree. Can this be said of a person who merely goes to another with intent to provoke a quarrel? We think not, unless the ultimate object or intent is to take the life of the party or commit a felonious assault in some of its grades. In *Selfridge's Case* it was held that: 'No words spoken or libelous publications, however aggravating, will compromise his complete right of defense.' This should be modified, for we have seen that, if the words were spoken with the intent to provoke an assault for the purpose of having a pretext for taking his life, he would be guilty of murder. There is a vast difference between this proposition and that stated by Judge Dillon, to wit, 'to bring on a quarrel.' While we might cite 100 cases bearing upon this subject, but little could be learned of value, so long as the principle which underlies the whole question is not correctly understood. What, then, is the principle? In *Broom's Legal Maxims*, p. 255, it is said: 'A man may not take advantage of his own wrong to gain a favorable interpretation of the law. He seeks the law in vain who offends against it.' 'It is upon the plain principle,' said Judge Wright

in Neeley's Case, 'that one cannot willingly and knowingly bring upon himself the very necessity which he sets up for his defense.' It would follow, therefore, that the conduct of the party must show that he knowingly and willingly used language or did acts which might reasonably lead to an affray or a deadly conflict, and that something besides merely going to the place where a person slain is with a deadly weapon, for the purpose of provoking a difficulty, or with the intent of having an affray, is required in order to constitute such wrongful act. But it is not necessary that the additional acts or words should be done or said at the time of the homicide. Neeley's Case. The former conduct of the defendant towards the party slain, with all of the attending circumstances occurring before, and in connection with the fact that he went to the person slain, and his language and bearing towards him at the time of the homicide, may and frequently do constitute that character of provocation which estops the defendant from pleading the necessity which could otherwise be interposed."

Judge Hurt in Franklin v. State, 30 Tex. App. 640, 18 S. W. 474, says: "A party may have a perfect right of self-defense, though he may not be wholly free from blame in the transaction; the question being, What is the nature of the blame? If the blame or wrong was not intended to produce the occasion nor an act which was under the circumstances reasonably calculated to produce the occasion or provoke the difficulty, then the right of self-defense would be complete, though the act may not be blameless. But if the act was a violation of the law, and was reasonably calculated to produce the occasion, then the right of self-defense would be abridged." And, in discussing the charge complained of in that case, he said: "But the objection to the charge is that it is too general. The wrongful act is not named, and the jury might believe certain acts as wrongful which are not such in law. The defendant might have gone to the house without any intent to injure him, and yet his presence there might have been in one sense wrongful, but not illegal nor calculated to provoke the occasion. This being the case, his right of self-defense would not be abridged. The charge, it is true, restricts the wrong to a misdemeanor, but the acts constituting the misdemeanor are not disclosed." The same learned judge on the second appeal of the Franklin Case, reported in 34 Tex. Cr. R. 286, 30 S. W. 231, after discussing and quoting approvingly the doctrine enunciated in Reed's Case, supra, uses this language: "Again, and as we have already said, one may be guilty of a wrongful act which produces the necessity to kill and be guilty of no offense though he take life. If the act, though wrongful, be not illegal and be not intended to provoke a difficulty, nor reasonably calculated to produce the occa-

sion and the necessity for taking human life, and the party kill to save himself, he is justified." The later cases from the same court have not varied or altered this rule, so far as we understand it, but, on the contrary, have expressly recognized the same.

In the case of Carter v. State, 37 Tex. Cr. R. 403, 35 S. W. 378, which was reversed on account of the failure of the lower court to specifically apply the law of provoking a difficulty to the facts in hand, but where the general doctrine as announced in the foregoing decisions was abstractly given in charge by the trial court, Judge Davidson, delivering the opinion of the court, said: "Again, a party may be provoked into a difficulty, but the person giving the provocation does not lose his right of self-defense unless he intends to provoke the difficulty with a view to entering into a fight with his adversary. The main question for the decision of the jury is the intention with which the provocation was given, and this should be stated in the charge. In every case involving the question of provoking the difficulty, if the defendant provoked the difficulty or produced the occasion for the purpose of inducing his adversary to make the attack, so that he could kill him, why this is murder. If there is no felonious intent, the party intending an assault and battery, and he is forced to kill to save his life, this is manslaughter; but, unless there is an intention to have a difficulty, his right of self-defense remains complete. Some acts may be committed of such a character as to carry the intention with them. This, however, is a matter for the jury. The court, however, should in all cases submit the intention with which the provocation is given." In Vann v. State, 45 Tex. Cr. R. 434, 77 S. W. 813, 106 Am. St. Rep. 961, it is held "that the court in charging on the law of provoking a difficulty should have instructed the jury that defendant must have said or done something which produced the occasion, or brought about and provoked the difficulty, before his right of self-defense will be abridged." And in Garza v. State, 48 Tex. Cr. R. 382, 88 S. W. 232, it is held that, "to render one guilty of provoking a difficulty, he must be shown to have used some language or done some act with that intent." In the recent able and elaborate opinion of Judge Ramsey in Young v. State, 53 Tex. Cr. R. 416, 110 S. W. 446, where many of the authorities upon this subject are reviewed, it is said: "It is undoubtedly the law of this state that if one provokes a difficulty in order to have a pretext to kill an adversary, or inflict upon him serious bodily injury, he cannot justify such killing on the ground of self-defense, although it may subsequently be necessary for him to kill his adversary to save his own life. It is the law, too, that if one provokes a difficulty intentionally, in order to have a pretext to inflict some unlawful injury upon him, but not for the purpose of killing him

or inflicting upon him serious bodily injury, he cannot thereafter justify such killing on the ground of self-defense, but that offense will not be murder, but will ordinarily be manslaughter. Where, however, with no intention of provoking a difficulty to kill or do other unlawful violence, but it is found that the acts and conduct of an appellant, though not intended by him so to do, had the effect of inducing his adversary to assault him, it cannot be held that he thereby loses his right of self-defense, or that such right is in any sense impaired."

Now, applying the law as set forth in the foregoing decisions to the facts of this case, let us see whether or not the words, conduct, and acts of appellant before and at the time of the difficulty were such as show on his part an intention to provoke a difficulty with deceased, and were reasonably calculated to effect that object, and thereby so abridge his right of self-defense as to make the act of killing under the circumstances unlawful. The testimony shows that appellant's wife had been insulted by the deceased, and that the appellant, having been informed of the insult, armed himself with a view of meeting and "calling" the deceased about it, knowing that it would likely bring about a difficulty, because his wife had told him that the deceased had asked her not to tell him about his conduct because it would cause trouble. He and deceased had known each other intimately for years, and it is reasonable to suppose that he knew what effect abusing the deceased under such circumstances would have; this being one of the purposes for which it is shown he sought the meeting. Under the law he clearly had the right to demand an explanation of the deceased of such conduct towards his wife, and if he apprehended, as the evidence showed that he likely did, that out of this interview there might arise trouble, he had the right to arm himself for the purpose of protecting himself from any unlawful assault that he contemplated deceased might make upon him. But this right to arm himself did not extend to any other purpose than the right to protect himself from any unlawful violence that might be offered to him by deceased, and did not give him the right to become the aggressor. *Shannon v. State*, 35 Tex. Cr. R. 2, 28 S. W. 687, 60 Am. St. Rep. 17. Now, the evidence of the defendant himself shows without question that he sought the deceased, as he says, for the purpose of "calling" deceased out and abusing him. While he had the right to demand an explanation or an apology, he had no legal right to abuse the deceased, and thereby bring on a difficulty. The evidence shows without going into detail that the defendant cursed and abused the deceased, that the deceased immediately walked away from the defendant; that the defendant pursued him, still cursing and abusing him, using towards him the most vile and opprobrious epithets

a man can use towards another, at which time, according to his own evidence, the deceased told him to "shut up," whereupon he replied: "You G—d—s—b—, you will have to make me." At this deceased turned upon him with a knife, whereupon he began to shoot, and, while the deceased was fleeing for his life, he continued to shoot until the deceased had entered the store.

It is a misdemeanor under our law, punishable by fine, for any person to curse or abuse another, or use towards him any violently abusive language under circumstances reasonably calculated to provoke a breach of the peace. Article 599, White's Ann. Pen. Code. Now, it seems to us that, while defendant had the right to demand an explanation or an apology from deceased, still this did not give him the right, in the event of a refusal on the part of deceased to satisfactorily explain or apologize, to curse and abuse him in such manner and under such circumstances as would be reasonably calculated to produce a breach of the peace, because so to do was not only wrongful conduct on the part of the defendant, but was unlawful as well, and, together with his acts, words, and conduct at the time, was reasonably calculated to irritate and exasperate the deceased into making an attack upon him, and was tantamount to an assault upon deceased, and could not, as we view it, be regarded by himself in any other light. And, if the same was done for the purpose of causing deceased to attack him, thereby making it necessary to defend himself from such attack by deceased (and every one must be presumed to intend the reasonable, natural, and probable consequences of his acts), then it seems to us that it cannot be said with reason that the defendant should not be held responsible for the occasion thus voluntarily brought on by himself. The law does not require that defendant should have declared that the purpose of his going to meet the deceased was to kill or do him serious bodily injury, or to assault him, before his right of self-defense could and should be abridged, but the test, we think, is: Do his words, conduct, and acts at the time make it to reasonably appear that such was his purpose? If we are correct in this, then it follows that notwithstanding the fact that the first shot, as contended by appellant, was fired by him while the deceased was facing him with a knife in his hand, still, under the law, the killing under such circumstances would deprive him of the perfect right of self-defense, and render him, in our judgment, at least guilty of the offense of manslaughter. Hence it follows that, if from his own testimony the defendant was not entitled to the perfect right of self-defense, then the testimony sought to be adduced by the autopsy upon the body of the deceased would be immaterial, even granting that it would show, as contended by appellant, three balls in the body of the deceased..

But, if we are incorrect in the last holding, still we think the evidence is ample to show that all of the shots entering the body of deceased did so from behind and none of them in front, and that the circumstances surrounding the transaction, as testified to by the witnesses, likewise support this theory. While it is true that no one other than the defendant undertakes to testify as to the attitude of the deceased at the very moment of the firing of the first shot, still the firing was rapid, almost instantaneous, and the witnesses do state that immediately after the first shot the deceased was seen fleeing toward and climbing into the back door of the store apparently wounded. From this evidence and the appearance of the wounds themselves we think the jury could fairly conclude that the deceased at the time of the difficulty was not facing the defendant, but, on the contrary, was fleeing from him, while the defendant was pursuing, abusing and shooting at him. And, so believing, we hold that the court did not err in overruling his motion for an autopsy. And, while we are aware that this ruling is in apparent conflict with the opinion of the honorable Court of Criminal Appeals in this case (see *Gray v. State of Texas*, 114 S. W. 635) so far as it applies to the refusal of the court to order the body exhumed, and for whose judgment we entertain the utmost respect, still we are constrained to believe that the facts of this case abundantly show, as held in the dissenting opinion of Judge Brooks, that the defendant provoked the difficulty with the deceased under such circumstances as to deprive him of the perfect right of self-defense, thereby rendering the killing of deceased unlawful, so that it then became immaterial to order the autopsy, even though it be conceded that it would disclose facts sustaining appellant's contention in this respect. But we concur with that court in their holding that there may be many instances in which, in order to attain justice, an autopsy should be granted, and that the court should and ought to have, even in the absence of a statute authorizing it, the inherent power to order the exhuming of a dead body, when it has been made to appear that justice and right would be defeated in the event that such order was not made.

By his second assignment appellant urges that the court erred in refusing to quash the venire of 25 men summoned by the sheriff under the order of the court from which to select the jury in this case, contending that he was entitled to select his jury from those drawn by the commissioners. At the instance of the defendant, the venue of this case was changed from Llano to Burnet county, where the case was tried. It appears from the bill of exceptions that at a previous term of the court, and before this case had in fact been transferred from Llano to Burnet county, the court, in view of the business

then upon its docket, ordered the jury commissioners to select a jury only for the first week of the succeeding term, which was done; that thereafter this cause was transferred to this court and was not reached in the first week, and no trial thereof during said week was demanded by the defendant; that on Wednesday of the second week, at which time no jury was in attendance upon the court which had been selected by the jury commissioners, the case was called for an announcement, whereupon the plaintiffs waived a jury trial, and agreed to try the case before the court without a jury. The defendant objected to said waiver, and demanded a trial by a jury selected by the jury commissioners. Whereupon the case was set by the court for Friday, January 17th, and the sheriff duly sworn and instructed to summon a venire of 25 men for that day, which he did and from which the jury in this case was selected. Article 3150 of the Revised Statutes of Texas of 1895 provides, among other things: "That if from any cause the jury commissioners should fail to select jurors as required, the court shall forthwith proceed to supply a sufficient number of jurors for the term under the provisions of this title." Article 3184, *Id.*, gives the court the authority to direct the sheriff to summon jurors when none have been selected by the jury commissioners. These articles have been construed by the courts, and the rulings there made expressly sustain the action of the court below. See *Bates v. Smith* (Tex. Civ. App.) 28 S. W. 64; *Railway Co. v. Vinson* (Tex. Civ. App.) 38 S. W. 540; *Western Union Tel. Co. v. Everheart*, 10 Tex. Civ. App. 468, 32 S. W. 90; *T. & P. Ry. Co. v. Fambrough* (Tex. Civ. App.) 55 S. W. 189; *Texas Midland R. R. Co. v. Crowder*, 25 Tex. Civ. App. 536, 64 S. W. 92; *Lucas v. Johnson* (Tex. Civ. App.) 64 S. W. 823; *Hayward Lumber Co. v. Cox* (Tex. Civ. App.) 104 S. W. 404. So, we take it, the law was not violated by the action of the court in this respect; but, on the contrary, the proper practice was pursued.

The court sustained the motion of the defendant to quash certain depositions taken at the instance of plaintiffs before John C. Oatman, a notary public of Llano county, because the envelope in which said depositions were transmitted did not have indorsed across the seal thereof the name of the officer purporting to have taken the same, and because said officer did not certify that he "in person" deposited the same in the mail for transmission, and because said officer did not indorse on the envelope inclosing the same the names of all the parties plaintiff, but only indorsed thereon the number and style of the cause, to wit, "No. 1865. *Mrs. Emma Phillips et al. v. Don F. Gray.*" and because said officer did not indorse on said envelope the names of all of said witnesses, but omitted therefrom the name of one of said

witnesses. Whereupon the plaintiffs moved the court to permit them to withdraw said depositions and forward the same to said notary, and permit him to correct and amend his return in the respects indicated, which motion was granted over the objection of defendant, and said depositions forwarded to said notary for the purposes indicated. The corrections and amendments were made, and the depositions again returned by mail to the clerk of said court. Whereupon the defendant again filed his motion to quash said depositions (1) because the officer before whom the same were taken did not indorse on the envelope in which the same were inclosed the names of the parties to this suit; and (2) because said depositions were not shown to be in the same condition as when first taken, and said defective return of said depositions has not been amended or cured in the manner authorized by law; and, further, because the same were returned to the town of Llano by mail, express, or some other manner unknown to defendant, and again returned into this court through mail by said Oatman. This last motion, which was not verified, was overruled, to which defendant excepted. The following explanation is attached to the bill: "That, when said order was granted permitting said depositions to be withdrawn for the purpose of permitting the officer who took the same to correct and amend his return thereof, the depositions had since their receipt a few days prior thereto by the clerk been in the possession of the court and the attorneys in the cause, and had no appearance of having been changed, altered, or in any manner tampered with; that said depositions were thereupon, in accordance with said order and under the direction of the court, forwarded to said officer by due course of mail to Llano to amend and correct his return, and thereafter the return of said depositions was amended and corrected, and said depositions returned by said officer into said court through mail in an envelope, under seal, addressed to and received by the clerk of this court, the said envelope having the name of the officer taking the depositions written across the seal thereof, the officer's certificate thereon of depositing the same in the mail being in legal form, and showing that he in person deposited said envelope containing said depositions in the mail for transmission, and with the names of the parties to the suit written thereon as in the first instance, as well as the names of all the witnesses whose depositions were therein contained. And that said depositions as so returned when received into this court did not appear to have been changed, altered, or in any manner tampered with since they had left the possession of the court."

We think the ruling of the court, especially in view of the explanation attached to the bill, was correct. It seems, under the authorities, that a deposition may be withdrawn

and irregularities corrected by the officer taking them made under the order of the court. Certainly this can be done in the presence of the court. In this instance it is not contended that the depositions themselves had been in any way tampered with or changed, but, on the contrary, they appeared to be the same as when first taken. The only changes made were those by the officer to his return in response to plaintiffs' motion. *Insurance Co. v. Hird*, 4 Tex. Civ. App. 82, 23 S. W. 393; *G. & S. F. Ry. Co. v. Lyman*, 27 Tex. Civ. App. 22, 65 S. W. 69. We think the cases cited by appellant in support of his contention differ from the case at bar, and do not conflict with the rule here announced. In the case of *Milliken v. Smooth*, 71 Tex. 760, 12 S. W. 59, 10 Am. St. Rep. 813, it appears that the depositions were taken without notice to the opposite party, for which reason they were suppressed. Believing no error was committed in refusing to quash the depositions, we overrule this assignment.

The sixth, seventh, and eighth assignments of error complain of the action of the court in permitting Mrs. Emma Phillips and Sam Phillips to testify to the average amount received by deceased from his farm work, and also the amount received by him from outside work. It is shown that these witnesses qualified themselves to testify relative to this matter by showing that they were intimately acquainted with the deceased, and knew of their own knowledge what returns he received from his work, and for this reason we think this evidence was permissible. See *Tompkins v. Toland*, 46 Tex. 590; *I. & G. N. R. R. Co. v. Kuehn*, 2 Tex. Civ. App. 215, 21 S. W. 58; *Garteiser v. G. & S. A. Ry. Co.*, 2 Tex. Civ. App. 234, 21 S. W. 631; *L. F. & St. L. Ry. Co. v. Clarke*, 152 U. S. 230, 14 Sup. Ct. 579, 38 L. Ed. 422; *Ark. Midland R. R. Co. v. Griffith*, 63 Ark. 491, 39 S. W. 550; *Abbott's Trial Evid.* (2d Ed.) p. 758, § 500.

The tenth assignment of error, which complains of the refusal of the court to permit appellant to read in evidence his motion asking for the appointment of a commission of competent physicians to exhume the body of the deceased and to make an autopsy thereon, is overruled. Certainly, if the motion itself ought not to have been granted, it was highly improper for the court to permit the same to be read to the jury.

The court did not err as complained of in the eleventh and twelfth assignments in declining to permit Dr. Brownlee, who qualified as an expert, to testify relative to his opinion as to whether a 45-caliber pistol ball, striking a body just below the point of the right shoulder blade, would not pass diagonally through and out of the body, but would lodge therein, which evidence was offered in support of appellant's contention that the first shot went into the breast of deceased,

and not in the back. If we are correct in what we have heretofore said relative to the autopsy, it seems to us that the ruling therein made would dispose of this question, because this evidence became immaterial in the view that we have taken of the question there raised. Apart from this, we are inclined to believe that the opinion of said witness as to the question asked was not otherwise admissible under the facts and circumstances in evidence.

By his thirteenth and fourteenth assignments of error appellant complains of the charge of the court in not submitting to the jury his right to defend himself against an apparent attack upon him by the deceased. The charge, in our judgment, was a full and clear presentation of the law upon the subject, telling the jury that the defendant would have the right to defend himself from any attack made upon him by the deceased. The evidence showing in this case, if anything, an actual and not an apparent attack by the deceased upon the defendant, the charge was in all respects a proper presentation of the law of the case, and it was therefore not necessary to charge upon an apparent attack, as the evidence did not raise that issue. Besides this, if the charge was not as full as defendant desired, it was his duty to present a special charge incorporating his view of the law on the subject. Since in our judgment no error was committed in this respect, this assignment is overruled.

By his fifteenth assignment of error appellant complains generally of the charge of the court on the subject of provoking the difficulty. What we have heretofore said upon this subject makes it unnecessary for us to discuss this assignment, and it is therefore overruled.

By his seventeenth assignment appellant insists that the court erred in the following portion of its charge, to wit: "If you believe from the evidence in this case that the defendant provoked a difficulty with the deceased, as above explained to you, but you believe from the evidence that such difficulty was provoked (if any such was provoked) without any intention to kill or inflict serious bodily injury upon deceased, or if you have a reasonable doubt as to defendant's intention to kill or inflict serious bodily injury upon deceased, and you believe from the evidence that defendant by his acts or language or both did provoke a difficulty with deceased, which caused deceased to attack defendant, and the defendant, under the influence of sudden passion which rendered the mind of the defendant incapable of cool reflection, did shoot with a pistol and thereby kill the deceased, you are instructed that such killing would be unlawful, and, if you find the facts so to be, your verdict should be rendered accordingly." And by his first proposition thereunder it is contended that this part of the court's charge was in con-

flict with the preceding portion of the charge, and, when the preceding portion of the charge referred to by the expression "as above explained to you" is read into it, the charge is unintelligible and confusing. We think, when taken in connection with the balance of the entire charge given to the jury, that no error is shown, but that, on the contrary, the charge given was an exceptionally fair and clear presentation of the law, in support of which we cite the cases heretofore mentioned under our discussion of the first assignment of error, also the case of *Beardon v. State*, 46 Tex. Cr. R. 144, 79 S. W. 39.

The eighteenth assignment of error complains of the charge of the court, because, as appellant contends, the same was an improper charge on the measure of damages. The charge given upon this subject is as follows: "If you find from the evidence and under the law given you in this charge for the plaintiffs, or either of them, you will assess their recovery of damages at such amount, if paid now, as would fully compensate them for the actual damages, if any, sustained by them, as shown by the evidence, and such as is fairly proportioned to the injury sustained, if any, and may include such pecuniary benefits as the plaintiff Mrs. Emma Phillips had a reasonable expectation of receiving from the deceased, Will Phillips, had he lived, and in addition to such pecuniary benefits to the plaintiffs Sadie Phillips, Ray Phillips, Dale Phillips, and Ada Phillips, you may also include the reasonable value of the nurture, care, and education that such children would have received from such parent had he lived, if any they would have received, provided you find such four last named plaintiffs to be minors and entitled thereto, and, if you find for plaintiffs or either of them any damages whatever, you will not allow actual damages for any other purpose than as above enumerated in this paragraph of this charge." And by his proposition thereunder appellant insists that the true measure of damages is such sum as would, if paid now, compensate plaintiffs for the pecuniary benefits they had a reasonable expectation of receiving from deceased had he not been killed by defendant, taking into consideration the uncertainties of human life, and the court erroneously instructed the jury that such was the measure of damages with the uncertainties of human life eliminated. Appellant insists that there is a difference in meaning between the expressions "had he lived" as contained in the court's charge on the measure of damages and the expression "had he not been killed by defendant," which should have been used in lieu thereof, because Will Phillips, had he not been killed by defendant, would still have been surrounded by the uncertainties of human life, etc., and benefits to be derived by plaintiffs from him were necessarily limited by the uncertainty of

the duration of his life. We are inclined to believe that the charge as given was correct, and that the objection urged thereto was hypercritical. In the case of *International & Great Northern Railway Co. v. McVey*, 99 Tex. 28, 87 S. W. 328, a charge similar to the one under consideration, relative to the nurture, maintenance, and education that a father was supposed to give to his children, was approved. We therefore overrule this assignment.

The other assignments which complain of the action of the trial court in overruling certain exceptions presented to the petition and in failing to give certain special charges are all overruled, because we think that the ruling of the court in these respects was correct.

Feeling that the judgment of the court below is amply sustained by the evidence, and is not excessive, and finding no reversible error in the record, the same is in all things affirmed.

**Affirmed.**

**CENTRAL HOTEL CO. et al. v. STATE.**  
(Court of Civil Appeals of Texas. Feb. 11, 1909. On Rehearing, March 25, 1909.)

On Rehearing.

**1. TAXATION (§ 573½\*)—LIABILITY OF PERSONS AND PROPERTY—REAL PROPERTY—PERSONAL LIABILITY OF OWNER.**

A personal claim for taxes and foreclosure of the lien on the land is maintainable.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1145; Dec. Dig. § 573½.\*]

**2. TAXATION (§ 593\*)—COLLECTION AND ENFORCEMENT—PERSONAL LIABILITY—BURDEN OF PROOF.**

In an action to enforce a personal liability for taxes, penalties, and interest, and costs for failure to pay the same, the burden is on plaintiff to show that defendant owned the property at the time of the assessment, or when the same should have been legally assessed.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 593.\*]

Appeal from District Court, Bell County; John M. Furman, Judge.

Action by the State against the Central Hotel Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Wagner & Spann, for appellants.

**LEVY, J.** The suit was brought for the collection of delinquent taxes and to foreclose a tax lien on real estate. The trial was before the court without a jury, and from a judgment entered against them the appellants have brought the case on appeal, seeking to have same revised for the errors assigned. No statement of facts has been filed in this court, as provided in the act of the Legislature approved May 25, 1907, relating to the subject, and the assignments of error are such as cannot be

considered, in the absence of a statement of facts.

The case is therefore ordered affirmed.

On Rehearing.

We concluded to, and did, grant a rehearing herein for the purpose of considering the statement of facts, now incorporated in the record. Upon consideration of the statement of facts, we are of the opinion that there was error in rendering a personal judgment against the appellants for the taxes, penalties, interest, and costs for the years 1901, 1902, 1903, 1904, and 1905, as there is in the record no evidence to support the claim that they were the owners of the property prior to January 1, 1907. Appellants in their answer admitted only that they were the owners since January 1, 1907. A personal claim for taxes and foreclosure of the lien on the land can be maintained in this state. *City of Henrietta v. Eustis*, 87 Tex. 14, 26 S. W. 619.

But, where a personal liability is sought for the taxes and penalties and interest and costs for failure to pay same, the burden is on the plaintiff to show that the delinquent owned the property during the years for which such taxes, penalties, interest, and costs are claimed. *Butler v. Watkins* (Ky.) 27 S. W. 995. We do not wish to be understood by this as meaning that the owner would not be liable for the taxes, if he at the time of the suit was not the owner of the same, or had parted with his ownership after his liability for the assessment. Only proof of ownership at the time of assessment, or when the same should have been legally assessed, was intended by this ruling.

For this error, the case is ordered reversed.

**HERF & FRERICHS CHEMICAL CO. v. BREWSTER et al.**

(Court of Civil Appeals of Texas. Feb. 27, 1909.)

**1. PLEADING (§ 216\*)—DEMURRER—MATTERS CONSIDERED.**

A complaint cannot be sustained as against a general demurrer on facts not alleged in the complaint.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 536; Dec. Dig. § 216.\*]

**2. CORPORATIONS (§ 228\*)—UNPAID STOCK SUBSCRIPTIONS—TRUST FUND.**

A balance due on unpaid stock subscriptions is a fund for the satisfaction of the corporate debts.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 874; Dec. Dig. § 228.\*]

**3. CORPORATIONS (§ 560\*)—RECEIVERS—RIGHTS AND DUTIES.**

The rights and duties conferred on receivers of the property of insolvent corporations and trustees in bankruptcy in possession thereof are largely the same.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2253-2260; Dec. Dig. § 560.\*]



**4. CORPORATIONS (§ 562\*)—INSOLVENT CORPORATION—COLLECTION OF UNPAID STOCK SUBSCRIPTIONS—DUTY IN GENERAL.**

The title to the property of an insolvent corporation is vested in the receiver, or the trustee in bankruptcy, in trust for the benefit of creditors, and it is his right and duty, when the interest of creditors require, to compel by proper proceedings delinquent subscribers to pay the balance due on unpaid stock, and with the fund thus acquired discharge the debts as far as he may.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2265-2279; Dec. Dig. § 562.\*]

**5. CORPORATIONS (§ 562\*)—TRUSTEE OF INSOLVENT CORPORATION—COLLECTION OF UNPAID STOCK SUBSCRIPTIONS—EXCLUSIVENESS OF REMEDY.**

So long as the estate of an insolvent corporation is being administered by the courts, the receiver or the trustee in bankruptcy alone has the right to pursue the remedy provided for collecting unpaid stock subscriptions, and a creditor cannot sue therefor.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 562.\*]

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Suit by the Herf & Frerichs Chemical Company against E. J. Brewster and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Griggs & Barkley, for appellant. Hunt, Myer & Townes, for appellees Brewster and others. Baker, Botts, Parker & Garwood, for appellee Wilson.

McMEANS, J. Appellant, plaintiff below, alleged in its petition, in substance, that having a claim against the Home Ice Company, a domestic corporation, it brought suit against said corporation thereon, and recovered judgment for \$1,755.64, besides costs of suit, upon which execution was issued and returned nulla bona; that at the time of the rendition of said judgment and the issuance and return of said execution said corporation had no property or assets out of which said judgment could be satisfied in whole or in part, and that it was insolvent and bankrupt, and that said corporation, on the petition of appellees, who were stockholders therein, had been adjudged a bankrupt by the United States District Court, and that in said bankruptcy proceeding, which was still pending in said court, all of the property and effects of the corporation had been vested in the trustee in bankruptcy; and that the same had been by the trustee distributed to the secured claimant, E. J. Brewster, one of the appellees, and that there was nothing left of the property of said bankrupt to pay plaintiff's judgment or to pay the costs of further administration of the bankrupt estate in the United States District Court, and that no further administration of the bankrupt estate can be had or is attempted to be had in said court. Plaintiff further alleged that the appellees, defendants below, were the prin-

cipal subscribers to the capital stock of said bankrupt corporation, and that they had failed to pay said corporation par value of the stock subscribed for by them, but that same was still due and owing; that neither of said stockholders nor the bankruptcy court, nor any of the creditors of the bankrupt corporation, have made, nor are they or either of them making, any effort, nor do they, or either of them, seek to marshal the assets of the bankrupt corporation represented by the unpaid balance due upon stock subscriptions, the par value of which is \$100 per share, nor to collect the amount due on same; and that plaintiff by this suit seeks to collect a sufficient amount due on said unpaid stock subscriptions to satisfy said judgment, and which, it alleged, is its only remedy, and without which its debt will be lost. It further alleged that secret settlement of all other claims against the bankrupt corporation had been made by appellees, leaving plaintiff's judgment the only unpaid claim against said corporation, and that it is without remedy to collect its claim except under article 671, c. 4, and article 684, c. 5, of the Revised Statutes of Texas of 1895, and other general statutes, by virtue of which the suit is brought for the sole benefit of plaintiff. The prayer was for judgment against the defendants jointly and severally for \$2,000, and interest and costs of suit, and for general relief. A general demurrer urged by appellees to the petition was sustained by the court, and, appellant declining to amend, the court entered judgment dismissing the suit, and from that judgment this appeal is prosecuted.

By its first assignment of error appellant contends that the court erred in sustaining the demurrer and dismissing its suit, because the trustee in bankruptcy was not compelled to accept title to property which he considered onerous, nor to choose in action which he deemed unprofitable to prosecute; and, when he failed and refused to prosecute suits against the stockholders for the amounts due on their stock subscriptions, the appellant had the right to sue for enough thereof to satisfy its debt.

By its second assignment appellant urges that it had the right to sue the delinquent stockholders because the trustee in bankruptcy had failed and refused to sue for the amounts due thereon.

A sufficient answer to these assignments is that appellant did not allege that the trustee had failed and refused to prosecute suits against the stockholders to collect their unpaid stock subscriptions or any part thereof.

By their other assignments of error appellant contends that it was error for the court to sustain the general demurrer and dismiss its suit for the reason that being a judgment creditor of the corporation, with execution returned unsatisfied, it had the right to pursue the remedy provided by statute in favor

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of such a creditor against delinquent subscribers for the capital stock.

It is unquestionably the law that the balance due upon unpaid stock subscriptions constitutes a trust fund for the satisfaction of the debts of the corporation (*Bank v. Investment Co.*, 74 Tex. 436, 12 S. W. 101; *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1020), and ordinarily when a judgment has been obtained against a corporation, and there can be found no property upon which to levy execution, that execution may be issued against any stockholder to the extent of the amount of his unpaid stock upon order of the court in which the judgment was rendered against the corporation, made upon motion, in open court, after reasonable notice in writing has been given to the stockholders thus sought to be charged. Rev. St. 1895, art. 671. But it has been held by the Supreme Court of this state that the article above cited has no application to an insolvent corporation in the hands of a receiver; that the provisions of our statutes clearly show that the arrearages of stockholders for unpaid stock are for the purpose of paying the debts and making distribution of the assets of a corporation as much to be treated as its property as anything else owned by it. *Showalter v. Laredo Improvement Co.*, 83 Tex. 164, 18 S. W. 491. The rights and duties conferred upon receivers of the property of an insolvent corporation and trustees in possession of the property of such a corporation under the appointment of a court of bankruptcy are largely the same. The title of the property of the insolvent corporation is vested in the receiver, or the trustee in bankruptcy, in trust for the benefit of the creditors, and it is his right and duty, when the interest of the creditors require, to compel by proper proceedings, the delinquent subscribers to pay the balance due on their unpaid stock, and with the fund thus acquired to discharge, as far as he may, the debts of the corporation. So long as the estate is being administered by the courts, the receiver or the trustee alone has the right to pursue the remedy provided by law for the collection of unpaid stock subscriptions. *Commercial Bank v. Warthen*, 119 Ga. 990, 47 S. E. 537, and authorities cited.

It follows, therefore, that the court did not err in sustaining the demurrer, and the judgment is affirmed.

Affirmed.

#### WHITAKER v. MILLER.

(Court of Civil Appeals of Texas. Feb. 24, 1909.  
Rehearing Denied March 31, 1909.)

**ANIMALS (§ 95\*)—TRESPASSING—ACTION FOR TITLE AND POSSESSION—JUDGMENT.**

Where, in an action for the title and possession of hogs, the undisputed evidence showed that plaintiff was the owner of the hogs, and

that they had not been sold in accordance with the provisions of the law under which they were taken up and impounded by defendant for trespass, the court, instead of rendering judgment that plaintiff take nothing by his suit, should have rendered judgment in his favor for title and possession, subject to defendant's lien for the damages found by the court.

[Ed. Note.—For other cases, see *Animals*, Dec. Dig. § 95.\*]

Appeal from District Court, Bandera County; R. H. Burney, Judge.

Action by J. A. Whitaker against Thomas Miller. Judgment for defendant, and plaintiff appeals. Affirmed in part, and reversed in part, and rendered.

Geo. Powell, for appellant. Chas. Montague, for appellee.

NEILL, J. The appellant sued appellee in the justice's court for title and possession of seven head of hogs, alleged to be worth \$8 each. The defendant claimed that he took up and impounded the hogs under the stock law which was in force in a subdivision of the county where they were trespassing on his inclosed premises, and set up a claim against plaintiff of \$12.45 for impounding, feeding, and for damages done by the hogs. A trial in the justice's court resulted in a judgment in favor of the defendant; and, on appeal to the district court, the judgment was that the plaintiff take nothing by his suit, and that defendant recover of him "the sum of twelve dollars and — cents, together with all costs incurred." From the judgment, the plaintiff has appealed to this court.

The undisputed evidence shows that the hogs sued for were the property of plaintiff, and that they were worth at least \$35; that they were taken up by defendant while on his premises; and the following report as to the damages was read in evidence by the defendant, viz.:

"March 11, 1908.

"We, the assessors appointed by the justice, Mr. Renshaw, have assessed the damage done by J. A. Whitaker's hogs in Mr. Tom Miller's corn to the amount of \$1.25; 75 cts. for impounding hogs.

"Geo. Williams.

"J. E. Kirkland.

"March 12, 1908.

"Sworn to and subscribed before me. J. L. Renshaw, justice of the peace in and for precinct No. 3, Bandera county, Texas."

It can hardly be said that the report shows a compliance with the provisions of article 4993, Rev. St. 1895. There is no evidence whatever tending to show that the hogs were sold for such damages and fee, under the provisions of article 4994, Rev. St. 1895. In fact, the evidence shows that they were not. From this it follows that the plaintiff was entitled to recover the title and possession of his hogs, subject to such fees and damages

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as the defendant was entitled to under the provisions of the stock law, if such law was in force when he took them up.

The contention of plaintiff that the stock law was not adopted nor in force cannot be maintained; for the record before us shows that all the provisions for adopting and putting such law in force in the subdivision of Bandera county where the hogs were taken up by defendant were complied with, in accordance with title 102, c. 5, Rev. St. 1895. All the evidence introduced on the trial to prove the adoption of and putting into effect such law was properly admitted. After defendant had shown the stock-law subdivision voted in 1907 was created according to law, it devolved upon plaintiff to prove that the subdivision included territory embraced in a subdivision voted in 1904. Such proof was not made, when it appeared from the evidence that the field notes of the supposed subdivision voted for in 1904 did not close, nor inclose, any area of Bandera county.

As it appears from the undisputed evidence that plaintiff was the owner of the hogs sued for, and that they have not been sold in accordance with the provisions of the law under which they were taken up, instead of rendering judgment that he take nothing by his suit, the trial court should have rendered judgment in his favor for title and possession of the animals, subject to the defendant's lien thereon for his damages of \$12, found by the trial court; and in that regard its judgment will be reversed, and such judgment rendered here. In all other respects, the judgment will be affirmed.

#### BAUM v. McAFEE.

(Court of Civil Appeals of Texas. March 13, 1909.)

#### 1. MANDAMUS (§ 57\*)—TRANSCRIPT ON APPEAL—COMPELLING OMISSION OF UNNECESSARY PAPERS.

The Court of Civil Appeals will not determine, on application for mandamus to compel the clerk of the lower court to deliver to appellant a transcript omitting certain papers, whether such papers are necessary; the matter merely involving a question of costs properly determined on a hearing of the merits.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 117; Dec. Dig. § 57.\*]

#### 2. APPEAL AND ERROR (§ 597\*)—TRANSCRIPT—PREPARATION—DUTY OF CLERK.

Rev. St. 1895, art. 1411, requires a transcript on appeal, except as thereafter provided, to contain a full copy of all the proceedings. Article 1413 authorizes the parties to agree, with the judge's approval, to omit immaterial proceedings. *Held*, that the clerk must include all proceedings, unless the parties agree to an omission of part; he being powerless to determine what is necessary and what is not.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2628; Dec. Dig. § 597.\*]

Action between I. Baum and M. W. McAfee. Baum appealed from the judgment and

applies for mandamus to the clerk of the county court. Application denied.

R. S. Neblett and H. L. Stone, for applicant. Richard Mays, for respondent.

RAINEY, C. J. This is an application to this court for the issuance of a writ of mandamus requiring the clerk of the county court of Navarro county to prepare and deliver to appellant a transcript omitting therefrom certain papers which appellant avers are not necessary for a proper revision of the case. The papers which appellant asks be eliminated are the original petition and answer, the case having been tried on amended pleadings, appellee's bills of exception 10 and 11, affidavits of jurors, affidavit of Richard Mays, and appellee's cross-assignment of error. All of these papers the clerk included in the transcript over the protest of appellant, and, the time for filing the transcript in this court being about to expire, the appellant received the same and filed it in this court.

The inclusion in the transcript of the papers mentioned will in no way militate against a proper review of the case, if they are not proper to be considered. For this court to determine that said papers are not necessary for the solution of the issues involved, it would require time and labor, which we do not think it necessary to expend, as it only involves a question of cost, and this can be settled on a hearing on the merits. Article 1411, Rev. St. 1895, provides that: "The transcript shall, except in cases hereinafter provided, contain a full and correct copy of all the proceedings had in the case." Article 1412 provides for the omission from the transcript of the citation and return, under certain conditions. Article 1413 provides: "The parties may by an agreement in writing, with the approval of the judge, direct the clerk in making up the transcript for the appellate court to omit therefrom any designated portion of the proceedings not deemed material to the disposition of the cause in such appellate court, and in such case the transcript shall not embrace such portions of the proceedings." Article 1414 provides for omitting from the transcript certain proceedings upon an agreed statement of the case. Article 1415 provides what the transcript shall contain in all cases, and article 1416 provides: "The clerk shall certify to the correctness of the transcript and sign the same officially with the seal of the court attached. Such certificate shall state whether the same be a transcript of all the proceedings in the cause, or the transcript provided for in articles 1412, 1413, and 1414." The foregoing articles comprise the duty of the clerk in regard to the documents necessary to be transcribed in the transcript, and in making his certificate in a case like this he has to certi-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fy that the transcript contains all the proceedings in the case; and in such a case as this, where the parties do not agree in writing, with the approval of the judge, that certain papers can be omitted from the transcript, he cannot, at the request of either party, be required to make such omission. If an agreement is made under article 1413, then he is not required to certify that the transcript contains all the proceedings in the case; but he can qualify his certificate as provided by article 1416. It is often the case that some of the proceedings in the trial of a case are unnecessary to the disposition of the issues raised in the appeal, and it would be better that they should not incur the record; but it is not left to the clerk to determine what is necessary or what is not. He must include all the proceedings, unless the parties agree as specified in the foregoing articles of the statutes.

The appellant asks relief in the alternative; that is, if the writ of mandamus be not granted, that said papers be stricken from the transcript and he be freed from the cost of including same in the transcript. This question will properly arise on the determination of the case on its merits, and, if then called to our attention, we will decide the question.

The application for a writ of mandamus is denied.

#### LYNCH v. McGOWN et al.

(Court of Civil Appeals of Texas. March 10, 1909.)

#### HOMESTEAD (§ 162\*)—ABANDONMENT.

An intent to return, which will prevent one's removal from his homestead from constituting an abandonment thereof, must continue during the entire time of his absence.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 315; Dec. Dig. § 162.\*]

Appeal from District Court, Sabine County; W. B. Powell, Judge.

Action by J. H. McGown and others against John Lynch. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Goodrich & Synnott, for appellant.

JAMES, C. J. This cause was once before on appeal, and was remanded by the Court of Civil Appeals for the First district. 40 Tex. Civ. App. 146, 88 S. W. 894. In the amended petition, filed October 19, 1907, plaintiff McGown alleged, in substance that the 60-acre tract in question was, prior to October 27, 1903, and has been ever since, his residence homestead, and states: "That is to say, the same has been used without any interruption whatever, as a homestead, and that your petitioner, nor his wife and children, have at any time abandoned said tract of land as their homestead, but, on the

contrary, do now and for the past 10 years have always continuously asserted homestead rights in said tract of land, and have at no time asserted or claimed any homestead right in any other tract of land." He alleged, also: That prior to the above date, for business purposes, and intending to return, he removed from this place, and since said time has continued to reside off it, intending to return to said tract and reoccupy it, in the meantime using it for the benefit of the family, and at no time ceasing to claim it as a homestead. That the defendant, Lynch, has caused the sheriff to levy an execution upon said land issued upon a judgment against plaintiff, notwithstanding said land is his homestead, and he had temporarily removed from the place, but had not acquired a new homestead nor formed an intention to abandon said tract as his homestead, but had at all times after leaving it intended to return to it and occupy it as a home in fact. The prayer was for injunction. It is not deemed necessary to state the contents of the answer, which placed all the material allegations of the plaintiff in issue. The verdict and judgment were in favor of the homestead. The creditor, Lynch, appeals.

The first, sixth, eighth, ninth, and tenth assignments of error relate to the charge. This is appellant's proposition under them: "The homestead character of the former home of a family residing elsewhere can only be retained by the continual existence in the mind of the head of the family of an intention to return to such former homestead, during the entire time of the absence. The charges complained of in assignments 8, 9, and 10 limit the jury in their determination of the question of abandonment vel non to the single consideration of the intention at the time of the removal, and the refused instruction set out in assignment No. 1 was necessary to correct this error, and the giving of the first and the refusal of the latter were reversible errors."

The charges referred to in the assignments 8, 9, and 10 are:

"The temporary renting or removing from a homestead does not change its character as such, when no other homestead is acquired, unless the owners leave the same with the purpose and intention to abandon the same, and when such is the case—that is, left with the intention to abandon it—it would not remain the homestead regardless of whether it was in the country, a town, or village.

"If you believe from the evidence that the plaintiff J. H. McGown, when he left the 60 acres of land claimed by him as a home, intended to and did abandon the same as his home, then it will be subject to execution, and you will find for the defendant; or if you find and believe from the evidence in the case that, after the plaintiff left and moved off the said 60 acres of land, he ac-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

quired a lot in the town of Hemphill and used and occupied it as a homestead on October 27, 1903, then you will find for the defendant.

"A homestead once established upon land by actual use and occupancy of the same may be abandoned by remaining away off of it with the intention not to return, or use it, as a homestead."

The requested instruction reads: "You are instructed that, before an intention to return will prevent one's removal from his homestead from constituting an abandonment of such place as his homestead, such intention to return must continue all the time till adverse interests accrue. Therefore, if you find from the evidence in this case that, between the time plaintiff removed from the 60 acres in controversy and the date of the levy of the execution, there was a time when he ceased to intend to return to it, then you will find for the defendant."

The only portion of the charge which told the jury upon what considerations to find for the defendant is as quoted above, which presents defendant's case upon two issues of fact: (1) Whether or not McGown, when he left the 60 acres, intended to abandon it; and (2) whether or not he had since that time acquired another homestead. The testimony showed that it was several years after he left the 60 acres before he moved to the place in Hemphill, and in the meantime, and in fact at any time after he left the 60 acres, if he ceased to have the intention to return to the same, he would by that fact alone have lost his homestead right therein, although he may have had such intention when he left it. There was evidence that tends to support the theory that after he left it he abandoned any intention to return to it as his home. We cannot conceive of any reason why defendant was not entitled to have the requested charge given. We have not the benefit of any brief by the appellee. We overrule the assignments of error which contend that defendant was entitled to a peremptory instruction.

Reversed and remanded.

# BRIGGS v. NEW SOUTH LUMBER CO. (Court of Civil Appeals of Texas. March 11, 1909.)

## 1. INJUNCTION (§ 167\*)—TEMPORARY INJUNCTION—MOTION TO DISSOLVE—TIMELINESS.

A motion to dissolve a temporary injunction, made after both sides had announced ready and the jurymen were taking their seats, was properly refused.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 354; Dec. Dig. § 167.\*]

## 2. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—INSTRUCTIONS.

Any error in an instruction to find against defendant "on the injunction sued out," was

harmless, where the injunction theretofore issued was dissolved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225; Dec. Dig. § 1068.\*]

## 3. APPEAL AND ERROR (§ 730\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment that the court erred in telling the jury to find against appellant on a specified item is insufficient, where it fails to point out in the assignment, the proposition, or the statement thereunder the part of the charge referred to.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3015; Dec. Dig. § 730.\*]

## 4. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment that the court erred in refusing to give a special charge, and in overruling a specified paragraph of defendant's motion for a new trial, is too general to be considered, where the special charge is not copied in the statement following the assignment, and there is no reference on the record to the charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

Error from District Court, Panola County; W. C. Buford, Judge.

Action by G. W. Briggs against the New South Lumber Company. From the judgment, plaintiff brings error. Affirmed.

H. N. Nelson, for plaintiff in error.  
Brooke & Woolworth, for defendant in error.

HODGES, J. Briggs, the plaintiff in error, owned a tract of land in Panola county. In March, 1906, he sold all the timber of a certain description thereon to Albert Deutsch, and by the terms of the sale allowed him two years within which to remove it. Deutsch later transferred all of his rights to the timber to the New South Lumber Company, the defendant in error, of which he was an officer. In January, 1908, before the expiration of the two years, the lumber company instituted this suit against Briggs, alleging that the latter was forcibly interfering with and attempting to prevent its employes from cutting and removing the timber from the land, and asked that he be enjoined from so doing. Later, and at the time of the trial, an amendment was filed, asking for damages in the sum of \$250 for the value of timber which the lumber company was, by virtue of the threats and interference of Briggs, prevented from removing. The plaintiff in error, Briggs, answered by exceptions, a general denial, and specially denied being guilty of the acts of interference and forcible resistance charged in the petition, and claimed that he had only requested the employes of the lumber company not to cut any more timber from the land, but denied that he had used any force or threats to that end. He further pleaded specially that an agent of the defendant in error had "turned the timber back to him," and that the lumber company thereafter had no legal right to remove any of the same from the land. There were also other defenses pleaded, not

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

necessary here to mention. The answer further contained a motion to dissolve the injunction theretofore granted. The case was not tried till in April, 1908, after the expiration of the two years within which the timber might be removed. The judgment rendered recites that the injunction is thereby dissolved, and awards a recovery of \$25 for damages against the plaintiff in error. From that judgment Briggs has prosecuted this appeal.

Assignments Nos. 1 and 2 complain of the refusal of the court to dissolve an injunction theretofore issued, and of a paragraph of the court's charge in which the jury are instructed to find against the plaintiff in error "on the injunction sued out." This would seem to indicate that a temporary restraining order had been issued in the case prior to the trial; but, if such was done, the record fails to show any fiat or order to that effect, or any restraining process. The exception to the refusal of the court to dissolve the injunction is preserved by a bill, to which the court attaches the explanation that the motion to dissolve was not called to his attention till after both sides had announced ready in the trial on the merits, and while the jurymen were taking their seats in the box. Assuming that there had been theretofore issued a temporary restraining order, the court correctly refused to hear a motion to dissolve it at that time, and this appears to be the extent of what he did. Just why the court gave the portion of the charge complained of does not clearly appear; but, conceding that it was error, it was purely abstract, and without any harmful results to the plaintiff in error. No injunction is granted or perpetuated as a result of the verdict of the jury. In fact the judgment of the court recites that the injunction theretofore issued is thereby dissolved, the time having expired within which the defendant in error had a right to go upon the land and remove the timber. The only judgment rendered against the plaintiff in error is one for \$25 damages for the value of timber which it is claimed he prevented the defendant in error from removing.

The third assignment of error complains of the charge of the court in telling the jury to find against Briggs for the value of any timber the lumber company did not cut, without undertaking to point out, either in the assignment, the proposition, or the statement following, the portion of the court's charge to which he has reference. The fourth assignment is equally as general. It complains of the refusal of the court to give a special charge, and in overruling the sixth paragraph of the defendant's motion for a new trial. The special charge is not copied in the statement following this assignment, nor is there any reference in the record to that charge. We think that both of the assignments are too general to require consid-

eration. *Horseman v. Coleman* (Tex. Civ. App.) 57 S. W. 304.

The judgment of the court is therefore affirmed.

### McCOLLUM v. BUCKNER'S ORPHANS' HOME.†

(Court of Civil Appeals of Texas. March 4, 1909.)

#### 1. DEEDS (§ 38\*)—EVIDENCE (§ 460\*)—EXTRINSIC EVIDENCE—DEEDS—SUFFICIENCY OF DESCRIPTION.

A deed from the administrator of A., describing the property as "situated in the county of Harris in the Republic of Texas \* \* \* 320 acres of land, part of a tract of 1,280 acres surveyed on Green's bayou for said M., deceased, on his bounty land warrant, bounded on the east by a part of the said 1,280-acre tract sold to N. and on the west, also by a part of the 1,280 tract sold to P.," is sufficiently definite to allow the introduction of the deed in evidence, in trespass to try title to the land described, and to permit extrinsic evidence to identify the property.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65-79; Dec. Dig. § 38.\* Evidence, Cent. Dig. § 2121; Dec. Dig. § 460.\*]

#### 2. BOUNDARIES (§ 36\*)—EVIDENCE—DEEDS OF ADJOINING PROPERTY.

In trespass to try title to 320 acres of land in a tract of 1,280 acres, described in the deed as lying between a portion of the tract sold to N. and another portion sold to P., deeds to N. and P. are admissible in evidence to define the location of the land in question.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 161; Dec. Dig. § 36.\*]

#### 3. BOUNDARIES (§ 35\*)—EVIDENCE—LOCATION OF LARGER SURVEY—PROBATE OF GRANTOR'S ESTATE.

In trespass to try title to land conveyed by the owner's administrator to plaintiff, and which was a part of a survey described in the deed as being "on Green's bayou," evidence as to the location of the survey with reference to Green's bayou and of the probate proceedings of the grantor's estate is admissible to aid the description in the deed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 153-183; Dec. Dig. § 35.\*]

#### 4. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE—ERRORS.

The use in an instruction of the word "defendant," instead of "plaintiff," and the word "they" in referring to plaintiff, is harmless, where from the context it is apparent that the words were wrongly used.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 705; Dec. Dig. § 295.\*]

#### 5. TRESPASS TO TRY TITLE (§ 45\*)—INSTRUCTIONS.

In trespass to try title, defendant attempted to defeat plaintiff's title by showing a transfer to Y. from a former owner prior to the transfer to plaintiff, and plaintiff claimed a resale by Y. to the former owner. *Held*, that an instruction that, before the jury could find for defendants on the issue of outstanding title, they must find that a deed had been executed and delivered to Y. by the former owner is not erroneous as making the burden of proof lighter on plaintiff than on defendant, because on the issue of a resale by Y. the charge only required the jury to find that there had been a resale and conveyance.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 67; Dec. Dig. § 45.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

**6. TRESPASS TO TRY TITLE (§ 45\*)—INSTRUCTIONS.**

In trespass to try title, plaintiff claimed through a conveyance by the administrator of the former owner, while defendants attempted to show a prior conveyance from the former owner to Y. The court charged that, if the jury found that there had been a resale and conveyance from Y. to the former owner or his administrator, or if they found that another person named, through whom plaintiff claimed title, paid a valuable consideration to the administrator of the former owner's estate for the land in controversy, then, in either or both events, to find for plaintiff, even though they believed that the former owner, before his death, executed and delivered a deed conveying the land to Y. There was evidence that one of the persons through whom plaintiff claimed had paid an adequate consideration for the land, at the sale by the former owner's administrator, that the final account of the administrator shows that he received the money for the land, and that this account was approved by the court, and that both the administrator and his grantee were dead. *Held*, that the instruction was not erroneous as ignoring the want of notice, to the person to whom the administrator conveyed, of the execution of the deed to Y., as where a valuable consideration has been paid for land, and the parties to the transaction are dead, the presumption is that the purchaser bought without notice of a prior conveyance.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 67; Dec. Dig. § 45.\*]

**7. VENDOR AND PURCHASER (§ 244\*)—EVIDENCE AS TO PURCHASE IN GOOD FAITH.**

Evidence, in trespass to try title, *held* to show that a former owner of the property, through whom plaintiff claims, was a purchaser for a valuable and adequate consideration.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 611; Dec. Dig. § 244.\*]

**8. TRESPASS TO TRY TITLE (§ 44\*)—EVIDENCE—QUESTIONS FOR JURY.**

Evidence, in trespass to try title, *held* to warrant the court in submitting to the jury the question whether one to whom the owner of the property had conveyed it had subsequently reconveyed the property.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 66; Dec. Dig. § 44.\*]

**9. DEEDS (§ 193\*)—EVIDENCE—PRESUMPTION AS TO EXISTENCE OF DEED.**

In order to presume the existence of a deed, it is not necessary that there be evidence of a deed, or other writing, upon which to base such presumption.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 562; Dec. Dig. § 193.\*]

**10. APPEAL AND ERROR (§ 742\*)—ASSIGNMENT OF ERRORS—STATEMENTS ACCOMPANYING ASSIGNMENT.**

Where assignments of error are not followed by any statement, as required by the rules, they will not be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

Appeal from District Court, Harris County; Charles E. Ashe, Judge.

Action by Buckner's Orphans' Home against M. McCollum. Judgment for plaintiff, and defendant McCollum appeals. Affirmed.

B. F. Louis and Hunt, Myer & Townes, for appellant. David F. Rowe, Thos. C.

Rowe, and Fisher, Sears & Campbell, for appellee.

**McMEANS, J.** This is a suit of trespass to try title for 320 acres of the Malcolm McAuley 1,280-acre survey in Harris county, brought by the Buckner's Orphans' Home against M. McCollum, John Gant, and a number of other defendants not necessary to name, in that they were dismissed from the case. Mrs. Margaret Holland and others intervened, but, having made no further appearance, were dismissed. The defendant John Gant appeared by answer, claiming only as tenant of the defendant McCollum. The case went to trial with Buckner's Orphans' Home as plaintiff, and McCollum as real defendant, though nominally Gant still appeared as defendant. The case was tried before a jury, which rendered a verdict for plaintiff, upon which judgment was duly entered, and from this judgment this appeal is prosecuted by defendant McCollum alone.

Appellee established by evidence a *prima facie* title in itself to the land in controversy. The appellant attempted to defeat appellee's title by alleging, and undertaking to establish, an outstanding title, and to this end they sought to prove by circumstantial evidence the execution and delivery of a deed from McAuley, the original grantee, to William Young, of date anterior to the execution of the administrator of said grantee of the deed under which appellee claims.

By his eighth, ninth, and tenth assignments appellant complains of the action of the court in admitting in evidence, over his objection, the deed from H. G. Pannell, administrator of McAuley, to F. R. Lubbock, and the deed from Lubbock to Michael Connelly, and the deed from Connelly to John Neil, the objection to each deed being that the description of the land sought to be conveyed was uncertain, indefinite, and ambiguous, and the ambiguity was patent, and that the deeds were void for uncertainty of description, and irrelevant and incompetent for any purpose. The eleventh assignment complains of the admission in evidence, over appellant's objection, of a certified copy of a deed from McAuley to H. G. Pannell and George C. Peters, and a certified copy of a deed from McAuley to B. A. Noland and H. G. Pannell, which were offered by appellee in aid of the description of the land conveyed by the deeds mentioned in the eighth, ninth, and tenth assignments; the objection being that the ambiguity in the deeds was patent, and that therefore extraneous evidence in aid of the description was inadmissible. The only proposition advanced under the foregoing assignments is that, where the ambiguity in a deed is patent, it is error to admit other evidence for the purpose of aiding the same. The description in the

deed from Pannell, administrator, to Lubbock is as follows: "Lying and being situated in the county of Harris in the Republic of Texas, \* \* \* 320 acres of land, part of a tract of 1,280 acres surveyed on Green's bayou for said McAuley, deceased, on his bounty land warrant, bounded on the east by a part of the said 1,280-acre tract sold to Noland, and on the west also by a part of the 1,280-acre tract sold to Pannell." The deed from Lubbock to Connelly, and from Connelly to Neil, contained substantially the same description. We think there can be no question that the description contained in the deeds was sufficient to admit of their introduction in evidence over the objection urged. The evidence also shows that the McAuley survey of 1,280 acres was in shape one mile wide, from east to west, and two miles long, from north to south. The deeds show that the 320 acres referred to were situated in Harris county, and were part of the McAuley survey, and were bounded on the east by the part of said survey sold to Noland, and on the west by the part of the survey sold to Pannell. The description, it is true, is imperfect, and, standing alone, without other evidence to aid it, might not be sufficient to identify the land, but, being imperfect, the deed for that reason be void; and other proper evidence was admissible to show the boundaries and prove its identity. To do this appellee introduced in evidence certified copies of deeds from McAuley to B. A. Noland and H. G. Pannell, and from McAuley to H. G. Pannell and George C. Peters. Each of these deeds conveyed 320 acres of the McAuley survey, and the description given in each identifies the land conveyed by it. The former shows that the 320 acres conveyed to Noland and Pannell were out of the extreme eastern part of the survey, and were one-fourth mile wide, from east to west, and two miles long, running the entire length of the survey, and the latter shows that the 320 acres conveyed to Pannell and Peters were also one-fourth mile wide, from east to west, and two miles long, and that its extreme eastern boundary was a line running through the center of the survey from north to south. This left a tract between the two above mentioned of the same shape and dimensions, and it is clear that it is the tract referred to in the deed from Pannell to Lubbock as "bounded on the east by a part of said 1,280-acre tract sold to Noland, and on the west also by a part of the 1,280-acre tract sold to Pannell." *Cook v. Oliver*, 83 Tex. 561, 19 S. W. 161; *Macmanus v. Orkney*, 91 Tex. 33, 40 S. W. 715; *Bowles v. Beal*, 60 Tex. 324; *Ragsdale v. Robinson*, 48 Tex. 379; *Norris v. Hunt*, 51 Tex. 614; *Coker v. Roberts*, 71 Tex. 601, 9 S. W. 665. The assignments are overruled. This disposes, adversely to appellant's contention, of his thirteenth assignment, which

complains of the refusal of the trial court to strike out of the evidence the deeds from Pannell to Lubbock, Lubbock to Connelly, and Connelly to Neil.

Nor was there error in admitting in evidence the testimony of the witness Yarbrough as to the location of the McAuley survey with reference to Green's bayou, and admitting evidence of the probate proceedings of McAuley's estate, all of which were offered in aid of the description in said deeds (*Hermann v. Likens*, 90 Tex. 449, 39 S. W. 282); and the assignments of error raising the point are overruled.

The court charged that: "If the jury have indulged the presumption of the execution and delivery of a deed from Malcolm McAuley to Wm. Young during the lifetime of said McAuley, then they will inquire whether they will indulge the presumption of a sale and reconveyance of said property from said Young back to McAuley, or his administrator, prior to the execution of the deed from McAuley's administrator to Lubbock, \* \* \* and if the jury believe \* \* \* that the circumstances are consistent with the influences or the presumption of a resale and conveyance of said land from said Young to the said McAuley, or his administrator, as claimed by defendants," etc.

Appellant, by his third and fourth assignments of error, contends that, inasmuch as the claim referred to in the charge was one made by the plaintiff, the use of the word "defendant" instead of "plaintiff," was a fatal error. We cannot agree with this. From its context it was patent that the charge meant "plaintiff" where "defendant" was used; and, in the connection in which it was used, a jury capable of understanding and passing upon the issues involved in the case could not have been misled thereby. *Railway Co. v. Porfert*, 72 Tex. 352, 10 S. W. 207. This may also be said as to the word "they," which was used at one place in the charge to designate the plaintiff, *Buckner's Orphans' Home*. The assignments raising the points are overruled.

Appellant by a second proposition under the third and fourth assignments further contends that the court, having instructed the jury that before they could find for defendants on the issue of outstanding title, they must find that a deed had been executed and delivered by McAuley to Young, made it less onerous on plaintiff, when on the issue of resale by Young to McAuley the charge only required the jury to find that there had been a resale and conveyance. This contention is without merit, and cannot be sustained.

The court charged that if the jury found that there had been a resale and conveyance from Young to McAuley or his administrator, or if they found that F. R. Lubbock, through whom plaintiff claims title, paid a valuable consideration to Pannell, the ad-



ministrator of McAuley's estate, for the land in controversy, then in either or both events to find for plaintiff, even though they believed that McAuley, before his death, executed and delivered a deed conveying the land to Young. This part of the charge is assailed by appellant by its fifth and sixth assignments, the contention being that the charge ignored the element of want of notice of Lubbock, at the time he purchased from the administrator, of the execution and delivery of the deed by McAuley to Young. Ordinarily, a person claiming land under a junior title, in a suit between himself and a person claiming under a prior conveyance, must allege and prove that he paid value, and bought without notice of the prior conveyance. In the absence of the means of making direct proof of want of notice, such want of notice will be presumed from evidence of the payment of a valuable and adequate consideration. Appellant makes no point, however, on the omission from the charge of the element of adequacy of consideration. It is, however, well-settled law that, where a valuable consideration has been paid for land, and the parties to the transaction are dead, and no direct proof can be made that the subsequent purchaser had or had not notice of a prior conveyance, upon proof being made that the subsequent purchaser paid a valuable consideration, the presumption may be indulged that he bought without notice of the prior conveyance. *Rogers v. Pettus*, 80 Tex. 428, 15 S. W. 1093; *Eastham v. Hunter*, 98 Tex. 564, 86 S. W. 323. The evidence is ample to warrant, if not to compel, a finding that Lubbock paid, not only a valuable, but an adequate, consideration for the land at the sale by the administrator. The land was appraised (as the law at that time required should be done) at 10 cents per acre, and Lubbock's bid was two-thirds of the appraised value, which was an amount then recognized by the law as adequate. The order of the probate court authorizing the sale directed that it should be made for cash, as required by law. The report of the sale showed that the administrator sold to Lubbock the land in controversy, together with 400 acres additional, at 6½ cents per acre, aggregating \$48, and that the land was sold according to the order of the court. The final account of the administrator shows that he received \$48 in cash for the land he sold to Lubbock, and this account was sworn to and approved by the court. The deed from the administrator conveying the land to Lubbock recited the payment by Lubbock of \$48. The transaction took place in 1845, and both Pannell, the administrator, and Lubbock are dead. This testimony was admissible for the purpose for which it was offered, and, being undisputed, was, we think, conclusive that Lubbock paid a valuable and adequate consideration for the land; and the court,

in the absence of evidence tending to prove that Lubbock in fact had notice of the prior conveyance at the time he bought, had the right to assume in the charge the want of such notice. Therefore want of notice was not an issue in the case for the jury to determine. If the evidence above set out did not justify the conclusion as a matter of law that Lubbock paid a valuable and adequate consideration for the land, it undoubtedly authorized the jury to so find, and, this issue being determined by the jury in favor of appellee, it follows, as a matter of law, in the absence of evidence to the contrary, that Lubbock purchased without notice of Young's claim. The assignments are overruled, as well as are the seventeenth, eighteenth, nineteenth, twenty-first, and twenty-fourth assignments, which raise substantially the points passed upon above.

The twentieth, twenty-second, and twenty-third assignments complain, in various ways, of the portions of the court's charge which give to the jury the right to presume the execution and delivery of a deed from Wm. Young to McAuley, or to his administrator, prior to the execution of the deed to Lubbock; the ground of complaint being that there was no evidence that warranted the charge. The assignments cannot be sustained. Appellant sought to defeat appellee's title by showing that in 1840 McAuley sold the land to Young, and thereby divested himself of the title, and that the outstanding title was in Young. The testimony shows that McAuley died in 1843; that prior to his death, and subsequent to the alleged sale to Young, McAuley asserted ownership to the land, and sold it to one Compton; that in 1844 an administrator of his estate was appointed and qualified; that the land in controversy was inventoried as part of his estate; that public notice was given of the sale to be made by the administrator; that the sale was made at auction, and the deed made in pursuance thereof, as well as other deeds constituting plaintiff's chain of title, were placed on record in Harris county; that one of the parties through whom appellee claims paid taxes on the land for several years; and that there had been an entire want of any ownership asserted by Young, or any one claiming under him. We think this evidence was sufficient to justify the court in submitting the issue.

The further contention that a presumption of a deed should never be indulged in any case, unless there was in evidence a deed or other writing upon which to base it, is not sound.

The twenty-fifth and twenty-sixth assignments are not followed by any statement, as required by the rules, and are therefore not considered. The first seven and twenty-seventh assignments have been examined by us, and found to contain no reversible er-

rors, and are severally overruled, without comment.

There being no reversible errors in the record, the judgment of the court below is affirmed.

**Affirmed.**

**SCOTT v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS.†**

(Court of Civil Appeals of Texas. Feb. 18, 1909. Rehearing Denied March 25, 1909.)

**1. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS.**

Where the allegations of plaintiff's petition based his right to recover on specific acts and omissions of his foreman, error in an instruction that other men with whom plaintiff was working were his fellow servants was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

**2. APPEAL AND ERROR (§ 739\*)—ASSIGNMENTS OF ERROR—VIOLATION OF RULES AS TO BRIEFING.**

Two assignments of error on appeal as to the refusal of instructions were grouped with another one based on the failure to submit issues of negligence made by the pleadings and evidence, and under the three assignments was a proposition asserting it to be the "duty of the court to submit all issues of law and fact to the jury raised by the pleadings and evidence, and especially is this true when the issues which have been omitted have been called to the attention of the court by special charge." The proposition was followed by the statement from the record of pleadings, and evidence which it was contended made it the court's duty to give the instructions as requested. *Held*, that the assignments as presented were subject to an objection that the assignments as to the refusal of instructions complained of the court's action with respect to matters distinct from each other, and hence grouping them as stated was a violation of the rules as to briefing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3034, 3035; Dec. Dig. § 739.\*]

**3. MASTER AND SERVANT (§ 295\*)—INJURIES TO SERVANT—INSTRUCTIONS—ASSUMED RISK.**

In an action by a railroad employé for injuries received while he was engaged with other employes under a foreman in loading timbers onto a car by means of a derrick operated by an engine on another car, plaintiff requested a charge to find in his favor if it was the duty of the foreman to properly place the derrick car for drawing, hoisting, and loading the timbers, and he negligently placed it in such a position that the timbers had to be drawn at an angle, requiring more power to draw the same, and rendering it impossible for plaintiff to hold the guy rope in safety while the timbers were being drawn, hoisted, and loaded, and his act in so placing the car was an act of negligence, which was the direct and proximate cause of his injury, and he was free from contributory negligence. *Held* properly refused, as it failed to present the issue of assumed risk, called forth by evidence that plaintiff had much experience, and knew the attending dangers, the position of the derrick and other car with reference to the pile of lumber, etc., and chose for himself the position he occupied at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1170, 1175; Dec. Dig. § 295.\*]

**4. MASTER AND SERVANT (§ 293\*)—INJURIES TO EMPLOYÉ—REFUSAL OF INSTRUCTIONS.**

In an action by a railroad employé for injuries received while engaged with other employes under a foreman in loading timber onto a car by means of a derrick operated by an engine on another car, an instruction to find for plaintiff if it was the duty of the foreman to see that a timber which struck him did not strike against anything while being drawn, or if the foreman saw the timber about to strike against the skidway, and failed to stop the engine or notify him of the danger, was properly refused, since it failed to negative liability in case the foreman could not have avoided the injury after seeing the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1156, 1160; Dec. Dig. § 293.\*]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Action by Howell P. Scott against the St. Louis Southwestern Railway Company of Texas. From a judgment for defendant, plaintiff appeals. **Affirmed.**

While engaged in appellee's service as an employé in its bridges and building department, appellant suffered injuries to his person, on account of which he prosecuted an action for damages. From a judgment in appellee's favor, rendered in accordance with the verdict of a jury, he prosecutes this appeal. It appeared from the evidence that appellant and five other employes of appellee, under a foreman named Enwright, by means of a derrick, were engaged in loading heavy pieces of timber used in constructing cattle guards onto a car on appellee's track. The derrick was on another car on the track, and was operated by power furnished by an engine on the same car it seems. The car on which the pieces of timber were being loaded was just south of the car on which the derrick and the engine which operated it were loaded. The pieces of timber to be loaded were to the right of the car on which they were to be loaded and about 40 feet from it. They were to be loaded one at a time, and in loading them it seems to have been the duty of two of the men to fasten to one of the pieces dogs or grappling irons attached to the end of a cable running from the boom of the derrick, and the duty of the foreman, Enwright, to so operate the engine as to wind the cable at its other end on a drum forming a part of the derrick, and so drag the piece of timber to a position where it would be hoisted by the derrick to a point above the level of the car. It was the duty of appellant and the man assisting him by means of a guy rope extending from the boom from their position on the east side of the track to hold the boom in a proper position while the piece of timber was being dragged to a position for loading on the car, and when it reached such a position, by pulling on the guy line, to swing the piece of timber to a point where, when the cable, by the operation of the en-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

gine, was unwound, the other two men, whose position was on the car being loaded, could take hold of same and properly place it on the car. At the time appellant suffered the injuries he complained of one car had been loaded with the pieces of timber, one of the pieces had been loaded upon another car, and by means of the cable another piece was being dragged towards the car. At that time appellant, it seems, was standing on the east side of the track with one of his feet resting on a heavy piece of timber around which he had wrapped the guy rope, to the free end of which he was holding, when the piece of timber on the other side of the track, as it was being dragged towards the car, struck a skid, the effect of which, it seems, was to suddenly jerk further east the boom to which the guy rope held by appellant was attached, and at the same time jerk further east the piece of timber around which appellant had wrapped the guy rope. As a result appellant, who was holding to the end of the guy rope, was thrown in front of the piece of timber, when it fell on him and broke one of his legs.

Gentry & Castle, for appellant. E. B. Perkins, Marsh & McIlwaine, and J. S. McIlwain, for appellee.

WILLSON, C. J. (after stating the facts as above). By his first assignment of error appellant complains of the action of the court in instructing the jury that the men engaged in assisting him in loading the timbers, except the foreman, Enwright, were his fellow servants. In his petition, after alleging the manner in which the pieces of timber were being loaded upon the car, appellant alleged that the accident resulting in the injury of which he complained was caused by the "negligence of defendant, its agents, servants, and employes in operating said derrick and engine and in loading said timbers." The allegations following the one just quoted from the petition were as follows: "That Jim Enwright, the foreman, whose duty it was to properly place said derrick car for hoisting and loading the timbers, negligently placed the same in such a position that the timbers had to be drawn at an angle requiring more power to draw the same, and rendering it impossible for the plaintiff to hold the guy rope in safety while the timbers were thus being drawn, hoisted, and loaded; that it was the duty of said Jim Enwright who was running said engine to operate the same in a careful manner consistent with the safety of this plaintiff and the other employes engaged in said work; that, notwithstanding his said duty, he negligently ran said engine in a careless and reckless manner, at a high and dangerous rate of speed, and suddenly turned on the steam, causing the same to jerk the guy rope that was being held by plaintiff with such force as to turn the piece of timber around which said rope was fastened, causing plaintiff to be thrown forward and injured as

hereinbefore set out; that plaintiff was standing at the time of his injury on the east side of the car that was being loaded, and could not see the piece of timber that was being drawn by the derrick from the west side of said car; that it was the duty of Jim Enwright, the foreman, to see that the timber did not strike against anything while being drawn that would be likely to injure plaintiff or endanger his safety; that it was also his duty when he saw the timber strike or about to strike against the skidway or other immovable object to stop the engine or to notify plaintiff of the imminent danger; that, notwithstanding his said duty, the said Enwright negligently permitted said timber to strike against a skidway or other immovable object, and negligently failed to stop the engine or to notify plaintiff of the danger after he saw, or by the use of ordinary diligence could have seen, that said timber was about to strike against some object that would endanger plaintiff's safety; that by and through said acts of negligence said accident and injury occurred." In determining whether the instruction complained of was materially erroneous or not, we are confined to a consideration of the acts and omissions specifically alleged in the petition, and relied upon as constituting negligence. *Railway Co. v. De Ham*, 93 Tex. 78, 53 S. W. 375; *Railway Co. v. Younger*, 10 Tex. Civ. App. 141, 29 S. W. 948; *Wallace v. Railway Co.* (Tex. Civ. App.) 42 S. W. 865. It will be noted that the specific acts and omissions relied upon as negligence are all charged to be acts and omissions of the foreman, Enwright, alone, and not acts or omissions of the other men, or any of them, assisting appellant in loading the timber. As by his pleadings appellant did not seek a recovery on account of negligence of other of appellee's employes than Enwright, whether the conclusion of the court that the other employes were appellant's fellow servants was a proper one or not is immaterial. The court instructed the jury that appellee would be liable for the negligence of Enwright in respect to the matters submitted to them, and in the condition of the pleadings Enwright's conduct alone could be made the basis of a recovery in favor of appellee.

Complaint is made in the sixth assignment of error of the refusal of the court to give to the jury a special charge requested by appellant as follows: "You are charged at the instance of plaintiff that if you believe from the evidence that it was the duty of Jim Enwright, the foreman, to properly place the derrick car for drawing, hoisting, and loading the timbers, and that he negligently placed the same in such a position that the timbers had to be drawn at an angle requiring more power to draw the same, and rendering it impossible for plaintiff to hold the guy rope in safety while the timbers were being drawn, hoisted, and loaded, and that his said act in so placing the car was an act of negligence as

that term has been defined to you in the main charge, which was the direct and proximate cause of plaintiff's injury, if any, and you further find that plaintiff was free from contributory negligence as that term has been defined to you, then you will find for plaintiff." And by his seventh assignment of error appellant complains of the action of the court in refusing to give to the jury a special charge requested by him as follows: "You are charged, at the instance of plaintiff, that if you find from the evidence that it was the duty of Jim Enwright, the foreman, to see that the timber did not strike against anything while being drawn that would likely injure plaintiff or endanger his safety, or if you find from the evidence that Enwright saw the timber about to strike against the skidway, and he failed to stop the engine or to notify plaintiff of the danger, and you further find that the said Enwright was negligent, as that term has been defined to you, in permitting said timber to strike against the skidway, or if he saw, or by the use of ordinary care could have seen, that the timber was about to strike against the skidway, and he failed to stop the engine or to notify plaintiff, and that said acts of negligence, if any, were the direct and proximate cause of plaintiff's injury, if any, then you will find for plaintiff." In appellant's brief said two assignments are grouped with another one, to wit, that the "court erred in failing to submit to the jury all the issues of negligence made by the pleadings and evidence," and under the three assignments of error so grouped is a proposition asserting it to be the "duty of the court to submit all issues of law and fact to the jury raised by the pleadings and evidence, and especially is this true when the issues which have been omitted are called to the attention of the court by special charge." The proposition is followed by a statement from the record of pleadings and evidence, which appellant contended, it seems, made it the duty of the court to give to the jury the instructions as requested. Appellee objects to the consideration by this court of said sixth and seventh assignments of error on the ground that they complain of the action of the court with respect to matters distinct from each other, and therefore that grouping them as stated was a violation of rules controlling the briefing of cases on appeal to this court. We are inclined to think that the manner in which the assignments are presented in appellant's brief justly subjects them to the objection urged. *Railway Co. v. Cain*, 37 Tex. Civ. App. 531, 84 S. W. 686; *Telegraph Co. v. Waller*, 37 Tex. Civ. App. 515, 84 S. W. 695. But nevertheless we have considered the assignments, and think they should be overruled. The one just quoted above, if unobjectionable on other grounds, properly was refused because it ignored the

issue of assumed risk on his part, made by evidence tending to show that he had had much experience in the kind of work he was then engaged in, knew the dangers attending it, knew the position of the derrick and other car with reference to the pile of lumber, etc., and chose for himself the position he occupied at the time of the accident. The other charge requested we think properly was refused, if for no other reason, because it authorized the jury to find for appellant if they believed from the evidence that Enwright saw that the piece of timber to be loaded, as it was being dragged to the car, was about to strike against the skidway and failed to stop the engine or notify appellant of the danger, notwithstanding they may also have believed from the evidence that he could not, after seeing that said piece of timber was about to so strike, have stopped the engine or notified appellant of his danger in time to have saved him from the injury he suffered.

The judgment is affirmed.

#### ZAN et al. v. CLARK et al.†

(Court of Civil Appeals of Texas, Feb. 3, 1909.  
Rehearing Denied March 17, 1909.)

##### 1. NAMES (§ 16\*)—IDEM SONANS.

If a name spelled with different letters can have but one pronunciation, it is immaterial which way it is spelled, and hence the difference between Zan and Zann is immaterial.

[Ed. Note.—For other cases, see Names, Cent. Dig. §§ 12-14; Dec. Dig. § 16.\*]

##### 2. PARTIES (§ 51\*)—IMPLEADING DEFENDANTS—PERSONS NOT PARTIES TO CONTROVERSY.

In a suit by transferees of vendor's lien notes against the maker and the payee to foreclose, defendants were properly denied leave to implead the payee's transferees, who were plaintiffs' transferees, so as to procure a rescission of the transfer to it and a recovery of damage for fraud inducing the transfer; the transferees not being shown to be proper parties to the controversy between plaintiffs and defendants.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 51.\*]

##### 3. PLEADING (§ 403\*)—PETITION—DEFECTS—CURE BY ANSWER.

Plaintiffs' right to recover was not defeated by insufficiency of the petition, where the deficiency was supplied by the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.\*]

##### 4. VENDOR AND PURCHASER (§ 274\*)—FORECLOSURE OF LIEN—DEFENSES—FRAUD.

In a suit by transferees of vendor's lien notes against the maker and payee to foreclose, fraud of the payee's transferees in procuring the indorsement was no defense, where the payee had procured a settlement of his claim for the fraud.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 274.\*]

Appeal from District Court, Falls County; Richard I. Munroe, Judge.

Action by A. Clark and another against John Zan and another. From the judgment, defendants appeal. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

Tom Connally and W. W. Holland, Jr., for appellants. Spivey & Carter, for appellees.

**KEY, J.** The nature and result of this suit is stated as follows in appellants' brief:

"This suit was instituted in the district court of Falls county on June 20, 1905, by the plaintiffs, A. Clark and Annette Moseley, upon six vendor's lien notes and for the foreclosure of the vendor's lien executed by John Zann and payable to the order of W. W. Holland, and by said Holland indorsed without recourse to the firm of Damon & Gibson. One of these notes was by Damon & Gibson transferred and assigned to Miss Annette Moseley, and the other five notes were transferred and assigned to A. Clark.

"This suit was instituted by plaintiffs, A. Clark and Annette Moseley, jointly, against defendants John Zan and W. W. Holland, upon six vendor's lien notes and for foreclosure of the vendor's lien upon 161½ acres of land situated in Falls and Robertson counties. All of said notes were executed by John Zan on the 27th day of October, 1900, and were due in one, two, three, four, five, and six years after date, respectively, and were payable to the order of W. W. Holland, and each was for the sum of \$316.66%, and each bears interest at the rate of 10 per cent. per annum and contains the usual clause of 10 per cent. attorney's fees. Each of said notes also contains a clause providing as follows: 'It is understood and agreed that failure to pay this note or any installment of interest thereon when due shall, at the election of the holder of them, or any of them, mature all notes this day given by me to said W. W. Holland in payment for said property.' Each of said notes also contains this clause: 'This note is given in part payment for a certain lot or parcel of land situated in Robertson and Falls county, Tex., 160 acres of the John West league, this day conveyed to John Zan by W. W. Holland.' Each of said notes also contains the following: 'Consideration. Cash, \$750.66% Note 1, \$316.66%, Note 2, \$316.66%, Note 3, \$316.66%, Note 4, \$316.66%, Note 5, \$316.66%, Note 6, \$316.66%.' Upon note No. 1 there was a credit of \$100 of date October 26, 1901, and a credit of \$50 of date October 4, 1902. On January 20, 1904, all of these notes were indorsed in blank without recourse by W. W. Holland, and transferred by him to Damon & Gibson, a firm composed of H. G. Damon and Guy M. Gibson, and on said date Holland executed a transfer of the vendor's lien to said parties. At the time of the transfer of these notes by Holland to Damon & Gibson notes Nos. 1, 2, and 3 were due and unpaid.

"Defendants Holland and Zan's pleadings allege that the consideration for the transfer of these notes by Holland to Damon & Gibson and the transfer of vendor's lien was the written promise by Damon & Gibson to convey to defendant Holland 450 acres of

land in the Republic of Mexico, which said land Damon & Gibson represented to Holland was very fertile and covered with dense forests of mahogany, rosewood, and other valuable timbers, and free from overflow and insects, etc.; that said representations were knowingly, falsely, and fraudulently made, and that they were untrue, and in consequence the consideration for said transfer had failed and the notes herein sued upon were still the property of W. W. Holland. About January 26, 1904, Damon & Gibson put up one of these notes, the one due October 27, 1904, with Miss Annette Moseley as collateral security for a loan, and on June 14, 1905, said note was sold and transferred to the plaintiff Miss Moseley. The other five notes were transferred to the plaintiff A. Clark in February, 1905.

"The defendants Holland and Zan interpleaded Damon & Gibson, and set up rescission of the transfer of the vendor's lien and transfer of the notes, and asked for special damages, asked for rescission, and defendant Holland also prayed for judgment for the title and possession of the notes against all parties to the suit. Defendant Zan pleaded payment of said notes to Holland by a re-transfer of the land.

"Upon a trial before a jury the court instructed a verdict for the plaintiffs against John Zan for the full amount of the notes, and a foreclosure of the vendor's lien against both defendants Holland and Zan, and rendered judgment accordingly."

There is no merit in appellants' first and second assignments of error, based upon the alleged distinction between the names "John Zan" and "John Zann." Rules of spelling do not constitute rules of law, and, if a name spelled with different letters can have but one pronunciation, in so far as legal rights are concerned, it is not material which way the name is spelled.

The third assignment is addressed to the action of the court in refusing to allow the defendants to implead Damon & Gibson. We overrule that assignment, because it is not shown that Damon & Gibson were proper parties to the controversy between the plaintiffs and defendants, and the defendants had no right to litigate in this case any cause of action they may have against Damon & Gibson. *Frey v. F. W. & R. G. Ry. Co.*, 86 Tex. 465, 25 S. W. 609; *Oak Cliff College v. Armstrong* (Tex. Civ. App.) 50 S. W. 610; *Stewart v. Gordon*, 65 Tex. 347.

The fourth assignment is overruled, because, if the plaintiffs' petition did not show all the facts necessary to entitle them to a judgment of foreclosure against the defendant Holland, such facts were supplied by the defendants' answer.

The other assignments are addressed to the action of the court in directing a verdict for the plaintiffs, and in not submitting the case to the jury upon the defendants' pleas of fraud alleged to have been perpe-

trated upon the defendant Holland by Damon & Gibson. No error was committed in that regard, because the undisputed testimony coming from both sides shows that if the alleged fraud was ever committed by Damon & Gibson in contracting to sell Holland land in Mexico, after the discovery of the fraud by Holland, he made another contract with Damon & Gibson for other lands in lieu of that charged by him to have been misrepresented by Damon & Gibson. According to his own testimony, he went to Damon & Gibson, charged them with misrepresenting the land they had agreed to sell him, and demanded \$1,500 compensation for the wrong done him. That demand was refused, but in lieu thereof and as a substitute for the first contract another was made by which he was to have other lands. This being the case, the alleged fraud pleaded by Holland constituted no defense to this suit.

No error has been shown, and the judgment is affirmed.

RICE, J., did not sit in this case.

MISSOURI, K. & T. RY. CO. OF TEXAS et al. v. PETTIT.

(Court of Civil Appeals of Texas. March 10, 1909.)

**1. CARRIERS (§ 228\*)—NEGLIGENT DELAY OF SHIPMENT OF CATTLE—EVIDENCE.**

In an action against a carrier for negligent delay and rough handling in the shipment of cattle, the court did not err in admitting in evidence the statement of the shipper that he had ordered cars a week before the cattle were shipped; the statement being only matter of inducement.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 959; Dec. Dig. § 228.\*]

**2. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

A party cannot complain of testimony, where he subsequently elicited the same testimony on cross-examination of the witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4161; Dec. Dig. § 1051.\*]

**3. EVIDENCE (§ 247\*)—ADMISSION BY PERSON REFERRED TO—ADMISSIBILITY.**

Where a shipper was referred by the station agent to a third person, statements made to the shipper by the third person, while openly engaged in the discharge of duties of the carrier, as to the time when the train would leave and the cause of the delay were admissible in an action by the shipper for negligent delay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 950-957; Dec. Dig. § 247.\*]

**4. EVIDENCE (§ 474\*)—OPINION EVIDENCE—COMPETENCY OF WITNESS.**

A witness with 18 years' experience in the shipment of cattle, and who had frequently accompanied shipments, and had noticed the effect of jerks of the train on cattle during shipment, was competent to testify to the effect jerks of the train detailed by him had on cattle.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2206; Dec. Dig. § 474.\*]

**5. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—SUBSEQUENT ADMISSION WITHOUT OBJECTION.**

A party is estopped from asserting error to the overruling of his objection to evidence, where similar evidence was subsequently repeated by the witness without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4161; Dec. Dig. § 1051.\*]

**6. EVIDENCE (§ 474\*)—OPINION EVIDENCE—COMPETENCY OF WITNESS.**

One who had been shipping cattle for 18 years, frequently accompanying the shipments, and who had for 15 years shipped cattle to a designated point, was competent to testify as to the average rate of speed of a train carrying cattle to such point.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2202; Dec. Dig. § 474.\*]

**7. APPEAL AND ERROR (§ 204\*)—OBJECTION TO EVIDENCE—REVIEW.**

One cannot on appeal urge an objection to evidence not raised in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1258; Dec. Dig. § 204.\*]

**8. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.**

Where a carrier, when sued for negligent delay in a shipment of cattle, showed by its trainmen and its time-tables that the average speed of trains transporting cattle was 20 miles an hour, it could not complain of the error, if any, in permitting a witness for plaintiff to testify that the average rate of speed of a train carrying cattle was 18 miles an hour.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4161; Dec. Dig. § 1051.\*]

**9. EVIDENCE (§ 474\*)—OPINION EVIDENCE—COMPETENCY OF WITNESS.**

One who had been a salesman at stockyards for 10 years, and who was engaged in such business, was competent to testify as to the market price of cattle at such yards.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2218; Dec. Dig. § 474.\*]

**10. EVIDENCE (§ 474\*)—OPINION EVIDENCE—COMPETENCY OF WITNESS.**

One who had been in the cattle business, including buying, selling, and shipping cattle, for about 6 years, and who had had experience in shipping cattle to a designated point, and was acquainted with shipments made by others, and knew what effect a delay would have on the appearance of cattle, was competent to testify as to the effect a delay in the shipment of cattle would have on their salable appearance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2206; Dec. Dig. § 474.\*]

**11. TRIAL (§ 260\*)—REFUSAL TO GIVE INSTRUCTIONS COVERED BY CHARGE GIVEN.**

It is not error to refuse a requested charge covered by the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.\*]

**12. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING ISSUES.**

A requested charge which singles out one separate issue and asks a finding thereon, while the cause of action is based on other issues alleged and proved, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 613; Dec. Dig. § 253.\*]

**13. TRIAL (§ 252\*)—NEGLIGENT DELAY OF SHIPMENT OF CATTLE—EVIDENCE—INSTRUCTIONS.**

Where, in an action against carriers for negligent delay and rough handling of a shipment

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of cattle, there was no evidence that the cattle suffered damages while on a terminal railroad, a requested charge that the jury should subtract the damages suffered by the cattle while on the terminal railroad from that which occurred on the lines of the carriers, and render a verdict for the difference, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

Appeal from Williamson County Court; T. J. Lawhon, Judge.

Action by J. R. Pettit against the Missouri, Kansas & Texas Railway Company of Texas and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Spell & Nickels, for appellants. W. H. Nunn and Henderson & Lockett, for appellee.

RICE, J. Appellee brought this suit against appellants for the recovery of damages sustained by him to a shipment of 159 head of beef cattle while in transit over appellants' line of railway from Smithville, Tex., to East St. Louis, Ill., alleging unreasonable delays and rough handling en route, whereby he sustained damage to said shipment in the aggregate sum of \$901.04, predicated upon the killing outright of one of said animals, the crippling of another, and decrease in weight of the others, depreciation in the market on account of reaching the same one day late, as well as depreciation in their value on account of the stale appearance of said cattle when they arrived. Defendants filed a general demurrer, general denial, and several special answers, among other things setting up contributory negligence on the part of plaintiff in failing to properly care for said cattle en route, in accordance with his contract so to do, and pleading that section of their contract limiting their liability to injuries occurring on their own lines, and requiring notice to carrier of injuries before cattle were taken from the cars or mingled with other stock, etc. And further contended that, if said cattle were injured by reason of any delay and rough handling, defendants were not liable therefor, because the same was only such as was ordinarily incident to the operation of their trains. Plaintiff addressed special exceptions to those portions of said answer which set up contributory negligence, and that part thereof requiring shipper to give notice of any injuries resulting to stock on account of the carrier's negligence before the cars left the carrier's line, and before the stock mingled with other stock, or were removed from pens at destination, which exceptions were sustained. There was a jury trial, resulting in a verdict and judgment for plaintiff for \$376, with interest thereon, from which judgment this appeal is prosecuted.

We do not think there was any error in permitting plaintiff to testify that he ordered the cars a week before the cattle were

shipped. This statement appears to be only matter of inducement. Besides, there was nothing in the statement that was calculated to prejudice appellants' rights. In addition to this it appears that appellants themselves, on cross-examination of this witness, elicited the same testimony, and therefore they have no right to complain.

Nor do we think there was any error, as complained of in appellants' second assignment, in permitting the plaintiff to testify that he had a conversation, with a party that he took to be the yardmaster, as to the time when the train would leave, and who told him, in explanation of the delay in starting, that the crew was at supper, and he would have to wait until they got back, and that the switch engine was broken down, and, when they got the engine in shape and began loading, it was about 9:30, because it appears from the evidence that the plaintiff was referred to this party by the station agent, and because it further appeared from the evidence that this party was openly engaged in the discharge of the carrier's duties at the time he made such statements, by reason of which they were admissible as *res gestæ*. See *Ry. Co. v. Cunningham* (Tex. Civ. App.) 113 S. W. 767; *Ry. Co. v. Batte* (Tex. Civ. App.) 94 S. W. 345; *Austin v. Nuchols*, 42 Tex. Civ. App. 5, 94 S. W. 336; *Railway Co. v. Watkins* (Tex. Civ. App.) 100 S. W. 162.

By their third assignment it is contended that the court erred in permitting the plaintiff to testify to the effect certain jerks of the train detailed by him would have upon the cattle. This is overruled because it appeared that this witness had had 18 years of experience in the shipment of cattle, had frequently accompanied shipments of cattle, and had seen and noticed the effect that similar jerks would have upon cattle during shipment. Besides this, said witness at another time repeated the substance of this testimony without objection on the part of appellants, whereby they were estopped from asserting error in the first instance, if any could be predicated thereon.

By their fifth assignment appellants urge that the court erred in permitting the plaintiff to testify that the average rate of speed for a train, such as the one that carried his cattle, was 18 miles per hour, the only ground of objection thereto being that said witness had not qualified to testify in response to the question eliciting said answer. The record shows that this witness had been shipping cattle for 18 years, frequently accompanying the shipments, 15 years of which time he had been shipping to St. Louis, the destination of this shipment. We think this evidence would qualify him to testify as to the subject inquired about. But by one of their propositions it is urged that this testimony was inadmissible, because it involved

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the witness' conclusion and opinion upon a matter of law as well as of fact, citing, in support of this contention, the case of *H. & T.-C. Ry. Co. v. Roberts* (Tex. Civ. App.) 109 S. W. 982. But the record discloses that this last objection was not made to this testimony in the court below, and appellee insists, and we think with reason, that on appeal appellants cannot urge any other objection than the ones presented in the court below. See *Wheeler v. Railway Co.*, 91 Tex. 359, 43 S. W. 876; *Everett v. Kemp* (Tex. Civ. App.) 80 S. W. 534; *Stith v. Moore*, 42 Tex. Civ. App. 528, 95 S. W. 587. If, however, there was any error in this ruling prejudicial to appellants (which we do not concede), the same was cured, by reason of the fact that the plaintiff was thereafter permitted, without objection, to testify to the same fact. In addition to this a number of appellants' conductors and trainmen testified that the reasonable and fair average speed for trains, such as transported the cattle in question, was 20 miles per hour, including stops, and appellants' time-table, which was introduced in evidence, was to the same effect. They, therefore, are not entitled to complain. *Ry. Co. v. Boshear* (Tex.) 113 S. W. 7.

The sixth assignment, in effect, raises the same question as that presented by the fifth, and for the reasons there stated it is also overruled.

The court did not err in permitting the witness Woodson, over appellants' objection, to testify as to the market price of such cattle as were embraced in plaintiff's shipment on March 21, 1907, at the stockyards in East St. Louis, because it appears from the explanation to the bill of exceptions taken to said testimony that said witness had been acting as salesman at said yards where these cattle were sold for the past 10 years, and was acting in such capacity at the time inquired about. It is therefore shown that he was an expert, and was competent to testify in response to the question as to their value. Apart from this the witness Gregg, without objection, testified substantially to the same effect as did the witness Woodson, whereby the error, if any, was waived.

We do not think there was any error in permitting the witness Anderson, over appellants' objection, to testify relative to the effect that the delay in the shipment of cattle would have on their salable appearance, because it was shown by his evidence that he had been in the cattle business, which business included buying, selling, and shipping cattle, for about 6 years, had had experience in shipping to St. Louis, and was acquainted with shipments made by others, and knew what effect a delay of 24 hours would have upon the appearance of cattle, from which experience he was qualified to state how much less per hundred weight the cattle would be worth by reason thereof.

We do not believe there is any merit in

appellants' objection to the charge of the court defining reasonable diligence, ordinary care, and negligence, as complained of in their ninth assignment. We think the charge in this respect was in substantial accord with the decisions of the courts upon the subject. See *Railway Co. v. Daniels*, 1 Tex. Civ. App. 695, 20 S. W. 955; *Railway Co. v. Duncan*, 10 Tex. Civ. App. 479, 31 S. W. 562.

By their tenth assignment appellants insist that the court erred in refusing to give their special charge No. 2, which reads as follows: "You are charged that if you believe from the evidence that the delay at Ft. Worth of the cattle in question, if you believe from the evidence there was such delay, was the usual and ordinary delay of such trains as the one in question, when those in charge of same use ordinary care to operate the same in a careful and prudent manner, you will find for defendant." Also by their eleventh assignment it is insisted that the court erred in refusing to give another special charge requested by appellants, which is as follows: "You are charged if you believe from the evidence that the jerk or jars to which such train was subject, if you believe from the evidence that it was subject to such jars and jams and jerks, then if you further believe from the evidence that such jams, jerks, and jars were incident to the operation of trains such as the one in question, when managed and operated in a prudent and careful manner, you will find for defendant." The defense suggested by these charges was fully submitted to the jury in the court's main charge, and also by special charges Nos. 5 and 7, given at defendants' request. In the main charge the court said: "But if you believe from the evidence that defendants exercised reasonable diligence to transport said cattle from Smithville, Tex., to St. Louis in a reasonable time, and exercised ordinary care to safely handle said cattle during such transportation, you will find your verdict for defendants." Appellants' special charge No. 5, which was given, reads as follows: "You are charged that, if you believe from the evidence that the stops or delays of the train in question, if you believe from the evidence it was subject to stops or delays, and that such stops or delays were usual and incident, when reasonable diligence and care had been used by defendants, or those in charge of the train, to operate it in a reasonably prudent and careful manner, and reasonable diligence had been used to transport it in a reasonable time between Smithville and East St. Louis, you will find for defendants, unless you find for plaintiff under some other allegation of negligence as set forth in plaintiff's petition." Special charge No. 7, which was given to the jury at the request of defendants, reads as follows: "You are charged that if you believe from the evidence that the jerks and jams and switching of the train in ques-



tion, if you believe from the evidence it was jerked, jammed, and switched, was the ordinary and usual result of the operation of said train, operated in a reasonably careful and prudent manner, and not because of any negligence of defendant companies or their employes, you are charged to find for defendants, unless you believe from the evidence plaintiff is entitled to recover under some other allegations of negligence set forth in plaintiff's petition." It, therefore, appearing that these defenses were submitted to the jury, and fully covered by the charges given, it was not error to refuse those requested. Besides, each of these special charges which were refused, were otherwise objectionable, in that they singled out one separate issue, and asked a finding in appellants' favor thereon; whereas plaintiff's cause of action was based upon other allegations and evidence of negligence than the one embraced in said special charges. *M., K. & T. Ry. Co. v. House* (Tex. Civ. App.) 113 S. W. 154. For which reasons both of said assignments are overruled.

There was no error, as complained of in appellants' twelfth assignment, in refusing to give their special charge instructing the jury to subtract the damages suffered by plaintiff's cattle while on the St. Louis Terminal Railroad from that which occurred on the lines of defendant companies, and render their verdict for the difference, because there was no evidence in the record requiring the submission of this issue; no damages having been shown to have occurred to said shipment upon said St. Louis Terminal Railroad.

Finding no reversible error in the record, the judgment of the court below is in all things affirmed.

Affirmed.

#### LYON et al. v. BEDGOOD.

(Court of Civil Appeals of Texas. Feb. 16, 1909. Rehearing Denied Feb. 18, 1909.)

#### 1. MASTER AND SERVANT (§ 293\*)—INJURY TO SERVANT—ACTION—INSTRUCTIONS.

In an action for injuries to a servant, plaintiff claimed the accident resulted from the unscrewing of a rod for want of a jam nut, while defendant claimed that it resulted from the breaking of the rod because of a hidden defect with which the absence of a jam nut had nothing to do. *Held* that while, in the absence of a more specific request, it was a sufficient instruction to define "latent defects" and direct a finding for defendant, if the accident "was caused by a latent defect," yet a more specific instruction having been requested, it was error not to give it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 293.\*]

#### 2. TRIAL (§ 260\*)—INSTRUCTIONS—INSTRUCTIONS COVERED BY OTHERS GIVEN.

In an action by an employer for injuries, plaintiff claimed the accident resulted from the unscrewing of a rod for want of a jam nut,

while defendant claimed that it resulted from the breaking of the rod because of a hidden defect, with which the absence of the jam nut had nothing to do. Defendant requested an instruction that plaintiff could not recover if the accident resulted from a defect in the machinery or equipment which could not have been discovered by defendant in the exercise of ordinary care. *Held*, that the instruction was not covered by another instruction defining "latent defects," and in general terms to find for defendant, if the accident "was caused by a latent defect," and should have been given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

#### 3. TRIAL (§ 202\*)—INSTRUCTIONS.

A party is entitled, when he requests it by a correct instruction, to have the facts establishing his cause of action or ground of defense and the law applicable thereto affirmatively stated by the court to the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 474; Dec. Dig. § 202.\*]

#### 4. TRIAL (§ 266\*)—REQUESTS FOR INSTRUCTIONS.

Where two requests for instructions cover substantially the same questions, the court is not required to give both of them.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 663-665; Dec. Dig. § 266.\*]

#### 5. MASTER AND SERVANT (§ 270\*)—INJURY TO SERVANT—DEFECTS IN EQUIPMENT—EVIDENCE OF CARE.

Evidence that the equipment used by defendant is in general use among reasonably prudent persons engaged in the same business is admissible on the question of ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 921; Dec. Dig. § 270.\*]

#### 6. MASTER AND SERVANT (§ 105\*)—INJURY TO SERVANT—CUSTOMARY EQUIPMENT—EVIDENCE OF CARE.

The fact that an equipment used by defendant was such as is in general use among reasonably prudent persons engaged in the same business is not conclusive that defendant exercised ordinary care, as that question depends on the facts in each particular case.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 185-191; Dec. Dig. § 105.\*]

#### 7. MASTER AND SERVANT (§ 291\*)—INSTRUCTIONS—EVIDENCE AS BASIS.

Testimony that "nothing except rough usage in handling the lever could have broken the connection" is insufficient to require an instruction on the effect of want of care in handling the equipment in question.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 291.\*]

#### 8. TRIAL (§ 261\*)—INSTRUCTIONS ERRONEOUS IN PART.

It is not error to refuse an instruction which is erroneous in part.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 660; Dec. Dig. § 261.\*]

#### 9. DAMAGES (§ 95\*)—PERSONAL INJURIES—ELEMENTS OF DAMAGES.

To allow compensation for mental and physical suffering, past and future, and also for diminished capacity to labor and earn money in the future, is not an allowance of double damages.

[Ed. Note.—For other case, see *Damages*, Cent. Dig. §§ 222-229; Dec. Dig. § 95.\*]

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Action by T. S. B. Bedgood against Cecil

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

A. Lyon and J. S. Rice, receivers of the Kirby Lumber Company. Plaintiff had judgment, and defendants appeal. Reversed.

Andrews, Ball & Streetman and Baker, Botts, Parker & Garwood, for appellants. Parker, Hefner & Orgain and Fisher, Sears & Campbell, for appellee.

REESE, J. This is a suit by appellee, suing by his next friend, against appellants to recover damages for personal injuries received by him while engaged in the performance of his duties in their employment. Upon trial with a jury plaintiff recovered judgment for \$10,000, from which defendants appeal.

Briefly stated, the allegations of the petition are, in substance, that appellee, while engaged in the discharge of his duties in the employment of appellants at their sawmill plant in the capacity of block setter, had taken his place on the carriage used in carrying logs to the saw when said carriage became unmanageable and "ran away"; that is, moved at an unusual and uncontrollable rate of speed, until suddenly stopped by an obstruction which caused appellee to be violently thrown from the carriage, inflicting upon him serious and permanent injuries. It was charged in the petition that the accident was caused by the parting of the connection between the lever, by means of which the sawyer regulated the movement of the carriage and the steam valve, whereby the sawyer was unable to stop the carriage or regulate its speed after it started. It was alleged that this parting between the lever and steam valve was caused by the absence of a jam nut at one end of the turnbuckle, which formed a part of this connection, by reason of which it worked loose, or the rod inserted in one end of the turnbuckle unscrewed or worked out. It was further charged that the connection referred to was not suitable for the purpose for which it was being used, but was of poor construction, improperly equipped, as hereinabove set forth, and was old and worn to an extent that made it defective and unfit for use, and rendered it easy for the parts to work loose, all of which could have been discovered by the exercise of reasonable care, and that appellants and their agents in charge and control of the work did have knowledge of this condition prior to the accident. Defendants pleaded general denial; that, if appellee's injuries were caused by any defect in the machinery, such defects were latent and could not have been discovered by the use of ordinary care; that if such defects were open and patent, as alleged in the petition, appellee assumed the risk incurred. Defendants further pleaded negligence of fellow servant, and, as to the extent of appellee's injuries, alleged that they had been aggravated by his negligence and inattention.

The evidence introduced by appellee tended to establish the theory that while he was

riding upon the carriage, the movements of which were controlled by the sawyer by means of an upright lever, whereby he operated the connection with the steam valves referred to in the petition, the connection between the lever and the steam valves separated, or parted, by which the sawyer lost control of the carriage; that is, could not shut off the steam which had been applied for the purpose of moving the carriage up to the saw. The carriage, the movement of which had thus become uncontrollable, ran violently against a bumper, throwing appellee off, and injuring him. Up to this point the evidence of appellants and appellee does not differ. The difference is as to the cause of the parting of the connection between the lever and the steam valves. This connection was made by the use of two rods, the ends of which were connected together by an implement known as a "turnbuckle." This implement can be described as two nuts connected by parallel bars. The ends of one of the rods had right-hand threads and the other left-hand threads, and the two nuts, at opposite ends of the turnbuckle, which was a solid piece, and likewise one right-hand threads and the other left-hand threads, so arranged that by screwing the turnbuckle on the two rods they would be drawn together. If turned one way, the turnbuckle would screw entirely off. If turned the other way, it would screw up on both rods. A jam nut, or clinch nut, is a nut that screws on the rods at the end of the turnbuckle, and, being tightened up against the end of the turnbuckle, served to prevent it from unscrewing or to render it more difficult for it to do so by any motion imparted to it. The purpose of the turnbuckle is to shorten or lengthen the connection. Appellee's evidence tended to show that at the time in question the turnbuckle of itself became unscrewed or screwed off one of the rods, and separated from it, thus severing the connection between the lever and the steam valves, and that there was no breakage of the rod. His evidence further tended to show that there was only one jam nut on the rods; that there should have been two, one at each end of the turnbuckle; and that, if there had been two, they would have prevented the turning of the turnbuckle on the rod and kept it fast, and that the failure to have the two jam nuts, of which, it is alleged, appellants had actual knowledge, was negligence, and was the proximate cause of the accident. Appellee's evidence further tended to show that appellants' agents in control of the mill had been advised that the use of only one jam nut rendered the machinery unsafe. The evidence of appellants tended to show that there was no unscrewing of the turnbuckle, but that one of the rods broke, outside of and next to one end of the turnbuckle, leaving a part of the rod about three-fourths or five-eighths of an inch in the turnbuckle, and this break in

the rod was caused by a hidden defect therein, which could not have been discovered by reasonable care or diligence on their part. Thus the case as presented by appellee in the evidence was that that parting of the connection was solely caused by the unscrewing of the turnbuckle, caused by the absence of the jam nut, there being no breaking of the rod; and the case as presented by appellants was that the parting was caused by the breaking of the rod, outside of the turnbuckle, with which the absence of the jam nut had nothing to do. If due to this cause, the evidence tended to show that the break was caused by a latent defect in the rod, not discoverable by ordinary care. If the rod broke, as testified by appellants' witnesses, such breaking was the sole cause of the accident.

In this state of the evidence, the court upon this issue charged the jury to find for the defendants "if plaintiff's injuries were caused by a latent defect; that is, such a defect as the master, by a proper inspection, could not have discovered." Appellants requested the two following instructions:

"The jury is instructed that if the running away of the carriage described in plaintiff's petition, and the injury that plaintiff sustained on account thereof, was due to the breaking of any portion of the carriage or its equipment, but if the defect, if any, causing said breakage was latent, and could not have been discovered by the defendants in the exercise of ordinary care in the discharge of their duty, then defendants cannot be charged in law with negligence on account of such defect, if it really existed, and under such circumstances your verdict should be for the defendants."

"If you believe from the evidence that the accident and injury to the plaintiff was caused by a breakage of any part of defendants' machinery and equipment, yet, if you believe in the exercise of ordinary care in inspecting said machinery and equipments the defendants could not have discovered any defects in said machinery or equipment which would have been reasonably calculated to cause it to break or separate, then the plaintiff cannot recover herein, and your verdict will be for the defendants."

These instructions the court refused to give, and the refusal is made the basis of the first two assignments of error. Objection to these charges are made by appellee on the ground, first, that the matter is sufficiently covered by the sixth and eighth paragraphs of the court's charge. The sixth paragraph contains only a general definition of the term "latent defects." The eighth paragraph, so far as it refers to this matter, only instructs the jury in general terms to find for the defendants if the injury "was caused by a latent defect." It is further objected that the requested instructions ignored actual knowledge on the part of appellants. Neither of these objections to the charges is sound. The

charge of the court on this issue was sufficient in the absence of a request for a more specific charge, but did not affirmatively apply the law to the specific facts relied upon by appellants and shown by the evidence. By the term "latent defect" the jury may have understood that reference was made to the absence of the jam nut, which was so prominent a portion of the plaintiff's case. The defendants' evidence presented the issue of the breaking of the connection, and that such breaking was caused by a latent defect in the piece that was broken. Appellants had the right, by requesting a proper charge to that effect, to have the attention of the jury specially directed to the facts upon which they predicated their defense. The court had in presenting the appellee's side of the case specially directed the attention of the jury by reference to the petition to the facts relied upon by him to establish negligence, and had not simply charged the jury to find for plaintiff if the injuries were received as a proximate consequence of the negligence of appellants. Appellants had a right to have their defense presented in the same way. The rule is thus stated by the Supreme Court in *Railway v. Hall*, 98 Tex. 488, 85 S. W. 790: "A party is entitled, when he requests it by correct instructions, to have the facts establishing his cause of action or ground of defense and the law applicable to them affirmatively stated by the court to the jury. It is a settled rule of practice established by many decisions of this court." This rule has been many times announced by our Supreme Court and by various decisions of the Courts of Civil Appeals, and has become a settled rule of practice. *Railway v. Hall*, supra; *Railway v. Ayres*, 83 Tex. 269, 18 S. W. 684; *Railway v. McGlamory*, 89 Tex. 639, 35 S. W. 1058; *Railway Co. v. Rogers*, 91 Tex. 58, 40 S. W. 956; *Cotton Oil Co. v. Jarrard*, 91 Tex. 293, 42 S. W. 959; *Railway Co. v. Casseday*, 92 Tex. 526, 50 S. W. 125.

The objection that the charges requested ignored the actual knowledge of appellants is not tenable. While there was evidence of the actual knowledge on the part of appellants of the absence of the jam nut, there was none of any defect in the iron rod, the breaking of which, according to the testimony of appellants' witnesses, caused the accident. If the objection is made to the requested instructions that they present the issue of the breaking of the rod as the sole cause of the accident and leave out of consideration the combined effect of this with other causes, it may be answered that none of the evidence presents such issue. According to appellee's evidence, there was no break, but a coming loose, occasioned by the absence of the jam nut. According to appellants' evidence, there was no coming loose or unscrewing of the turnbuckle, but a breaking of the rod with which the absence of the jam nut had nothing to do. None of the evidence tended to show

a combination of the jam nut, or any other cause, with the breaking in causing the accident. If the breaking occurred, it was clearly the sole cause of the accident, and the jam nut had nothing to do with it. We think the general charge No. 2 referred to in the assignment of error should have been given. Special charge No. 3 covers substantially the same ground. It would not have been necessary or proper to give both of them.

There was no error in refusing to give the requested instruction that, if the equipment used by defendants was such as was in general use among reasonably prudent persons engaged in the same business, defendants were in the exercise of ordinary care in using it. We do not think this is the rule in this state. Evidence of such use by other persons engaged in the same kind of business is admissible upon the issue of ordinary care, but the question at last is whether, under the facts of the particular case, there has been an absence of ordinary care. *Railway Co. v. Smith*, 87 Tex. 358, 28 S. W. 520; *Kirby Lumber Co. v. Dickerson*, 42 Tex. Civ. App. 504, 94 S. W. 156. The third assignment of error, presenting the point, is overruled.

Appellants requested the court to charge the jury that if the breakage was caused by the way the carriage was handled, or was due to a breaking of the rod from any other cause than the absence of a jam nut, plaintiff could not recover. This charge was refused, and the refusal is made the basis of the fourth assignment of error.

As to the first part of this charge, there is no evidence of any want of proper care in the handling of the equipment by the sawyer. We are referred to none in appellants' brief in the statement under the assignment. We find in the record the statement of the witness Pope that "nothing except rough usage in handling the lever could have broken this connection." This statement alone did not raise the issue of want of ordinary care in handling the equipment as causing the injury. This part of the charge, being incorrect, was sufficient ground for rejection of the whole. In view of the allegations of the second count of the petition, vague and indefinite, however, as to the age and condition of the equipment generally, of which there was some evidence, it would have probably been improper to give the latter part of this instruction. If the parting of the connection was caused by the breaking of the rod on account of the age or general unfitness of this part of the equipment, and not to the absence of the jam nut, we think it would come within the allegations of the second count of the petition. This disposes also of the fifth assignment of error.

The sixth assignment of error cannot be sustained. To instruct the jury on the measure of damages to allow compensation for mental and physical suffering, past and fu-

ture, and also for diminished capacity to labor and earn money in the future, did not authorize the assessment of double damages. The case of *Railway v. Butcher*, 98 Tex. 462, 84 S. W. 1052, relied upon by appellants, does not support their contention. In that case the holding was that to allow the plaintiff compensation for impaired mental and physical health and also for diminished capacity to labor and earn money would be to allow double damages. In *Railway Co. v. Nesbit*, 40 Tex. Civ. App. 209, 88 S. W. 892, also cited by appellants, it was held that to allow compensation for diminished capacity to earn money and also to pursue the course of life which the plaintiff might have done authorized the assessment of double damages. In *Railway Co. v. McCraw*, 43 Tex. Civ. App. 247, 95 S. W. 82, also cited by appellants, the charge objected to was approved in so far as it embraced the elements of the charge here objected to. In *Industrial Lumber Co. v. Bivins* (Tex. Civ. App.) 105 S. W. 834, a charge almost identical with the charge given in the present case was approved by the Court of Civil Appeals of the Fourth District. Writ of error refused. We are clearly of the opinion that mental and physical suffering as elements of damage in this class of cases does not cover any part of the same ground covered by diminished capacity to labor and earn money. Each is an independent element of damage.

As the judgment must be reversed on another ground, it is not necessary to pass upon the seventh and eighth assignments of error, presenting the objection that the amount of the judgment is excessive.

For the errors indicated in the first and second assignments of error, the judgment is reversed and the cause remanded.

Reversed and remanded.

**HOUSTON ELECTRIC CO. v. SLEGAR.**†  
(Court of Civil Appeals of Texas. March 1, 1909. Rehearing Denied March 18, 1909.)

**1. DAMAGES (§ 95\*)—PERSONAL INJURIES—ELEMENTS OF DAMAGES.**

Mental and physical suffering is an element of damage for personal injuries, and the value of lost time or capacity to attend to business or to earn money is also an element of damage, and both of these elements may be considered in fixing the amount of recovery without the verdict being subject to the objection of awarding double damages.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 95.\*]

**2. JURY (§ 58\*)—SELECTION OF TALESMEN—REPEAL OF STATUTE.**

The jury wheel law (Laws 1907, p. 269, c. 139), providing for the selection of jurors in counties having cities of a certain size, did not repeal by implication Rev. St. 1893, art. 3219, providing for the summoning of talesmen by the sheriff, where the regular panel has been exhausted before completing the jury.

[Ed. Note.—For other cases, see *Jury*, Dec. Dig. § 58.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

### 3. APPEAL AND ERROR (§ 200\*)—QUESTIONS NOT RAISED ON TRIAL.

The objection that talesmen were drawn by the sheriff before exhausting the regular panel of jurors cannot be raised first on review.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 200.\*]

### 4. DAMAGES (§ 182\*)—PERSONAL INJURIES—AMOUNT OF RECOVERY.

Evidence in an action for personal injuries held to warrant a finding that plaintiff's state of hysteric neurasthenia might be permanent, so that a verdict for \$10,000 was not so great as to indicate that the jury was actuated by prejudice or improper motives.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 182.\*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by E. E. Seegar against the Houston Electric Company for personal injuries. Plaintiff had judgment, and defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood, for appellant. Ewing & Ring, for appellee.

McMEANS, J. Mrs. E. E. Seegar brought this suit against the Houston Electric Company for damages for personal injuries sustained by her while a passenger upon defendant's street car, and upon the verdict of a jury recovered a judgment for \$10,000, from which judgment this appeal is prosecuted.

The court charged the jury on the measure of damages as follows: "If the verdict is for the plaintiff, the jury will take into consideration the nature of her injuries, if any, and whether serious and permanent or otherwise, together with the other facts and circumstances in evidence, and the jury will assess her damages at such sum as they believe from the evidence will fully and adequately compensate her for such injuries, if any, as she sustained on the occasion in question, taking into consideration as elements of damage mental anguish and physical suffering resulting to her therefrom, if any, including such as will in reasonable probability result to her therefrom in the future, if any, and also the reasonable value of her lost capacity to attend to her affairs resulting therefrom down to the trial, if any, and also the reasonable value, if paid now, of her lost capacity and power to earn money and attend to her affairs in the future resulting to her therefrom, if any, and also such reasonable sums as she may necessarily have incurred liability for on account of medicine and medical attention in attempting a cure of such injuries." This charge is assailed by appellant's first assignment of error; the contention being that the charge allowing damages for mental and physical suffering and also for lost capacity to earn money permitted a double recovery, in that each element is embraced within and is inseparable from the other. This

contention is untenable. Mental and physical suffering, past and future, in so far as reasonably probable, is an element of damage of itself, and the reasonable value of lost time or capacity to attend to one's affairs, business or domestic, or to earn money, past or future, is an element of damage of itself, and both of these separate elements may be considered in fixing the damages. *Lyon v. Bedgood* (opinion of this court filed February 16, 1909) 117 S. W. 897; *Railway v. McGraw*, 43 Tex. Civ. App. 247, 95 S. W. 82; *Lumber Co. v. Bivins* (Tex. Civ. App.) 105 S. W. 834; *Railway v. Vance* (Tex. Civ. App.) 41 S. W. 170; 8 Am. & Eng. Ency. pp. 648, 651, 655, 660. The assignment is overruled.

Appellant's second assignment of error is as follows: "The court erred in causing talesmen to be summoned by the sheriff to fill the panel of jurors from which the defendant was compelled to select a jury in this case. The list of jurors submitted contained 17 names of the regular jurors selected from the wheel as provided by the act of the Thirtieth Legislature, and 6 names of jurors not selected from the wheel, but summoned by the sheriff at the instance of the court. The defendant excepted to the action of the court in thus filling the panel of the jurors thus supplied, which exception was overruled by the court, and the defendant was compelled to take objectionable jurors on account of this ruling of the court, as is fully shown by defendant's bills of exception on file herein."

The bill of exception referred to in this assignment is as follows: "Be it remembered that on the trial of this cause, on, to wit, the — day of January, 1908, and when the case was called for trial and the parties announced ready, the court caused a list of the jury from which counsel were required to strike the jury to be selected for plaintiff and defendant of the jurymen drawn from the regular panel for the week out of the jury wheel, as provided by the act of the Thirtieth Legislature. There were 18 names, the remaining 6 names upon said list so furnished having been summoned as talesmen by the sheriff under the direction of the court, their names not having been drawn from the jury wheel as provided by said act of the Legislature aforesaid. The names upon said list having been summoned by the sheriff, and not drawn from the wheel, being as follows, to wit: W. H. Bundy, Lewis Hager, John O'Mera, John Claudon, F. H. Fowler, Thomas Wright, A. H. Hess. Thereupon the defendant in open court excepted to the action of the court in filling the panel of jurors by having them summoned by the sheriff, and not having first drawn their names from the jury wheel, and objected and excepted to the action of the court in requiring defendant to strike the jury from this list prepared and consti-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tuted as aforesaid. The court stated that he would require defendant to proceed and allow its bill of exceptions. Thereupon a jury was selected and impaneled from the list of jurors so presented, and the defendant, after otherwise exhausting his peremptory challenges, was compelled to take upon the jury four out of the list of talesmen aforesaid, to wit, John O'Mera, John Claudon, Thomas Wright, A. H. Hess, which jurors the defendant's attorney now states were objectionable to the defendant, and the defendant here now tenders its bill of exceptions stating these facts, and asks that the same be approved, which is accordingly done in open court." With this explanation by the court: "The talesmen were summoned and selected strictly in accordance with the articles of the Revised Statutes relating to talesmen, and the court was and is of opinion that the enactment as to drawing jurors from the wheel does not apply to talesmen (1) because there is no express repeal of the statutes relating to talesmen; and (2) because there cannot be an implied repeal, (a) for the reason that it would be impracticable in the dispatch of business to get talesmen from the wheel, and (b) for the further reason that the enactment contains no provision for the drawing of talesmen from the wheel."

Under this assignment appellant urges the proposition that the act of the Thirtieth Legislature, commonly known as the "Jury Wheel Law" (Laws 1907, p. 269, c. 139), was intended to provide a complete method and system for the selection of jurors in the counties embraced within the act, and those portions of the former jury law not specifically repealed were repealed by implication. The bill of exception discloses that, when the names of the jurymen who were to serve for the week were placed on the list, there were on it the names of only 18 that had been drawn from the wheel, and that thereupon the sheriff, under the order of the court, summoned 6 talesmen to fill the panel and bring it to the required number of 24, from which the parties were required to make their peremptory challenges. Appellant contends that no provision is contained in this law for summoning jurors by the sheriff, or for filling the panel in the method done in this case, and that it was the intention of the Legislature to do away altogether with the provision relating to talesmen, and to have only those jurors serve who were first drawn from the wheel.

To this we cannot agree. The act in question did not repeal the statutory provision relating to the summoning of talesmen by the sheriff, but expressly limited its repeal to specified chapters and articles of the Revised Statutes, not including those relating to the summoning of talesmen by the sheriff, and extended its operation merely to the selection of jurors for specified counties in the first instance without any provision for

the selection of talesmen by the mode which is provided, namely, drawing from a wheel. That this construction of the act is correct will be readily seen from a brief discussion of some of its sections. Section 4 provides that the drawing of the jurymen to serve for the term shall be made not less than 10 days before the beginning of the term of court at which they are to serve. Section 7 provides that the names of these jurymen who do not serve as many as four days during the week for which they are selected shall be returned to the wheel, and the names of those who have served four days shall be put in a box provided for that purpose for the use of the officers, whose duty it shall be to next select the jurors for the wheel. Section 8 provides that if, for any reason, the wheel containing the names of jurors be lost or destroyed with the contents thereof, or if all the names be drawn out, such wheel shall immediately be refurnished, and cards bearing the names of jurors shall be placed therein immediately in accordance with sections 1, 2, and 3 of the act, and the judge of the court desiring jurors for a regular or special term of his court may have same selected in accordance with chapters 2, 3, 4, tit. 62, Rev. St. 1895, in the event such new wheel and contents cannot be furnished in time to comply with the provisions of the act. Sections 1, 2, and 3 of the act merely refer to the manner of selecting the jurors to serve for the next ensuing two years, the mode of placing their names in the wheel, and provides for the securing and safe-keeping of the wheel and its contents.

It is thus seen that there is but one time provided for the opening of the wheel and the drawing of the names of jurymen therefrom, which is not less than 10 days before the term begins, and section 11 of the act provides that if any person shall take from the wheel, except at the times provided for in the act, a card or cards bearing the name or names of any person, he shall be deemed guilty of a misdemeanor and subject to a fine of not less than \$50 nor more than \$500. If the construction sought to be placed upon the act by appellant is correct, then the court might find itself confronted with the dilemma of having to select talesmen from the wheel by a drawing then made, when a drawing, made at any time less than 10 days before the beginning of the term, is forbidden by law, and a heavy penalty prescribed for its violation. The assignment is overruled.

By its second proposition under the second assignment appellant contends that even if article 3219, Rev. St. 1895, providing for the summoning of talesmen, was not repealed by the act under discussion, still the court erred in causing the talesmen to be summoned, because of the 24 names upon the list of jurors furnished the defendant 18 of these were taken from the regular jury which had been drawn from the wheel; that, prior to the time these 18 names were furnished to

defendant, the court had caused the names of the 6 talesmen to be added to the list; and that this was in violation of the provision of article 3219, as the contingency specified in the article as a requisite for summoning the talesmen had not happened. The proposition, stripped of useless verbiage, is that the court erred in directing the talesmen to be summoned before the 18 jurymen drawn from the wheel had been passed upon by the parties. Article 3219 provides: "Where there are not so many names drawn from the box as twelve \* \* \* the court shall direct the sheriff to summon such number of qualified persons as it may deem necessary to complete the panel, and the names of the persons so summoned shall be placed in the box and drawn and entered upon slips as provided in the preceding article." Construing this article our Supreme Court in *Railway v. Greenlee*, 70 Tex. 559, 8 S. W. 129, held that, where as many as 12 regularly drawn jurors remained, it was reversible error to add the names of talesmen until the list of those regularly drawn had been reduced by challenge.

Appellee contends that the point here presented was not made in the court below, and is not comprehended by the assignment of error, and in this contention we agree. The gravamen of appellant's complaint, as shown by the bill of exceptions, is that the court ordered the summoning of talesmen to fill the panel, instead of causing the panel to be filled by drawing names from the wheel, and in requiring it to strike the jury from the list prepared in this way. The point now insisted on might possibly be inferred from the language employed in the bill, but that this is its true meaning can be arrived at only by inference, because there is no clear statement in the bill of the objection now urged; and the point is so veiled and obscured as to have escaped the attention of the astute trial judge as shown in his explanation of the bill of exceptions. Certainly it cannot be said that the objection was plainly called to the trial court's attention; and fairness to the judge and fairness to the opposing litigant requires that no party litigant shall make a point in vague and uncertain language, not apt to draw the minds of the trial court and opposing attorneys to it, when, had the point been called plainly to the trial court's attention, the error would have been obviated. The assignment is overruled.

Appellant's third assignment of error, which is submitted as a proposition, is as follows: "Since the plaintiff's allegations show that she was suffering from hysteric neurasthenia, and the undisputed evidence shows that hysteric neurasthenia is a mental disorder,

temporary in its nature, from which the plaintiff would recover when environments are changed, therefore the verdict in this case for \$10,000 is grossly excessive and so disproportionate to the ailment alleged and proven as to lead to the inference that the jury was influenced by improper motives in arriving at its verdict."

Plaintiff alleged in her petition the following injuries, among others, had been sustained by her as the result of defendant's negligence: (1) Tachycardia, a rapid or irregular action of the heart that generally deranged her nervous and physical system; and (2) impairment of her vision, with attendant complications; and (3) hysteric neurasthenia, so that in consequence of these injuries, which were alleged to be serious and permanent, she had been rendered a mental and physical wreck. Three physicians, Drs. Smith, Barrell, and Mullen, the last mentioned being an oculist, testified, in substance, that plaintiff was afflicted with the injuries alleged, and that they were serious and permanent, and had left her a physical wreck for the rest of her life, the first two explaining that in their opinion the injury she sustained at the base of the brain falling from the car had left there a clot of blood, which they described, that was responsible for her injuries, and which no medical skill could remedy. Dr. Barrell testified that hysteric neurasthenia might be temporary or permanent, depending on whether the cause that produced it was temporary or permanent. This was implied from the testimony of the other physicians named, and Dr. Red, the defendant's witness, testified that while he would not classify neurasthenia into permanent and temporary, because it was neurasthenia in either event, yet it was true that "it may come from a wound or injury, and, as long as that cause remains, the neurasthenia will remain. Neurasthenia may last for a lifetime. It is sometimes permanent." It is unnecessary to set out in full the testimony of the witnesses as to the extent and probable duration of plaintiff's injury, her physical and mental suffering, and the impairment of her capacity to labor and earn money. It is sufficient to say that, in view of the testimony, the verdict is not so large as to indicate that the jury was actuated by prejudice, passion, or other improper motive in making their award. *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288; *Railway v. Higby* (Tex. Civ. App.) 26 S. W. 737; *Railway v. Vollrath* (Tex. Civ. App.) 89 S. W. 280.

The assignments present no reversible error, and the judgment of the court below is affirmed.

Affirmed.

CHICAGO, R. I. & G. RY. CO. v. KAPP.  
(Court of Civil Appeals of Texas. March 11, 1909.)

**1. EVIDENCE (§ 543½\*)—OPINION EVIDENCE—MARKET VALUE.**

In an action against a railroad company for damages for delay in furnishing cars for shipping cattle, it was error to allow plaintiff to testify as to the depreciation between the market value of the cattle in a lump sum at their destination when they arrived, and in the condition in which they arrived, and their market value there at the time they should have arrived, and in the condition in which they would have been but for the delay in furnishing cars, where it did not appear that he had any knowledge of the market value of cattle at the place in question, though he had been in the cattle business about 15 years, and where there was no evidence from any source as to such market value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2359; Dec. Dig. § 543½.\*]

**2. CARRIERS (§ 229\*)—CARRIAGE OF STOCK—DELAY IN FURNISHING CARS—ACTION—DAMAGES.**

In an action against a carrier for damages for delay in furnishing cars for transportation of stock, where there was evidence that there were cars for the cattle on the day they were promised, but no engine to pull them; that an engine arrived the next morning, and they could have been shipped then if plaintiff's agent had not ordered that, if they could not be shipped that night, they should be held until the night of the next day, so that they could be fed and watered—plaintiff cannot recover damages for that part of the delay caused by complying with the instructions of plaintiff's agent.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 229.\*]

Appeal from District Court, Jack County; J. W. Patterson, Judge.

Action by H. Kapp against the Chicago, Rock Island & Gulf Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

N. H. Lassiter, Robert Harrison, and Stark & Cox, for appellant. Nicholson & Fitzgerald, for appellee.

WILLSON, C. J. Relying, as he alleged in his petition and testified on the trial, on an undertaking by appellant to furnish him at Graham, at 10 o'clock on Sunday morning, October 27, 1907, cars in which to load, for immediate transportation to Ft. Worth, 241 head of cattle, appellee drove the cattle to Graham from a pasture 40 miles distant, and before 10 o'clock on said morning placed them in pens at Graham, ready for loading and transportation. Because, as he further alleged and testified, appellant failed to furnish cars as it had agreed to do, the cattle were necessarily detained in the pens, without proper facilities for feeding them, until the following Monday evening, and as a result, he further alleged and testified, they shrunk in weight, and thereby were so injured as to damage him in the sum of \$843. He recovered as his damages a judgment for the sum of \$301.25.

While testifying in his own behalf appellee was asked to state: "What was the difference in the market value of your cattle when they reached Ft. Worth, in the condition in which they arrived there, and their market value at said place at the time they should have reached there, and in the condition they would have been in had they been shipped on October 27, 1907, and arrived there in proper condition and proper time?" The question was objected to, upon the ground that it was hearsay, and that it called for the opinion of the witness in the absence of evidence showing that he had any knowledge of the fact sought to be proved. The objection was overruled, and the witness was permitted to answer: "The difference was at least \$3.50 per head." Appellant assigns as error the action of the court in overruling its said objection, and permitting appellee as a witness so to testify, and the action of the court in overruling its motion, subsequently made, to strike out said answer to said question. The assignment is sustained. It appears from the record that appellee had been in the cattle business about 15 years, but it does not appear that he had any knowledge whatever of the market value in Ft. Worth of cattle like those in question, or of any kind of cattle. In fact, the record is silent as to the value of the cattle at Ft. Worth, or at any other point, at any time, in any condition. It appears, therefore, not only that the witness was permitted to state his opinion as to the amount of the depreciation in the value of the cattle at Ft. Worth, in the absence of evidence that he knew their value there, but he was permitted to state it in a lump sum, in the absence of evidence from any source showing what the market value of the cattle was in Ft. Worth. Ry. Co. v. Barnett, 27 Tex. Civ. App. 503, 66 S. W. 477; Ry. Co. v. Staton (Tex. Civ. App.) 49 S. W. 277; Ry. Co. v. Wright, 1 Tex. Civ. App. 402, 21 S. W. 81; Ry. Co. v. Hughes (Tex. Civ. App.) 31 S. W. 412. In Ry. Co. v. Barnett, supra, the court said: "Witnesses should not be allowed, over objections, to testify to the questions concerning values at the place of destination, unless they are shown to have knowledge of such subject." In Ry. Co. v. Hughes, supra, the witness testified: "The usage of the cattle at Coleman before shipment affected their market value in Chicago, Ill., and decreased their market value at said place in the sum of \$4 per head for the steers, \$2 per head for the cows, and \$1 per head for the calves." The court said: "This evidence should have been excluded. In cases like this, witnesses who qualify themselves so to do should be allowed to state the market value, and give their opinions as to the physical effect that the injury complained of would have on the animals, even including the estimate of the decrease in weight per head, and all such

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



other data as would enable the jury to reach a correct conclusion as to the loss sustained. But no witness should be allowed to omit all the data, and state in dollars and cents the amount of damage, or decrease of value, which in his opinion the animals have suffered." *Ry. Co. v. Barber* (Tex. Civ. App.) 30 S. W. 500; *Ry. Co. v. White* (Tex. Civ. App.) 32 S. W. 324.

The witness Perry testified that at the time the cattle were tendered at Graham for shipment to Ft. Worth he was acting as appellant's station agent at Graham; that there were then at the station cars in which the cattle could have been loaded for transportation, but there was no engine there to pull them; that an engine reached the station on the next morning at about 7:30 or 8 o'clock; and that he could, and would, then have sent the cattle on to Ft. Worth but for the fact that, on the evening before, appellee's agent in charge of the cattle stated to him that, if the cattle could not be shipped out that evening, he would want to feed and water them the next morning, and would not want them to be shipped out until about 4 o'clock the next evening. In his main charge the court instructed the jury, if appellee was entitled to recover, the measure of his damages would be the difference "between what would have been the market value of the cattle in the condition they were in when they reached Ft. Worth and in the condition they would have been in had they been shipped from Graham on the 27th of October, 1907, without being held in said pens. And if you believe that, by reason of the plaintiff having to hold his cattle in the pens of defendant from the 27th to the 28th of October, it became necessary to feed the cattle, he would be entitled to recover therefor the reasonable value of the feed given the cattle (if they were fed) if the feeding were necessary." It is insisted that the portion quoted of the charge was on the weight of the evidence, and therefore erroneous, in that it assumed, in face of the testimony referred to of the witness Perry to the contrary, that the delay in shipping the cattle from about 8 o'clock on the morning of October 28th to about 4 o'clock in the afternoon of that day, was not in accordance with, and due to, the instructions given appellant's agent by appellee's agent in charge of the cattle. If the delay of about eight hours referred to was in compliance with appellee's agent's instructions, appellant would not be liable to appellee in damages for the injury suffered by the cattle as the result of such delay; and, in assuming in his charge that it would be, and in authorizing the jury to include in their finding such damages, if any, we think the court erred.

The judgment is reversed, and the cause is remanded for a new trial.

# CITY OF COLEMAN v. PRICE†

(Court of Civil Appeals of Texas. Feb. 17, 1909. Rehearing Denied March 24, 1909.)

## 1. MUNICIPAL CORPORATIONS (§ 736\*)—TORTS—CREATION OF NUISANCE—NEGLIGENCE.

A city in removing garbage and refuse matter from its streets and depositing it on its dumping ground is engaged, not in a governmental, but a corporate, duty, and is liable as an individual for a nuisance thereby created, whether guilty of negligence or not.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1552; Dec. Dig. § 736.\*]

## 2. MUNICIPAL CORPORATIONS (§ 736\*)—TORTS—NUISANCE OUTSIDE CORPORATE LIMITS.

A city owning and maintaining a dumping ground for the deposit of refuse matter is liable for a nuisance resulting therefrom, notwithstanding such dumping ground is beyond its corporate limits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1552; Dec. Dig. § 736.\*]

## 3. MUNICIPAL CORPORATIONS (§ 742\*)—LIABILITY FOR NUISANCE—PERMANENT INJURY.

Where, in an action against a city for injury to property resulting from the maintenance of a dumping ground adjacent thereto, it appeared that the dumping ground had been bought by the city for that purpose, and that the city intended to continue such use, and that, if it did, plaintiff would continue to sustain the same character of injury as that for which he sued, the evidence justified the conclusion that the injury was permanent.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1563; Dec. Dig. § 742.\*]

Appeal from District Court, Coleman County; John W. Goodwin, Judge.

Action by C. A. Price against the City of Coleman. Judgment for plaintiff, and defendant appeals. Affirmed.

Snodgrass & Dibrell, for appellant. J. C. Randolph, for appellee.

**FISHER, O. J.** This is a suit by the appellee, Price, against the city of Coleman for damages on account of a nuisance created and maintained by the city in using and maintaining its dumping ground adjacent to appellee's premises for the purpose of depositing thereon dead animals and other refuse matter collected in the city. A verdict and judgment below were in appellee's favor against the city in the sum of \$1,000.

The petition of the plaintiff substantially alleges that he is the owner of a certain tract of land near the city of Coleman, upon which he has his residence and other buildings, and that the city of Coleman purchased 8 $\frac{1}{10}$  acres of land near and adjacent to his premises for use by it and the inhabitants of the city of Coleman as a garbage and dumping ground for the deposit of dead animals and the refuse and filthy matter accumulated in the city, and that the city has since its purchase negligently and without due care used and caused to be used and permitted to be used the tract of land for that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

purpose, and that from the garbage, filthy matter, and dead animals so deposited upon this ground the habitable use of the plaintiff's premises has been injuriously affected, the water in his tank, which he used for domestic purposes and for watering his stock, has been poisoned, and that the nuisance has reduced the value of his premises. He alleges the nuisance to be permanent. We find that there is evidence which substantially supports these averments. The case was tried and disposed of below on the theory that the city could only be held liable in the event it was guilty of negligence in creating or maintaining the nuisance; and, with this theory of the case in view, appellant complains of the action of the court in overruling certain demurrers which attack the petition on the ground of the insufficiency of averments in setting out the acts of negligence relied upon. The petition does in a general way allege that the nuisance was created and maintained by and through the negligence of appellant, and sets out certain things done and suffered to be done by the city from which the nuisance resulted. If it could be conceded that it was necessary for negligence to be shown in order to hold the city liable, we are not prepared to agree with the appellant that the petition was not sufficient in averring that fact. The petition does state that the city negligently and without due care used and permitted to be used the land so acquired by it as garbage ground, and then states that such use consists of placing upon it dead animals and other offensive matter, and goes on then to charge what effect this had upon the plaintiff's premises and the habitable enjoyment thereof. But the case as made by the petition, and, for that matter, also by the evidence, goes beyond the question of negligence. The city in its use of the premises created and maintained a nuisance, and that was by a deposit upon its garbage ground of dead animals and other offensive refuse matter adjacent to the plaintiff's premises, which the evidence shows affected the habitable use of the premises and the value thereof, and injured the water in his tank. If this is true, the nuisance arises from the act and not from the manner in which it is done, and, if by the averments of the petition an actionable nuisance is alleged, the demurrers were properly overruled, although there was no allegation of negligence, and the city could be held liable, provided the act that occasioned the nuisance arose from some work or duty performed by the city in its private or corporate capacity, as distinguished from the exercise of a governmental function.

It is held in *Ostrom v. City of San Antonio*, 94 Tex. 524, 62 S. W. 909, that the city in removing garbage and refuse matter from its streets and dumping it upon its garbage grounds selected by it is engaged, not in a governmental, but a corporate, duty, and could be held liable for a willful or negligent

performance of that duty which resulted in injury to another. If the city is merely exercising a corporate power, one intended for the private advantage of that locality and its inhabitants, and by its wrongful or negligent conduct inflicts damage, it would be held liable, as would be an individual or private corporation. *City of Galveston v. Posnain-sky*, 62 Tex. 127, 50 Am. Rep. 517; *City of Ft. Worth v. Crawford*, 74 Tex. 406, 12 S. W. 52, 15 Am. St. Rep. 840; *Ostrom v. City of San Antonio*, supra. In the latter case the court in commenting upon *Ft. Worth v. Crawford*, 64 Tex. 202, 53 Am. Rep. 753, which was finally affirmed in 74 Tex. 406, 12 S. W. 52, 15 Am. St. Rep. 840, says: "We can see no difference upon the question of liability between this case and *Ft. Worth v. Crawford*. If the disposition of garbage, dead animals, and the like in that case had been considered a function of the state government exercised by officers of the municipal corporation, the court could not have held the city liable for the consequences, and the judgment of this court that the city was liable for the nuisance includes the proposition that the acts were done in execution of a corporate power as distinguished from a governmental function." The reference here is apparently to *Ft. Worth v. Crawford*, as first reported in 64 Tex. 202, 53 Am. Rep. 753, but the court evidently means and refers to the last report of the case in 74 Tex. 406, 12 S. W. 52, 15 Am. St. Rep. 840. In the *Crawford* Case referred to—74 Tex. 407, 408, 12 S. W. 52, 15 Am. St. Rep. 840—the court in effect holds that, if the work is for the private advantage of the city, it would be liable as an individual for all damages resulting from its acts, irrespective of the question of negligence. If, as so held in the case of *Ostrom v. San Antonio*, the conduct of the city in a case of this character is for its private or corporate advantage, and it would be liable as would be an individual or a private corporation for the nuisance created by it, or knowingly allowed to continue, its liability would not depend upon whether it was guilty of negligence or the want of ordinary care, but would result from its act in creating the nuisance. This view is fully illustrated in the opinion of this court in *M. & T. Ry. Co. v. Anderson*, 36 Tex. Civ. App. 131, 81 S. W. 781, in which a writ of error was refused.

This view is very tersely stated by the editor of the notes in the first volume of *Dillon on Municipal Corporations* (4th Ed., p. 448), where it is stated: "A corporation [meaning a municipal corporation] has no more right to license or maintain a nuisance than an individual would have, and for a nuisance maintained upon its property the liability attaches against a city as against an individual"—citing *Haag v. County Com'rs*, 60 Ind. 511, 28 Am. Rep. 654; *Petersburg v. Applegarth*, 28 Grat. (Va.) 321, 26 Am. Rep.

357; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470; *Franklin Wharf Co. v. Portland*, 67 Me. 46, 24 Am. Rep. 1; *Harper v. Milwaukee*, 30 Wis. 365; *Hannibal v. Richards*, 82 Mo. 330; 2 Wood on Nuisances (3d Ed.) pp. 1032, 1033. But a case directly in point, where the question was properly raised, is *Markwardt v. City of Guthrie*, 18 Okl. 32, 90 Pac. 26, 9 L. R. A. (N. S.) 1151. In that case it is insisted that, as it was not alleged and shown that the city negligently created and maintained the nuisance, it could not be held liable. The court held that, if the act of the city constituted a nuisance injurious to the rights and property of the owner, he could maintain his action, whether the city was guilty of negligence or not. Therefore the conclusion must be reached that there was no error in overruling appellant's demurrers.

There is a contention by the appellant substantially to the effect that it could not be held liable in this instance because the ground or place where the nuisance was created was beyond its city limits. In our opinion this makes no difference. If as a fact it bought the land adjacent to plaintiff's premises upon which to dump its garbage, dead animals and refuse matter, and so used it, and thereby created a nuisance hurtful and injurious to the plaintiff and his property, its liability would result as if the grounds were situated within the corporate limits. There might be some difficulty in the city passing an ordinance regulating the use of the property beyond its corporate limits; but, however, if when engaged in a mere corporate or private duty it created a nuisance, it must be held liable as would be an individual, although it is unable to regulate the use of its ground by ordinance. It has in its corporate capacity or the exercise of a corporate function brought about the hurtful condition, and it is not contended that the city did not have power to create and establish garbage grounds and remove thereto from the city refuse matter.

The court below in its charge submitted to the jury the question whether the injury to the plaintiff's land was permanent or temporary. It is contended by appellant that the evidence was not sufficient to permit the jury to consider the question whether the injury occasioned by the nuisance was permanent. The evidence shows that the lands were bought by the city for the purpose of establishing thereon its garbage and dumping ground, and that it was actually used for that purpose; and the conclusion may be reached from the testimony upon that subject that the purpose of the city is to continue such use, and the facts are of a nature which would justify the conclusion that, if the use is continued, the plaintiff might, so long as the premises are so used, sustain the

same character of damages for which he has sued in this case, and which he alleges and which the proof shows has permanently injured the value of his premises. This question was considered by this court in *M., K. & T. Ry. Co. v. Green*, 44 Tex. Civ. App. 247, 99 S. W. 573, and we believe the facts in this case are as strong as the facts there, which we held sufficient to justify the inference or conclusion that the injury to the plaintiff's premises was permanent.

There are a number of assignments of errors raising other questions, all of which we have carefully considered, and are of the opinion that no reversible error is shown.

Judgment affirmed.

### HARRIS et al. v. HILL.

(Court of Civil Appeals of Texas. March 15, 1909.)

#### 1. PROCESS (§ 85\*)—SUBSTITUTED SERVICE—STATUTORY PROVISIONS.

The statute authorizing service of process by publication as a substitute for personal service is in derogation of the rule at common law, and, to confer jurisdiction on the court, it must be strictly followed.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 99; Dec. Dig. § 85.\*]

#### 2. TAXATION (§ 642\*)—DELINQUENT TAXES—ACTIONS—NOTICE—SUFFICIENCY.

Under *Sayles' Ann. Civ. St.* 1897, art. 5232c, providing that the notice in tax suits shall be directed to all persons claiming any interest in the land so described as to identify it, a notice in a tax suit for taxes due on the "A. Netherly" survey issued to the unknown owners of the "A. Wetherby" survey, and published as directed to the unknown owners of the "A. Weatheraby" survey, is fatally defective.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1305, 1306; Dec. Dig. § 642.\*]

#### 3. TAXATION (§ 648\*)—PROCEEDINGS TO COLLECT—JUDGMENT—COLLATERAL ATTACK—DEFECTIVE NOTICE.

Where the judgment in a tax suit does not show that the court determined that service of proper process had been made on the owners of the land, and the record therein shows a fatally defective notice, the judgment may be collaterally attacked for invalidity of notice.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1316; Dec. Dig. § 648.\*]

Appeal from District Court, Panola County; W. C. Buford, Judge.

Action by N. I. Harris and another against W. D. Hill. From a judgment granting insufficient relief, plaintiffs appeal. Reversed and rendered.

The A. Netherly survey of 160 acres, in Panola county, was patented to R. S. Board as assignee. By its petition filed in the district court of said county July 23, 1902, the state commenced an action against the "unknown owner" of the land to recover the taxes due thereon and unpaid for the years 1886 to 1901, inclusive, together with interest, costs, and penalties which had accrued thereon, aggregating the sum of \$41.30. In

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the petition the land was described as a tract of 160 acres, the "A. Netherly headright, situated in Panola county, on the west side of the Sabine river about 18 miles northwest from the town of Carthage," and by its metes and bounds. Attached to the petition was the affidavit of the county attorney, to the effect that the averments contained in the petition were true to the best of his knowledge and belief. July 24, 1902, a citation or notice for service by publication on said unknown owner was issued. It was directed as follows: "To unknown owners and to all persons owning or having or claiming any interest in the following described land delinquent to the state of Texas and county of Panola, for taxes, to wit: One hundred and sixty acres of land, the A. Wetherby headright in Panola county, Texas, on west side Sabine River about 18 miles northwest from the town of Carthage." No other description of the land was given in the notice. As published in a newspaper for service on the unknown owner, defendant in the suit, the notice was directed as follows: "To unknown owners and to all persons owning or having or claiming any interest in the following described land delinquent to the state of Texas and county of Panola for taxes, to wit: One hundred and sixty acres of land, the A. Weatheraby headright in Panola county, Texas, on west side of Sabine river about 18 miles northwest from the town of Carthage." No other description of the land or its owners was given in the notice. Without service on the owners of the land of any other notice, on April 3, 1903, the state recovered a judgment against them for said sum of \$41.30 and foreclosing a lien on the land as described in its petition. At a sale made in executing the judgment appellee, Hill, became the purchaser of the land it seems. Appellant N. I. Harris, owning an undivided interest in the land, within two years after the purchase thereof by appellee sought to redeem same from said sale, and tendered to appellee double the sum paid by him as the purchaser thereof at the tax sale. Appellee acknowledged said appellant's right to redeem to the extent of her undivided interest in the land, but denied her right, in the absence of authority from the owners of the other undivided interests, to redeem as to their interests. Said appellant N. I. Harris, joined by her husband, then commenced this suit. From a judgment in their favor canceling the deed conveying the land to appellee, the latter appealed to this court. Because of an error of the trial court in sustaining a demurrer to appellee's answer, including a general denial, and in the absence of evidence rendering the judgment against him, it was reversed, and the cause was remanded for a new trial. 108 S. W. 489. In the court below the pleadings were then amended; the owners of the other undivided interests making themselves parties plaintiff.

The new trial resulted in a verdict and judgment in favor of appellant N. I. Harris against appellee for a one-seventh undivided interest, and in favor of appellee against all the appellants for a six-sevenths undivided interest in the land. The appeal is prosecuted by the plaintiffs in the court below, the heirs and vendees of the heirs of R. S. Board, the patentee, against the judgment in appellee's favor for six-sevenths of the land.

F. H. Prendergast, for appellants. H. N. Nelson and Brooke & Woolworth, for appellee.

WILLSON, C. J. (after stating the facts as above). The validity of the judgment is attacked on several grounds. In disposing of the appeal we have found it necessary to consider only one of the number. If the owners of the land were unknown, the law authorized notice of the pendency of the suit to be given to them by publication, but it required the publication to be of a notice so describing the land as to identify it, and so identify them as the defendants in the suit. Sayles' Ann. Civ. St. 1897, art. 5232o. In no other way authorized by law could the owners of the land, being unknown, be so brought before the court as to empower it to bind them by its judgment. Notice so given was "at best but a miserable substitute for personal service" (Hemphill, C. J., in *Edrington v. Allsbrosks*, 21 Tex. 189), and, being in derogation of the rule at common law, must, to confer jurisdiction on the court to render the judgment, have been strictly followed. *Brown on Jurisdiction*, p. 207; 17 *Ency. Plead. & Prac.* pp. 39, 45. The requirements of the law in the issuance and publication of the notice were ignored. As issued it was to the unknown owners of the A. Wetherby survey. As published, it was to the unknown owners of the A. Weatheraby survey. As notice to the owners of the A. Netherly survey, it was not merely defective. It was no notice at all. Had the owners of the A. Netherly survey seen and carefully read it as published, the notice would not have advised them that a suit was pending against them. There was no recital in the judgment showing the court to have determined that service of proper process had been had on the owners of the land. Therefore we need not determine what would be the effect of such a recital when the attack made on the validity of a judgment is a collateral one. Not only did it not affirmatively appear from such a recital or from the record that the court by service of proper process had acquired jurisdiction to render the judgment in question, but, on the contrary, it affirmatively appeared, as we have just shown, that it had not acquired jurisdiction to render it. Under such circumstances there can be no doubt about the right of the owners of the land to attack as they have attacked it the validity of the judgment. *Earnest v. Glaser*, 32 Tex. Civ. App.

378, 74 S. W. 605; Babcock v. Wolffarth, 35 Tex. Civ. App. 512, 80 S. W. 642; Fowler v. Simpson, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370; Kenson v. Gage, 34 Tex. Civ. App. 547, 79 S. W. 605; Brown on Jurisdiction, pp. 189, 192, 194, 245, 248, 249, 251, 255; 12 Ency. Plead. & Prac. pp. 175, 196. The judgment in the tax suit being void it follows that the judgment from which this appeal is prosecuted is erroneous in so far as it was in favor of appellee for a six-sevenths undivided interest in the land.

It will be reversed, and a judgment will be here rendered in favor of appellants, annulling the judgment in the tax suit and decreeing the title to the land to be in them as against appellee. The costs in this court and in the court below will be adjudged against appellee.

### LATHAM CO. v. J. M. RADFORD GROCERY CO.

(Court of Civil Appeals of Texas. March 20, 1909.)

#### 1. CORPORATIONS (§ 507\*)—SERVICE—OFFICERS SERVED—"LOCAL AGENT."

Under Rev. St. 1895, art. 1222, requiring the citation to be served on the president, etc., or upon the local agent representing the company in the county, in actions against an incorporated company, considered in view of article 1223, permitting process to be served on the president, general manager, or upon any local agent within the state, in suits against a foreign corporation, service upon the manager of a domestic corporation was not sufficient to sustain a default judgment against the corporation; the term "manager," or "general manager," not being equivalent to "local agent," as used in article 1222.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1988; Dec. Dig. § 507.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4203, 4204; vol. 8, p. 7708.]

#### 2. JUDGMENT (§ 17\*)—ON DEFAULT—SERVICE.

The statutory requirements as to citation must be followed, in order to give jurisdiction over the person, so as to support a default judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 25; Dec. Dig. § 17.\*]

Error from Eastland County Court; E. A. Hill, Judge.

Action by the J. M. Radford Grocery Company against the Latham Company. Judgment for plaintiff by default, and defendant brings error. Reversed and remanded.

Earl Conner, for plaintiff in error. J. A. Patton, Jr., for defendant in error.

CONNER, C. J. On March 10, 1908, plaintiff in error suffered a judgment by default in favor of defendant in error upon a duly verified account for goods, wares, and merchandise alleged to have been sold and delivered to plaintiff in error. Defendant in error alleged in its petition that plaintiff in error was "a corporation duly organized un-

der the laws of the state of Texas, and doing business at Eastland, in the county of Eastland, in the state of Texas," and the prayer was "that defendant be cited to appear and answer this petition," without an allegation of the name of any person upon whom service of citation might be made. The citation that was issued, and upon which the judgment rests, was in the usual form, commanding the proper officer to summon the "Latham Company, a corporation," to be and appear at the next term of the county court to be held at Eastland, also without designation of person upon whom the citation might be served. The following is the sheriff's return upon the citation, to wit: "Came to hand the 18th day of Feb., A. D. 1908, at 11 o'clock a. m., and executed the 18th day of Feb., A. D. 1908, at 8 o'clock p. m., by delivering to L. P. Cox, manager for Latham & Company, at Eastland, Texas, the within-named defendant's manager, in person, a true copy of this writ."

It is contended that the service is insufficient to support the judgment by default, and we think the contention must be sustained. So far as necessary to here notice, Rev. St. 1895, art. 1222, provides that: "In suits against any incorporated company or joint-stock association, the citation may be served on the president, secretary or treasurer of such company or association, or upon the local agent representing such company or association in the county in which suit is brought, or by leaving a copy of the same at the principal office of the company during office hours." This article applies to domestic corporations, and as applicable here we approve what was said in the case of Tompkins Machine & Implement Co. v. C. F. Schmidt, 4 Willson, Civ. Cas. Ct. App. § 134, 16 S. W. 174, viz.: "It cannot be assumed or presumed that the 'manager' of said company was either president, secretary, treasurer, or local agent of said company."

The term "local agent" implies a representative of a corporation appointed to transact its business and represent it in a particular locality. It does not embrace the idea of an agent who casually happens to be in the particular territory, or one who is temporarily sent to such locality to perform some particular purpose or specified act, or to superintend the business in a general way; and while, under certain circumstances and in a certain sense, the terms "general manager" and "local agent" may convey much the same idea, we conclude that they were not used in the statutes under consideration as synonymous. This is indicated by the next succeeding article to that from which we have quoted, which applies to foreign corporations. The article referred to (1223) provides that: "In any suit against a foreign, private or public corporation, joint-stock company or association or acting corporation or association, cita-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion or other process may be served on the president, vice president, secretary or treasurer, or general manager, or upon any local agent within this state," etc.

The terms "general manager" and "local agent" not being equivalent, it must be held that the service in the case before us is insufficient to sustain the judgment by default; it having been repeatedly held that, in order to support such a judgment, the direction of the statute with reference to the citation must be followed. In such event only does it appear with certainty that the court obtained jurisdiction over the person of the party sued.

Judgment reversed, and cause remanded.

#### GRIFFIN v. GRIFFIN.

(Court of Civil Appeals of Texas. March 27, 1909.)

##### 1. DIVORCE (§ 79\*)—PROCESS—PUBLICATION SERVICE—VALIDITY.

A valid decree of divorce may be obtained in the county of the matrimonial domicile on service by publication where plaintiff continues to reside there, and defendant's residence is unknown.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 258; Dec. Dig. § 79; Process, Cent. Dig. § 131.]

##### 2. PLEADING (§ 214\*)—ADMISSION BY DEMUR- RER.

The allegations of a petition must be taken as true on demurrer thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 525; Dec. Dig. § 214.\*]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Action by Nanny Griffin against Jess Griffin. From a judgment dismissing the petition, plaintiff appeals. Reversed and remanded.

Ivy, Hill & Greenwood, for appellant.

TALBOT, J. This is a suit for divorce instituted by the appellant against the appellee in the district court of Hill county, Tex., on the 19th day of February, 1908. The petition alleged that the plaintiff was and had been for more than six months next before the filing thereof a bona fide inhabitant and resident of Hill county, Tex., and that the residence of the defendant was unknown; that during the year 1895 plaintiff and defendant were duly and legally married in said county, and lived together as husband and wife until the month of January, 1896, when defendant without cause left plaintiff with the intention of abandoning her, and had never returned. The prayer was for citation to be served by publication, for judgment for divorce, for costs of suit, and general relief. The case was called for trial July 13, 1908, and the defendant failing to appear in person, or by an attorney of his own selection, the court appointed an attorney of the bar

to represent him. The attorney so appointed answered excepting to the jurisdiction of the court to hear and determine the case on the ground that the petition of plaintiff alleged that the residence of the defendant was unknown, and it appeared that service of citation upon the defendant was made by publication in terms of the statute of Texas. This exception was sustained by the court and judgment entered dismissing the cause at plaintiff's cost, said judgment reciting that "it is the opinion and judgment of the court that this court is without jurisdiction of the case on service by publication; the residence of the defendant being unknown." The correctness of the court's action in sustaining the exception or plea to the jurisdiction of the court and dismissing plaintiff's case is challenged by an appropriate assignment of error. We think the assignment is well taken. It does not so definitely appear, but we presume the trial court was influenced and controlled in the judgment rendered by the case of *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 837. That case was decided by a divided court, and both the majority and dissenting opinions exhaustively discuss the extraterritorial force of a decree of divorce rendered in one state upon service of citation, or notice given the defendant of the pendency of the suit, by publication, by virtue of that clause of the federal Constitution which requires that full faith and credit shall be given by states to the judicial decrees of other states. It does not become necessary for us to say in the present case whether we concur in or dissent from the majority opinion in that case. We are of the opinion that the decision of the majority does not go to the extent of the court's holding in this case. The effect of the decision in the *Haddock Case*, as expressed in the syllabus, is that the mere domicile within the state of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all other states by virtue of the clause of the federal Constitution above referred to against a nonresident who did not appear, and was only constructively served with notice of the suit. The decision does not deny the authority of a state in such case to render a decree of divorce susceptible of being enforced within its border, nor does it deny, as we understand it, the right of other states to give such effect to a judgment of that character as they may elect to do under principles of state comity. On the contrary, such power and such right is expressly recognized. In the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, it was held that a judgment of a state court on a debt could not be supported without personal service on the defendant within the state or his appearance in the cause, but the court was careful to say: "To prevent any misapplication of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a state may not authorize proceedings to determine the status of one of its citizens towards a nonresident which would be binding within the state, though made without service of process or personal notice to the nonresident. The jurisdiction which every state possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The state for example has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the state, a dissolution may be granted, may have removed to a state where no dissolution is permitted. The complaining party would therefore fall if a divorce were sought in the state of the defendant; and, if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. 2 Bishop, Marr. & Div. § 156."

Again, the allegations of the petition in the case at bar show the matrimonial domicile to be in Hill county, Tex., and that the defendant had wrongfully abandoned his wife, evidently for the purpose of avoiding his marital obligations. By such abandonment he relinquished his marital control and protection of plaintiff, and gave up the power and authority over her which alone makes his domicile hers. In such case she should be treated as having her domicile in the state of the matrimonial domicile for the purpose of the dissolution of the marriage, and a decree of divorce rendered at such domicile upon service by publication will be binding upon both parties and entitled to recognition in other states by virtue of the full faith and credit clause of the Constitution of the United States. This view of the law, as applied to this case, is strengthened by the fact that it does not appear that the defendant has established for himself since he left the plaintiff a new domicile. But, even if it appeared that he had acquired a new domicile, the law upon the subject would be the same. In the case of *Atherton v. Atherton*, 181 U. S. 156, 21 Sup. Ct. 544, 45 L. Ed. 794, which it seems was not overruled by the case of *Haddock v. Haddock*, supra, it was held, in effect, as we understand that case, that a decree of divorce may be lawfully obtained at the matrimonial domicile upon service by publication, notwithstanding the defendant may have taken up his or her residence separate from the other party in another state,

provided the law of such domicile with respect to such service be fully observed.

The petition in the case before us manifestly made a case for divorce under our statute. The statutory ground that the defendant had left plaintiff for the period of three years with the intention of abandonment, and that she was a bona fide inhabitant of the county and state where the suit was brought, and had resided in said state and county for six months next preceding the filing of the petition, was alleged. The judgment of the court recites service upon the defendant by publication, and there is nothing in the record to indicate that the law of this state with respect to such service was not scrupulously observed, and, the question of jurisdiction having been raised by demurrer, the allegations of the petition must be taken as true. We think the district court should have heard and determined the cause upon its merits, and rendered such judgment as the law and facts warranted.

Therefore the judgment dismissing the case for want of jurisdiction is reversed, and the cause remanded for trial.

PECOS & N. T. RY. CO. v. PEARCE.  
(Court of Civil Appeals of Texas. March 11, 1909.)

1. JUDGMENT (§ 139\*)—DEFAULT JUDGMENT—SETTING ASIDE—DISCRETION OF COURT.

A motion to set aside a default judgment is addressed to the sound discretion of the trial court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 265; Dec. Dig. § 139.\*]

2. JUDGMENT (§ 143\*)—DEFAULT JUDGMENT—SETTING ASIDE—EXCUSES FOR DEFAULT.

A cause was by agreement set down for trial on a designated date. On that date default judgment was entered; defendant not having answered, nor appearing. On the following day he moved to set aside the judgment, and showed that his counsel were unable to reach the court on the preceding day, as well as a defense to the action. It did not appear that plaintiff could not procure his witnesses before the adjournment of the court to retry the case. Held to require the setting aside of the default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 282; Dec. Dig. § 143.\*]

Appeal from Hale County Court; Geo. L. Mayfield, Judge.

Action by G. C. Pearce against the Pecos & Northern Texas Railway Company. From a judgment refusing to set aside a default judgment, defendant appeals. Reversed and remanded.

Madden & Trulove and Ben H. Stone, for appellant. Mathes & Williams, for appellee.

LEVY, J. The suit was filed in the county court to recover damages alleged to have been occasioned to a shipment of cattle. The case was set down by agreement of all the parties for trial in the county court on the

second Monday of the April term of the court. On the second Monday of the term the case was called for trial in its regular order by the court, and, the appellant not having filed an answer nor appearing by an attorney, judgment by default was entered. On the following morning after the day of default the appellant's counsel appeared and filed a motion asking that the judgment by default be set aside. The motion was verified by affidavit, and fully set out the reasons why appellant's counsel were unable to reach the place of the court and be present on the Monday in question. The defense to the cause of action is also set out in the motion.

It is clear from the motion that the counsel were not attempting either to delay or postpone the trial of the case, or to trifle in the least with the case or the court in respect to the hearing. The attorneys were warranted in assuming, from the agreement, that they had until the second Monday of the April term in which to file answer in the case. While it is true that such motions of the kind we are now considering are addressed to the sound discretion of the trial court, yet there are particular circumstances surrounding the nonattendance of attorneys representing defendants in causes that require such circumstances to be carefully taken into consideration by the courts in determining whether a judgment by default should be set aside. It does not altogether appear that appellant's counsel were inexcusably absent from the trial on the day set; and in the particular circumstances of this motion we have concluded that it was inequitable to overrule the motion presented, and that justice would be best subserved by setting aside the judgment by default rendered in the case. The motion to set the same aside was made the very next morning after the default, and it does not appear that plaintiff could not have procured his witnesses this next day, or before the adjournment of court, to have retried the case, nor that injustice would have been worked to him by granting a trial of the case on its merits.

The case is ordered reversed and remanded for a new trial.

#### CENTRAL CITY LOAN & INVESTMENT CO. v. VINCENT.

(Court of Civil Appeals of Texas. March 17, 1909.)

##### 1. TRIAL (§ 229\*)—REPETITION OF INSTRUCTIONS.

Instructions, each presenting facts to some extent different from the others, are not subject to objection as constituting unnecessary repetition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 513; Dec. Dig. § 229.\*]

##### 2. LANDLORD AND TENANT (§ 233\*)—ACTION FOR RENT—FAILURE TO REPAIR AS DEFENSE.

A landlord's obligation to repair does not depend on his employment of competent work-

men; and, in an action for rent of premises abandoned by the tenant for plaintiff's alleged failure to repair, it was not error to refuse a charge conveying the idea that plaintiff would have complied with his duty if he employed such workmen.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 233.\*]

##### 3. APPEAL AND ERROR (§ 1003\*)—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

A verdict, objected to on the ground that it is against the evidence will not be disturbed on appeal, when there is evidence sufficient to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.\*]

Appeal from McLennan County Court; E. C. Street, Special, Judge.

Action by Charles N. Vincent against the Central City Loan & Investment Company. From a judgment for plaintiff, defendant appeals. Affirmed.

D. A. Kelley, for appellant. S. E. Stratton and J. E. Yantis, for appellee.

**FISHER, C. J.** This is the second appeal of this case, which will be found reported in 99 S. W. 428.

The first assignment of error complains of a portion of the main charge of the court, and of two special charges given at the request of the appellee, on the ground that they constitute an unnecessary repetition of one of the principal issues to be passed upon, and by reason of that fact the jury were likely influenced in the belief that the defendant was entitled to recover. We have carefully examined these charges, and find that each presents facts to some extent different from the other.

There was no error in the court refusing the charge requested as set out under the third assignment. The obligation rested upon the plaintiff to make the repairs, and it was not dependent upon the fact whether he had employed competent workmen or not. This charge, which was refused, allows the jury to consider whether the repairs were made by competent workmen, which is calculated to convey the idea that, if the plaintiff had employed competent workmen, it would, in a sense, be a compliance with the duty imposed upon him. His contract was to make the repairs, and the fact that he employed or did not employ competent workmen was not to be considered.

The fourth assignment is to the effect that the verdict is contrary to the evidence, in that it shows that the oven was properly repaired. There is evidence to the contrary sufficient to support a verdict against the plaintiff.

The evidence complained of in the fifth and sixth assignments of error was admissible. We find no error in the record, and the judgment is affirmed.



**FRANKS et al. v. HARKNESS.**

(Court of Civil Appeals of Texas. Feb. 17, 1909. Rehearing Denied March 31, 1909.)

**1. TRIAL (§ 250\*)—INSTRUCTIONS—ABSTRACTIONS.**

In an action against a contractor for breach of his contract to construct a building, an instruction that one contracting to build a house for another, agreeing to furnish all labor and material, is bound in law to finish the job, taken in connection with the further proposition that, if the contractor failed to fulfill the contract, the other party could finish the building and recover all damages arising from a breach of contract, was not objectionable as an abstraction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.\*]

**2. DAMAGES (§ 120\*)—BREACH OF CONTRACT—FAILURE TO PERFORM—BUILDINGS—MEASURE OF DAMAGES.**

The measure of damages for breach of a builder's contract is the cost of completing the building, less the contract price.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 293-294; Dec. Dig. § 120.\*]

**3. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION.**

A charge should be read in its entirety.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 295.\*]

**4. TRIAL (§ 256\*)—INSTRUCTIONS.**

One desiring a more detailed instruction than that given must request it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 623; Dec. Dig. § 256.\*]

**5. CONTRACTS (§ 350\*)—BUILDING CONTRACTS—ACTION FOR BREACH—SUFFICIENCY OF EVIDENCE.**

In an action for breach of a building contract, evidence held not to show that one of defendants agreed to complete the building or to do more than furnish the lumber.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 350.\*]

Appeal from District Court, Frio County; J. F. Mullally, Judge.

Action by J. C. B. Harkness against L. W. Franks and another. Judgment for plaintiff, and defendants appeal. Affirmed as to defendant Franks, but reversed as to the other defendant, and judgment rendered in his favor.

C. S. Robinson, Shook & Vander Hoeven, and S. T. Phelps, for appellants. Magus Smith and Mason Maney, for appellee.

**FLY, J.** This is a suit on breach of contract to build a storehouse in the town of Pearsall, instituted by appellee against L. W. Franks and William Boon. The pleadings of appellee are based on the claim: That Franks obligated himself to build the storehouse for \$3,400, and, after \$1,950 had been paid on the contract by appellee, Boon informed appellee that he had associated himself with Franks in the building of the store, and that he was to receive the balance of the contract price; that appellee paid Boon \$600 on the contract, and then both of the parties abandoned the contract, and appellee was

compelled to pay \$724.64 in excess of the contract price to finish the building. Franks pleaded that he had been released by appellee. Boon claimed that he had agreed to furnish the necessary lumber and material and had furnished \$514.61 worth, and that appellee had paid him \$600 and had released him from any liability to build the house.

That part of the charge in which the court instructed the jury that when one person contracts to build a house for another, agreeing to furnish all labor and material, he is bound in law to finish the job, was not an abstraction, but was matter stated in connection with the further proposition that, if the contractor failed to fulfill the contract, the other party could finish the building and recover all damages arising from a breach of contract. If it had been an abstraction, it could not have injured appellants.

If, as contended by appellee, Franks entered into a contract with appellee to build a house for a certain sum, furnishing all labor and material, and he failed to comply with the contract, and appellee finished the house in a prudent and economical manner and at a reasonable cost, and the building, on account of such breach, cost appellee in excess of the contract price, Franks would be liable in damages to the amount of such excess, unless appellee had released Franks from further compliance with the terms of the contract. The measure of damages, in case of breach of builder's contract, is the cost of completing the building, less the contract price. Page on Contracts, § 1587; *Suth. Dam.* § 91. The law as stated was given by the court to the jury and is not open to criticism.

Boon returned into court \$98.30, which he claimed to have received from appellee in excess of the material furnished by him, and the court did not err in instructing the jury to apply that money on any excess found by them.

The court did not err in assuming that Franks gave up the job. All the evidence shows that he did. The first section of the charge, when read in its entirety, as it should be, is not open to any of the criticisms urged against it. The only vital issue in the case, so far as Franks was concerned, was whether he was released from his contract by appellee. The charge might have been more elaborate and explicit, but it was correct so far as it went, and, if appellant Franks wanted a more detailed instruction, he should have asked it.

Appellee sought to bind Boon on an agreement made by him to take charge of the work and complete it. The only evidence on the subject was the testimony, as follows, of appellee: "On 12th day of September, 1907, Mr. Boon came to me and said he wanted to notify me not to pay L. W. Franks any more

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

money on the building contract, but to pay it to him (Boon), that he and Franks together were going to finish and complete my house according to my contract with L. W. Franks, that he had made arrangements with Franks to finish my house, that the contract to that effect was at his place of business, and he wanted me to see it. I told him I would not go now to see it, but would come next day, and next day I saw the contract between Boon and Franks and read it over. I then told Boon I would pay him the money according to the L. W. Franks contract with me, but he must finish my house, and he said he would finish my house." Boon, it seems, was not a builder, but a lumberman, and the contract on which appellee acted between Franks and Boon was nothing but an undertaking on his part to furnish the lumber. All of the evidence pointed to that conclusion. Boon did furnish the lumber that he was called on to furnish. Appellee got the benefit of the money he paid Boon, except \$98.30, and that was paid into court for him. All of the other witnesses and the written contract contradicted appellee. The evidence was not sufficient to justify a verdict against Boon.

The testimony clearly shows that Williams, the representative of Franks, remained in charge of the job until appellee assumed control of it. Williams got material from Boon on orders from Franks, and Boon never controlled or exercised any authority over Williams. That appellee understood that Boon was only to furnish material is evidenced by a letter written for him by his attorney, requesting Boon to furnish lumber for a balance remaining on the \$600 which he had paid Boon.

The judgment will be affirmed as to Franks, but will be reversed as to Boon, and judgment here rendered in his favor.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. ROGERS.

(Court of Civil Appeals of Texas. March 6, 1909. Rehearing Denied March 27, 1909.)

##### 1. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING ISSUES.

An instruction, in an action for injuries to a railway employé through a defective platform, that, though the defect in the platform caused the accident, there could be no recovery unless it was discoverable by ordinary care, was properly refused for ignoring the issue of the improper construction of the platform raised by the pleadings and evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 253.\*]

##### 2. MASTER AND SERVANT (§ 296\*)—INJURY TO SERVANT—EVIDENCE—INSTRUCTIONS.

Where, in an action for injuries to a brakeman while running on a cinder platform by the side of a moving train, the evidence showed that it was his duty to keep a lookout for hot boxes, that he discovered a hot box and ran

along with the train to put water on it, and that he knew that the train would stop at a water tank a short distance away, the refusal to charge that if a person of ordinary care would have waited until the train stopped, and then poured water on the hot box, and that the brakeman was negligent in running along beside the train and the negligence contributed to his injury, there could be no recovery, was erroneous. [Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 296.\*]

Appeal from District Court, Grayson County; B. L. Jones, Judge.

Action by James N. Rogers against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Coke, Miller & Coke, Head, Dillard, Smith & Head, and Jno. C. Wall, for appellant. Wolfe, Neese & Maxey, for appellee.

BOOKHOUT, J. Appellee filed his original petition herein seeking a recovery against appellant for the sum of \$30,000 on account of personal injuries received by him on or about the 26th day of December, 1906, at Wagoner, Ind. T., while in the employ of appellant in the capacity of brakeman; the injuries consisting of the crushing of his left foot and ankle so that amputation was necessary. Appellee alleged that the injuries were caused by the negligence of appellant in the following manner: That it had erected at its depot in Wagoner a cinder platform for use of its employes. That there was a hot box on one of the cars in the train on which appellee was brakeman, and it became necessary and was his duty, in order to cool same at Wagoner, to throw water thereon while the train was moving slowly along by said platform, and said platform was so located that it was necessary for appellee to use the same for walking thereon in an effort to put water on said hot box. That while doing this, using a bucket from which to pour the water, said platform suddenly sloughed off and caved in, so that he was caused to fall with his left leg under the wheels of said train. That this was caused by the gross negligence of defendant in improperly constructing and in negligently maintaining said cinder platform and in failing to place a board or plank, along the edge thereof, which defects were known or should have been known to appellant, but were unknown to him. Appellant answered by general and special exceptions, general denial, and special plea of contributory negligence and assumed risk, and also alleged that appellee's injuries were caused through the negligence of fellow servants. Said cause was tried before a jury on the 29th day of January, 1908, and resulted in a verdict and judgment in favor of appellee in the sum of \$5,500. Appellant's motion for new trial was overruled, and an appeal was duly perfected.

Appellant assigns error to the court's ac-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion in refusing to give a special charge requested by it as follows: "In this case you are instructed that, if you believe from the evidence there was a defect in defendant's platform which caused the plaintiff to fall and receive his injuries, you still cannot find in favor of the plaintiff unless such defect would have been discovered by a person of ordinary care, and would have been considered by a person of ordinary care such a defect as would likely cause injury to some of its servants using said platform in the discharge of their duties, and would have been discovered by a person of ordinary care in such time by the exercise of ordinary care to have remedied the same." This charge ignores the issue raised by the pleadings and evidence of improper construction of the platform, and for this reason it was properly refused.

Error is assigned to the court's action in refusing to give special charge No. 6, requested by defendant, which is as follows: "In this case you are instructed that if you believe from the evidence a person of ordinary care, seeing a hot box on the train, before attempting to cool the same, would have waited until the train stopped, and then poured water on the same, and that the plaintiff was negligent in running along beside the train as he was doing at the time of his injury and such negligence contributed to his injury, you will return a verdict in favor of defendant, although you may believe from the evidence that the defendant was also negligent in the construction or maintenance of the platform at Wagoner." This assignment must be sustained. There is a plank platform in front of the depot at Wagoner. Just south of this platform there is a platform made of cinders extending south 314 feet along the side of the main line. It is 16½ feet wide at the north end and 12 feet wide at the south end. The plank platform is 8 inches above the ground and ties. The ties are on a level with the ground. The cinder platform starts out from the plank platform on a level with it, and is of the same height throughout. There are no stays or planks on the side of the cinder platform. The west edge of the plank platform is about 16 or 18 inches from the rail, and the cinder platform at the point where it joins in with the ties is about the same distance from the rail, but the top of the cinder platform is broken off until it is further away from the track than the other part of it. There is a water tank about 200 feet south of the cinder platform. Appellee was head brakeman on one of appellant's trains going south. As the train was approaching Wagoner, appellee discovered a hot box on one of the cars in the train, and procured a bucket and filled it with water from the tank, and got down off the train on the east side on the plank platform, about 25 feet from its south end, and ran along on the east side

of the train, and at intervals dashed water on the hot box to cool it off. While doing so, he testified, the cinders on the west side of the cinder platform crumbled off with him, and caused him to stumble and fall under the train, resulting in his injuries. The train was running about eight or ten miles per hour. There was evidence that it is the duty of the head brakeman to keep a lookout for hot boxes, and, upon discovering one, to put water on it as soon as possible, and put it on while the train is in motion if the brakeman can get to it. The appellee knew that the train was going to stop at the water tank to take on water, and appellant contended that appellee should have waited until the train stopped at the water tank before attempting to cool the hot box. This was a material issue in the case, and appellant sought to have the same submitted to the jury by special charge No. 6, above quoted. This issue had not been affirmatively submitted in the court's main charge. The appellant was entitled to have the same affirmatively submitted to the jury, and it follows that the court's refusal to do so was error.

For the error indicated, the judgment is reversed, and the cause remanded.

#### COLLIER et al. v. WM. CAMERON & CO. et al.

(Court of Civil Appeals of Texas. March 17, 1909. On Rehearing, April 7, 1909.)

#### TENANCY IN COMMON (§ 43\*)—TREES AND TIMBER—SALE BY CO-TENANT—LIABILITY OF PURCHASER.

Where one tenant in common without authority sells all the timber on the land, his co-tenant is entitled to recover from him and from purchasers with notice of the co-tenancy his share of the value of the timber taken.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 130, 137; Dec. Dig. § 43.\*]

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Action by J. N. Collier and others against William Cameron & Co. and others. From the judgment, plaintiffs appeal. Affirmed in part, and reversed and remanded in part.

Mooney & Mann and John L. Little, for appellants. Talliaferro & Nall, Dies, Singleton & Dies, and Lanier & Martin, for appellees.

FLY, J. This suit was instituted by appellants against Wm. Cameron & Co., a corporation, J. L. McElyea, William Parker, and his wife, Callie Parker, and W. W. Cruse, to try title to 320 acres of land and to recover the sum of \$5,000 alleged to be due appellants for pine lumber cut by them off of the 320 acres of land belonging to appellants. All of the appellees pleaded misjoinder of causes of action. Cameron & Co. and McElyea

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

disclaimed all interest in the land. The corporation also answered that it bought the timber on the land from McElyea, who represented that he was the owner of the land sued for, and that it had no notice that appellants claimed the land, and that appellants had no cause of action against it. McElyea filed a general denial and plea of two-year limitation. Cruse pleaded general denial, not guilty, and three and five years limitations. Parker and wife disclaimed all interest in the land, except as tenants of W. W. Cruse. The court instructed a verdict for appellants for one-half the land and against them as to the damages.

It seems to be conceded by all parties that appellants own now and owned at the time of the conversion of the timber a one-half undivided interest in the 320 acres of land, and it is not controverted that McElyea sold the timber to Wm. Cameron & Co. for himself and Cruse, and that they appropriated the proceeds thereof to their own use and benefit. It is also conceded that Wm. Cameron & Co. cut the timber off the land, one-half of which belonged to appellants and converted it to its own use. If appellants owned one-half of the land, they owned one-half of the timber attached thereto, and, when the timber was converted, they had the right to recover its reasonable value from those who converted it. As said by the Supreme Court of Minnesota in the case of *Shepard v. Pettit*, 30 Minn. 119, 14 N. W. 511: "The trees, when severed, became personal property, and, unless the severing them vested the exclusive title in defendant, they belonged afterwards, as when they were part of the realty, to the parties as tenants in common. One co-tenant who without the consent of the other sells as his own the joint personal property thereby severs the co-tenancy, and is liable to the other for the conversion of his share. \* \* \* One co-tenant of real estate may, in the absence of any agreement, and if he do not exclude the other from a joint occupation with him, exclusively possess and occupy the land, and may make such profit as he can by proper cultivation or other usual means of acquiring benefit therefrom, and retain the whole of such benefits. In other words, he is not to be deprived of the beneficial use and enjoyment of the land merely because his co-tenant does not see fit to insist upon enjoying such use with him, nor is he required in such case to share with the other the benefits of his skill and labor bestowed in the proper use and employment of the common property. The products of his skill and labor in such use and employment are his. But this right to retain, use, and appropriate the benefits of the land extends only to the products of its proper use and employment, and not to anything which is a part of the land itself, and not severable in the proper use of it." Not only is the co-tenant liable for the timber sold by him, as in this case, but the purchas-

er of such timber, with a knowledge of the co-tenancy, would also be liable. As said in the Kentucky case of *Nevels v. Kentucky Lumber Co.*, 108 Ky. 550, 56 S. W. 969, 49 L. R. A. 416, 94 Am. St. Rep. 388: "It is clear that it is waste to cut and remove the timber off the timbered land, and where this is done by a tenant in common his co-tenant may at his election claim the property in the hands of a purchaser, or hold him liable for a conversion." As to the liability of the co-tenant, see, also, *Hunter v. Hodgson* (Tex. Civ. App.) 95 S. W. 637; *Roberts v. Roberts* (Tex. Civ. App.) 99 S. W. 886; *Adams v. Thornton*, 5 Cal. App. 455, 90 Pac. 713; *Sutherland v. Carter*, 52 Mich. 151, 471, 17 N. W. 780, 18 N. W. 223; *Wattles v. Dubois*, 67 Mich. 313, 34 N. W. 672.

It was held in the case of *Gillum v. Railway*, 5 Tex. Civ. App. 338, 23 S. W. 717, that a tenant in common has the right to sell marketable timber growing on the common estate and pass a clear title thereto to the purchaser, and no right of action would accrue to the other co-tenants against the vendee who carries off and uses the same, but that was in a case where the evidence did not show that all the timber was cut, or that enough was not left to secure the complaining party in his pro rata share of the timber. In the same report as the case last mentioned the Court of Civil Appeals of the Second District held that where the property has been lost to a co-tenant through the agency of a vendee of another co-tenant, the vendee would be liable for such loss to the other co-tenant. *Worsham v. Vignal*, 5 Tex. Civ. App. 471, 24 S. W. 562. In the case of *Trammell v. McDade*, 29 Tex. 360, it was held that the purchaser of goods from one tenant in common and the delivery of possession conferred a good title against the lawful owner until he makes known his title to the vendee. In the case of *Worsham v. Vignal*, 14 Tex. Civ. App. 324, 37 S. W. 17, it was held that a third party who bought cattle from a joint owner with notice of the joint ownership would be liable to the other owner for his part of the cattle. In the case of *Mast v. Tibbles*, 60 Tex. 301, it was held: "It is well settled that a purchaser from one tenant in common cannot acquire and hold to the prejudice of a co-tenant any specific portion of the common estate. Parties so taking must hold subject to all equities existing between co-tenants, to be worked out in the partition of the land." In the case of *Cosgriff v. Dewey*, 164 N. Y. 1, 58 N. E. 1, 79 Am. St. Rep. 620, a tenant in common in possession of land had converted the rock on it, and the court held, in an action by the other co-tenant for his share: "The stone which the defendant quarried and converted to his own use was a part of the freehold, and therefore was the common property of all. It was not, in any proper sense, the product of the land itself. It did not represent the use of the land or

the rents and profits, but to the extent that it was taken by the defendant operated as a diminution of the estate. If the defendant had taken valuable timber from the land and sold it or converted it into lumber, there is no doubt, we think, that he would be liable to account for its value to his co-tenants. The act of taking timber and the act of taking stone, whether it be trap rock or marble, cannot be differentiated so far as the question of waste is concerned. Whether the stone which the defendant quarried upon the land and converted to his own use be considered personal property or part of the realty, he was bound to account to his co-tenants for their proportion of its value." To the same effect are *Gates v. Bowers*, 169 N. Y. 14, 61 N. E. 993, 88 Am. St. Rep. 530, and *Abbey v. Wheeler*, 170 N. Y. 122, 62 N. E. 1074. The evidence showed without contradiction that McElyea and Cruse acted together in the appropriation of pine timber, one-half of which they knew belonged to appellants and they are liable for its conversion, and if Wm. Cameron & Co. had notice that appellants owned an interest in the timber, or if it was put upon inquiry by the circumstances as to that fact, it too should be held liable to appellants for one-half the value of the lumber.

The part of the judgment which gives one-half the land to appellants is not assailed, and it will be affirmed in all particulars, but, in so far as it adjudges that appellants should not recover any damages of McElyea, Cruse, and Wm. Cameron & Co., it will be reversed, and the cause remanded for a trial in consonance with this opinion.

Affirmed in part, and reversed and remanded in part.

#### On Rehearing.

The case of *McClanahan v. Stephens*, 67 Tex. 354, 3 S. W. 312, liberally quoted from by appellees, has no applicability whatever to the facts of this case. In that case the defendants sold the land to another and not the timber, and it was held that the sale was not the effective cause of the cutting of the timber. In this case the timber was sold, and with the purpose of having it taken from the land. The distinction is too clear to warrant discussion or argument.

The evidence shows that practically all the timber was cut that was growing on the entire tract. Pedago swore: "The pine timber on that tract of land has been cut." Salter, the manager of William Cameron & Co., swore that before he went on the tract to cut the timber he estimated that the land had seven hundred and fifty thousand feet of lumber on it, but that he cut about 1,000,000 feet on the tract. In another place the witness stated, in connection with the cutting of timber on another tract: "I think we had cleaned up the Manell before we cut this." If they had "cleaned up" the land in

controversy, it would justify a finding that all the timber of any value had been cut.

There is no merit whatever in the motion, and it is overruled.

#### BURKETT & BARNES v. DILLON.

(Court of Civil Appeals of Texas. March 10, 1909. Rehearing Denied March 31, 1909.)

#### 1. APPEAL AND ERROR (§ 1071\*)—HARMLESS ERROR—AFFECTING ONE NOT ENTITLED TO JUDGMENT.

In an action by one tenant against another for damages caused by permitting a faucet to flow and the water to run through the ceiling into plaintiff's room, in which the owners were also made defendants, any error in finding that there was no express covenant by the owners to repair was immaterial to defendant, where he did not ask for judgment over against them; plaintiff being entitled to recover against defendant in any event.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4238; Dec. Dig. § 1071.\*]

#### 2. INDEMNITY (§ 15\*) — REMEDIES — RECOVERY OVER AGAINST CODEFENDANT.

In an action by one tenant against another for damages caused by permitting a faucet to flow and the water to run through the ceiling into plaintiff's room, defendant brought in the owners and alleged that they had charge of the hydrants, basins, etc., and were under a duty to repair them, and plaintiff's damage, if any, was caused by their negligence, but did not expressly ask for judgment over against them. Held, that defendant pleaded the owners' negligence as a defense to his own liability to plaintiff, and not to recover over against them, so that defendant was not entitled to a judgment against the owners.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 36, 42, 43, 46; Dec. Dig. § 15.\*]

#### 3. LANDLORD AND TENANT (§ 166\*)—INJURIES FROM DEFECTIVE CONDITION—INJURIES TO PROPERTY OF TENANT—DEFECTIVE WATER PIPES—CO-TENANT'S LIABILITY.

Where a tenant knew that a faucet in his room was defective and leaked, and allowed it to remain so, and the water therefrom ran through the ceiling and injured the goods of another tenant below, the former was liable to the latter for such damages, irrespective of whether the landlord agreed to repair the faucet.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 637; Dec. Dig. § 166.\*]

Appeal from Harris County Court; A. E. Amerman, Judge.

Action by J. C. Dillon against Burkett & Barnes, in which Charles Miller and another were impleaded. From a judgment for plaintiff against the principal defendants, and against them on their cross-action against the impleaded defendants, Burkett & Barnes appeal. Affirmed as reformed.

A. R. & W. P. Hamblen, for appellants. M. C. Wagner and Henry J. Dannerbaum, for appellee.

JAMES, C. J. The briefs agree that the following is substantially the pleadings: Dillon sued Burkett & Barnes to recover \$365.67 as damages to his stock of cigars and to

bacco, caused, as alleged by him, by the negligence of Burkett & Barnes in allowing a water faucet in the basin in the room occupied by them to flow and overflow, and the water to escape and run through the ceiling down into Dillon's store underneath. Burkett & Barnes answered by general denial, and brought in Charles and Annexa Miller, the owners of the building, and their agent, I. Austin Miller, and pleaded that appellants occupied one room in the building and were tenants from month to month; that said cross-defendants had charge of the halls, stairways, roofs, water pipes, hydrants, and basins in the building, and were charged with the duty of repairing the same and did repair the same; and that if Dillon was damaged, as alleged by him, such damage was caused by the fault or negligence of said cross-defendants, and not by appellants. Charles Miller, Annexa Miller, and I. Austin Miller pleaded general denial and contributory negligence on the part of Burkett & Barnes. It appears from the pleadings that plaintiff, by his supplemental petition, prayed for judgment against the Millers, in the event they were, and Burkett & Barnes were not, found liable for the damage. We do not find that Burkett & Barnes asked for judgment over against the Millers. The case was tried by the judge, who gave judgment for plaintiff against Burkett & Barnes for \$264.13, and against Burkett & Barnes on their cross-action against the Millers, from which judgment Burkett & Barnes have appealed.

The first and second assignments of error are that the court erred in its conclusions of fact: (1) "That there was no express stipulation in said contract that the said Mrs. Annexa Miller should make repairs upon the let premises." (2) "There was no evidence tending to show that the repairing was negligently done, or was defectively done." The testimony cited by appellant to sustain the first assignment is as follows: "I. Austin Miller testified: 'I took charge of the building for my mother in 1902, and moved into the building myself, and from that time on I have made the repairs, or had them made, and was my mother's agent in charge of the building. I had repairs made in October, 1906. \* \* \* I made an agreement with Burkett & Barnes as to the use and occupancy of the building and keeping it in repair. \* \* \* When any repairs were needed, I made the repairs demanded, if necessary.' It appears, however, that the witness testified, also, that in October 1906, he had caused a plumber to repair all faucets in the building, by putting in new faucets or new washers, and that the faucet in question was then repaired by putting in a new washer, and it was thereby left in good condition. 'I heard no complaint about the faucet being out of repair

until the morning after this trouble.' The accident occurred March 17, 1907. Barnes testified: 'Under the terms of our lease we had no conditions to do repairs.' In support of the second assignment appellants state these facts: That Miller repaired all the faucets in the building in October, 1906, about six months before the accident, and Barnes testified that shortly before the accident he notified Mr. Miller that the faucet was leaking, and Mr. Miller fixed it with a monkey wrench. Burkett testified that when he came to his office the morning after the accident the top of the faucet had slipped up, and he took a towel and tied it down, and the water stopped running; and the witness John Nealy testified on cross-examination that the core of the faucet must have been defective and all the threads on the core had worn off.

Although we doubt the correctness of the judge's finding that there was no express stipulation that Mrs. Annexa Miller should make repairs, we think his finding was immaterial, in view of the fact that Burkett & Barnes did not ask for judgment in their favor against her. Their pleadings, when examined, are found to set up the duty of Mrs. Miller to keep the faucet in repair, and that she was at fault in allowing it to be and remain in the condition it was in; but this matter was pleaded and set up for the purpose of exonerating them from liability to plaintiff, and, in case plaintiff was entitled to damages, to have plaintiff recover of the Millers, instead of them. It was set up as a defense against their liability to plaintiff, and not for the purpose of their recovery over against the Millers. In this state of the pleading the case between Burkett & Barnes and the Millers was not involved, and the court should not have undertaken to adjudicate matters between them. We therefore conclude that that part of the judgment should be changed and reformed, so as to read merely that plaintiff have no recovery against the Millers, leaving any issues between Burkett & Barnes and the Millers upon the contract, if any there were, unadjudicated.

Whatever the relation or contract may have been between them, there can be no question that appellants would be liable to Dillon for the results of conditions permitted by them. The faucet had gotten out of repair in their room. They knew it had become defective and leaky, and needed repairing, and allowed it to remain so until the damage complained of occurred therefrom. Mrs. Miller's obligation to repair the faucet was wholly immaterial to Dillon. Dillon is not complaining of his not having been given judgment against the Millers.

Judgment reformed and affirmed.

## GRAY v. FULLER et ux.

(Court of Civil Appeals of Texas. March 9, 1909.)

## 1. PLEADING (§ 258\*)—AMENDMENT OF PLEA IN ABATEMENT.

A defective plea in abatement may be amended after evidence has been offered in support of the original plea, and excluded on the ground that the plea was insufficient to admit the same.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 773; Dec. Dig. § 258.\*]

## 2. APPEAL AND ERROR (§ 742\*)—ASSIGNMENT OF ERRORS — STATEMENTS ACCOMPANYING THE SAME.

In an action by the receiver of the estate of an insane person, it was assigned as error on appeal from an order dismissing the action that "the action of the county court in appointing the receiver was neither void nor subject to attack in a collateral proceeding." Following this was the statement: "Defendants' plea in abatement seeks to invalidate this receiver's appointment on account of the manner in which that appointment was made." *Held*, that the statement was insufficient to entitle the assignment to consideration, as it did not inform the court what facts were pleaded by defendants in abatement of plaintiff's suit, nor what evidence was adduced under said plea.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

## 3. APPEAL AND ERROR (§ 742\*)—STATEMENT ACCOMPANYING ASSIGNMENT OF ERRORS.

On appeal from an order sustaining a plea in abatement and dismissing the suit of a receiver of the estate of an insane person, plaintiff assigned as error that "the court erred in sustaining defendants' plea in abatement and dismissing plaintiff's suit on the evidence," and one proposition under this assignment was that "the receiver had authority to bring and maintain this suit as shown by his letters of appointment and application therefor." The statement under this proposition only showed that the order of the county court appointing the appellant receiver authorized him to enter into a contract with attorneys to recover any real property to which the lunatic for whom he was acting might be entitled. *Held*, that the plea in abatement not being copied in the statement, and no statement being made of the substance of said plea or of the grounds therein urged for the abatement of the suit, the court on appeal cannot say that the fact that the order appointing the receiver authorized him to contract with attorneys for the recovery of land was an answer to the plea, or that because this fact was shown the court erred in sustaining said plea.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

## 4. APPEAL AND ERROR (§ 742\*)—STATEMENT ACCOMPANYING ASSIGNMENT OF ERROR.

Plaintiff, the receiver of the estate of an insane person, brought suit, and defendants filed a plea in abatement, which was sustained, and the suit dismissed. On appeal plaintiff assigned as error the refusal of the trial court to allow an amendment to his petition, and the statement accompanying the assignment was that "the grounds for abating the suit were laid down in defendants' answer as the improper procedure employed by the county court in making the appointment and the incapacity of the receiver to maintain the suit." *Held*, that the statement was insufficient, as not showing that any request for leave to amend was made by plaintiff and refused by the court, and, if this request could be inferred, the statement

would still be insufficient because it fails to show when or under what circumstances such request was made, or to state any facts which indicate that any error was committed in refusing to permit the amendment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

Appeal from District Court, Newton County; W. B. Powell, Judge.

Action by S. P. Gray, as receiver of the estate of Abner Gray, against F. P. Fuller and wife. Judgment dismissing plaintiff's suit, and plaintiff appeals. Affirmed.

West & Lynnot, for appellant. Geo. G. Clough and Aubrey Fuller, for appellees.

PLEASANTS, C. J. This suit was brought by S. P. Gray, as receiver of the estate of Abner Gray, who is alleged in the petition to be a person of unsound mind, against appellees, F. P. Fuller and wife, Fannie Fuller, to recover an undivided one-tenth interest in 27 lots in the town of Newton, and to have partition made of said property between plaintiff and said defendants. Upon the trial in the court below a plea in abatement presented by defendants was sustained, and plaintiff's suit dismissed.

The first and second assignments are presented together in appellant's brief. These assignments are as follows:

"The court erred in overruling plaintiff's objections to defendants' request for leave to amend their answer as shown by plaintiff's bill of exceptions No. 1.

"The court erred in overruling plaintiff's motion to strike out defendants' plea in abatement as contained in their first amended original answer."

The first proposition under these assignments is: "A plea in abatement comes too late after exceptions are filed." The second proposition is: "A plea in abatement comes too late after an answer to the merits is filed." The statement under the propositions is, in substance, that on March 2, 1908, defendants filed an answer containing general and special exceptions, plea of not guilty, and pleas of improvements in good faith, but no plea in abatement, the court having held on a hearing of the case on March 3d that the plea in abatement filed and presented on March 2d was insufficient. Thereafter, on the 3d day of March, defendants filed an amended plea in abatement, which was sustained by the court. The bill of exception referred to in assignment No. 1, and which was approved by the court, is as follows: "Be it remembered that on this 3d day of March, 1908, came on to be heard the defendants' plea in abatement, and both parties appearing by their attorneys, announced ready for trial on said plea, whereupon the said defendants offered evidence under said plea, and the court sustained objections of plaintiff's attorneys to any evidence on the

ground that the plea was not sufficient to admit evidence, and the attorneys for defendants thereupon asked leave to amend, to which the plaintiff's attorneys then and there objected on the grounds that the answer of the said defendants contained no plea in abatement, and did contain pleas in bar, and insisted that a plea in abatement would come too late, and would not be filed in the due order of pleading, which objections were by the court overruled, and leave granted to the said defendants to file an amendment to said plea, to which action of the court the said plaintiff, by his attorneys, then and there in open court excepted, and tenders this as his first bill of exceptions, and asks that same be approved by the court and made a part of the record in this cause." These assignments are not sustained by the bill of exceptions referred to therein, nor by the statement made in the brief. Both the bill of exceptions and the statement made by appellant show that on the 2d of March the defendants presented what was intended as a plea in abatement, and the bill of exceptions shows that evidence was offered by appellees in support of said plea, and that, upon objection by the appellant, the evidence so offered was excluded on the ground that the plea was insufficient to admit same. The pleading to which this exception was sustained is not set out in the statement under these assignments, but we have examined the record, and find that it was in fact a defective plea in abatement, and was presented and passed upon as such. It follows from these facts that the authorities cited by appellant to sustain the contention that a plea in abatement will not be heard if not filed until after an answer to the merits has been filed have no application. The amendment of the plea was permissible, and, in so far as the question of due order of pleading is concerned, it must be considered as of the date of the filing of the original plea.

The third assignment of error is as follows: "The court erred in sustaining defendants' plea in abatement and dismissing plaintiff's suit on the evidence." The first proposition under this assignment, with the statement thereunder, is as follows: "The action of the county court in appointing the receiver was neither void nor subject to attack in a collateral proceeding. Statement: Defendants' plea in abatement seeks to invalidate this receiver's appointment on account of the manner in which that appointment was made." This statement is clearly insufficient to entitle the assignment to consideration. We are not informed by the statement what facts were pleaded by defendants in abatement of plaintiff's suit, nor what evidence was adduced under said plea, and upon this showing we cannot say that any error was committed by the trial court in sustain-

ing the plea. The second proposition under this assignment is as follows: "The receiver had authority to bring and maintain this suit as shown by his letters of appointment and application therefor." The statement under this proposition only shows that the order of the county court appointing the appellant receiver authorized him "to enter into a contract for the said Abner Gray with attorneys to recover any real property to which he may be entitled." The plea in abatement not being copied in the statement, and no statement being made of the substance of said plea or of the grounds therein urged for the abatement of the suit, we cannot say that the fact that the order appointing the receiver authorized him to contract with attorneys for the recovery of any land belonging to Abner Gray was an answer to the plea, or that because this fact was shown the court erred in sustaining said plea.

The fourth assignment complains of the refusal of the trial court to allow plaintiff to amend his petition. The statement under this assignment is as follows: "The grounds for abating the suit were laid down in defendants' answer as the improper procedure employed by the county court in making the appointment and the incapacity of the receiver to maintain the suit." This statement is clearly insufficient to entitle the assignment to consideration. It does not show that any request for leave to amend was made by plaintiff and refused by the court, and, even if this should be inferred, the statement would be insufficient because it fails to show when, or under what circumstances, such request was made, or to state any fact which indicates that any error was committed by the court in refusing to permit the amendment.

There being no error pointed out in appellant's brief which requires a reversal, the judgment of the court below is affirmed.

Affirmed.

#### PATTON v. MINOR et al.

(Court of Civil Appeals of Texas. March 10, 1909. Rehearing Denied March 31, 1909.)

#### 1. TAXATION (§ 781\*)—TAX SALES—TITLE OF PURCHASER.

Where property was sold for taxes, if the tax deed was valid, it passed only such title as the real owner, at the time the assessment was made, had at the time of the sale, and the purchaser stood in relation to persons having no title, but in possession under claim of right, with no notice of the sale, just as the real owner would have stood if there had been no sale, since ownership of the land, as against those claiming adversely to the unknown owner, is not vested in the purchaser by Const. art. 8, § 13, embraced substantially in Rev. St. 1895, art. 5232h, providing that the tax deed shall be held to vest a perfect title in the purchaser, subject to be impeached only for actual fraud, and Rev. St. 1895, art. 5232b, providing that



the taxes on all lands returned delinquent, or reported sold to the state, city, or town, for taxes thereon since January 1, 1885, or on lands which may hereafter be so returned or reported sold, shall remain a lien on the land, though the owner be unknown, or though it be listed in the name of a person not the actual owner, and though the ownership be changed, the land may be sold, under the judgment of the court, for all taxes, etc., shown to be due by such assessment for any preceding years; and hence, where, at the time land was purchased at a tax sale, defendants had been in adverse possession thereof for years, and, with no notice of any sale, continued thereafter in adverse possession for the statutory period of 10 years, the purchaser's grantee was barred from recovery of possession.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1549; Dec. Dig. § 781.\*]

## 2. TAXATION (§ 826\*)—PAYMENT—RIGHT OF SUBROGATION TO LIEN.

The purchaser having paid the taxes, his grantee was entitled to be subrogated to the state's lien upon the land therefor, upon his recovery of possession being barred by adverse possession.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1632; Dec. Dig. § 826.\*]

## 3. APPEAL AND ERROR (§ 984\*)—REVIEW—DISCRETION OF COURT—COSTS.

In trespass to try title to recover land purchased at a tax sale, and held adversely, or, in the alternative, to recover the price paid with interest, the taxing of costs against plaintiff, on rendering judgment for him on his alternative demand, and for defendant for possession of the land, lay in the discretion of the court, and will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3381; Dec. Dig. § 984.\*]

Error from District Court, El Paso County; J. M. Goggin, Judge.

Trespass to try title by George M. Patton against Thomas L. Minor and others. From the judgment, plaintiff brings error. Affirmed.

Beauregard Bryan, for plaintiff in error. Patterson & Wallace and McGown & Price, for defendants in error.

NEILL, J. This suit was brought by plaintiff in error against defendants in error, in the form of an action of trespass to try title, to recover possession of a certain parcel of land described as lot 15, block 103, of Campbell's addition to the city of El Paso, Tex.; or, in the alternative, to recover \$175, with 6 per cent. interest thereon from March 15, 1904. The defendants pleaded not guilty and the 10-year statute of limitation. The case was tried without a jury, and judgment rendered in favor of defendants upon their plea of limitations, and in favor of plaintiff on his alternative demand. The nature of the case will more fully appear from the following conclusions of fact and law, which we adopt as our opinion, filed by the trial judge, Hon. J. M. Goggin.

### "Conclusions of Fact.

"First. I find that some time during the year 1894 defendant Minor took possession

of the lot sued for herein, erected a substantial dwelling thereon, into which he then moved, and that about seven months thereafter the defendant Rojas, having built on said lot an addition to Minor's house, moved into same, and that both said Rojas and Minor have continued to reside thereon without intermission up to the present time. That during said time they continuously occupied, used, and enjoyed said lot as their homestead, and have always claimed the same as their property. That the possession, from the time of their entry in 1894 until the present, has been continuous, exclusive, and hostile to the claim, or claims, of the unknown owners, and to that of all other persons who might have, or did assert, an interest in said property, and that during said occupancy they claimed the same as their joint property and homestead.

"Second. That the taxes on said property not having been paid for the years 1889 to 1900, inclusive, the state, on the 6th day of September, 1902, acting through its attorney, filed suit for taxes, costs, etc., against the unknown owners, perfected service by citation by publication, and on the 15th day of December, 1902, obtained judgment against the unknown owners of said property for taxes, costs, etc. That thereafter, on the 15th day of March, 1904, the sheriff, in pursuance of an alias order of sale issued out of said tax judgment, sold said property to satisfy same, and the property was regularly bid in and knocked down, and regularly deeded by the sheriff, to one Daniel P. Holland. That said judgment, among its other recitations, contained one to the effect that the unknown owners had been duly and legally cited by publication, as the law directed. That thereafter by quitclaim deed the said Daniel P. Holland, joined by his wife, conveyed said lot so purchased by him to George M. Patton, as executor of the estate of Carrie C. Higgins, and the said Patton is now claiming said property, and sues herein for same under said alleged tax title. The defendants claim against said title under the statute of 10 years. I further find that said Holland bid in said property at said sale for the amount of \$175, which was paid, as stated in his tax deed executed to him by the sheriff.

"Third. That neither of the defendants were ever cited, or had notice, of any character, of the pendency of the suit for foreclosure of the tax lien by the state, nor knew anything of the judgment obtained in that case, until they were notified to vacate shortly before the institution of this suit; but, as aforesaid, at the time of the institution of said suit, during its pendency, at the time of the judgment and sale, and continuously up to the present, they have been in possession of said property, occupying, using, and enjoy-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing the same, as aforesaid, as their homestead. That plaintiffs claim under said tax title alone. That plaintiffs show no possession of the land in controversy at any time.

#### "Conclusions of Law.

"First. I conclude that the defendants, Minor and Rojas, were holding adversely to the unknown owner, or owners, sued in said tax suit before, and at the time of, the institution of same, at the time judgment was obtained and said property sold and bid in by Holland, and continued to so hold as to the real owner from the date of their entry (or the entry of the said Minor in 1894) up to the present. That as against the unknown owner, or owners, of said property limitation was running during the entire time of defendant's occupancy, their occupancy being hostile and continuous, and was complete before the institution of this suit, on the 22d day of November, 1906. I find that, if the sheriff's deed in said tax sale was valid, and passed the title, 'it would, as it professes to do, pass the title of the person who was really the owner of the land at the time the assessment was made,' and that the purchaser 'at such sale would take the title of the real owner if title passed by it, and would stand in relation to a person having no title, but in possession under claim of right, just as the real owner would have stood had there been no sale,' as was held by Judge Stayton in *Jordan v. Higgins*, 63 Tex. 150. See, also, *White v. Plingenot* (Tex. Civ. App.) 90 S. W. 672. In the case at bar, at the time this action was instituted, the title of the defendants, Minor and Rojas, had been perfected by adverse possession of 10 years, and the action of those who purchased at the tax sale the title and interest of the unknown owner, or owners, is barred, 'just as would have been the former owner had the tax sale not been made, and had the action been instituted by him.' See *Jordan Case*. It appears from the authorities that the Legislature might enact a law cutting off the claims of all persons by sales for taxes, and placing in the purchaser at such sales perfect title as against the world, should it see fit to do so, but has not done so. At the time the rights accrued in the *Jordan Case*, and at the time of the writing of the opinion in that case, our Constitution provided, as it now provides, by article 8, § 13, that the deed of conveyance to the purchaser for land and other property sold by the state for taxes shall be held to vest a good and perfect title in the purchaser thereof, subject to be impeached only for actual fraud. This provision was carried into our statutes, and now, in substance, is article 5232h of same Rev. St. 1895.

"It seems, however, the following provision has been ingrafted on our tax laws since the opinion above referred to: 'All lands or lots which have been returned delinquent, or

reported sold, to the state, or to any city or town for taxes due thereon since the 1st day of January, A. D., 1885, or which may hereafter be returned delinquent or reported sold to the state or to any city or town, shall be subject to the provisions of this chapter, and said taxes shall remain a lien upon the said land, although the owner be unknown or though it be listed in the name of a person not the actual owner, and though the ownership be changed, the land may be sold under the judgment of the court for all taxes, interest, penalty and costs shown to be due by such assessment, for any preceding years.' Article 5232b. I find that this article, following provisions changing the manner of procedure in tax suits, does not alter the rights of the party purchasing at tax sale, or vest in him any title other than that of the unknown owner, as was the case under the former law. The constitutional provision declaring that a tax deed shall be held to vest good and perfect title in the purchaser does not in fact vest in the purchaser ownership of the land as against those not claiming under the unknown owner, but adversely to him; and I find the provisions of article 5232b cannot be taken as in any way altering the rule and cutting off such adverse claimants. Although taxes, as provided in this article, do form a lien upon the land, no matter in whom the ownership may lie, and though the ownership be changed, the occupant, however, or person whose rights are maturing by limitation, who is in possession claiming adversely to the owner, cannot have his right, or, inchoate right, cut off by a suit against unknown owners, when he has no legal notice of the pendency of such suit. I, therefore, find that the plaintiff is not entitled to recover the land in controversy, and that the defendants are entitled to have judgment for same under their plea of 10-year limitation; that limitation was in no way suspended, and their title was in no way affected, by the foreclosure of said lien for taxes, or by the sale made.

"Second. The plaintiff has pleaded in the alternative, however, in his second amended original petition, that in case of judgment against him for the land, the amount bid by him be in equity returned, and that the same be decreed a lien upon said property. The court finds that, the plaintiff having asked this affirmative relief in equity, it is immaterial whether said sale for taxes and purchase by Holland be treated as void or voidable; that the said taxes constitute a lien upon said land which has not been destroyed, and the plaintiff is entitled to be subrogated to the same, and have the same so decreed against said property. *Rogers v. Moore* (Tex. Civ. App.) 94 S. W. 114."

From our adoption of the foregoing conclusions of the trial judge, it follows that in our opinion none of the assignments of error which assail them is well taken. Those as-

signments which complain of the court's taxing costs against the plaintiff relate to a matter resting in the sound discretion of the trial court—it being in the nature of a motion to retax costs—which we are not authorized to disturb. *Moore v. Rogers*, 100 Tex. 361, 99 S. W. 1024.

The judgment is affirmed.

# ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. ALLEN.†

(Court of Civil Appeals of Texas. March 4, 1909. Rehearing Denied April 1, 1909.)

## 1. CARRIERS (§ 227\*)—INJURIES TO SHIPMENT OF LIVE STOCK—PETITION.

A petition, in an action for negligent delay and rough handling of a shipment of live stock, which states with particularity injuries to the bodies of the several animals is not demurrable for incorrectly stating the measure of damages.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 227.\*]

## 2. WITNESSES (§ 240\*)—EXAMINATION—LEADING QUESTIONS.

A question inquiring only as to a single fact, and not suggesting a particular answer, is not objectionable as leading.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 837-851; Dec. Dig. § 240.\*]

## 3. EVIDENCE (§ 471\*)—CONCLUSION OF WITNESSES.

Where witnesses, who were experienced dealers in live stock, testified that they had seen a shipment of stock, and described the injuries to the stock based on their knowledge thereof, the statements of the witnesses that some of the stock were damaged more than others, that three of the animals were badly damaged, and that the entire shipment had the appearance of being damaged to some extent, were not objectionable as the conclusions of the witnesses.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 471.\*]

## 4. EVIDENCE (§ 543½\*)—OPINION EVIDENCE—INJURY TO PERSONAL PROPERTY.

One qualified, as a dealer in live stock, to state the extent of the damage to a shipment of live stock, and the loss of same in value, in consequence of injuries received during transportation, may testify that the value of the stock had depreciated a specified per cent.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 543½.\*]

## 5. APPEAL AND ERROR (§ 1140\*)—HARMLESS ERROR—ERRONEOUS ALLOWANCE OF DAMAGES.

Where the exact amount improperly allowed by the jury in assessing damages is shown by the verdict, the error may be cured by a remittitur of the amount erroneously allowed, and the error does not necessarily require a remanding of the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4462-4478; Dec. Dig. § 1140.\*]

Appeal from District Court, Camp County; R. W. Simpson, Judge.

Action by M. L. Allen against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Conditionally affirmed.

Appellee sued appellant company for damages for injuries to a shipment of horses and mules from Pittsburg, Tex., to Corsicana, Tex., alleged to have resulted to them from negligent handling of the cars and delay in transporting the stock by the appellant. The appellant answered by general denial, and specially pleaded that the shipment was made under a contract in writing, excepting it from liability except for negligence, and providing that appellee assume the risk of watering and feeding the stock. The case was tried to a jury, and in accordance with their verdict a judgment was rendered for the appellee. The evidence substantially shows that appellee delivered to the appellant company at Pittsburg, Tex., in the early morning of October 4, 1907, 25 horses and mules for shipment to Corsicana, Tex. While en route, and near Athens, Tex., the train bearing the live stock was derailed on account of some defect in the track, but the car in which the live stock were did not entirely get off the track—only the fore trucks of the car got off. The train was delayed for some hours in clearing this wreck. The live stock were delivered to the appellee at destination, at about 12 o'clock a. m., October 6, 1907, being about 60 hours from the time of shipment. It was shown by the evidence that the stock should have arrived at their destination, by ordinary schedule time of the train, in about 12 hours. Some of the horses in the shipment were shown to have been of extra fine breeding and value. There is evidence showing that all the stock sustained injuries in the transportation, and that some of them sustained severe injuries. The evidence is sufficient to sustain the finding of the jury that the company was guilty of negligence as complained of in the petition, and that the negligence was the proximate cause of the injuries to the stock, and is sufficient to sustain the amount of damages awarded in the verdict, except as to the amount allowed for the feeding and watering of the stock. The shipment appears to have been made under a contract in writing, providing that the live stock covered by this contract were not to be delivered within any specified time, nor at any particular hour, nor for any particular market, and that the railway company was exempted from liability for loss or damages, except that arising from its negligence, and that the appellee assumed all risk of watering, feeding, and bedding the stock while in the cars or the yards or pens; and we do not think the evidence in the record, under this contract, supports any finding of insufficient watering and feeding, or denial of the privilege to do so, by the appellant to the appellee.

E. B. Perkins, Dan Upthegrove, and Glass, Estes & King, for appellant. W. R. Heath, for appellee.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

LEVY, J. (after stating the facts as above). We do not think there was error in overruling the special exceptions to the petition as complained of in the first and second assignments. The petition sufficiently alleged the damages to the live stock. Because the petition states with particularity the injuries to the bodies of the several animals, it is not demurrable on the ground that it incorrectly states the measure of damages. The statement of the particular injuries has the effect only to show the lessened market value of the animals.

There are numerous assignments of error presented to the ruling of the court on the depositions of the witnesses Donaho, Bryant, and Anderson. We do not undertake here to take up each assignment, but group them for consideration, as the groups practically present the same main questions. We have gone through the record, and in the light of all the evidence are of the opinion that there was no substantial error committed by the court in his ruling on the several objections to the evidence. By assignments Nos. 4, 5, 7, and 11 it is contended that the court erred in overruling appellant's written motion to strike out certain sentences in the written answers of these said witnesses to certain direct interrogatories set out in the assignments, upon the ground that they were not responsive to the questions, and were voluntary statements. The answers complained of had some connection with the questions. We do not think assignments Nos. 8 and 10 should be sustained. The questions were not objectionable as leading, as they only inquired into a single fact, and did not suggest a particular answer. When the depositions of these said witnesses were offered in evidence, the appellant made oral objections to certain portions of their several answers to certain interrogatories, and complaints of the ruling of the court in respect thereto. By assignments Nos. 12, 15, 16, 17, and 19 it is complained that that portion of the answers which stated that "some (of the stock) were damaged more than others," and "three of the mules were in bad condition, being very badly damaged," and "the entire bunch had the appearance of being damaged to some extent," consisted merely of the opinions and conclusions of the witnesses. The connection in which these several sentences appear is shown to have been where the witnesses were testifying that they had seen the animals, and were experienced dealers in stock, and, from their present knowledge of the animals, undertook to describe the injuries. The sentences complained of, though general by themselves, considered in connection with the further evidence about which the witnesses were testifying, were not admissible as bare conclusions, and were properly understood in their true meaning and reference. By assignments Nos. 13, 14, and 22 it

is complained that it was error to allow the witness to testify, while he was undertaking to testify as to the result of his inspection of the stock and his estimate of their damages, that "their value had been depreciated 50 per cent." He was shown to be qualified as a stock dealer to state the extent of the damage to the stock, and their loss in value in consequence of the injuries. "Such is but a short method of stating the difference in the market value of stock in the condition in which they arrived and the condition in which they would have arrived if properly transported." *Ry. Co. v. Halsell*, 35 Tex. Civ. App. 126, 80 S. W. 140. We do not think there was error in the matters presented in assignments Nos. 20, 21, 23, 24, 26, 27, 28, and 29, and they are therefore overruled.

The contention raised by assignments Nos. 30, 31, 32, 34, 35, and 36 is to the effect that the appellant was not liable for the damages for failure to sufficiently water and feed the stock, and that the issue by reason thereof, and in the evidence, was improperly submitted to the jury, and that the appellee is not entitled to recover such damages. We have come to the conclusion that in the record before us this contention should be sustained, and that there was error in this respect. The error, however, is such as can be in the record cured by a remittitur, and does not necessarily require a remanding of this case. The evidence is definite as to the amount of such damage, and by reason of the definiteness of this evidence the jury undertook to return a verdict for the specific amount shown by such evidence. The special finding of the jury is presented to us in the form of a bill of exception approved by the court, which shows their finding to be in words as follows: "The further sum of \$250 for failure to sufficiently feed and water stock." Therefore we think the amount of \$250 was improperly recovered in this case.

We have considered the other assignments of error, and think the same should be overruled.

The case was ordered reversed and remanded, unless the appellee would within 20 days enter and file a remittitur for the sum of \$250, in which event the case will be affirmed for the balance of the verdict returned, with costs of appeal against the appellee.

#### BEAUCHAMP v. COUCH et al.†

(Court of Civil Appeals of Texas. March 17, 1909. Rehearing Denied April 7, 1909.)

##### 1. CONTRACTS (§ 54\*)—CONSIDERATION.

A promise to do, forbear, or suffer, given in return for a like promise, is a consideration for an executory contract, provided the promise is not illegal or against public policy.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 233; Dec. Dig. § 54.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

**2. VENDOR AND PURCHASER (§ 315\*)—CONTRACTS—LIABILITY OF PURCHASER—BURDEN OF PROOF.**

A purchaser in a contract of sale of real estate stipulating that the vendor has sold real and personal property for a specified price, payable partly in cash and partly by notes, and fixing the time for the execution of the deed, etc., is prima facie liable on a note given and accepted as the cash payment at the time of the execution of the contract, and to escape liability he must show the vendor's refusal to perform.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 928; Dec. Dig. § 315.\*]

**3. VENDOR AND PURCHASER (§ 316\*)—CONTRACTS—LIABILITY OF PURCHASER.**

A vendor in a contract for the sale of real estate, and stipulating for \$1,000 liquidated damages for the refusal of the purchaser to perform, prepared an abstract ready for delivery, and was ready to execute the deed at the time and place fixed, but the purchaser ignored his agreement. *Held*, that the vendor was entitled to \$1,000 as liquidated damages, and therefore was entitled to judgment against the purchaser on a note for \$800 given and accepted as a part of the cash payment called for by the contract, and to retain the \$200 received from the purchaser at the time of the execution of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 932; Dec. Dig. § 316.\*]

Appeal from District Court, Kimble County; Clarence Martin, Judge.

Action by Legh Beauchamp against E. C. Couch and another. From a judgment for defendants, plaintiff appeals. Reversed and rendered.

Horace E. Wilson and M. E. Blackburn, for appellant. R. P. Conner, for appellees.

NEILL, J. This suit was brought on December 21, 1907, by Legh Beauchamp against the appellees, E. C. Couch and McD. Henderson, to recover on the following promissory note: "800.00. No. ——— Junction, Texas, August 26th, 1907. Thirty days after date, for value received, I, we, or either of us promise to pay to the order of Legh Beauchamp, eight hundred dollars at Junction, Kimble county, Texas, with 10 per cent. interest per annum from maturity until paid. And in the event default is made in the payment of this note at maturity and it is placed in the hands of an attorney for collection, or suit is brought on the same, then an additional amount of ten per cent. on the principal and interest of this note shall be added to the same as collection fees. [Signed] E. C. Couch. McD. Henderson." The allegations in plaintiff's petition were such as are usual and proper in actions of this character. The defendants answered by a general denial, and the defendant Couch by a special plea of failure of consideration, in which he alleged in connection with, and as a part of, the contract by which the plaintiff agreed to sell him 8,000 acres of land, and also certain horses and other property (the contract is, in substance, set out in our conclusions of fact); that the contract recited

a cash consideration of \$1,000 paid by defendant to plaintiff, when, in fact, the consideration paid, when the contract was made, was a check drawn by defendant for \$200 in favor of the plaintiff, which he afterwards collected, and the note sued on; that the contract required plaintiff to furnish defendant an abstract of title and execute deeds of conveyance to said land, but that the defendant never received any part of land or other property, nor did plaintiff furnish the abstract of title, nor execute and deliver the deeds of conveyance, but retained the exclusive possession of said property, and has since sold it to another party; that a portion of the 8,000 acres included plaintiff's homestead, and that he and his wife did not at the time of making the contract execute a deed to the land described therein, nor have they since, nor has defendant, received any of the rents or revenue from the property; and that the contract was never consummated, and, it being for the sale of a homestead, could not be enforced by defendant, was void for the lack of mutuality, wherefore the note was without consideration, and void; that plaintiff, by the sale of the property, rescinded the contract, and is not therefore entitled to hold the note nor the \$200 collected by him on defendant's check. The answer concluded with a prayer for the cancellation of the note and judgment against plaintiff for the \$200 collected by him on the check. The plaintiff, by a supplemental petition, denied the allegations in defendant's answer, set out the contract referred to in full, and averred that he complied with all its terms; that he had prepared an abstract of title to the land for defendant, and upon September 30, 1908, the date stipulated in the contract for the delivery of the deeds of conveyance, he and his wife went to Junction City, Kimble county, Tex.—the place designated for the delivery of the deeds—and were then and there ready and willing to convey the property to defendant Couch, but that said defendant did not meet plaintiff there nor make or tender the payments as he agreed to do by the contract, whereby he became liable under its terms to pay plaintiff the amount stipulated in the note according to its tenor and effect; that the defendant Henderson was not a party to the contract, but signed the note as an accommodation maker for the purpose of securing the same. The case was tried without a jury upon an agreed statement of facts, and judgment was rendered against plaintiff in favor of defendant Couch for \$214 (the principal and interest on the check) and a cancellation of the note decreed.

**Conclusions of Fact.**

The execution of the note sued upon and the contract referred to in the pleadings of the parties were admitted and introduced

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in evidence. So much of the contract as is necessary to be stated in order to dispose of this case is as follows:

"The State of Texas, County of Kimble.

"This contract this day entered into by and between Legh Beauchamp, of the county of Kimble, state of Texas, party of the first part, and E. C. Couch, of the county of Brown, state of Texas, party of the second part, witnesseth: The party of the first part has this day sold to the party of the second part all of his ranch situated on the North Llano river, in Kimble county, Texas, about 10 miles from the town of Junction, Texas, consisting of about 8,000 acres of land of which about 5,500 acres of land are patented lands and 1,920 school land, and also 640 acres of leased land. [Then follows the stipulation for the sale of cattle, horses, and goats on the ranch, and the description of the animals by marks and brands.] In consideration of which the party of the second part has agreed to pay the sum of nineteen thousand dollars, in the manner as follows, to wit: In cash, the sum of \$1,000.00, the receipt of which by the party of the first part is hereby acknowledged, \$9,000.00 in cash on the 30th day of September, 1907, \$2,000.00 secured by a note due 90 days after the date of the deed of conveyance, and the balance in 6 equal payments due on or before 2, 3, 4, 5, 6, and 7 years after date, respectively, all of the deferred payments to be secured by vendor's lien on the above-described land, all deferred payments bearing interest at the rate of seven per cent. per annum, payable annually, from the date of the delivery of deeds of conveyance under the terms of this contract. It is agreed that the deeded land shall be conveyed by warranty deed and that the school land shall be conveyed by deed with warranty of title except as against the state of Texas, the party of the second part assuming the payment of the unpaid part.

"State of Texas. The deed of conveyance shall be delivered not later than Sept. 30th, 1907, at the office of Wilson & Blackburn in Junction, Kimble county, Texas, at which time and place the party of the second part shall pay the sum of \$9,000.00 as herein stipulated and shall execute the notes for the deferred payments. The party of the first part shall furnish abstract of title for all of his patented lands, and he agrees to convey the same with good and sufficient title. The sum of \$1,000.00 here now paid shall be as a forfeit, and, if the party of the second part fails or refuses to comply with the terms of this contract, then the party of the first part shall be entitled to retain the same as liquidated damages for the loss or damage he may have suffered by reason of the default of the said party of the second part. But in the event the title to the aforesaid land fails to comply with the conditions of this contract then the party of the second part shall not be required to accept same and he

shall be entitled to the return of the sum of \$1,000.00 here now paid as a forfeit.

"Witness our hands this 26th day of August, 1907. [Signed] Legh Beauchamp.  
"E. C. Couch."

The contract was, on the day it was executed, duly acknowledged by both parties thereto.

The agreement by the attorneys of the parties as to the statement of facts, which was signed by them and approved by the court, is as follows:

"It is agreed between the attorneys for the parties in this cause that the following facts shall be considered the only facts proven in this cause in addition to the note sued on in this cause and the contract pleaded by plaintiff in his first supplemental petition: The contract set out in plaintiff's first supplemental petition is a copy of the contract executed by plaintiff and defendant E. C. Couch for the sale of the land therein described. That at the time of execution of said contract defendant E. C. Couch delivered to plaintiff Legh Beauchamp a check for \$200, which plaintiff collected and appropriated to his own use. That at the same time defendant E. C. Couch executed and delivered to plaintiff a promissory note for \$800 dated August 26, 1907, due 30 days after date, payable to the order of Legh Beauchamp and which note is signed by McD. Henderson as a principal with said defendant Couch, and is the note introduced in evidence in this case. That said sum of \$200 and the note for \$800 were accepted by plaintiff Legh Beauchamp as a cash payment at the time of signing said contract, and represents the sum of \$1,000 alleged to be paid in said contract. That the abstract of title as required by said contract was prepared by Horace E. Wilson prior to the 30th day of September, 1907, and was ready in the office of Wilson & Blackburn for delivery one or two days before the 30th day of September, 1907. That on the 30th day of September, 1907, plaintiff and his wife, Aurelia Beauchamp, came to the office of Wilson & Blackburn at Junction, Tex., for the purpose of making and delivering deeds of conveyance in accordance with the terms of said contract, but that said deeds were not executed. That defendant E. C. Couch was not present at Junction, Tex., but was, in fact, at his home in Brown county, Tex., on said date, and that plaintiff knew of this fact. That 200 acres of the land included in said contract of sale constituted the homestead of plaintiff Legh Beauchamp and his wife, Aurelia Beauchamp, on which they resided at the time of making said contract of sale, and on which they continued to reside and occupied as their homestead on the 30th day of September, 1907. That at no time after the execution of said contract of sale did defendant E. C. Couch offer to comply with the terms of said contract of sale, but on

the 30th day of September, 1907, there were liens affecting the title of some of the tracts of land included in said contract of sale, but not exceeding \$1,000, but that plaintiff expected to pay off said liens out of the sum of \$9,000, to be paid him on that day by defendant Couch, and that the lienholders were ready and willing to release said liens upon payment of the notes secured thereby. That plaintiff and his wife, Aurelia Beauchamp, on or about February 13, 1908, conveyed the land included in this contract of sale to C. L. Dunbar for a valuable consideration paid, and delivered possession of the same to said C. L. Dunbar. It is agreed that the defendant E. C. Couch was never in possession of any part of the property mentioned in said contract of sale, and did not receive anything from the rents, hire, and use of said property; that plaintiff Legh Beauchamp retained possession and control of the property included in said contract of sale, and received all rent and profit derived from said property."

#### Conclusions of Law.

In view of the undisputed facts, we cannot perceive upon what principle of law the judgment against plaintiff was rendered. Upon its face the written agreement between the parties shows all the elements of a valid executory contract. The competency of the parties to make the agreement is unquestioned, no fraud is alleged or indicated on the part of the plaintiff, nor breach by him of any part of the agreement shown. That there was a valid consideration for the agreement cannot be questioned. It is elementary that "a promise to do, forbear, or suffer given in return for a like promise" is a consideration for an executory contract, provided that the promise is not illegal or against public policy. No illegality in the promise of either party is suggested or intimated. Prima facie defendants are liable on the note sued on; and the burden was upon them to show such default or refusal of plaintiff to perform his promise or part of the agreement as would excuse them from performing their promise.

The evidence wholly fails to show any such default or refusal of the plaintiff to perform his part of the agreement as would excuse the defendant Couch from performing his. On the contrary, it is indisputably shown that Couch failed and refused to perform any part of his agreement. He cannot put plaintiff in default by his failure, nor be heard to say, "I never received anything of value for the note," when he failed to perform such part of the agreement as would have entitled him to receive from the plaintiff the land, cattle, horses, goats, and other property bargained for in the contract. The plaintiff had the abstract of title prepared and ready for defendant Couch, as he agreed

to do by the contract. He went with his wife to Junction City upon the day appointed for the purpose of executing and delivering to Couch the deeds to the property he had agreed to sell him. He was ready and willing to make the deeds, and his wife to join him in one to the part of the land which was their homestead upon Couch's paying him as much of the purchase money as was to be paid at the time, and executing to plaintiff his notes for the balance as agreed upon in the contract. The defendant Couch failed to meet him at the time and place when and where the executory contract was to be executed and performed by both parties; but, on the contrary, he wholly ignored his part of the agreement, and offered no reason nor excuse whatever for breaking his promise. Couch having thus defaulted, plaintiff could not be expected to, nor was he required to, execute and deliver the deeds to him; nor can either Couch or his codefendant be heard to say there was no consideration to support the note. It was taken as so much cash, in lieu of \$800 of the \$1,000 mentioned in the contract as paid, and stipulated to be taken as a forfeit, and to be retained by plaintiff as liquidated damages, in case Couch failed or refused to comply with the contract, for the loss or damages suffered by plaintiff by reason of such default. Such default was made, and according to the terms of contract plaintiff was entitled to the \$1,000 as liquidated damages. Therefore he was entitled to judgment against defendants on the note and to retain the \$200 received by him on defendant's check for the balance of the \$1,000. *Half v. O'Connor*, 14 Tex. Civ. App. 191, 37 S. W. 239; *Santa Fé Ry. Co. v. Schutz*, 37 Tex. Civ. App. 14, 83 S. W. 44; *Tobler v. Austin*, 22 Tex. Civ. App. 100, 53 S. W. 706.

Therefore the judgment of the district court is reversed and set aside, and judgment is here rendered in favor of the plaintiff (appellant) against the defendants (appellees) for the amount, principal, interest and 10 per cent. thereon, due upon the note sued on.

Reversed and rendered for appellant.

#### EL PASO & S. W. RY. CO. v. ALEXANDER.

(Court of Civil Appeals of Texas. Feb. 10, 1909. Rehearing Denied April 7, 1909.)

#### 1. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence, in an action by a servant for injuries, held to make the question of contributory negligence in tripping over some lumps of coke scattered along defendant's railroad track one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1113; Dec. Dig. § 289.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**2. MASTER AND SERVANT (§ 288\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.**

Evidence, in an action for injuries to a servant, *held* to make the question of assumption of risk of tripping over lumps of coke scattered along defendant's railroad track one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1070; Dec. Dig. § 288.\*]

**3. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—NEGLIGENCE ON PART OF MASTER—QUESTION FOR JURY.**

Evidence, in an action for injuries to a servant, *held* to make the question of the negligence of the master in allowing lumps of coke to be scattered along its railroad track one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1021; Dec. Dig. § 286.\*]

**4. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—PROXIMATE CAUSE—QUESTION FOR JURY.**

Evidence, in an action by a servant for injuries, *held* not to show, as a matter of law, that the proximate cause of his injury was his unnecessary choice of a dangerous way to perform his duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1181; Dec. Dig. § 289.\*]

**5. MASTER AND SERVANT (§ 276\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.**

Evidence, in an action by a servant for injuries, *held* to show that the act he was doing at the time of his injury was a necessary one and done in the discharge of his duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 952; Dec. Dig. § 276.\*]

**6. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

Evidence, in an action by a switchman for injuries received while attempting to open the knuckle on one of defendant's cars, *held* not to show, as a matter of law, that the method adopted by him to open the knuckle constituted contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1125; Dec. Dig. § 289.\*]

**7. MASTER AND SERVANT (§ 288\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.**

Evidence, in such action, *held* not to show, as a matter of law, that he assumed the risk of being injured by attempting to open the knuckle by hand without using the levers placed on the car for that purpose.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1071; Dec. Dig. § 288.\*]

**8. MASTER AND SERVANT (§ 226\*)—INJURIES TO SERVANT—RISKS ASSUMED.**

A servant does not assume the risk of his master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 659; Dec. Dig. § 226.\*]

**9. MASTER AND SERVANT (§ 11\*)—INJURIES TO SERVANT—RISKS ASSUMED—STATUTORY PROVISIONS.**

Acts 1905, p. 386, c. 163, prescribing when the defense of assumed risk shall be available, is constitutional.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 11.\*]

**10. MASTER AND SERVANT (§ 296\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

In an action against a railroad company by a switchman for injuries received while at-

tempting to open the knuckle of the car by attempting to mount the car and open it with his hand, an instruction requested by defendant that if the jury found that there were safe means provided for opening the knuckle, and that the act of plaintiff in mounting the car or attempting to mount it to open it with his hand was necessarily dangerous, to find for defendant, although they might believe that other employees had done or undertaken to do the same act, was correctly refused, as the jury could not have found from the evidence that the act was necessarily and inherently dangerous and at the same time that other employees had safely done the work in that manner, and the instruction would also have directed a verdict regardless of proximate or contributing cause of the accident, which the jury might have believed was not due to plaintiff's act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1189; Dec. Dig. § 296.\*]

**11. MASTER AND SERVANT (§ 296\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

An instruction that if the jury believed from the evidence that plaintiff was injured while attempting to mount a moving car for the purpose of opening a knuckle, and that the way in which plaintiff so attempted to open the knuckle was a "very hazardous way," and that the knuckle might have been opened in another way, which would not have been hazardous, and that plaintiff in exercising ordinary care should have chosen the less dangerous way, but failed to do so and chose the more dangerous way, and his having done so contributed to bring about his injury, he cannot recover, was defective only in the use of the words "very hazardous" instead of "hazardous."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1189; Dec. Dig. § 296.\*]

**12. MASTER AND SERVANT (§ 296\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—INSTRUCTIONS.**

In an action by a switchman for injuries while attempting to open the knuckle of a car, it was shown that while the car was in motion he attempted to mount the car and tripped over some coke scattered by the side of the track. *Held*, that an instruction requested by defendant that if the jury believed that plaintiff, while the car was moving, attempted to put his foot on the end of the brake beam, intending to climb around the corner of the car to get a position on the brake beam, and that such act on his part was negligence, they should find for defendant, was properly refused, unless modified by requiring the jury to further find that such negligence proximately contributed to the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1193; Dec. Dig. § 296.\*]

**13. MASTER AND SERVANT (§ 296\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

An instruction requested by defendant that, before the jury could find in favor of the plaintiff, they must believe from the evidence that it was his duty to mount the car at the southwest corner of the same to open the knuckle at the time he says he did, was properly refused, because the charge confounded the duty sought to be performed with the means of performing it, and it was not necessary to plaintiff's recovery that the jury should have found that it was his duty to do the work exactly as he undertook to do it, but whether in attempting to do it in a certain manner he was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1189; Dec. Dig. § 296.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



**14. MASTER AND SERVANT (§ 203\*)—INJURIES TO SERVANT—NEGLIGENCE—INSTRUCTIONS.**

A requested instruction of defendant that the rule which requires a master to furnish his servant with a reasonably safe place in which to work does not apply to those places which are made dangerous by the very act in which the servant was engaged, and that if the jury believe that at the time of his injury plaintiff was engaged as a switchman, and that, even though defendant exercised ordinary care to keep its yards in a reasonably safe condition, in switching cars it was usual and customary for coke contained in said cars to break and fall onto the grounds of said yards, and if they believe that the coke upon which plaintiff alleges he fell was on the ground by reason of having fallen from a car being switched in said yards and without negligence on the part of defendant, that they should find for defendant, was properly refused, as excluding the issue of negligence in allowing it to remain there, and as being sufficiently presented in the court's charge that if they believe that plaintiff's injuries were caused by the presence of pieces of coke along the track, but if they believe the presence of such coke, if any, was not due to any negligence on the part of defendant, their verdict must be for defendant, and that if they believe that permitting the pieces of coke to be in the yards was not negligence, under all the surrounding facts and circumstances, that plaintiff assumed the risk of danger and cannot recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1151; Dec. Dig. § 293.\*]

**15. MASTER AND SERVANT (§ 203\*)—INJURIES TO SERVANT—NEGLIGENCE—INSTRUCTIONS.**

An instruction that if what plaintiff attempted to do was unnecessarily dangerous, and if the place was reasonably safe for doing the work, notwithstanding the presence of the coke there, the verdict should be for defendant, was properly refused, where the court charged that if defendant had exercised ordinary care to keep the place in a reasonably safe condition, to find for defendant, even though the jury believed that said place, by reason of the coke therein, was not in a reasonably safe condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1151; Dec. Dig. § 293.\*]

**16. MASTER AND SERVANT (§ 205\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—INSTRUCTIONS.**

An instruction that if the jury believed from the evidence that plaintiff was injured by reason of the presence of the coke in defendant's yard, and believed that the falling of the coke upon the yard and the stepping on the coke by plaintiff was one of the ordinary risks attending his work, that they should find for defendant, was properly refused, where there was evidence of negligence in allowing the coke to remain on the ground.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1179; Dec. Dig. § 295.\*]

**17. MASTER AND SERVANT (§ 295\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—INSTRUCTIONS.**

A requested instruction that if the jury believed that the presence of the coke where plaintiff was injured was one of the ordinary risks of defendant's work, notwithstanding the exercise of ordinary care to keep the place reasonably safe, that they could not regard the presence of the coke as a defect or danger within the meaning of the court's general charge, such as would relieve the plaintiff from having assumed the risk, was properly refused, where the court charged that if defendant exercised

ordinary care to keep the place safe, to find for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1171; Dec. Dig. § 293.\*]

**18. TRIAL (§ 260\*)—REQUESTED INSTRUCTIONS—INSTRUCTIONS COVERED BY OTHERS GIVEN.**

Requested instructions which are covered by other instructions given are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 631; Dec. Dig. § 260.\*]

**19. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—VIOLATION OF RULE—QUESTIONS FOR JURY.**

Whether the violation by a servant of a rule of the master is contributory negligence is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1127; Dec. Dig. § 289.\*]

**20. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—VIOLATION OF RULE—QUESTION FOR JURY.**

The violation of a rule as a defense in an action by a servant for injuries must be submitted to the jury, if there is any evidence tending to excuse its nonobservance, or if the violation of the rule would be consistent with ordinary care, and the issue should always be submitted unless the violation of the rule is palpably negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1127; Dec. Dig. § 289.\*]

**21. MASTER AND SERVANT (§ 243\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—VIOLATION OF RULE.**

A rule of a railroad company that "employees are warned not to attempt to get on the end of a car as it approaches them" has no application, as affecting contributory negligence, to an attempt to get up the side of a moving car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 771; Dec. Dig. § 243.\*]

**22. MASTER AND SERVANT (§ 296\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

In an action by a switchman for injuries received while attempting to mount a moving car, a rule of defendant was introduced warning employees not to attempt to get on the end of an approaching car or to jump on or off trains in rapid motion, and the court instructed that if the jury found that plaintiff attempted to get on the end of the car, in violation of the rule, that he would have violated the rule, and the jury should so find, but if, after the end of the car had passed him, he attempted to get upon the side of the car, then his act would not be within the rule, and that, even if he violated the rule in attempting to get on the car, it was still for them to determine whether such violation was negligence, and that if they believed that, in attempting to get upon the car, he was violating the rule, it was their duty to determine whether he was guilty of negligence. *Held*, that the charge was not erroneous in asserting that plaintiff in attempting to get upon the side of the car was not attempting to jump on a train in rapid motion, as the charge had reference only to that portion of the rule with reference to getting upon the end of a car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1190; Dec. Dig. § 296.\*]

**23. MASTER AND SERVANT (§ 204\*)—INJURIES TO SERVANT—ASSUMED RISK—STATUTORY PROVISIONS—"DEFECT IN PREMISES."**

Plaintiff, who was a switchman, was injured by stumbling over coke scattered along defendant's track while he was attempting to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mount a moving car. The coke did not fall from the car that plaintiff was attempting to mount, but from other cars, and had been lying on the ground for several hours. It was defendant's practice to keep the yard clear of coke. *Held*, that the presence of the coke was a defect in the premises within the meaning of Acts 1905, p. 386, c. 163, providing that the defense of assumed risk shall not be available in actions against a railroad company, where a person of ordinary care would have continued in the service with the knowledge of the defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 544; Dec. Dig. § 204.\*]

For other definitions, see Words and Phrases, vol. 2, p. 1933.]

**24. MASTER AND SERVANT (§ 204\*)—INJURIES TO SERVANT—ASSUMED RISK—STATUTORY PROVISIONS.**

In an action by a switchman for injuries received while attempting to mount a moving car by stumbling over coke scattered along defendant's track, there was no evidence showing defendant's knowledge of the presence of the coke. *Held*, that it was error to instruct that, "where the servant knows of a defect or danger arising out of the negligence of the railway or its servants, he does not assume the risk from such defect and danger, where the railway or his superior in the work also knew of such defect within a time reasonably sufficient to have remedied the same before the accident occurred," as the knowledge specified in Acts 1905, p. 386, c. 163, providing that the defense of assumed risk shall not be available where an employé of a railway company notifies the employer of the danger or the employer knows of the defect, is actual knowledge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 544; Dec. Dig. § 204.\*]

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by Charles A. Alexander against the El Paso & Southwestern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Patterson, Buckler & Woodson, for appellant. T. A. Falvey and P. H. Clarke, for appellee.

JAMES, C. J. Alexander, an employé, sued to recover damages for the loss of his right arm and leg, alleging that it was his duty, among other things, to open and close switches in the yard, to open the knuckles of any coupler on any car so that the same would automatically couple to another car by impact, and, in the performance of such services, it was usual and proper and the duty of plaintiff to mount and ascend said cars while in motion; that upon this occasion he was acting with proper care in attempting to mount a moving car to open a knuckle that was closed, and could and would have succeeded in mounting same with safety, but for the negligence of defendant in permitting and having lumps of coke so near the track as to endanger plaintiff in the course of said work, the same being an obstruction, and, coming in contact with plaintiff's foot while he was in the act of mounting the car in the usual way and for said purpose, caused plain-

tiff to be thrown under the cars. There was a verdict for plaintiff for \$12,000.

The first assignment of error is that the court refused to give a peremptory instruction for the defendant.

A number of propositions are arrayed under this assignment. The first is that, as plaintiff testified the car was going six or eight miles an hour, and by running with it and grabbing around the corner of the car a rod on the front end of the same, and by placing his right foot on the end of a six-inch brake beam in front of the wheels, intending to climb around the corner of the car in front and open the knuckle with his hand, and while doing this received his injury, and it appears that the car was supplied on the opposite corner with lever and appliance as required by the United States safety appliance act, plaintiff was guilty of contributory negligence, and assumed the risk, as a matter of law.

It was a fact that there was a lever on the opposite or north side for use in opening the knuckle. It is also a fact that plaintiff was attempting to do this work on the south of the car when he was hurt. Plaintiff's testimony was in substance that he had received a signal from the foreman that this cut of cars was going to No. 4 switch, and consequently he would have to throw the switch No. 4 and line the track for No. 4; that in complying he went over to No. 4 switch and to the south side thereof, as that was the side he would have to be on to throw the switch; and after walking a few steps this cut of cars came up to him, and when about abreast of him he noticed that the knuckle on the front car was closed, and it was his duty to open it. He did not have time to cross over to the other side where the lever was, the car being 20 or 30 feet from switch No. 4, and what he was going to do he had to do very quick. "I would have to mount the car, and to open switch No. 4. I would have to dismount from the car—I would have both to get upon the car and then drop off of it in order to open that switch No. 4." As he had hold of the grabiron, which runs from corner to corner in front of the car and running with it, and was about to, or, as he says, in a way to, place his foot on the brake beam, when he was tripped by stepping on some coke that was on the ground there, which plaintiff and other witnesses said was about a bushel of coke scattered along there. Plaintiff had not noticed this coke. Another of defendant's witnesses stated, as to the usual way of opening a knuckle, that a knuckle would be opened by the use of the lever if one was on that side; if one was on the other side, it is usually done by catching the grabiron and stepping on the brake beam. Another stated that a man on the south side could not open a knuckle on the other side by the lever. If he was on the south side, he would

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have to pass in front of the moving cars to get to the north side; if he was going to throw switch 4, he would necessarily have to be on the south side, and it would be impossible for him to throw the lever under those circumstances to open the knuckle, unless he ran in front of the moving car. If he were abreast of the car, it would not be customary or usual for him to run in front of it. Another stated: "If a man saw that knuckle closed, and he was on the south side and wanted to open it before he reached switch 4, I know what would have been the usual and customary way, under the circumstances, to have opened it. It have seen it done a hundred different times. I have done it myself. The man on that side—no lever on that side of the car—if he saw a place to get on that brake beam, he would get on that brake beam by getting hold of the grabiron, putting his foot on the brake beam, and reach over and open the knuckle with his left hand." This was the testimony of the foreman of the yard crew. He also stated: "If, when these cars got abreast of him, and he was on the south side and the cars were moving towards switch No. 4, according to his instructions, and the knuckle was closed, if he saw a chance to open it, he ought to open it if there a chance to do it, either him or the long-feldman—either one of them." It appears that the coke dropped from coke cars in the yards. The witness Roe and others testified that as a rule there was coke scattered along the side of the tracks in the yards. "I have seen it scattered on other days occasionally during all the time we were working in the yard. Myself and other officers had been frequently in the yard. \* \* \* I know that they cleaned the yard during the day. Whenever a yard was not cleaned during the day I would get after them. \* \* \* It was the practice to have one man at least in each of these two yards to clean up the coal and coke, and where it was too much for one man to clean we used the entire gang to clean it up." A witness saw this coke there at 8 or 9 o'clock that morning, and the accident occurred about noon. It was not established that it was an ordinary incident for a bushel of coke to drop from the cars. *Ry. v. Pitts* (Tex. Civ. App.) 42 S. W. 255.

We think it unnecessary to state more from the facts. A statement of them is all that is necessary to show that the proposition cannot be sustained. The above testimony precluded the assumption by the court, as a matter of law, of negligence on the part of plaintiff, or of the assumption of the risk of the unsafe premises, as a matter of law, arising from the presence of lumps of coke in his way which caused him to fall. The same facts were sufficient to make the negligence of the defendant, in permitting the coke to be there under the circumstances, a question for the jury. This disposes of the

sixth, seventh, and eighth propositions under the first assignment.

The fifth proposition is that the proximate cause of plaintiff's injury, as a matter of law, was his unnecessary choice of a dangerous way of doing what he tried to do, and not the presence of the coke on the ground. The fourth is that, having unnecessarily chosen the dangerous way of doing what could have been done in a safe way, plaintiff was, as a matter of law, not entitled to recover. This is also the substance of the second proposition. All these propositions are refuted by the presence of the above facts.

The third proposition is that the car being equipped with the lever for opening the knuckle as required by the act of Congress (safety appliance act) Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), and the car being at that time engaged in the transportation of interstate commerce, it was plaintiff's duty, if he desired to open the knuckle, to use the lever, and, being injured in an unnecessary attempt to open the knuckle without the use of the lever, the court should have instructed a verdict for the defendant. The facts above stated would show that the act he was engaged in doing was a necessary one, and one in the discharge of his duty under the circumstances.

What is practically the same as said third proposition is the subject of the second assignment of error, the propositions being as here copied:

"(1) The act of Congress of March 2, 1893 (safety appliance act), imposing the duty upon carriers to equip their cars engaged in moving interstate commerce with couplers which can be uncoupled without the necessity of going in front of or between moving cars, necessarily imposes upon the servants of the carrier the correlative duty of using such equipment and of refraining from going in front of or between moving cars; and the car which plaintiff alleges ran over him being at the time engaged in interstate commerce, and being equipped with the safety appliances required by said act of Congress, this special charge stated the law as applicable to the facts of this case, and the court erred in refusing it.

"(2) The evidence in this case having shown without dispute that the car which injured plaintiff was, at the time, engaged in interstate commerce, and that the coupling levers required by the act of Congress known as the 'Safety Appliance Act' were at the time on the car, and at the time were in good condition, and that the knuckle which plaintiff alleges he was attempting to open could have been opened easily by lifting the lever on the northwest corner of said moving car and without going in front of the moving car, the plaintiff in attempting to get and hang upon said moving car for the purpose of opening said knuckle with his hand was

gulty of contributory negligence as a matter of law; and this special charge should have been given.

"(3) Plaintiff, by attempting to open the knuckle on the car engaged in transporting interstate commerce, in the manner he did, without necessity for so doing, assumed the risk of being injured, and the court should have so charged the jury as requested in said special charge No. 1."

We overrule these propositions in view of what has been stated. The third, fourth, fifth, and sixth assignments are to the same effect, and are disposed of the same way. These assignments are all based upon the idea that, under the evidence, and as a matter of law, plaintiff was guilty of contributory negligence in doing what he did, and assumed the risk of being injured while attempting to get upon the car for the purpose of opening the knuckle, there being an appliance provided for that purpose on the other side. We cannot agree with these views. A correct view to take of the matter would be that plaintiff was not injured by his effort to get upon the brake beam at the corner of the car and to reach over to open the knuckle, and that he would have accomplished his purpose with safety, had it not been for the presence of the coke under his feet. The foreman of the yard crew testified that, under the circumstances plaintiff was in at the time, the way to do the work was as plaintiff attempted to do it, and that he had seen it done a hundred times and had done it himself. Plaintiff was on the south side of the track, where it was necessary for him to be in order to attend to the switch, and on account of the speed of the cars and the distance to the switch it was not practicable for him to perform the duty of opening the knuckle when he noticed that it was closed, without doing it from the side he was on. Under these circumstances it was not for the court, but for the jury, to decide whether or not he was guilty of negligence. And they were also authorized to find that the only danger he encountered in going at it as he did was occasioned by the presence of the coke in his way; and it is too well settled to require discussion that he did not have to anticipate and assume risks introduced by his master's negligence.

The seventh and eighth assignments challenge the constitutionality of section 1 of the act of the Legislature of 1905, entitled "An act to prescribe when the defense of assumed risk shall and shall not be available," etc., being chapter 163, p. 386, of the Acts of 1905, and also the constitutionality of the entire act. We overrule these assignments.

The ninth assignment complains of the refusal of a charge in substance that if the jury found that there were safe means provided for opening the coupler, and that the act of plaintiff in mounting the car or attempting to mount it to open it with his hand

was necessarily and inherently dangerous, to find for the defendant, although they might believe that other employes had done or undertaken to do the same act. Under the evidence the jury could not have found that the act was necessarily and inherently dangerous, and at the same time have found that other employes had frequently safely done the work in that manner. We regard the requested charge objectionable in another respect, which is that it would have directed a verdict regardless of proximate or contributing cause of the accident, which the jury might have believed was not due to plaintiff's act, or any danger involved in that act, but solely to the presence of the coke which plaintiff stumbled on.

What we think was a more correct charge in this regard is the one given by the court and complained of by the tenth and eleventh assignments. We copy it: "You are charged that if you believe from the evidence that plaintiff was injured while attempting to mount a moving car for the purpose of opening a knuckle on the car, and you believe that the way in which plaintiff so attempted to mount and open the knuckle was a very hazardous way, and you believe that the knuckle might have been opened in another way or in other ways which would not have been hazardous but would have been safe to the plaintiff, and you believe from the evidence that plaintiff, in exercising ordinary care for his own safety, should have chosen the less dangerous way, but failed to do so and chose the more dangerous way, and his having done so contributed to bring about his injury, then and in that event he cannot recover, and your verdict should be for the defendant." This charge was not subject to the criticisms made to it under said assignments tenth and eleventh. But we think the use of the words "very hazardous" instead of "hazardous" was a defect in this charge.

The twelfth is that the court should have given the following charge: "If you believe from the evidence that plaintiff, while the car was moving, attempted to put his foot on the end of the brake beam intending to climb around the corner of the car to get a position on the brake beam, and you believe that such act on his part was negligence, you will find for defendant." Under the evidence in this case it would not have been proper to give the above, unless the jury were required to further find that such negligence proximately contributed to the injury. The court in the ninth paragraph of the charge stated: "Therefore, if you believe from the evidence that plaintiff attempted to get upon said car while the same was moving for the purpose of opening the knuckle with his hand, and as the end of the car passed him he caught hold of the grabiron on the end of said car, intending to step upon the brake beam and take a position in front of said car and open said knuckle, and that in attempting to mount

said car, while the same was moving, in the manner he did, he was guilty of contributory negligence, then and in that event your verdict will be for the defendant company." The charge defined contributory negligence to mean "some negligent act or omission on the part of plaintiff which, concurring or co-operating with some negligent act or omission on the part of defendant, is the proximate cause of the injury complained of."

The thirteenth is that the court should have given this charge: "Before you can find in favor of the plaintiff, you must believe from the evidence that it was his duty to mount the car at the southwest corner of the same to open the knuckle at the time he says he did." This charge would have made the case depend on a false issue. As far as plaintiff's duty concerned the case, he being an employé, the only question was: Was he engaged at the time in the performance of the work to which his employment related? This the testimony supported. The manner in which he undertook to perform the work (the opening of the knuckle) raised a question of negligence, and, if this question of negligence was submitted properly, it was all that defendant was entitled to. The requested charge confounded the duty sought to be performed with the means of performing it. It was not necessary to plaintiff's recovery that the jury should have found that it was his duty to do the work exactly as he undertook to do it, but whether or not, in attempting to do it in a certain manner, he was negligent, etc.

The fourteenth complains of the refusal of this charge: "You are charged that the rule of law which requires a master to furnish his servant with a reasonably safe place in which to work does not apply to those places which are made dangerous by the very act in which the servant is engaged, and therefore if you believe from the evidence that at the time of his injury the plaintiff was engaged as a switchman in defendant's yards, and if you believe from the evidence that even though the defendant exercised ordinary care to keep its yards in reasonably safe condition, that in switching cars in said yards it was usual and customary for coke contained in said cars so being switched to break and fall from or out of said cars onto the grounds of said yards, and if you further believe that the coke upon which the plaintiff alleges he fell was on the ground of said yards by reason of having fallen from a car being switched in said yards and without negligence on the part of the defendant, then your verdict must be for the defendant." This was sufficiently presented in the court's charge. It stated: "Therefore if you believe from the evidence that plaintiff's injuries were caused by the presence of a piece or pieces of coke along said track as alleged by him, but if you believe that the presence of a piece or pieces of coke, if any, was not due to any

negligence on the part of defendant, then and in that event your verdict must be for the defendant." Also: "If you believe from the evidence that the permitting of pieces of coke to be in the yards, as the same is alleged to have been by plaintiff, was not negligence on the part of defendant under all the surrounding facts and circumstances, then you are instructed that the plaintiff would have assumed the risk of danger to himself and injuries which he might receive by reason of said coke being so in the yards, and in that case cannot recover, as the plaintiff assumed the risk of all dangers not due to negligence on the part of the company or its servants." In so far, therefore, as defendant's being entitled to a verdict if not guilty of negligence itself, the charges given were clear and emphatic. The requested charge now in question was designed for something more, which was to have the jury told that inasmuch as plaintiff was a switchman in the yards, if the coke which he says tripped him had dropped there from cars which had been switched in the yards, and this dropping of coke was usual and customary, and not negligence on the part of defendant, then to find for defendant. This, it seems to us, would have excluded the issue of negligence on the part of defendant in allowing it to remain there.

The fifteenth complains of the refusal of this charge: "You are instructed that it was the duty of the defendant to exercise ordinary care to provide a reasonably safe place for plaintiff to do his work, having regard to the ordinary way in which his work was to be performed, and the defendant was under no obligation in keeping the yard mentioned in the evidence, to anticipate dangers that might arise from an employé placing himself in an unnecessarily dangerous position, or attempting to do an unnecessarily dangerous act; and if you believe from the evidence that there was coke on the ground at the place where plaintiff says he was injured, and that notwithstanding its presence there the place was reasonably safe for the doing of the work ordinarily done there, and you believe that the plaintiff attempted to mount the car mentioned in the evidence to open the knuckle of the coupler, and that his attempt to mount the car to open the coupler in the way, at the place, and for the purpose he did, was unnecessarily dangerous, you will return a verdict for the defendant." The substance of what would have been submitted, if the court had given the above charge, was if what plaintiff attempted to do was unnecessarily dangerous, and if the place was reasonably safe for doing the work, notwithstanding the presence of the coke there, the verdict should be for defendant. It seems to us that a finding that the place was reasonably safe would have been enough, without anything more. And we find that the court charged the jury in direct terms

that if defendant had exercised ordinary care to keep the place in a reasonably safe condition, to find for defendant, even though they believed that said place was not, by reason of the coke therein, in a reasonably safe condition. As the verdict was for plaintiff, the jury might reasonably be said to have found that the place was not in a reasonably safe condition.

The sixteenth is that the court erred in refusing to charge: "That even though you may believe from the evidence that the plaintiff was injured by reason of the presence of coke in the yard of defendant, yet if you believe from the evidence that the falling of the coke upon the yard, and stepping on coke engaged as plaintiff was, was one of the ordinary risks attending the work about which he was engaged, you will find for defendant."

The seventeenth is as follows: "The court erred in refusing to give to the jury defendant's special charge No. 10, which was as follows: 'If you believe from the evidence that the presence of pieces of coke at the place where plaintiff was injured was one of the ordinary risks attending the doing of the defendant's work, notwithstanding the exercise of ordinary care (if you believe such care was exercised) to keep the place reasonably safe, you could not regard the presence of coke as a defect or danger in the meaning of the court's general charge, such as would relieve the plaintiff from having assumed the risk, but you should regard the presence of coke as one of the ordinary risks assumed by plaintiff.'"

The latter of these instructions amounted to nothing more than a charge that if defendant exercised ordinary care to keep the place safe to find for defendant, and this is what the court told the jury in terms. As to the former charge, we think it ignored the evidence tending to show negligence in allowing this coke to remain on the ground.

The eighteenth complains of the refusal to give this charge: "You are charged that under the law the railroad company is not the insurer of the safety of its employes; and, before you can find a verdict in this case in favor of the plaintiff, you must find from a preponderance of the evidence that the coke on account of which plaintiff alleges he lost his footing was where it was at the time of the accident on account of the failure on the part of the defendant to exercise ordinary care; and you are further charged that the burden of proving the want of such ordinary care is upon the plaintiff." The court charged that the burden was upon plaintiff to establish all the facts necessary to a recovery by a preponderance of the evidence. All the conditions submitted by the court required the findings to be from the evidence. Where there is evidence on both sides concerning a fact, this form of submission is ordinarily sufficient, and is especially so where the jury are told that the facts nec-

essary for plaintiff to prove must be established by a preponderance of the evidence. This need not be constantly repeated. The court also, in the charge, told the jury that defendant was not an insurer of the safety of its employes. Section 7 of the charge required the jury to find from the preponderance of the evidence that plaintiff was caused to stumble by his stepping upon a piece or pieces of coke, and that such coke was there on account of the negligence of the defendant, etc., in order to find for plaintiff. We think everything in the requested charge that was proper to be given was in the general charge.

The assignments 19 to 22 deal with the rulings of the court in reference to defendant's rule No. 306, which was: "Employees are warned not to attempt to get on (the front or rear of an engine or on) the end of a car as it approaches them or to jump on or off trains (or engines) in rapid motion (or to go between cars in motion to uncouple them) or open, close or arrange knuckles or couplers, these and all similar acts are forbidden." The portions in parentheses represent what was not allowed in evidence.

In regard to these assignments we hold:

First (nineteenth assignment). The portion of the rule referring to going between cars did not apply to the circumstances of this case.

Second (twentieth assignment). The undisputed evidence did not show that plaintiff was violating a rule.

Third (twenty-first assignment). This complains of the tenth paragraph of the charge, the substance of which was that if from the evidence the jury found that plaintiff attempted to get on the end of the car in violation of the rule as it approached him, then in doing so he would have violated the rule, and they should so find; but if after the end of the car had passed him and he attempted to get up on the side of the car, intending thereafter to place himself on the end of the car to open the knuckle, that his act would not be within the purview of the rule, or in violation thereof. The court then proceeded to say that, if they found that plaintiff violated the rule in getting upon or in attempting to get upon the car, it was still a question for them to determine whether or not such violation was negligence and contributed to bring about plaintiff's injury "and if you believe from the evidence, in getting upon or in attempting to get upon said car, he got upon or attempted to get upon the side of same, not in violation of said rule, it is your duty to determine whether or not, in so getting upon or in attempting to get upon said car, he was guilty of negligence, and you will determine from the evidence under all the surrounding circumstances bearing upon the issues as to whether or not the mounting or attempted mounting of said car in the way plaintiff did,

whether in violation of said rule or not, was negligence on his part and contributed to bring about his injury, and, if you believe it was negligence so contributing, your verdict will be for the defendant." It is now well settled in this state that the violation of a rule is not negligence per se. And the violation of a rule as constituting a defense must be submitted to the jury, if there is a phase of the case in the evidence which would tend to excuse the servant from observing it, or the act would be consistent with ordinary care. And such issue should always be submitted unless the act done in violation of the rule is palpably negligent. *Ry. v. Adams*, 94 Tex. 100, 58 S. W. 831. The portion of the rule which the above charge has reference to, viz., "Employees are warned not to attempt to get on the end of a car as it approaches them," might or might not be found to apply to the evidence in this case, and it clearly has no application except where the employee attempted to mount the end of an approaching car. It had no application to an attempt to get up the side of a car. The court left it to the jury to determine whether or not plaintiff attempted to get upon the end of the car, or upon the side of the car, and correctly told them that the former would be a violation of the rule and the latter not. But the ultimate test was the question of negligence in what plaintiff did—whether his act was in violation of the rule or not—and the jury must have found, under this charge, that, under all the facts and circumstances of the case, the act was not negligent.

In this connection appellant claims that the paragraph of the charge under consideration was erroneous in assuming that plaintiff, in attempting to get upon the side of the car, was not attempting to jump on a train in rapid motion, which was also prohibited by the rule. The paragraph had express reference only to that portion of the rule which says, "Employees are warned not to attempt to get upon the end of a car as it approaches them," and to nothing else. It did not mention the matter of jumping "on or off trains in rapid motion." Nor do we find where the court charged, or was asked to charge, on this portion of the rule. That portion of the rule was a part of the evidence which the jury had before them in determining the ultimate issue, viz., Was plaintiff guilty of negligence in doing what he did on this occasion? There was a general charge requested by defendant to the effect that plaintiff violated the rule No. 306, and therefore to find for defendant, but from what has been stated it would not have been proper to give it.

Fourth (twenty-second assignment). The charge was erroneous, appellant says (because there was nothing in the evidence to indicate any excuse for the violation of the rule), in charging that if it was violated by an attempt to get on the end of the car,

still it was for the jury to determine whether or not the violation of it was negligence and contributed to plaintiff's injury. It is contended that, if the rule was violated, the evidence was such as made it necessary for the court to charge that he was guilty of negligence as a matter of law; and also contended that such violation necessarily contributed to the bringing about of the injury. The rule was violated, of course, if plaintiff attempted to get on the end of this car as distinguished from the side of the car. The court so told the jury. It is doubtful that there was any evidence that plaintiff attempted to get upon the end of the car, in the meaning of the rule, which we think meant the front of the car. All the testimony seems to indicate that his attempt was to get upon the car on the brake beam on the side, and if this is so, the charge was favorable to defendant. However, in any event, the issues of plaintiff's negligence and of it being the proximate cause or contributing to his injury were matters which the court, under the testimony, could not properly have assumed.

The twenty-third assignment, complaining of the fourth paragraph of the charge, presents this proposition: "As the evidence shows that the coke on which plaintiff says he stepped was in defendant's yard as a consequence of the ordinary movement and switching of cars loaded with coke in the yard, and was a mere temporary and transitory condition, arising naturally out of the very business of switching coke cars in which plaintiff was engaged, the presence of the said coke was not a defect within the meaning of said chapter 163 of the Acts of the Twenty-Ninth Legislature of Texas." Plaintiff was not engaged at the time in working with coke cars from which the coke in question fell; the car being switched was a furniture car. The testimony shows, however, that coke cars were handled in the yard, and that coke would drop from them in switching. But it was the practice to keep the yard clear of coke. The coke in question, about a bushel in quantity, was shown to have been there three or four hours at least. The presence of coke left lying on the ground was undoubtedly a defect in the premises within the meaning of the act.

The twenty-fourth assignment complains of said paragraph in not only considering the presence of the coke a defect, but in charging that, "where the servant knows of a defect and danger arising out of the negligence of the railway or its servants, he does not assume the risk from such defect and danger, where the railway or his superior in the work also knew of such defect within a time reasonably sufficient to have remedied the same before the accident occurred." We may here state that the court in another part of its charge defined correctly what it meant by the word "superior,"

which answers one of appellant's propositions. But we see no answer to the proposition that there was no evidence that the employer, or any one intrusted by the employer with authority to remove or cause to be removed the coke, had knowledge of the presence of the coke upon which plaintiff stumbled. We find that the paragraph No. 11½ of the charge complained of by the twenty-sixth assignment, which directly submits the issue of assumed risk, embodies the same mistake. The defense of assumed risk was not properly submitted when the jury were charged that they must believe, among other things, that neither the company nor the superior knew of the presence of the coke at said place, when the evidence failed to show that either had such knowledge. The statute of 1905, on "Assumed Risk," where it speaks of the employer's or superior's knowledge of the defect and danger, means actual knowledge.

The same matter is referred to by the twenty-fifth assignment of error.

The twenty-seventh is overruled. *Kansas City Con. Smelting & Refining Co. v. Taylor* (Tex. Civ. App.) 107 S. W. 893.

The twenty-eighth is also overruled. Reversed and remanded.

#### INTERNATIONAL & G. N. R. CO. v. TINON et al.†

(Court of Civil Appeals of Texas. March 4, 1909. Rehearing Denied April 1, 1909.)

##### 1. RAILROADS (§ 350\*)—ACCIDENTS AT CROSSINGS—DUTY TO STOP, LOOK, AND LISTEN—QUESTION FOR JURY.

The failure of a person approaching a railway crossing to stop, look, and listen is not negligence as matter of law.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1169-1176; Dec. Dig. § 350.\*]

##### 2. NEGLIGENCE (§ 136\*)—CONTRIBUTORY NEGLIGENCE—ACTIONS—QUESTIONS FOR JURY.

If reasonable men might fairly differ whether, under the existing conditions, decedent acted as an ordinarily prudent person would have acted, he cannot be held negligent as matter of law.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 333-346; Dec. Dig. § 136.\*]

##### 3. RAILROADS (§ 350\*)—ACCIDENTS AT CROSSINGS—ACTIONS—QUESTION FOR JURY—NEGLECT.

In an action for the death of a person at a railway crossing, whether decedent was negligent in going upon the crossing under the circumstances held under the evidence for the jury.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 350.\*]

##### 4. RAILROADS (§ 350\*)—ACCIDENTS AT CROSSINGS—ACTIONS—QUESTIONS FOR JURY—DISCOVERED PERIL.

In an action for the death of a person killed by a train at a crossing, evidence held to justify the submission of the issue whether decedent's danger was discovered by the fireman in time to have averted the injury with the means at hand.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 350.\*]

##### 5. EVIDENCE (§ 590\*)—WEIGHT AND SUFFICIENCY—CREDIBILITY OF WITNESSES.

In an action for the death of a person killed by a train at a crossing, the jury in determining the question of discovered peril could disbelieve testimony of the fireman and engineer that the fireman was busy firing the engine, and believe the testimony of decedent's sister, who saw the accident, that a man was in the window on the fireman's side of the cab, and infer therefrom that the man was the fireman.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 590.\*]

##### 6. RAILROADS (§ 348\*)—ACCIDENTS AT CROSSINGS—ACTIONS—EVIDENCE—DISCOVERED PERIL.

In an action for the death of a person killed by a train at a crossing, evidence held to support findings that the fireman discovered decedent's peril in time, that he might by the means at hand, and with regard to the duty owed the railroad company and the persons on the train, have averted the accident, and failed to use such means.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 348.\*]

Appeal from District Court, Hays County; L. W. Moore, Judge.

Death action by Abe and Mary Tinon against the International & Great Northern Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Eva Tinon, a negro girl about 16½ years old, on November 28, 1904, was struck by one of appellant's passenger trains and killed at a point where a public road crossed appellant's track. In an action for damages alleged to have been suffered by them by reason of her death, appellees (her father and mother) recovered a judgment against appellant for the sum of \$500. The appeal is from that judgment.

The negligence alleged in the petition was the failure of appellant's employes in charge of its train, as same approached the crossing, to blow the whistle and ring the bell of the locomotive, their failure to keep a lookout for persons traveling upon the public road and about to cross said track, and their failure, after discovering the perilous position of the deceased, to use the means they should have used to avoid injuring her. The defense relied upon was contributory negligence on the part of deceased, in that as she approached the crossing she failed to look and listen for the train, but, instead, carelessly ran upon the track at a time when she knew the train was rapidly approaching and almost upon the crossing.

From the evidence it appeared: That appellant's line of railroad at the point where it crossed a public road ran north and south; that a public road running from west to east, at a point about identical with the west line of the right of way of the railroad, divided into two prongs, one of which extended east across the track of the railroad, and the other of which extended north along and parallel with the west boundary line of said right of way; that from the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.



point where the public road crossed the railroad to a point south about 250 to 300 yards, where it curved to the west, the track of the railroad was straight and slightly up-grade; that for some distance west the public road as it approached the crossing over the railroad was also straight; and that between said public road as it so approached said crossing from the west and the right of way for the railroad south of the crossing was a field inclosed in part by a fence along the south line of the road and west line of the right of way. It further appeared from the evidence: That at about 9 o'clock on the morning of November 28, 1904, deceased and her sister Rose, then about 30 years of age, started to go afoot from a point on the public road west of the crossing to a point east of the crossing; that at the time the wind was blowing strongly from the south; that deceased was wearing a sunbonnet, which extended down and out, covering the sides of her head and face, and which was tied on to her head because of the wind; that her sister was wearing an ordinary hat pinned on to her head; that as they approached the crossing deceased and her sister, who had been jumping and skipping along the road, raced towards the crossing, the former being a short distance ahead of her sister; that at the same time appellant's north-bound passenger train was approaching the crossing at a speed of between 40 and 50 miles an hour, and making very little noise; and that deceased, as she reached the crossing, and while running across the same, was struck by the locomotive pulling the train and thereby instantly killed.

S. R. Fisher, J. H. Tallichett, S. W. Fisher, and Jno. M. King, for appellant. Will G. Barber, for appellees.

WILLSON, C. J. (after stating the facts as above). The testimony was conflicting as to whether appellant's employes in charge of its engine, as was required by law (Sayles' Ann. Civ. St. 1897, art. 4507), blew the whistle and rang the bell thereof as the train approached the crossing. It is not contended that the evidence was not sufficient to support a finding by the jury that in those respects appellant was negligent. The contention is that the judgment is erroneous because the evidence showed the deceased to have been guilty of negligence contributing to the cause of her death, and did not show that her perilous position was discovered by appellant's employes, or, if it was, that it was discovered in time to enable them in the exercise of proper care to avoid inflicting upon her the injury resulting in her death.

The evidence was undisputed that the deceased did not stop and look or listen for the train before crossing in front of it. It was undisputed that had she done so she could have seen, if she could not have heard it

approaching from the south; but the fact that she did not so stop, or look, or listen did not as matter of law establish that she was negligent. *Railway Co. v. Chapman*, 57 Tex. 75; *Railway Co. v. Frugia*, 43 Tex. Civ. App. 48, 95 S. W. 563; *Railway Co. v. Anderson*, 76 Tex. 251, 13 S. W. 196. The question therefore is: Was there other evidence which, when considered in connection with that fact, required the court to say as a matter of law that deceased was guilty of contributory negligence? There was evidence that the train was due to pass the point where the accident occurred at about 9 o'clock on the morning it occurred, and that deceased knew it was due to pass at about that time. There was evidence that on the morning of the accident the train was 12 or 15 minutes late. There was no evidence showing that deceased knew it was late, and that it had not passed the crossing; nor was there any evidence showing that she knew the time of the day, and that it was about time for it to pass. There was no evidence showing about how many trains usually passed over the crossing during a day. There was evidence that a high wind was blowing from the south, and there was evidence that deceased was wearing a bonnet so tied on and about her head, ears, and face as to render it more difficult than it otherwise would have been for her to hear or see the train as it approached the crossing. There was evidence that by looking to her right across the field as she ran toward the crossing she could have seen the train approaching from a point on the railroad at least 250 to 300 yards south of and to the crossing. And, finally, there was evidence that without looking to the right or to the left she ran along the public road to the crossing and in front of the train as it reached the same.

The test which should be applied in determining whether the testimony referred to required the court as matter of law to say deceased was guilty of negligence or not is: Should it be said that the minds of reasonable men fairly might have differed upon the question as to whether in going upon the crossing under the circumstances shown by said testimony she acted as an ordinarily prudent person would have acted or not? *Railway Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. 679, 36 L. Ed. 485. We think reasonable men fairly might have differed as to the nature of her act, and that the issue properly was submitted to the jury. A reasonable man fairly might have concluded, it seems to us, that if deceased knew it was about the time the train was due to pass the crossing, she was ignorant of the fact that it was running behind its schedule time, and that it had not passed; or that, if she knew it had not passed, she was ignorant of the fact that it was about the time for it to pass. In the absence of evidence showing

how, trains usually approached and passed the crossing, instead of indulging the presumption that deceased should have expected the train to approach and pass the crossing, as it did, almost noiselessly and at an unusual speed, in favor of appellant's conduct having been blameless, such a man fairly might have indulged the presumption (*Meadows v. Insurance Co.*, 129 Mo. 76, 31 S. W. 583, 50 Am. St. Rep. 427) that she had a right to believe, from the manner in which she had before heard and seen trains approach and pass the crossing, that a train approaching it would by its mere movement make such usual noises as would warn her of its approach, and travel at such a usual speed as would enable her when so warned to so act as to protect herself from injury by it. Such a man might further have concluded that always before appellant's employees in charge of the engine had, as they testified they had, given warning of the approach of the train to the crossing by blowing the whistle and ringing the bell of the engine, as was required by law, and that she had a right on the occasion when she was killed to rely not only on such employees complying with the law, but upon their acting as they before had acted in giving warning of the approach of the train. From one or all of such conclusions, such a man, we think, might have reached as the ultimate one the conclusion that deceased was not guilty of negligence contributing to the injury causing her death. *Railway Co. v. Wagley*, 15 Tex. Civ. App. 308, 40 S. W. 539; *Frugla v. Railway Co.*, 36 Tex. Civ. App. 648, 82 S. W. 815; *Railway Co. v. Willard* (Tex. Civ. App.) 98 S. W. 220; *Railway Co. v. Balllett* (Tex. Civ. App.) 107 S. W. 908; *Railway Co. v. Cardena*, 22 Tex. Civ. App. 300, 54 S. W. 313.

The engineer testified that he was in his proper position in the cab on the right-hand side, keeping a lookout on the track north, and that he did not see deceased until after his engine struck her. The fireman was engaged, he testified, in firing the engine, was not keeping a lookout, did not see deceased before the engine struck her, and did not know the engine had struck any one until the engineer, as he applied the brakes to the train, remarked, "We have struck some one," or something to that effect. The fireman's proper position in the cab, when he was not engaged in firing the engine, was on the left-hand side thereof. From that position, from the curve south 250 to 300 yards to the crossing, he could have seen deceased and her sister as they approached the crossing. He testified that he moved from that position and began firing the engine at a point about one-fourth of a mile south of the crossing. The engineer testified that the fireman so moved when they had reached a point about 200 yards south of the crossing, and from that point until they passed the crossing was

"down keeping fire," where he "could not see outside." The engineer further testified: "I was not in the window on the left-hand side that day when I passed that crossing, and my fireman was not. I don't know that any one standing on the left side of the track could see me where I was. I know he couldn't see the woman. I don't know whether he saw her before he got off the box or not." Deceased's sister testified: "There was a man in the engine on the side next to me. I saw him. He was in the little window that is in the engine. I don't know whether there was a man on the other side or not. I never noticed that man in the window and cannot give a description of him." The only wound found on deceased's person by the physician who examined same a short time after her death was a bruise or crushed place in her right side, "right about the point of her back and side, under the shoulder blade and to the right of the backbone." The engineer testified that if the guard knife of the pilot to the engine had struck her it would have left signs thereof on her leg, and that if she was "standing up coming across the track running" a bumper "on the side of the engine could have caught her right in the side." The bumper he referred to, he further testified, was a piece of timber about 8 by 12 inches in size, extending across the front of the engine and out about 6 inches beyond each rail of the track. The engineer further testified that, had he a hundred yards before reaching the crossing "applied the air in the emergency, it would have checked the train very appreciable before I got to the crossing."

We are of the opinion that the testimony referred to made it proper to submit to the jury as an issue in the case whether deceased's perilous position was discovered by the fireman or not, and, if it was, whether or not it was discovered in time to have enabled him by the means at hand to have averted the injury resulting in her death. Had deceased known that the train was approaching, and that it was so close to the crossing, her position would not have been one of peril, for by stopping before she reached the crossing she could have effectually prevented injury to herself from the train. Her peril was due to her ignorance of the fact that the train was approaching and so close to the crossing. *Railway Co. v. Finn* (Tex. Civ. App.) 107 S. W. 99; *Railway Co. v. Munn* (Tex. Civ. App.) 102 S. W. 445; *Railway Co. v. Ball*, 96 Tex. 624, 75 S. W. 4. Is the evidence sufficient to support a finding that the fireman discovered that she was so ignorant? The jury had a right to disbelieve the testimony of the fireman and the engineer that the former was engaged in firing the engine as they approached the crossing, and a right to believe the testimony of deceased's sister that a man was in the window on the fireman's side of the cab, and from her testimony infer that that man was

the fireman. *Railway Co. v. Craig*, 35 Tex. Civ. App. 548, 80 S. W. 866; *Brown v. Griffin*, 71 Tex. 659, 9 S. W. 546; *Railway Co. v. Ball*, 96 Tex. 624, 75 S. W. 4; *Railway Co. v. Finn* (Tex. Civ. App.) 107 S. W. 94. They had a right to further infer, if the fireman was in a position to see deceased as she approached the crossing, that, in the discharge of his duty to keep a lookout for persons on the public road at or near the crossing, he did see her, and that, seeing her, he knew she was approaching the crossing from the west, on a run, at a time when a high wind then blowing was calculated to distract her senses of sight and hearing, already more or less impeded by a bonnet she was wearing, and apparently was oblivious to the fact that a swiftly and almost silently moving train, running behind its schedule time, was approaching the same crossing. If the jury might have found that the fireman knew so much, what deductions, if any, were they authorized to draw from such knowledge on his part? We believe they were authorized to infer that he knew that her intention might be to continue running and so pass over the crossing, that she at the time might be ignorant of the fact that the train was approaching and so near to the crossing, and that because of the bonnet she was wearing, the strongly blowing wind, the absence of noise in the movement of the train, and its rapid speed, she might not discover its approach in time to save herself from injury by it. If the jury might have inferred the fireman knew so much, then we think they might have concluded that he discovered before the train reached the crossing that deceased was in a position of peril from it. To require further evidence as a support for such a conclusion by the jury, we think, "would be," as was said by Judge Gill in *Railway Co. v. Munn* (Tex. Civ. App.) 102 S. W. 445, "to require that a case of murder be established" in order to show a liability on the ground of discovered peril.

Assuming, then, that the evidence was sufficient to support a finding that the fireman discovered deceased's perilous position, the question remaining is: Was the evidence sufficient to support a finding that he discovered it in time, by the means at hand, and with regard to the duty he owed appellant and the persons on the train, to have averted the consequence to deceased which followed? The question, we think, should be answered in the affirmative. If the evidence was sufficient to support a finding by the jury that the fireman discovered deceased's perilous position, it was sufficient to support the further finding that he discovered it at least as far south as the point where the train left the curve as it approached the crossing, or at a distance south of the crossing of 250 or 300 yards. The evidence further was sufficient to support a finding that, if he did discover de-

ceased in her perilous position, he resorted to none of the means at hand, either to warn her of her danger, or to stop or so decrease the speed of the train as to avoid injury to her. The preponderance of the testimony was that he neither blew the whistle nor rang the bell of the locomotive as it approached the crossing, and the testimony was uncontradicted that no effort was made to stop the train or to lessen the speed at which it was moving. It ought to be assumed that had he sounded the whistle or rung the bell deceased would have heard same, and that, hearing same, she would have so acted as to prevent injury to herself. Furthermore, the engineer testified that the speed with which the train was moving could have been "very appreciably" checked before the train reached the crossing by an application of "the air in emergency" to the brakes at a point 100 yards south from the crossing. So, if sounding the whistle and ringing the bell when deceased's position was discovered should have proved ineffectual in preventing her from running onto the crossing in front of the train, the injury to her in all probability might have been avoided by so applying the air to the brakes. The testimony tends to support the conclusion that she was struck by the end of the pilot beam just after she had crossed and reached the east side of the track. If she was then struck, it is apparent that the least lessening of the speed of the train would have enabled her safely to pass the crossing. *Railway Co. v. Munn* (Tex. Civ. App.) 102 S. W. 444; *Beaty v. Railway Co.* (Tex. Civ. App.) 91 S. W. 365; *Railway Co. v. Scarborough* (Tex. Civ. App.) 104 S. W. 412.

The judgment is affirmed.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. ROGERS.

(Court of Civil Appeals of Texas. Feb. 13, 1909. On Rehearing, April 3, 1909.)

##### 1. MASTER AND SERVANT (§ 293\*)—INJURIES TO SERVANT—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an engineer's action for injuries sustained in a collision with another train which was compelled to stop because of a broken eccentric, the evidence was that, when the latter train gave the signal indicating that it was going to stop, the conductor immediately got off the train before it stopped and ran back to flag plaintiff's train, having gone  $4\frac{1}{2}$  telegraph poles, when he saw it approaching and signaled it to stop, and that an engineer should immediately stop his train when an eccentric broke. The company's rules required one torpedo to be placed at a point 15 poles from the rear of the train when it was detained by accident, and others at a greater distance. The court, after instructing that it was the duty of the employees in charge of the standing train to send back a flagman a sufficient distance to warn the approaching train to prevent a collision, and if they failed to send back a flagman in time to signal the approaching train, and such failure

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was negligence, plaintiff could recover, was requested to charge that if, after the first train gave the stop signal, its conductor alighted before it stopped and ran back as great a distance as a reasonably prudent man would have done under the circumstances and signaled the approaching train, the jury should find for defendant, though the conductor did not go back as far as required by the rules, or place torpedoes on the track, as required by the rules. *Held*, in view of the evidence and the charge already given, that it was error to refuse the charge requested.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1156, 1157; Dec. Dig. § 293.\*]

## 2. DAMAGES (§ 206\*) — EVIDENCE — PHYSICAL EXAMINATION.

Defendant, in a personal injury action, cannot require the court to appoint physicians to examine plaintiff, or compel plaintiff to submit to such an examination.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 531; Dec. Dig. § 206;\* *Discovery*, Cent. Dig. §§ 92-98.]

## 3. TRIAL (§ 122\*) — ARGUMENT OF COUNSEL — FAILURE TO PRODUCE TESTIMONY.

Where the nature and extent of plaintiff's injuries was seriously controverted, and defendant did not offer expert testimony on the subject, it was prejudicial error for plaintiff's counsel to say in argument that defendant's counsel could not complain of the lack of medical testimony because they knew that defendant could require plaintiff to be examined by competent physicians, and, if he refused to submit thereto, could require the court to appoint physicians to make such examination; defendant not having such right.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 299; Dec. Dig. § 122.\*]

## 4. TRIAL (§ 253\*) — INSTRUCTIONS — CONFORMITY TO PLEADING.

Where the petition in a servant's injury action did not allege negligence of the engineer of the train with which his train collided in failing to give signals of its intention to stop sooner than he did, a requested instruction was not rendered objectionable by ignoring any negligence in that respect.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 616; Dec. Dig. § 253.\*]

## 5. TRIAL (§ 192\*) — INSTRUCTIONS — ASSUMPTION OF FACTS — FACTS ESTABLISHED BY EVIDENCE.

The court, in its instructions, may assume matters shown by uncontradicted evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 432; Dec. Dig. § 192.\*]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Action by Harry Rogers against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This was a suit for damages for personal injuries, filed by the appellee in the district court of Hill county, Tex., tried at the January term, 1908, and resulting in a verdict for the appellee for the sum of \$5,500. Motion for a new trial, filed by appellant, was overruled on February 3, 1908, to which appellant excepted and gave notice of appeal, which was duly perfected.

It was alleged by appellee: That he was injured on May 11, 1907, while acting as lo-

comotive engineer in the employ of appellant, in charge of a freight train belonging to appellant; that said train so operated by appellee ran into and collided with another train of appellant a short distance north of Waco; and that appellee was forced to jump from his said train for his own safety and protection, and received the injury sued for herein. It was alleged that the employees of appellant in charge of the first train were negligent in stopping said train at the place where same was stopped, and that they negligently failed to send back a flagman or danger signals and to place torpedoes on the track, as required by rules of the appellant, in time to enable appellee to avoid said collision, and that it was negligent in permitting the engine on said first train to become defective and out of repair. In addition to a general denial, the appellant presented general and special pleas of assumed risk and contributory negligence.

Coke, Miller & Coke and Ramsey & Odell, for appellant. Morrow & Smithdeal, for appellee.

BOOKHOUT, J. (after stating the facts as above). On the morning of May 11, 1907, appellant's extra train No. 411, in charge of Joe Williams as conductor and Jim Brown as engineer, left Hillsboro for Waco over appellant's line of railroad. The train consisted of 23 cars and a caboose; 10 of the cars being loaded, and 12 empty. Five minutes after this train started from Hillsboro, another train loaded with coal, consisting of 20 cars and a caboose, in charge of conductor Hopkins and Harry Rogers, appellee, as engineer, left Hillsboro, over appellant's line of railroad, for Waco following extra No. 411. Just before reaching the yard-limit board in East Waco, the engineer of the first train discovered that an eccentric on his engine was broken, and he gave the signal that he was going to stop and to protect the rear end of the train. The evidence shows that: "An 'eccentric' on an engine is that part of the engine that is made for the purpose of driving the valve motion and is in the form of a circle. On the outside of the engine it would be termed by mechanics a 'crank,' the same thing as a crank motion; in other words, to convert your reciprocating into linear motion in the line you have it to drive your valve gear. If, in the operation of a freight train, a locomotive engineer should discover that his eccentric or his eccentric strap was broken, he should stop his train immediately in order to avoid serious damage to other parts of the engine." The evidence shows that, before extra train No. 411 came to a full stop, the conductor got a flag and got off the train and went back to signal the approaching train. He had only time to go back 4½ telegraph poles when he came in sight of the approaching freight train in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

charge of appellee. He signaled it to stop. It was shown that in approaching the place of the accident the train operated by appellee was coming downgrade, through a cut, and around a curve at such a rate of speed that he could not and did not stop the train before it reached the forward train standing at a distance variously estimated from three to eight car lengths outside the yard limits. Appellee's train struck the standing train and pushed it forward and demolished some of its cars.

The rules of appellant governing the running of its trains applicable to the facts are as follows:

Rule 98(d): "Third class and extra trains are required to approach and pass all water tanks, coal chutes, yards and stations, completely under control. Speed must be reduced, and the enginemen and the trainmen must commence to get their train in hand in ample time so that under no circumstances whatever, shall it be possible for it to strike any train, car or engine which may be occupying the track. Responsibility for safety rests with the approaching third class or extra train. This rule must not be construed as relieving enginemen and trainmen of responsibility for accidents resulting from failure to comply with rules 87, 88 and 89."

Rule 99(a): "When a train is detained by an accident or obstructions, or stops at any unusual point, the flagmen must immediately go back with danger signals, to stop any train moving in the same direction. At a point fifteen telegraph poles from the rear of his train he must place one torpedo on the rail on the engineman's side; he must then continue to go back at least twenty telegraph poles from the rear of his train and place two torpedoes on the rail on the engineman's side, ninety feet (three rail lengths) apart, when he may return to a point fifteen telegraph poles from the rear of his train, where he must remain until an approaching train has been stopped or he is recalled by the whistle of his engine. When he comes in he will remove the torpedoes nearest his train but the two torpedoes must be left on the rail as a caution signal to any following train. Should the flagman be recalled before reaching the required distance he will place two torpedoes on the rail on the engineman's side, ninety feet (three rail lengths) apart and immediately return to his train, unless a train is in sight or hearing. If from any cause the speed of the train is reduced, the conductor will be held responsible for fully protecting the rear of the train by the use of proper signals. If the accident or obstruction occurs upon a single track, and it becomes necessary to protect the front of the train, or if any other track is obstructed, the head brakeman must go forward and use the same precautions. If the head brakeman is unable to go, the fireman must be sent in his place."

Rule 99(b): "When on a curve or down-

grade the flagman must go back a distance of at least twenty telegraph poles farther than as above provided, and as many more as may be necessary, before placing torpedoes, to give approaching trains ample time to stop."

Rule 99(d): "When it is necessary for a train to stop between stations for any cause, it will, if practicable, be stopped at a place where the view in the rear of the train is clear for at least half a mile, but not at the foot of a grade, and the train must be protected as per rule 99(a) and rule 99(b)."

There was evidence that rule 99(d) would not apply when an engine stopped on account of a broken eccentric strap, because in such case it is necessary to bring the train to a stop as soon as practicable to avoid further damage to the engine. There was also evidence that rule 98(d) is not given a literal construction, but that what is understood by having a train under control is governed by location and conditions.

Appellant assigns as error the court's failure to give its requested charge No. 14, as follows: "If you should believe from the evidence that after the engineer Brown, on train extra No. 411, gave the signal for a flag, the conductor on said train got a flag and alighted from said train before it stopped and ran back the track in the direction in which plaintiff's train was moving, to as great a distance as a reasonably prudent person under the same or similar circumstances would have gone, and that, in alighting from said train and going back said distance under the circumstances, the said conductor acted as a man of ordinary care would have acted under the same or similar circumstances, then you are instructed to find for the defendant, even though you should believe from the evidence that the said conductor did not go back the distance required by defendant's rules, or place torpedoes on defendant's track as required by said rules." Joe Williams, the conductor of extra train No. 411, testified, in substance: That the engineer on his train gave a signal that he was going to stop, which meant to protect the rear end of the train by flag; that at the time the signal was given he was in the caboose, and the rear brakeman was on top of the train; that it is the rear brakeman's duty to flag, and the conductor's duty to do it if the brakeman is not there; that when the signal was given he got the flag and got down off the train before it had come to a full stop and went back to flag appellee's train; that he ran back as far as he could, which was  $4\frac{1}{2}$  telegraph poles, when he came in sight of the approaching train and signaled it to stop, which signal the appellee answered by two blasts of the whistle. The court having instructed the jury that it was the duty of the employees in charge of such standing train to send back a flagman a sufficient distance to give warning or signal to the approaching train in order to prevent a collision, and

that if they failed to send back a flagman in time to signal the approaching train, and that such failure was negligence which was the proximate cause of appellee's injuries, they should find for the appellee, the appellant was entitled to have the jury instructed that, if the employees in charge of such standing train did use ordinary care in said respects, they should find for the appellant. The requested charge sought to have this issue specially submitted to the jury, which, under the evidence, it was entitled to have done. The charge requested announced a correct proposition of law and should have been given. The court's failure to do so was error.

Error is assigned to the remarks of one of the counsel for plaintiff made to the jury in his closing argument, as follows: "Gentlemen of the jury, counsel for defendant have no right to complain of the lack of medical testimony, because they know that the defendant had a right to demand that plaintiff be examined by competent physicians and surgeons, and that, if he refused to submit himself to such an examination at defendant's request, it then had a right to require the court to appoint physicians and surgeons to make such examination, and the court would have appointed physicians to examine him, and they knew it, and they failed to avail themselves of that privilege, and that is the reason why they are without medical testimony in this case." These remarks were not authorized by the record. The appellant did not have the right to require the court to appoint physicians and surgeons to make an examination of the injuries of plaintiff, and compel plaintiff to submit to such examination. *Railway Co. v. Cluck* (Tex. Civ. App.) 73 S. W. 569; *Railway Co. v. Sherwood* (Tex. Civ. App.) 67 S. W. 776. The nature and probable effect of the action of the court in overruling the objection to these remarks was to lead the jury to believe that the statement of appellee's counsel was correct, and that the appellant did have the right to demand that plaintiff be examined by competent physicians and surgeons, and to require the court to appoint such physicians to make such examination. The remarks were therefore highly prejudicial to the appellant. The nature and extent of plaintiff's injuries were seriously controverted issues, and, plaintiff not having offered the testimony of a physician or surgeon in regard to his condition, we regard the remarks of counsel prejudicial and reversible error.

*Railway Co. v. Walden* (Tex. Civ. App.) 46 S. W. 87; *Railway Co. v. Langston*, 92 Tex. 713, 50 S. W. 574, 51 S. W. 331.

For the errors pointed out, the judgment is reversed, and the cause remanded.

#### On Rehearing.

Appellee in his motion for rehearing strenuously contends that appellant's requested charge No. 14, for the refusal of which the judgment was reversed, does not announce a correct proposition of law, and therefore we erred in reversing the cause. It is insisted that this charge ignores: (1) The issue as to whether the engineer on train extra 411 was negligent in failing to sound the whistle in ample time to permit the trainmen to protect the following train; (2) the issue as to whether the rear brakeman on train extra 411 used ordinary care to go back and give appellee the signal to stop his train; (3) the issue of negligence on the part of the engineer of train extra 411 in reducing the speed of his train and failing to warn appellee thereof.

There was no allegation in appellee's petition that the engineer in charge of train extra 411 was negligent in failing to give the signal of his intention to stop his train sooner than it was. The uncontradicted evidence shows that the conductor in charge of appellant's train extra 411 did all in his power to protect the rear of his train as required by the rules. He got the flag and got down off the train before it stopped and ran back as far as he could, before he saw appellee's train. He at once gave appellee the back-up signal. At the time the rear brakeman was on top of the train in the discharge of his duties. The evidence of the conductor of train extra 411 was that his train had not slackened its speed. This evidence is not contradicted. The court could assume and determine these matters under the uncontradicted evidence.

The opinion states that "the nature and extent of plaintiff's injuries were seriously controverted issues, and plaintiff not having offered testimony of a physician or surgeon," etc. There is a clerical error in this sentence in using the word "plaintiff" for defendant. The plaintiff did offer the testimony of a physician of the nature and extent of his injuries, but defendant did not offer the testimony of physicians to show the nature and extent of the same. In this respect the opinion is corrected.

The motion for rehearing is overruled.

WOOSLEY et al. v. KENNON et al.

(Court of Appeals of Kentucky. April 16, 1909.)

EXCEPTIONS, BILL OF (§ 40\*)—TIME FOR PRESENTATION—EXTENSION OF TIME.

Under Civ. Code Prac. § 334, providing that time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term to be fixed by the court, where it does not appear that the opposing party or his counsel consented, or made no objection, to an extension of time for filing a bill of exceptions beyond the succeeding term, but the order granting such extension saved an exception in favor of the opposing party, the trial court is without power to make the extension, and the bill of exceptions will not be considered on appeal.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 44-64; Dec. Dig. § 40.\*]

Appeal from Circuit Court, Estill County.  
"Not to be officially reported."

Action by Richard C. Kennon and others against John Woosley and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Chas. W. Friend and Riddell & Friend, for appellants. J. B. White, for appellees.

CLAY, C. Richard C. Kennon and others (plaintiffs below) instituted this action to recover damages for trespasses alleged to have been committed by the defendants. Judgment was rendered in favor of plaintiffs, and defendants appeal.

Upon the filing of the case in this court, appellees moved to strike the bill of exceptions from the file. This motion was passed until the hearing of the case on its merits. It appears from the record that the motion and grounds for a new trial were overruled at the December term, 1906, of the Estill circuit court. At the same time the defendants were given until the first day of the next term of the court to prepare, tender, and file their bill of exceptions. At the following term of the court, which was the April term, the time for filing said bill of exceptions was extended to the second day of the July term. On the fourteenth day of July, 1907, term of said court the defendants tendered their bill of exceptions and the court permitted same to be filed, at the same time saving an exception for plaintiffs. Appellees' ground for their motion to strike the bill of exceptions from the file is that the court's action in extending the time for filing the bill of exceptions was in violation of section 334, Civ. Code Prac. That section is as follows: "The party objecting must except when the decision is made; and time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term, to be fixed by the court."

In construing this section, this court has held that the trial court may extend the time for filing a bill of exceptions from one day certain in the next term to another day

certain in the same term. *Smith v. Blake-man*, 8 Bush, 476. It has also been held that if the opposing party, or his attorney, consents to an extension of time beyond a day in the succeeding term, or is present in court and makes no objection to such extension, such conduct will be considered as a waiver of any objections. *Walling v. Eggers*, 78 S. W. 428, 25 Ky. Law Rep. 1563; *Hill v. Penn Life Insurance Co.*, 120 Ky. 190, 85 S. W. 759. But where it does not appear from the record that the opposing party, or his counsel, consented or made no objection to the extension of time, but the order granting an extension saved an exception in his favor, the trial court is without power to make such extension, and under such circumstances the bill of exceptions will not be considered by this court. *Johnson v. Stivers*, 95 Ky. 128, 23 S. W. 957; *Combs v. Combs*, 41 S. W. 7, 19 Ky. Law Rep. 441; *Zehe's Adm'r v. City of Louisville*, 123 Ky. 621, 96 S. W. 918.

The only question then remaining is whether or not the petition supports the judgment. Of this there can be no question.

Judgment affirmed.

# COLUMBIA TRUST CO. et al. v. CHRISTOPHER.

(Court of Appeals of Kentucky. March 23, 1909.)

1. WILLS (§ 693\*)—CONSTRUCTION—POWERS.

A will devised property to testator's widow and mother, provided that the mother's share should be held in trust for her use for her life; that on her death the use of such share should pass to the widow; that, if the widow elected to establish or aid a benevolent institution, etc., with part of her devise, the mother's share should be paid by the trustee to such institution; that, if the widow failed to elect to establish or aid such institution, the mother's share should be divided between specified associations. The widow, the mother, and her husband, the executors, the testamentary trustee, and the trustees of the specified associations deeded the property to appellee, and afterwards the wife executed a writing to appellee, agreeing that, if she thereafter elected to aid or establish an institution, she would so establish it that it could not interfere with appellee's interest. *Held*, that the will gave the widow a power appendant of appointment and coupled with an interest, so that the conveyance passed the whole estate in the property, and that it was not subject to be avoided by the establishment by the widow of an institution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1655-1661; Dec. Dig. § 693.\*]

2. CONTRACTS (§ 54\*)—CONSIDERATION.

The probability of appellee recovering from the widow and from the trustee a part of the purchase money paid for the land, and of his defeating notes given for the unpaid purchase price if the conveyance did not pass good title to him, was sufficient consideration for the widow's agreement.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 54.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**3. POWERS (§ 43\*)—RIGHTS OF PURCHASER.**

Even if the conveyance did not pass good title, equity would not permit any institution established by the widow to disturb appellee, and especially when it had received the proceeds of the property from the trustee which were directed to be paid over to it when established.

[Ed. Note.—For other cases, see Powers, Dec. Dig. § 43.\*]

**4. POWERS (§ 1\*)—NATURE.**

Powers are either collateral or such as relate to an estate or interest given by the donor to the donee.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 1; Dec. Dig. § 1.\*]

**5. POWERS (§ 1\*)—"COLLATERAL POWER"—NATURE.**

A "collateral power" is a bare power given to a mere stranger, who has no interest in the estate or property to which the power relates.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 1; Dec. Dig. § 1.\*]

**6. POWERS (§ 1\*)—APPENDANT OR IN GROSS—NATURE—"POWER APPENDANT"—"POWER IN GROSS."**

The power relating to an estate or interest given the donee may be either appendant or in gross, being a "power appendant" when the exercise of the power overreaches, affects, or destroys the donee's interest, and being a "power in gross" when the estate created by the power is beyond and does not affect the estate of the donee.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 6, p. 5483.]

**7. POWERS (§ 23\*)—NATURE.**

The distinction between collateral powers and such as relate to an estate or interest given by the donor to the donee of the power is chiefly important respecting the extinguishment or suspension of such powers by the donee.

[Ed. Note.—For other cases, see Powers, Dec. Dig. § 23.\*]

**8. POWERS (§ 23\*)—SUSPENSION OR DESTRUCTION.**

A mere collateral power cannot be extinguished or suspended by the donee; but all powers other than powers collateral and powers coupled with a trust or duty may be suspended or destroyed, either wholly or in part, by the donee, and the rule applies where the donee is confined or limited in his choice to certain classes of individuals or to certain institutions.

[Ed. Note.—For other cases, see Powers, Dec. Dig. § 23.\*]

**9. POWERS (§ 23\*)—SUSPENSION OR DESTRUCTION—METHOD.**

Powers not merely collateral, and not coupled with a trust or duty, may be released, extinguished, or suspended by express agreement, or by implication, and any dealing with the property inconsistent with the exercise of such power will operate as an implied release or extinguishment of the power.

[Ed. Note.—For other cases, see Powers, Dec. Dig. § 23.\*]

Appeal from Circuit Court, Muhlenberg County.

"To be officially reported."

Action between C. C. Christopher and the Columbia Trust Company, trustee, and others. From the judgment, the company and others appeal. Affirmed.

Trabue, Doolan & Cox, for appellants. Browder & Browder, for appellee.

NUNN, J. In the month of October, 1900, appellee, Christopher, and one John Hill Eakin, both of Nashville, Tenn., became the owners of 3,008 acres of land situated in Muhlenberg county, Ky. It is not stated in the record what interest each owned in the land; but it has been treated by counsel for the parties as if each owned an undivided half. It appears that John Hill Eakin, in the month of July, 1902, made and executed his last will and testament, that he died in the latter part of the year 1903, and that his will was duly probated in the month of January, 1904. The provisions of the will with reference to the matter in controversy, and which it is necessary to construe, are contained in item 3, which is as follows:

"I desire that the remainder of my estate, real, personal and mixed, be equally divided between my wife and my mother. The portion herein devised to my mother is to be held by the Nashville Trust Company, of Nashville, Tennessee, for her sole and separate use, and the income arising from same to be paid her quarterly during her life, and at her death to be distributed as follows, viz.: Should my wife elect to establish or aid an already established benevolent or charitable or eleemosynary institution with the larger portion of the estate herein devised to her, then and in that event the portion of my estate devised to my mother is to be paid over at her death by the Nashville Trust Company, trustee, to the institution above mentioned at such time as my wife may elect to make the donation of her estate, but until such donation is made the Nashville Trust Company, trustee, will pay the income after my mother's death to my wife. Should, however, my wife not elect during her lifetime or at her death to establish or aid any institution above mentioned, then at her death the portion of the estate devised to my mother to be held in trust for my mother's benefit shall at my wife's death be paid over equally to the Young Men's Christian Association and to the First Presbyterian Church, both of Nashville, Tennessee."

He named his mother, Louise P. Evans, and his wife, Elizabeth R. Eakin, as his executrices, without bond. It appears that appellee, C. C. Christopher, on the 7th day of September, 1905, purchased the undivided half interest in the survey of land referred to, that was owned by the late John Hill Eakin, and received a conveyance of the title thereto from Elizabeth R. Eakin, and Elizabeth R. Eakin and Louise P. Evans as the executrices of John Hill Eakin, and from Louise P. Evans and Thomas Evans, her husband, the trustees of the First Presbyterian Church, and the Young Men's Christian Association, both of Nashville, Tenn., and the Nashville Trust Company, trustee for Louise P. Evans. Appellee paid \$16,000. of the pur-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



chase price and executed his notes for the balance, with a lien retained upon the land for their payment. In the month of November, 1906, appellee and one of the appellants, Murphy Land Company, entered into an agreement by which the land company agreed to loan appellee the sum of \$18,000, with which the purchase-money lien was to be satisfied. This \$18,000 loan by the land company was to be paid by appellee in eight equal installments; the first payable in one year, the second in two years, and so on until it was paid, with 5 per cent. interest. It appears that after this agreement was entered into appellant Murphy Land Company became doubtful of its power under its charter of the state of Tennessee to loan money and take a mortgage upon real estate situated out of that state, and negotiations were entered into between it and the other appellant, Columbia Trust Company, and it agreed to accept the mortgage on the real estate in Kentucky and act as trustee for its coappellant, Murphy Land Company. Appellee, with his wife, then duly executed a mortgage conveying the whole 3,008 acres of land to the Columbia Trust Company, trustee, of the city of Louisville, to secure the loan of \$18,000 on the terms stated. The mortgage was recorded, and all the papers necessary to carry out the contract were executed. In fact, the whole thing was completed, except the payment of the \$18,000 to appellee. It appears that at that time appellants became doubtful of appellee's title to one-fourth of the land described; that is, to that portion that was willed by John Hill Eakin to his mother for life, and in the event his wife elected to establish a benevolent, charitable, or eleemosynary institution with the larger portion of the estate devised to her, then that portion devised to his mother should go to such institution established by his wife, instead of to the Presbyterian Church and the Young Men's Christian Association, and for this reason alone refused to complete the contract by paying the \$18,000 to appellee. It appears that the mother, Mrs. Evans, and her husband, have both died.

The contention of appellants' counsel, in substance, is that her conveyance to appellee does not have the effect to prevent her from hereafter establishing a benevolent, charitable, or eleemosynary institution as referred to in the will; that as such institution is not now in being, and consequently not before the court in this action, there would be nothing to prevent it, after being established, from suing and recovering one-fourth of the land in controversy under the provisions of the will of John Hill Eakin. They have presented this contention by oral argument and in their briefs with great ability. We deem it unnecessary to discuss all the reasons presented for a reversal of the judgment. It would extend this opinion to an unreasonable length. Therefore we present, in as succinct

a manner as possible, our reasons why the conveyance to appellee is valid and passes the whole estate in the land to him.

It will be noticed that the share devised to the mother for life was, after her death, to pass to the wife for life, or rather the income from it. It was willed to the Nashville Trust Company to be held by it for the mother and wife. The testator named the remaindermen, the First Presbyterian Church and the Young Men's Christian Association, of Nashville; but by the same clause of the will he gave his wife power to defeat them, by providing that, if his wife should elect to establish or aid a benevolent, charitable, or eleemosynary institution with the greater portion of the estate devised to her, then and in that event the portion devised to his mother for life was directed to be paid over by the Nashville Trust Company to the institution so established or aided, at such time as his wife might elect to make the donation of her estate. It is clear from the testator's will that it was exclusively within the power of his wife as to whether she would or would not establish such an institution. If she did so, by virtue of that act, she necessarily controlled and directed that that part of the estate willed to his mother should go to the institution established by her. It was at her election to create the institution, and not in any sense the testator's. She was not required to do this; but it is perfectly clear that she had the power, under the will, to defeat the claims of the First Presbyterian Church and the Young Men's Christian Association by doing the act described in the will—i. e., by giving the greater portion of the estate devised to her by her husband for the purpose of establishing one of the institutions named in the will. This, in our opinion, was the creation of a power of appointment in her.

In the case of *Dudley v. Weinhart*, 93 Ky. 401, 20 S. W. 308, it appears that the testator, after having provided for his wife and granddaughter in his will, provided for the families of his brother and half-brother and for certain nieces and nephews of his wife. The devises to his wife and granddaughter were absolute; but by item 9 of his will he gave his wife power, within a stated time, to change or cancel any or every gift or devise made by the will, and described the formalities by which she could do this. She performed this act as designated in the will and defeated the remaindermen. In the opinion this court said: "Now, a general power of appointment is a power given by the maker of a deed or will, called the donor of the power, to another person, called the donee of the power, in the name of and by the authority of the donor, to create a new estate in any one out of the estate of the donor without divesting any estate previously granted or devised subject to such power, or by divesting an estate previously granted

subject to such power and bestowing on another person. Such power has always been exercised and held valid as being the will of the donor of the power, and not as a revocation or destruction of his will, in the sense of the statute supra; for it is perfectly competent for a testator to give another person the power to dispose of his property according to his own judgment and discretion. In such case the will and discretion of such person would be the will of the testator. If the testator had devised some estate to certain persons, subject to be divested or defeated, and its destination changed by the exercise of a power given to another person, the exercise of such power would be the will of the testator; for he may attach conditions to the devise, the happening of which will defeat it, and defeating the devise upon such conditions that the donee of the power might thereafter present is the same as if the testator had inserted in the will the identical conditions as a defeasance of the present estate." To the same effect are the cases of *McCullough's Adm'r v. Anderson*, 90 Ky. 126, 13 S. W. 353, 7 L. R. A. 836, and *Lillard v. Robinson*, 3 Litt. 415.

We cannot better elucidate the questions involved than by copying an extract from the opinion of the learned chancellor who tried the case in the lower court. We quote therefrom as follows:

"By the third clause of the will of J. Hill Eakin the testator devised the remainder of his estate, not previously disposed of, to his wife and to his mother. It is provided that the share devised to the mother shall be held by the Nashville Trust Company for her sole and separate use during her life. After the death of the mother the share willed to her, or rather the use of it, is given to the wife for life, it being provided, however, that, if the wife should elect to establish or aid a benevolent or charitable or eleemosynary institution with the larger portion of the share devised to her, then and in that event the portion devised to the testator's mother for life, and after her death to the testator's wife, is to be paid over by the Nashville Trust Company to the institution so established or aided at such time as the wife may elect to make the donation of her estate. After the death of the mother, and until such donation is made, the Nashville Trust Company is directed to pay the income to the testator's wife. The clause in question not only gave the wife an interest after the death of the testator's mother in the share devised to his mother, but it also clearly gives to the wife the power to give said share to a benevolent, charitable, or eleemosynary institution, provided she should first give to such institution the larger portion of the share first given by the testator to her in fee. This was beyond doubt a power. The testator, J. Hill Eakin, is the donor of the power. The testator's wife is the donee. The property affect-

ed by the power is that one-half of the testator's residuary estate which was given by the testator to his mother for life, and after the mother's death to the testator's wife, with the power above mentioned attached thereto. See *Bristow v. Skirrow*, 27 Beav. 585. In the case cited the testator devised his estate to the same persons to whom his wife should devise her residuary estate. This was held to vest in the testator's wife a testamentary power of appointment. It is clear that, under the clause in question, the testator's wife might select a benevolent or charitable or eleemosynary institution by making the donation provided for in her lifetime, or by making such donation by will at her death. The power was special, however, inasmuch as the donee was confined to benevolent, charitable, or eleemosynary institutions. She could not give the estate to any person, nor to any institution except of the kind mentioned.

"Powers are either collateral or such as relate to an estate or interest given by the donor to the donee of the power. A collateral power is a bare power given to a mere stranger, who has no interest in the estate or property to which the power relates; e. g., a power of sale given to executors, or a power of appointment such as was given by the testator to his wife in *Bristow v. Skirrow*, 27 Beav. (Rolls Court) 585. 'A power collateral is of the nature of an authority to deal with an estate, no interest in which is vested in the donee of the power. A power of that kind is wholly different from an estate or interest, and cannot without abuse of language be so designated.' *Dickinson v. Teasdale*, 1 De Gex, J. & S. 60; *Farwell on Powers*, p. 8. A power relating to an estate or interest given by the donor of the power to the donee may be either appendant or in gross. The distinction between collateral powers and such as relate to an estate or interest given by the donor to the donee of the power is chiefly important with respect to the extinguishment or suspension of such powers by the donee. A power is appendant when the estate created by the execution of the power overreaches, affects, or destroys the interest of the donee. It is in gross when the estate created by the execution of the power is beyond and does not affect the estate or interest of such donee. Thus a power of appointment by will given to a tenant for life is in gross. The execution of such a power does not affect the life estate of the donee of the power. A power of sale given to a life tenant is, however, appendant, because the execution of such a power overreaches, affects, and destroys the interest of the donee. A power simply collateral cannot be extinguished or suspended by any act of the donee. *Farwell on Powers*, p. 11; *West v. Berney*, 1 R. & M. 434; *Willis v. Shorral*, 1 Atk. 474; *Sugden on Powers*, 893.

"Such a power is not in the nature of a right or interest in the donee thereof, and is given, or supposed to have been given, for the benefit of some third person. Thus, if a testator gives to his wife power to dispose by will of any fixed portion of his estate among certain named individuals or institutions, giving her at the same time no interest in the property so to be disposed of, the wife would, in such case, have simply a collateral power. She would have no interest whatever in the property, and could not by any act or agreement extinguish such power in herself or bind herself not to execute it. Such power is indestructible in its nature, and, of course, every power coupled with a trust or duty is likewise indestructible. The execution of such last-mentioned power is imperative on the donee, and it would be a breach of trust for the donee to undertake not to execute the power. All powers, however, other than powers collateral and powers coupled with a trust or duty, may be suspended or destroyed, either wholly or in part, by the donee thereof. Farwell on Powers, p. 15; Sugden on Powers, p. 82; Coke's Littleton, p. 265; Bird v. Christopher, Stiles, 389; Albany's Case, 1 Co. Rep. 110; Noel v. Henry, McCle. & Yo. 302; Wess v. Berney, 1 R. & M. 481. This rule applies also to those cases in which the donee of the power is confined or limited in his choice to certain classes of individuals or to certain institutions. Smith v. Death, 5 Mad. 371; King v. Melling, 1 Vent. 226; Coffin v. Cooper, 2 Dr. & Sm. 365; Bickley v. Guest, 1 R. & M. 440. In Smith v. Plummer, 17 L. J. Ch. 145, certain property was settled on the husband and wife successively for life, and after their death to their children, as they should by deed jointly appoint, and, in default of such an appointment, as the survivor should by deed or will appoint. No appointment was made by deed during the joint lives of the husband and wife. The wife died, and the husband, being the survivor, had a life estate and power to appoint by deed or will, according to the terms of the original settlement. In 1842 the husband released his power by deed. Afterwards, in 1843, he made a will purporting to exercise the power. As he was in the first instance given an interest for life in the property, to which was attached a power, the court held that he could by deed or contract bind himself not to execute the power, and that his release of it in 1842 was valid and binding, and the will subsequently made in exercise of the power was held to be inoperative. Such powers as are not merely collateral and such as are not coupled with a trust or duty may be released, extinguished, or suspended by express agreement or by implication. Any dealing with the property inconsistent with the exercise of such power will operate as an implied release or extinguishment of the power. Hurst v. Hurst, 16 Beav. 372; Davies v. Huguenin, 1 H. & M. 730; Isaac v.

Hughes, 9 Eq. 191; Green v. Green, 2 Jones & L. Ch. 529; Re Chambers, 11 Ir. Eq. 518; Cunningham v. Thurlow, 1 R. & M. 436; Smith v. Houbton, 26 Beav. 482; Boyd v. Petrie, 7 Ch. 385; Young v. Roberts, 15 Beav. 558.

"It was provided by act of Parliament in England January 1, 1882, that even collateral powers might be extinguished or suspended by the act of the donee, so that now in all the countries in which that act applies the donee of any power, except such as is coupled with a trust or duty, may suspend or extinguish the same by express agreement or by implication. In this state, however, I take it the rule is the same as it was in England prior to January 1, 1882. As heretofore stated, the rule as it then existed permitted the donee of the power, which related to property an interest in which was given to the donee, to extinguish or suspend the power by express agreement or by implication. All powers, other than powers collateral and powers coupled with a trust or duty, may be suspended or destroyed, either in whole or in part, by the donee thereof. The power given by the third clause of the will of J. Hill Eakin to his wife over the moiety of his residuary estate, which was devised to the testator's mother for life, and after her death to the testator's wife, subject to the power above mentioned, was clearly not a collateral power, nor was it a power coupled with a trust or duty. It was a power which related to an estate or interest given by the donor to the donee of the power, and it was appendant because its execution would affect or destroy the interest of the donee. Such a power the donee clearly had the right to release or extinguish, and this she has done, both expressly and by implication. The deed to Christopher, in the first instance, was clearly an implied release of the power. It was a dealing with the property in question inconsistent with a subsequent execution of the power. The general principle is that it is not permitted to one to defeat his own grant. One may not so deal with the estate over which he has a power, other than a power collateral or a power coupled with a trust or duty, as to create interests inconsistent with the exercise of his power. West v. Burney, 1 R. & M. 431.

"I think the title of Christopher is good and sufficient, and that the demurrer to the petition should be overruled."

It further appears in the record that, after the deed was executed, Mrs. Eakin, the widow, executed another writing to appellee by which she obligated herself, in effect, that, if she thereafter elected to aid or establish one of the institutions named in the will, she would so establish it that it could not interfere in any way with the one-fourth interest in this land. Appellants' counsel contend, first, that this writing was executed without consideration, and therefore was not binding; second, that it did not have the ef-

fect to change the situation and obligations already existing. We differ with counsel on the first contention. There was a sufficient consideration to uphold the agreement. If the conveyance which was executed did not pass to appellee a good title, there was a probability of his recovering from her and the Nashville Trust Company that part of the purchase money paid for the land and of his defeating the collection of the notes given for that part of the purchase price unpaid. The trust company, under the terms of the will, held one-half of the cash paid and owned, a half interest in the notes, and she owned the other halves. We will not discuss the second proposition, as we have already determined that appellee received a good title by reason of the conveyance.

It will be noticed that the will provides that the Nashville Trust Company shall hold the one-half interest devised to the mother for life for her benefit, and upon her death for the benefit of the widow for life, and at her death the trust company is to pay it over to the First Presbyterian Church and the Young Men's Christian Association, provided the widow does not elect and establish one of the institutions named in the will, in which event the trust company should turn over to such institution that portion of the testator's estate in its possession. Our opinion is, under these facts, even though we are in error when we say that appellee has a good title by reason of the conveyance, no court of equity would permit the institution, when established by Mrs. Eakin, to disturb appellee in his title and possession of the property in controversy, or any part of it. If Mrs. Eakin, notwithstanding the conveyance and in violation of her obligation assumed in the separate writing, should establish such an institution without protecting the right of appellee in the land, no court of equity, in our opinion, should permit the institution created by her to disregard the obligations of its creator and disturb this conveyance, and especially when it has received the proceeds of the land from the Nashville Trust Company, the trustee named by the testator, Eakin, which were directed to be paid over to it when established.

For these reasons, the judgment of the lower court is affirmed.

#### BAILEY v. NAPIER.

(Court of Appeals of Kentucky. April 14, 1909.)

##### 1. SHERIFFS AND CONSTABLES (§ 157\*)—COLLECTION OF TAXES—SEIZURE AND SALE—EXCESS LEVY—LIABILITY ON BOND.

If the sheriff without right seizes and sells property, or seizes and sells more property than is necessary to satisfy taxes against the property owner, the latter's remedy is against the sheriff on his bond.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 369; Dec. Dig. § 157.\*]

##### 2. TAXATION (§ 561\*)—COLLECTION OF TAXES—SALE OF PROPERTY—ACCOUNTABILITY OF SHERIFF.

Where a sheriff sells property for taxes and fails to collect the price from the purchaser, he becomes responsible therefor to the state and county.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1084; Dec. Dig. § 561.\*]

##### 3. TAXATION (§ 784\*)—COLLECTION OF TAXES—SALE OF PROPERTY—IRREGULARITIES.

That a sheriff sold more property levied on for taxes than was necessary to pay the taxes, or that he failed to collect the money from the purchaser, did not affect the purchaser's title.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1470; Dec. Dig. § 734.\*]

##### 4. TAXATION (§ 683\*)—EXCESSIVE LEVY—SALE—SURPLUS.

Where a sheriff, to collect delinquent taxes, levies on property which sold for more than the amount due, the sheriff was required to pay the taxes from the proceeds and return the remainder to the owner.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1367; Dec. Dig. § 683.\*]

##### 5. TAXATION (§ 691\*)—COLLECTION—SEIZURE OF LIVE STOCK—EXPENSE OF KEEP.

Where a sheriff seized live stock for nonpayment of delinquent taxes, he was entitled to reimburse himself out of the proceeds of the sale for the reasonable actual cost of keeping and caring for the stock between the seizure and sale.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1368; Dec. Dig. § 691.\*]

##### 6. SALES (§ 479\*)—CONDITIONAL SALES—BREACH OF CONTRACT—RECOVERY OF PROPERTY.

Certain cattle, having been seized by the sheriff as the property of defendant's father for nonpayment of taxes, were sold to plaintiff, who in turn sold and delivered them to defendant under an agreement that he should have them, provided he paid the taxes within a specified time; the title to remain in plaintiff until payment was made. *Held*, that plaintiff, on defendant's breach of such contract, was entitled to a specific recovery of the cattle.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1420; Dec. Dig. § 479.\*]

Appeal from Circuit Court, Knott County.  
"Not to be officially reported."

Action by Irving Napier against Taubee Bailey. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Craft and J. J. C. Bach, for appellant. Smith & Combs, for appellee.

CARROLL, J. The appellee, Napier, who was plaintiff below, claiming that he was the owner of and entitled to the possession of eight oxen of the value of \$300, brought this action for their recovery and damages for their detention against the appellant, Bailey, who was defendant below. In his answer Bailey, after denying that the plaintiff, Napier, was the owner of the cattle, averred that he owned and was entitled to the possession of them. Upon a trial of the issue as to who was the owner of the cattle, which was the only issue in the case, the jury found for the plaintiff, Napier, and fixed the value of the cattle at \$300, and a judgment

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was entered in accordance with the verdict.

It appears from the evidence that one J. M. Bailey, the father of the defendant, owed the sheriff of Knott county a large sum for taxes. The sheriff also had an execution in his hands against Bailey on a judgment in favor of one Richardson. For the purpose of satisfying the taxes and the execution, the sheriff seized about 65 head of cattle and other personal property, including the oxen in controversy. Afterwards the sheriff offered for sale, and sold, to satisfy the taxes, about 40 head of the cattle; and after applying the proceeds as a credit upon the taxes there was yet due \$207.50, which sum embraced the costs of feeding and taking care of the cattle after the sheriff had seized them for the taxes and before they were sold. To satisfy this amount the sheriff sold the four yoke of oxen to the plaintiff, Napier, for \$252.50, which was \$45 more than the amount claimed by the sheriff to be due for the taxes, costs, and expenses. After the tax sale the defendant, Bailey, enjoined the sale of the remainder of the property that the sheriff had taken possession of for the purpose of satisfying the Richardson execution. A few weeks after the sale of the four yoke of oxen, and while they were in the possession of plaintiff, Napier, as purchaser, he testifies that he sold them to the defendant under an agreement at the time made that the defendant should pay to the sheriff the \$207.50 due for taxes, and pay to J. M. Bailey \$45, and that it was further agreed that the defendant should have one month's time in which to pay for the cattle, and they were to remain the property of the plaintiff until paid for, and that as Bailey failed to pay for them it became necessary that suit for their recovery should be brought.

It is the contention of Bailey: First, that the sheriff had no authority to sell more property than was necessary to satisfy the amount of taxes; second, that the statute makes no provision for the expense of keeping property seized for taxes, and hence the sheriff had no right to sell any of the property for the purpose of paying the expense of keeping it; and, third, that the sheriff did not collect from Napier at the time he sold the property for taxes the purchase money. Other contentions are also made by Bailey, but in the view we have of the case it is not necessary to discuss any features of it except two: First, was Napier at the time he sold the cattle to Bailey the owner of them; and, second, did he sell them to Bailey under an agreement by which the title was to remain in him unless Bailey paid the amount agreed upon when he purchased them? Upon the last of the issues, there was conflict in the evidence; but it was for the jury to decide this controverted question of fact.

If the sheriff, without right, seized and sold the cattle, or if he sold more cattle than was necessary to satisfy the taxes, the law

affords the owner a remedy against the sheriff on his bond; and so, if the sheriff did not collect from the purchaser the money, he became responsible for it to the state and county. But these irregularities upon the part of the sheriff, if there were any—a question we do not decide—do not affect the title of the purchaser at the tax sale. It may not, however, be out of place to observe that it is often necessary to sell personal property for more than the amount of taxes due, as, for instance, if a horse worth \$50 is levied on for a tax bill of \$5, the sheriff or tax collector may sell the horse, and out of the proceeds pay the taxes and return to the owner of the horse the remainder. And so, if a sheriff seizes for taxes live stock, he is entitled to be paid out of the proceeds of the sale the reasonable amount expended by him in keeping and caring for the stock between the time of their seizure and sale. It cannot be seriously insisted that a sheriff must defray out of his own pocket the expense of keeping live stock that he has seized for taxes; but, if he should charge more than the actual cost, an action to recover the excess could be maintained against him.

The cattle were sold in November, 1904, and Bailey testifies that in January, 1904, he bought these cattle and other property from J. M. Bailey, and that when the cattle were seized and sold they were owned by him. He further said that, after Napier bought the cattle at the tax sale, Napier told him he could take the cattle if he would pay the taxes, and that upon his agreement to do this the cattle were delivered to him, and that in compliance with his agreement he offered to pay the amount of tax actually due, which was \$157, but the sheriff refused to receive the check for that amount unless he would also pay the expense of keeping the cattle, which he declined to do. With the evidence in this condition, the court instructed the jury that: "If they believed from the evidence that Bailey bought from Napier the cattle described in the petition under an agreement that he was to pay the amount of taxes J. M. Bailey owed, and that the cattle were delivered to him under this agreement, they should find for him. On the other hand, if they believed from the evidence that the cattle were delivered to Bailey by Napier under an agreement that the title was not to pass, and that the cattle were to remain the property of Napier unless within the time specified Bailey paid the sum agreed upon, and if they further believed that Bailey did not comply with this agreement, they should find for Napier."

These instructions presented to the jury in plain and unmistakable language the only issues in the case. If the cattle were sold by Napier to Bailey under an agreement by which they were to be paid for within a specified time, the title to remain in Napier until the payment was made, upon a breach of the contract by Bailey, Napier had the

right to bring the suit he did for the specific recovery of the cattle. The rights of no third persons are concerned. The controversy is exclusively between Bailey and Napier. *Vaughn v. Hopson*, 10 Bush, 337.

Although the evidence was conflicting upon the issues submitted, there was sufficient to support the verdict, and, as the law of the case was correctly given to the jury, the judgment must be affirmed, and it is so ordered.

**KIDDER PRESS CO. v. J. V. REED & CO.**  
(Court of Appeals of Kentucky. April 14, 1909.)

**1. SALES (§ 72\*) — CONDITIONS — "SATISFACTORY" MACHINERY.**

Plaintiff constructed a printing press, which was in the nature of an experiment for the printing of labels. He sold the same to defendant under a contract providing that, if the machine was not "satisfactory," it was to be returned free of expense to the seller. The contract also required the buyer to pay therefor after "satisfactory" trial a specified sum or its equivalent, and that on payment of the price plaintiff agreed to execute and deliver to the buyer a sufficient bill of sale of the property, subject to a condition that it should not be used for the manufacture of sales slips or counter checks. *Held*, that the word "satisfactory" meant that defendant's decision that the machine was not satisfactory should be conclusive so that defendant, having given reasonable notice of such decision, was entitled to refuse to accept the machine without liability for the price.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 201; Dec. Dig. § 72.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6334, 6335.]

**2. SALES (§ 168\*)—SALE ON APPROVAL—BUYER'S EXPENSES.**

Where defendants bought a printing press under an executory contract that the press should be satisfactory to defendants, and plaintiff, after numerous efforts, failed to make the press work satisfactorily, so that defendants ultimately refused to accept or pay for the press, defendants were entitled to refuse to return the press until they had been reimbursed for reasonable sums advanced for living expenses of plaintiff's experts sent to adjust the machine and endeavor to make it work to defendants' satisfaction.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 408; Dec. Dig. § 168.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"To be officially reported."

Action by the Kidder Press Company against J. V. Reed & Co. Judgment for defendant, and plaintiff appeals. Affirmed.

Herbert B. Lee, Wm. Marshall Bullitt, Keith L. Bullitt, and Bullitt & Bullitt, for appellant. Dodd & Dodd, for appellee.

CLAY, C. The plaintiff, Kidder Press Company, instituted this action against J. V. Reed to recover the sum of \$3,262, the

purchase price of a printing press. The defendant, by answer, set up the contract hereinafter noted, and denied any liability for the purchase price. It also set up a counterclaim of \$343.46. At the conclusion of all the evidence the court peremptorily instructed the jury to find against plaintiff on its claim as set out in its petition, and for defendant on his counterclaim. Judgment was entered accordingly, and the Kidder Press Company appeals.

The contract entered into between the parties is as follows: "Gibbs-Brower Company, General Agents American and European Machinery, 150 Nassau Street, New York. Kidder Press Company hereby agrees to sell at the sum of \$2,925.00 net to J. V. Reed & Company, Louisville, Ky., one of its No. 3 Roll Feed Bed and Platen Presses for two colors with multiple feed and cut, and fountain both sides, to be delivered boxed on cars at Louisville, about the 1st of March, 1908, warranted free from defects of material and manufacture and with the following attachments: Slitting attachment \$55.00; 7 sets slitters at \$5.00, \$35.00; 3 crosswise perforators, at \$135.00, \$405.00; rewinder for narrow rolls, \$250.00. Freight and erector expenses \$200.00. J. V. Reed & Company hereby agrees to buy said property as above specified and to pay therefor after satisfactory trial, cash \$2,925.00, or its equivalent. Deferred payments, if any, bearing 6 per cent. interest and exchange on New York. Said machine is guaranteed to do a good quality of printing and to produce rolls of narrow width, hard and even wound. The perforating attachment is to have in addition to crosswise perforating knives attachments for cutting cross. Register is guaranteed to be satisfactory and to accomplish the desired results. Sample inclosed to be changed in size to 3 in. x 2 in. making it possible to print nine (9) wrappers, the long way of the press and to print six (6) in width, size of press inside of chase measures 27 in. x 13 in. Attachments working three (3) times each to each impression of the press, making it possible to cut cross X each three (3) inches in each strip. As this X is to register with wrapping machine, register must be satisfactory to accomplish the desired result. If said machine is not satisfactory it is to be returned free of expense to the purchaser. Main shaft, diameter — inches. Speed — turns per minute. To belt from below with motor connections. The seller to send erector to superintend erection of said machinery, for erector's time, hotel bills, and all traveling expenses. The purchaser agrees to insure said machinery fully, immediately upon its receipt. The purchaser agrees to report to the seller in writing all defects of material or manufacture, if any, in the above machinery within thirty days after receipt of same, and that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the seller shall not be liable for any defects not so reported within said period. Upon payment of the purchase price in cash, Kidder Press Company agrees to execute and deliver a good and sufficient bill of sale of the above-described property, but such sale is made subject to the condition that said machine shall never be used in the manufacture of sales slips or counter check books by said purchaser or successors in interest and the title hereto is taken subject to said restriction, of which notice shall be given upon transfer. Kidder Press Company, Per Gibbs & Brower Company, General Agent. J. V. Reed & Company, By J. V. Reed. Louisville, Ky., November 27, 1905."

On the margin, written in red ink, is the following: "Note.—It is agreed that the whole agreement between the parties is contained in the contract, and that all representations and warranties unless reduced to writing and inserted herein are void."

For some time prior to the date of the above contract, J. V. Reed, a printer of Louisville, Ky., was engaged in furnishing to the Colgan Gum Company, of that city, a large quantity of hand-made wrappers to be used in wrapping its tolu. In the latter part of the year 1905, appellant's agent, L. M. Cain, came to appellee for the purpose of inducing him to permit the Kidder Press Company to construct and furnish him a machine to be used in furnishing wrappers in rolls. As an inducement to the appellee's consenting to purchase the machine, appellant's agent agreed to go with appellee's representative and help him make a contract with the Colgan Gum Company. They succeeded in getting an order from the latter company for 50,000,000 wrappers. Thereupon the above contract was entered into. The machine, itself, was in the nature of an experiment. Therefore the contract provided that if the machine was not satisfactory it was to be returned, free of expense to the purchaser. The contract provided that appellant should deliver the press to appellee at Louisville, Ky., on March 1, 1906. The machine did not arrive until April 23, 1906. A representative of appellant came to Louisville at that time to direct and adjust the machine. He having failed to adjust the machine, the company then sent its chief expert, W. C. Williams, who arrived in Louisville May 22, 1906. He claims that he put the machine in good running order and then left on May 24, 1906. Afterwards other experts were sent by appellant. Many changes and alterations were made. On July 7th appellant requested a settlement for the press, but was refused on the ground that the machine was not satisfactory. On July 14th appellee wrote appellant as follows: "The press sent us has never delivered satisfactory work, and we are inclined to believe that it never will as it is now constructed. Some parts needed, which your erector promised to have sent to us at once, have never arrived, and as a result we

have done nothing since he left the city." On December 28, 1906, appellee wrote appellant, in part, as follows: "We are very much surprised in not hearing further from you in regard to your numerous appointments in regard to your press that we have in our possession. As you know this press has never come up to our requirements, and is not at all satisfactory to us, and as we seem unable to hear from you on the subject, we are considering another press for our needs." After that appellant's general agent was sent to Louisville twice, once in February, 1907, and the next time in May following. During this time appellant attempted to sell appellee another machine at the price of \$7,500. An offer to this effect was made in a letter from appellant to appellee, dated February 8, 1907. On February 27, 1907, appellee wrote Gibbs-Brower & Company, appellant's general agents, to the effect that the press was furnishing an output of only about 40 per cent. of the wrappers promised. On May 20th appellant sent appellee a letter containing the following: "Since the writer's return to the city, he has interviewed the Kidder Press Company in regard to the press they sold you, and has been instructed to advise you as follows: "That you may return the press which we sold you under contract dated November 27, 1905, within ten days from date, or pay for same as per contract.'" On May 29, 1907, appellee wrote Gibbs-Brower & Co. to the effect that it would be impossible for him to accept their proposition to return the machine, unless the claims he had against the machine were paid. On May 22, 1907, the appellant, through its general agents, Gibbs-Brower & Co., wrote to the Gibbs-Inman Company, of Louisville, a letter containing the following: "We are not taking advantage of our relation with Mr. Reed in giving you the information which we have, and suggest that you take over the press and contract, because we know that, in Mr. Reed's present state of mind, it is just the way he would like to settle the whole deal."

Upon the question whether or not the machine was satisfactory, the overwhelming weight of the evidence is that it did not register properly, the output was insufficient, and a large portion of the work which was done for the Colgan Gum Company was returned as not being up to their requirements. Because of certain statements of appellant's agents, to the effect that the machine worked all right while they were in Louisville, because of the fact that appellee retained the machine from January until May and did certain work for the Colgan Gum Company thereon, and because there was some evidence to the effect that the failure of the machine to work satisfactorily was due to the fact that the paper used was defective and the operator employed in managing the machine was slow, it is insisted that the court erred in not submitting to the jury the question whether or not, as a matter of fact, the press

was satisfactory. The determination of this question depends upon the further question whether or not the facts of this case bring it within the line of cases where the purchaser of an article has the arbitrary right to decide that it is unsatisfactory, or that other line of cases where he must decide the question of satisfaction as a reasonable man.

Upon this question the authorities are by no means harmonious. Thus in *Hummel v. Stern*, 21 App. Div. 544, 48 N. Y. Supp. 528, Stern contracted to furnish and install certain ventilating machinery upon the premises of Hummel; the contract providing as follows: "We guarantee to ventilate receiving room to your satisfaction; otherwise, we will remove the wheel without cost to you." In that case the court said: "A wide distinction is drawn in the cases between contracts for doing work or furnishing material to suit the taste or fancy or caprice of a party, and contracts such as the one in suit."

\* \* \* One who makes a suit of clothes or molds a bust may not unreasonably be expected to be bound by the opinion of his employer honestly entertained; but in cases where the parties contract to do work not of the character referred to above, and it is stipulated that the person for whom the work is to be done is to be satisfied with that work, the final construction has been given that, to justify a rejection of the work and a refusal to pay therefor, there must be some reason for the dissatisfaction shown." Among the authorities holding the contrary doctrine may be mentioned that of *Wood R. & M. Machine Co. v. Smith*, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57, where it was held that, where the vendor of a harvesting machine gave a warranty that the contract of purchase should be of no effect unless the machine worked to the buyer's satisfaction, it was held the purchaser had reserved the absolute right to reject the machine, and that his reasons for doing so could not be investigated. A still stronger case is that of *Plano Mfg. Co. v. Ellis*, 68 Mich. 101, 35 N. W. 841. The agreement was that a certain grain binder should do good work and "give satisfaction." It was held that, unless the defendant was satisfied with the machine, although it did good work, he was not bound to purchase. In the case of *McCormick Harvesting Machine Co. v. Chesrown*, 33 Minn. 32, 21 N. W. 846, the plaintiff agreed to furnish the defendant a cord binder guaranteed to work satisfactorily. It was held that in case, upon reasonable trial, it did not work satisfactorily, it was unnecessary for the defendant to return the binder to the plaintiff, but was sufficient for him, within a reasonable time, to notify plaintiff, in substance, that it did not work satisfactorily, and that he declined to accept it. The same ruling was announced in regard to a steamboat, in *Gray v. Central R. Co.*, 11 Hun, 70. The purchasers in that case agreed to buy a steamboat for \$15,000, "provided, upon

trial, they are satisfied with the soundness of her machinery, boilers," etc. It was held that no recovery could be had unless it was shown that defendants were satisfied with the boat; whether or not they ought to have been satisfied was immaterial. In the case of *Aiken v. Hyde*, 99 Mass. 183, the same doctrine was laid down with reference to a machine for generating gas; also, in *Goodrich v. Van Nortwick*, 43 Ill. 445, with reference to a fanning mill; and in *Singerly v. Thayer*, 108 Pa. 291, 2 Atl. 530, 56 Am. Rep. 207, in regard to a passenger elevator. Another strong case in support of the same doctrine is *Osborne v. Francis*, 38 W. Va. 312, 18 S. E. 591, 45 Am. St. Rep. 859. In that case the defendant bought a harvesting machine upon the condition that if it did not work to his satisfaction he might return it. It was held that his right to reject was absolute, and his reasons for so doing could not be investigated. See, also, *Frary v. American Rubber Co.*, 52 Minn. 264, 53 N. W. 1156, 18 L. R. A. 644; *Blaine v. Knapp & Co.*, 140 Mo. 241, 41 S. W. 787; *Wood Reaping & Mowing Machine Co. v. Smith*, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; *Reeves & Co. v. Chandler*, 113 Ill. App. 167.

In the case before us the printing press to be constructed was in the nature of an experiment. Appellant had never constructed one like it before. The purpose was to enable appellee to supply his customers with machine-made wrappers, instead of hand-made wrappers. The contract of sale was purely executory. The contract provided that if the machine was not satisfactory it was to be returned. A careful reading of the contract shows that the title was not to vest in the purchaser unless the machine was satisfactory and the purchase price therefor paid. It was a conditional sale, made upon the condition that the machine should be satisfactory. It is insisted that the meaning of "satisfactory" is to be determined by the actual warranty contained in the contract, to the effect that the "said machine is guaranteed to do a good quality of printing and to produce rolls of narrow width, hard and even wound." In our opinion this would be taking entirely too narrow a view of the word "satisfactory" as repeatedly used in the contract. The machine might comply with the guaranty referred to, and still be utterly useless for the purposes for which it was constructed. The work might be of good quality, and yet the output so small that the machine could not be run except at a loss. When we consider the relations of the parties, the peculiar circumstances under which the contract was entered into, and the further fact that the title to the property was not to vest unless the machine was satisfactory, we conclude that the parties intended to be bound by the decision of appellee as to whether or not the press was satisfactory, for it is well settled that, where the contract requires the article to be satis-



factory, without stating the person to whom it is to be satisfactory, it means satisfactory to him to whom it is sold or furnished. *Taylor v. Brewer*, 1 Maule & S. 290; *McCormick Harvesting Machine Co. v. Chescrown*, 83 Minn. 32, 21 N. W. 846; *Singerly v. Thayer*, 108 Pa. 291, 2 Atl. 530, 56 Am. Rep. 207. It may be that appellant was injudicious and indiscreet in undertaking to furnish the press to be paid for upon the happening of a contingency so hazardous or doubtful as the approval or satisfaction of appellee, but it assumed the risk. Against the consequences resulting from its own bargain, the law affords it no relief. Having voluntarily assumed the obligations and risk of the contract, appellant's legal rights are to be ascertained and determined solely according to its provisions. *McCarren v. McNulty*, 7 Gray (Mass.) 139. In the record before us there is nothing from which it could be even inferred that appellee was satisfied with the press. For months appellant endeavored to make the machine work to his satisfaction. It utterly failed. Its letter of May 22d to the Gibbs-Inman Company shows that it recognized the fact that appellee was not satisfied with the press. As the contract in question was merely executory, and the sale was made upon the condition that the press should prove satisfactory to appellee, as he alone had the right to determine whether or not it was satisfactory, and as he at no time, either by word or deed, intimated that he was satisfied, we conclude that the trial court properly instructed the jury to find against plaintiff on its claim for the purchase price.

The proof shows that appellee, after receiving appellant's letter of May 20th requiring him either to pay or return the machine, boxed the machine up and declined to return it until appellant paid him the sum of \$343.46 advanced by him as the living expenses of appellant's experts. Appellant was a nonresident. The evidence shows that appellee's claim was just. Indeed, there is no evidence to the contrary. It was not incumbent upon appellee to return the press until his valid claim against appellant was satisfied. *C. L. Flaccus Glass Co. v. Alvey-Ferguson Co.*, 102 S. W. 870, 31 Ky. Law Rep. 552. The court did not therefore err in instructing the jury to find for appellee on his counterclaim.

Judgment affirmed.

#### LOUISVILLE RY. CO. v. HOLMES.

(Court of Appeals of Kentucky. April 15, 1909.)

#### 1. EVIDENCE (§ 598\*)—WEIGHT AND SUFFICIENCY—NECESSITY OF PREPONDERANCE OF EVIDENCE.

The rule that, where the evidence which would render defendant liable is no stronger than the evidence to the contrary, there could be no recovery, only applies where the deduc-

tion is to be made from circumstantial evidence, and does not apply where there is a mere discrepancy in the testimony of witnesses.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2450; Dec. Dig. § 598.\*]

#### 2. STREET RAILROADS (§ 78\*)—THROWING PAPERS FROM CARS—INJURIES TO THIRD PERSONS—NEGLIGENCE OF PASSENGER.

A street car company is not liable for injuries to a person standing at a street corner waiting for a street car injured by the negligence of a passenger in gratuitously throwing a bundle of papers from the car in the performance of a duty devolving on the car operatives.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 166; Dec. Dig. § 78.\*]

#### 3. STREET RAILROADS (§ 114\*)—INJURIES TO THIRD PERSONS—EVIDENCE.

In an action against a street car company for injuries to plaintiff caused by being struck by a bundle of papers negligently thrown from a passing car, evidence held insufficient to sustain a finding that the papers were thrown by the conductor, and not by a passenger.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 239; Dec. Dig. § 114.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by Annie Holmes against the Louisville Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Fairleigh, Straus & Fairleigh and Howard B. Lee, for appellant. Bennett H. Young, for appellee.

HOBSON, J. The street cars in Louisville deliver newspapers for the publishers; the papers being tied up in bundles which are thrown off as the cars pass the business places for which the papers are intended. The papers are marked to show to whom they go. While Mrs. Annie Holmes was standing at the corner of Twenty-Sixth street and Portland avenue on January 21, 1907, waiting for the east-bound car, a west-bound car passed, and a bundle of papers was thrown from it which struck her violently in the stomach, in the solar plexus region, inflicting serious injuries, to recover for which she brought this suit; and, a verdict and judgment having been rendered in her favor for the sum of \$4,000, the railway company appeals.

Her injury was, as she proves, so serious that the amount of the verdict was not excessive if the defendant is liable. It is insisted for it, however, that the court should have instructed the jury peremptorily to find for it, and that, if the case should have gone to the jury, the verdict is palpably against the evidence. The case turns on who threw the bundle of papers from the car. The defendant contends that the bundle of papers was thrown from the car by one of the passengers on it without the knowledge or authority of its agents in charge of the car. The plaintiff contends that the papers were thrown from the car by the conductor, and that the defendant is responsible although

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the papers were thrown from the car by the passenger. As to who threw the papers from the car only four witnesses were introduced, and all these were introduced by the plaintiff. The plaintiff's statement is as follows: "While we were standing there, a man threw off a bundle of papers, and hit me in the stomach. I did not see the bundle until I got ready to go into the car, and I stepped on it." This is her whole statement as to who threw off the bundle. She evidently was knocked out by it, and did not know who threw it off. J. H. Evans, the conductor of the car, testified that he was just coming out of the car near the back door, when J. G. Foster, a passenger on the car, threw the papers off; that Foster was employed by the B. F. Avery Plow Company, and was going home on the car; that he had nothing to do with the papers, and that he had not requested him to throw them off, and did not know that he intended to do so. Foster testified that he was only on the car going home; that he saw the papers were marked to be delivered at this point, and that he reached around in the back and got the bundle and pitched it out; that the conductor did not know he was going to throw it off, and said to him, "You ought to have let it alone"; that he answered, "I just pitched it off, and did not intend to hit anybody." He also testified that about a year before he had run as a conductor on the line, and knew that the papers were to be thrown off at the points indicated by the marks on them. The conductor said he went into the car to collect some fares, and, when they got to that point, had not got out, and Foster took the papers before he could get there, and threw the bundle off. Mrs. Mary Humley, who was standing with Mrs. Holmes on the corner, testified as follows: "While we were standing there waiting for the car, the car going in west, why he threw a bundle of papers out from the back end of the car it seemed to me. He was a street car man. He had on a uniform and cap, and threw it out from the back end of the car, and it struck her across the breast, and she went to fall and I caught her, and she turned blind and sick, and there was a couple of men come up and asked if she was hurt, and I told them, 'Yes,' and I assisted her home and went out as far as one square of her house, and I got off the car and went home. My daughter was sick and I went home, and I went over in a couple of days, and she was bad and in bed. Q. What sort of a uniform did this man have on that threw this paper? A. He had on a blue uniform. Q. Are you familiar with the uniforms of street car conductors? A. Yes, sir; pretty familiar. Q. Did he have on one of those? A. Yes, sir. Q. Show us how he threw that paper? A. He just kept swinging it this way two or three times, and then he sent it, and it struck her across there very hard." The defendant insists that as the plaintiff introduced all four of the witnesses, and none of

them are impeached, the rule should be applied that, where the evidence in favor of a state of case in which the defendant would be liable is no stronger than the evidence in favor of a state of case in which it is not liable, there can be no recovery. But this rule has no application. The rule is applied where the deduction is to be made from circumstantial evidence, and where there is no direct proof as to how the injury occurred. It does not apply where there is a discrepancy in the testimony of the witnesses. In such a state of case it is for the jury to say which of the witnesses correctly stated the facts. We therefore conclude that the court properly refused to instruct the jury peremptorily to find for the defendant.

It remains to determine whether the verdict is palpably against the evidence. On the trial the conductor, Evans, was not in the service of the railway company, and Foster had left the service of the Avery Plow Company and was in the service of the railway company. Mrs. Humley was a disinterested witness, and, none of the witnesses being in any wise impeached, we should not interfere merely because the jury believed one witness rather than the other two if there was nothing more in the case. Mrs. Humley might be mistaken, and still swear truthfully to all she states, believing it to be true. But neither Evans nor Foster can be mistaken in what they state. The facts are either as stated by them or they have willfully sworn falsely. They cannot be mistaken as to the facts they state. Mrs. Holmes was hurt, and they knew it. As to who had thrown the papers off, they could not then be mistaken. On the contrary, Mrs. Humley, who was standing on the sidewalk, and who had nothing to call her attention to who had thrown the papers off until her friend was struck, might naturally think that the conductor who appeared at the back door just after her friend was struck was the man who had thrown the papers. She was naturally excited from the injury received by her friend, and she might very reasonably be mistaken as to which of the two men had thrown the papers off, and it will be observed she says, "It seemed to me," etc. The cause of action arises, not from the throwing off of the papers, but from the negligent manner in which it was done. If the man who threw them off had noticed what he was doing, or had looked before he threw the papers out, he would not have hit Mrs. Holmes. Her injury was due to the fact that he threw them out without looking. If the conductor did this, the defendant is liable, but if a passenger on the car, acting on his own volition and without authority, did so, the defendant is not liable for his negligence in not looking; for it had not authorized him to act for it. He is liable for his own negligence in so throwing off the papers, but he could not by volunteering to throw them off impose a liability on the defendant for his negligence in throwing them

off without looking. In view of all the facts, we think the ends of substantial justice require that a new trial should be granted.

Judgment reversed, and cause remanded for a new trial.

# DERICKSON et al. v. CONLEE et al.

(Court of Appeals of Kentucky. April 15, 1909.)

## 1. INTOXICATING LIQUORS (§ 37\*)—LOCAL OPTION ELECTION—CONTEST.

The county judge and two justices of the peace residing near the courthouse constitute the proper board to hear and determine a local option election contest.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.\*]

## 2. INTOXICATING LIQUORS (§ 37\*)—LOCAL OPTION ELECTION—CONTEST—NOTICE—PETITION—TRAVERSE.

Ky. St. 1909, § 2566, subd. 2 (Russell's St. § 4063, subd. 2), relating to local option election contests, provides that the contestants within 10 days after the final action of the examining board shall file in the office of the clerk of the county court a written statement of the grounds of contest and shall cause a copy thereof to be served on the county judge, etc. Held that, where a petition alleged that notice was given as required by statute, an allegation in the answer that the copy of the grounds of contest filed March 5, 1908, was served on the county judge before March 3d, did not constitute a traverse of the petition, as it might also be true that another copy of the grounds of contest was filed with the county clerk before service on the county judge.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.\*]

## 3. INTOXICATING LIQUORS (§ 37\*)—LOCAL OPTION ELECTION—CONTEST—NOTICE—SERVICE.

Under Ky. St. 1909, § 2566, subd. 2 (Russell's St. § 4063, subd. 2), providing that local option election contestants shall within 10 days after final action of the examining board file with the clerk of the county court a statement of the grounds of contest and cause a copy to be served on the county judge, it is immaterial whether the service of a copy on the judge is made before or after the copy is filed with the county clerk.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.\*]

Appeal from Circuit Court, Powell County.

"To be officially reported."

Local option election contest by Matt Conlee and others against J. M. Derickson and others. From an order awarding mandamus compelling defendants to hear such contest, they appeal. Affirmed.

C. T. Spencer, for appellants. Henry Watson, for appellees.

HOBSON, J. On February 26, 1908, an election was held in Powell county to take the sense of the voters on the question as to whether or not spirituous, vinous, or malt liquors should be sold in the county. The election resulted in a majority against the sale on the face of the returns, and the election commissioners certified the result to the county court. Thereupon appellees filed notice of contest which came on to be heard

before appellants, the county judge, and the two magistrates residing nearest to the county seat. The contestees filed the following special demurrer: "Now, come the contestees above named by attorneys, J. D. Atkinson and C. F. Spencer, and demur specially to the jurisdiction of this court and to the proceedings herein, for they say that neither the county court nor the county election commissioners nor the county board of contest have any jurisdiction to hear and determine this contest." On the hearing of the demurrer appellants entered the following order: "The court, having heard the argument of counsel on the special demurrer of the contest to the jurisdiction herein, and being sufficiently advised, considers that this court has no jurisdiction of this contest, and therefore sustains the demurrer to which the contestants except and object and pray an appeal to the circuit court, which is granted." Thereupon the contestants brought this suit in the Powell circuit court against appellants, alleging that, desiring to contest the election, they filed within 10 days after the final action of the examining board in the office of the clerk of the Powell county court a written statement of the grounds of contest, and caused a copy of it to be served on the county judge; that they gave notice by printed posters at the courthouse door, and three other public places in the county, and also caused it to be published in the Clay City Times, a newspaper published in the county, for two consecutive issues, beginning with the first issue of the paper after it was filed in the office of the county clerk. They set out in the petition the notice of contest, and alleged that the contestees filed their demurrer as above set out. They alleged that thereupon the appellants declined to hear the contest, deciding that they had no jurisdiction to determine it. They prayed that the appellants be required by mandamus to hear and determine the contest. Appellants filed an answer to which the circuit court sustained a demurrer and awarded the mandamus as prayed. From this judgment the appeal before us is prosecuted.

In *Shindlar v. Floyd*, 118 Ky. 468, 81 S. W. 668, it was held by this court that the county judge and two justices of the peace residing nearest the courthouse are the proper board to hear and determine the contest of a local option election. See, also, *De Haven v. Bowmer*, 125 Ky. 800, 102 S. W. 306. These cases are conclusive that appellants are the proper board to hear the contest. It is insisted here for the appellants that proper notice of the contest had not been given, and that for this reason they were right in holding that they were without jurisdiction. The statute regulating the matter is subdivision 2, § 2566, Ky. St. (Russell's St. § 4063, subd. 2): "Any number of the

citizens and legal voters, but not less than ten, of the county, city, town, district or precinct in which the election has been held, shall have the right to contest any election held under this law, and shall be designated the contestants. Such contestants shall, within ten days after the final action of the examining board, file in the office of the clerk of the county court a written statement of the grounds of the contest and shall cause a copy thereof to be served on the county judge, and shall give notice thereof by written or printed notices to be posted at the court house door of the county, and in three or more public places in the county, city, town, district or precinct in which the election has been held, and shall cause the same to be published in some newspaper of the county, when possible, for two consecutive issues, commencing not later than the first issue of the paper after filing the statement. When a notice of the contest shall be executed on the county judge, the certificate shall not be recorded."

It is alleged in the petition that notice was given as required by the statute, and these allegations of the petition are not traversed in the answer. It is alleged in the answer that no notice of the grounds of contest filed in the county clerk's office on March 5, 1908, was served on the county judge after the filing of the contest with the county clerk. It is also shown in the answer that it was agreed on the hearing before appellants that a copy of the grounds of the contest as shown by paper filed of date March 5, 1908, was served on the county judge before March 3, 1908. It is insisted that, as the notice was served on the county judge on March 3d and filed with the county clerk on March 5th or two days afterward, the service on the county judge was not good, as the paper had not then been filed with the county clerk. It may be true that the paper served on the county judge was not filed in the county clerk's office until March 5th; but it may also be true that another copy of the grounds of contest was filed with the county clerk before the service on the county judge. The affirmative matter in the answer does not therefore amount to a traverse of the allegations of the petition. But, aside from this, the statute requires the notice to be filed in the county clerk's office within 10 days after the final action of the examining board, and whether a copy is served on the county judge before or after it is filed in the county clerk's office is not material. It must be filed in the county clerk's office within 10 days, but, when this is done, it is not necessary to serve it again on the county judge if the paper was served on him before it was filed in the county clerk's office. The purpose of the statute is to give the county judge notice of the proceeding; and this notice can be giv-

en by serving a copy of the contest on him as well before as after it is filed with the county clerk. The statute does not require that the notice shall be served on the county judge after it is filed in the county clerk's office, and it should be liberally construed with the view to promote its objects.

Judgment affirmed.

**FAWCETT'S ASSIGNEE et al. v. MITCHELL, FINCH & CO. et al.**

(Court of Appeals of Kentucky. April 14, 1909.)

**1. BANKS AND BANKING (§ 87\*) — STATE BANKS—DOING BUSINESS IN OTHER STATES.**

In the absence of any statute limiting its authority, a bank organized under the laws of this state may transact any business within the scope of its charter in other states.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 219; Dec. Dig. § 87.\*]

**2. BANKS AND BANKING (§§ 177, 179\*)—BANKING BUSINESS.**

Taking notes or other securities, whether for the purpose of discount or to secure a debt, is a part of the legitimate business of a banking corporation.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 654, 655, 667-683; Dec. Dig. §§ 177, 179.\*]

**3. BANKS AND BANKING (§ 179\*)—TAKING SECURITIES—WHAT LAW GOVERNS.**

Where a Kentucky bank took a transfer in Ohio of notes to secure an Ohio debt, the transaction must be governed by the laws of Ohio.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 179.\*]

**4. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 19\*)—WHAT LAW GOVERNS.**

Ky. St. 1909, § 1910 (Russell's St. § 2104), providing that every assignment in contemplation of insolvency and with the design to prefer one creditor to the exclusion of others shall operate as an assignment of all the property of the debtor for the benefit of his creditors, does not apply to a transfer of notes in Ohio to a Kentucky creditor with intent to prefer such creditor; and, there being no similar provision of law in Ohio, the transaction was valid, being valid where made.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 75; Dec. Dig. § 19.\*]

**5. FRAUDULENT CONVEYANCES (§ 115\*) — RIGHT TO PREFER CREDITORS.**

In the absence of any statutory provision in relation thereto, there is nothing illegal in the act of a debtor in preferring one creditor over another.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 370; Dec. Dig. § 115.\*]

Appeal from Circuit Court, Mason County.

"To be officially reported."

Action by W. A. Rist, as assignee of D. A. Fawcett, for the benefit of his creditors, and others, against Mitchell, Finch & Co. and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Allan D. Cole and Young & Barnes, for appellants. Worthington & Cochran, for appellees.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

CARROLL, J. In June, 1908, D. A. Fawcett, who was engaged in business at Aberdeen, Ohio, made a general assignment of his property for the benefit of his creditors to W. A. Rist, also a citizen of Ohio. Afterwards Rist, as assignee, brought this suit against Mitchell, Finch & Co., a banking corporation located at Maysville, in this state, charging that a few days before his assignment Fawcett transferred and delivered to it, in contemplation of insolvency and for the purpose of preferring them to the exclusion of his other creditors, notes aggregating \$1,095, for the purpose of satisfying a debt of \$700 created prior to that time. He further alleged that the transfer was ultra vires and void, because under its charter Mitchell, Finch & Co. had no authority to transact business in the state of Ohio. He asked that the transaction be adjudged to operate as an assignment of the property of Fawcett for the benefit of his creditors under Ky. St. § 1910 (Russell's St. § 2104), known as the act of 1856.

A demurrer being sustained to the petition, an amended petition was filed, in which it was averred that the Citizens' Bank of Dover, Ky., was a creditor of Fawcett in the sum of \$8,000, and that, with the intent to hinder, delay, and defraud the said bank and his other creditors in the collection of their debts, Fawcett transferred and delivered to Mitchell, Finch & Co. the notes described in the petition. It was further averred that the transfer of the notes was null and void under sections 6343, 6344, of the Revised Statutes of Ohio, which read in part as follows: "All transfers, conveyances, or assignments made by a debtor, or procured by him to be made, with the intent to hinder, delay, or defraud creditors, shall be declared void at the suit of any creditor; and the probate judge of the proper county, after any such transfer, conveyance, or assignment shall have been declared by a court of competent jurisdiction to have been made with the intent aforesaid, or in trust with the intent mentioned in the next preceding section, shall, on the application of any creditor, appoint a trustee according to the provisions of this chapter, who, upon being duly qualified, shall proceed by due course of law to recover possession of all property so transferred."

The Citizens' Bank of Dover, which was made a party to this amended petition, offered to file its answer, in which it set up the indebtedness of Fawcett to it, and the fact that in contemplation of insolvency, and with the design to prefer Mitchell, Finch & Co., he did within six months next before the institution of the action transfer and deliver to it the notes mentioned, which it asked should be taken as a cross-petition against Mitchell, Finch & Co., and that the transfer of the notes to it be adjudged to operate as an assignment of the property of Fawcett for the payment pro rata of his

debts. The lower court struck from the record the amended petition, and refused to permit the answer of the Dover bank to be filed; and, the assignee of Fawcett declining to plead further, his petition was dismissed.

So far as the question of ultra vires is concerned, it is scarcely necessary to devote much attention to its discussion. We know of no law, statutory or otherwise, that denies to a bank organized under the laws of this state and doing business in this state, the right to transact business, within the scope of the authority granted by its charter, in other states. Nor can there be any doubt that the lending of money to residents or nonresidents, and taking notes or other securities, whether it be for the purpose of discount or to secure a debt, is a part of the legitimate business of a banking corporation. If the transfer of the notes in the manner and for the purpose mentioned had been made by a citizen of this state to Mitchell, Finch & Co., it would have been a preference under the statute, and any creditor of the assignor or transferor of the notes might have attacked the transaction in the manner provided for in the statute. But it is distinctly charged in the petition that the transfer of the notes by Fawcett to the Kentucky bank took place in the state of Ohio, and so the transaction must be controlled by the laws of Ohio. But the Ohio statute relied on in the pleadings does not forbid preferential conveyances. It is similar to section 1906 of the Kentucky Statutes (Russell's St. § 2099), which provides that "every gift \* \* \* or transfer \* \* \* with the intent to delay, hinder, or defraud creditors \* \* \* shall be void"; while section 1910, under which this action was brought, declares in part that "every \* \* \* assignment \* \* \* in contemplation of insolvency, and with the design to prefer one creditor to the exclusion \* \* \* of others, shall operate as an assignment of all the property of the debtor \* \* \* for the benefit of his creditors."

Although the attempt is made to bring the transaction within the reach of section 1910 of our statute, it does not appear that they have in Ohio a statute similar to this, and our statute against preferential conveyances cannot be extended to embrace transactions that happen in other states. It has no force or effect beyond this state. We have, then, this state of affairs: An Ohio debtor, who is in failing circumstances, transfers in Ohio to a citizen of this state notes, intending thereby to prefer the Kentucky creditor over his other creditors. If the transaction had taken place in Kentucky, it would amount to an assignment of the estate of the debtor for the benefit of all his creditors, if action was taken in the manner and time provided in section 1910 of the Kentucky Statutes. But, as they have no statute like this in Ohio, or, at any

rate, as this record does not disclose such a statute, we must assume that the transaction was valid in the state where it took place. So that the question comes to this: Will the courts of this state undertake to apply our laws to a transaction occurring in another state, and convert that transaction from a legal one to an unlawful one? We think not. As the transaction was valid where it took place, so it will be treated as valid here, so far as this action is concerned. It must be kept in mind that the creditor who was given the preference is not asking the courts of this state to enforce any rights conferred upon him by the Ohio assignment. Mitchell, Finch & Co. is not asking our courts to enforce any right it acquired under the Ohio transfer. It is not seeking any affirmative relief under the contract. It is simply insisting that it has the right to hold property acquired in a transaction recognized as valid by the laws of the state where it took place. So that the question as to what contracts made in a sister state our courts will enforce is not involved in this case.

We are not called upon to decide whether we would afford a remedy that was allowable under the laws of the place where the transaction out of which it arose took place if the same remedy would not be given under the laws of this state if the transaction had occurred in this state. The only question here is whether or not our courts will recognize as valid a contract that was valid under the laws of the state where it was made. Except for our statute, there is nothing illegal in the act of preferring one creditor over another. *Matthews v. Lloyd*, 89 Ky. 625, 13 S. W. 106; *Bank of Commerce v. Windmuller*, 106 Ky. 395, 50 S. W. 548; *Bank of Commerce v. Windmuller*, 77 S. W. 1103, 25 Ky. Law Rep. 1334. And our court in the cases mentioned recognized the validity of preferential laws in other states. Nor in our opinion would it make any difference if this action had been brought in the first instance by the Dover bank. We do not regard it as material that the action was brought by a foreign assignee or a foreign creditor. He would have as much right to maintain it as a Kentucky creditor. The question is not where the attacking creditor resides, but is: Was the transaction attacked valid under the laws of the state where it took place? If it was, no relief can be granted. If it was not, then our courts are open to those who invoke their jurisdiction for the purpose of giving a remedy for the enforcement of a right authorized by the laws of the state where the transaction took place, if the relief sought was of such a nature that our courts when applied to would grant it. To put it in another way, if there had been a statute in Ohio like section 1910 of the Kentucky

Statutes, and a citizen of Ohio had in violation of it transferred property to a citizen of Kentucky, our courts would enforce the Ohio statute and give the same relief the courts of Ohio would. If the transaction was invalid under the laws of Ohio, or if the laws of that state furnished a remedy for the recovery of property conveyed by a falling debtor with the purpose of preferring a favored creditor, we would enforce in this state the Ohio law, as it would be in harmony with the laws of this state. But, in the absence of an Ohio statute, our courts cannot grant relief such as is sought in this case. The property transferred was not located, and did not have a situs, in Kentucky at the time it was transferred. In all its aspects the transaction was completed in Ohio.

The relief sought is in all its features nothing more than an attack upon a transaction that took place in Ohio. So that it does not seem necessary to consider the effect of an assignment in a foreign state upon property, real or personal, located in or that has a situs in this state, if a conflict came up between a creditor residing in this state, or a creditor who sought the aid of our courts, and a foreign assignee. Interesting cases upon these phases of the law are *Security Trust Co. v. Dodd*, 173 U. S. 624, 19 Sup. Ct. 545, 43 L. Ed. 835; *Smead v. Chandler*, 71 Ark. 505, 76 S. W. 1060, 65 L. R. A. 353; *Peach Orchard Coal Co. v. Woodward*, 105 Ky. 790, 49 S. W. 793; *Zacher v. Fidelity Trust Co.*, 109 Ky. 441, 59 S. W. 493; *Coffin v. Kelling*, 83 Ky. 649.

Perceiving no error in the ruling of the lower court, the judgment is affirmed.

#### SOUTHERN RY. CO. IN KENTUCKY v. BREWER.

(Court of Appeals of Kentucky. April 15, 1909.)

#### DAMAGES (\$ 130\*)—PERSONAL INJURIES—EXCESSIVENESS.

Evidence as to the nature of personal injuries considered, and held, that a verdict for \$8,000 is not so excessive as to justify a reversal.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 357; Dec. Dig. § 130.\*]

Appeal from Circuit Court, Mercer County. "Not to be officially reported."

Action by Emma Brewer against the Southern Railway Company in Kentucky for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

For prior reports, see 105 S. W. 160, 32 Ky. Law Rep. 43; 108 S. W. 936, 32 Ky. Law Rep. 1374.

E. P. Humphrey, E. H. Gaither and Humphrey, Davie & Humphrey, for appellant. Robert Harding, T. H. Harding, E. M. Harding, E. V. Puryear, and Greene, Van Winkle & Schoolfield, for appellee.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

NUNN, J. This is the second appeal of this case. The facts with reference to appellee's injuries may be found in the two opinions and the dissenting opinion delivered on the first appeal. 105 S. W. 160, 108 S. W. 936, 32 Ky. Law Rep. 43, 1374. The case was reversed upon the sole ground that the lower court gave an instruction that authorized the jury to find for appellee punitive damages. On the last trial, which occurred nearly three years after appellee received her injuries, the jury awarded appellee a verdict in the sum of \$8,000.

Appellant presents only one ground for a reversal, to wit, that the verdict and judgment are excessive. Appellee's testimony conduces to show that she was an exceedingly healthy and strong woman prior to receiving her injuries. She did her own work, such as cooking, washing, and other household duties, with ease; that by reason of her injuries she was confined to her bed eight months, and had been unable to perform any labor of consequence since that time, or to move about without assistance; that she had since the date of her injuries suffered great pain in the back of her head and in her spine, in her left hip and leg, and with her kidneys. Two physicians stated that her injuries were permanent. One stated that he could not give an opinion as to whether they were or not. Another stated that she might get well. All agreed, however, that she had not recovered from the injury to her spine at the time of the last trial, and that this injury caused partial paralysis of the right arm. The fact that appellee had not recovered from her injuries for three years is a strong circumstance sustaining the testimony of the physicians who gave it as their opinion that her injuries were permanent.

In view of this fact, and the suffering she must have experienced, both mentally and physically, we are unwilling to say that the verdict is so excessive as to justify us in reversing the judgment. See *Cumberland Telephone & Telegraph Co. v. Overfield*, 106 S. W. 242, 32 Ky. Law Rep. 421, and the cases there cited.

For these reasons, the judgment of the lower court is affirmed.

#### SEALY et al. v. WILLISTON.

(Court of Appeals of Kentucky. April 15, 1909.)

#### 1. DEPOSITIONS (§ 79\*)—FILING AND CUSTODY.

Where a deposition is not transmitted to and filed by the clerk of the circuit court, as required by Civ. Code Prac. § 583, but is directed to the master commissioner, to whom the case has been referred, an exception to the depositions is properly sustained.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 202; Dec. Dig. § 79.\*]

#### 2. DEPOSITIONS (§ 107\*)—TIME FOR PASSING ON EXCEPTIONS.

An exception to a deposition for failure to comply with Civ. Code Prac. § 583, requiring the deposition to be directed to and filed with the clerk of the circuit court, should be passed upon prior to beginning the trial of the case upon its merits.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 309; Dec. Dig. § 107.\*]

#### 3. APPEAL AND ERROR (§ 203\*)—PRESERVATION OF GROUNDS OF REVIEW—OBJECTIONS—FAILURE TO HEAR EXCEPTIONS TO DEPOSITION.

Where appellant does not object to the failure of the court, before hearing the case on its merits, to pass upon exceptions to a deposition because of noncompliance with Civ. Code Prac. § 583, directing the deposition to be sent to and filed by the clerk of the circuit court, he cannot on appeal complain of the court's ruling.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 203; Depositions, Cent. Dig. § 339.]

#### 4. APPEAL AND ERROR (§ 260\*)—PRESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS—FAILURE TO PASS ON EXCEPTIONS TO DEPOSITION.

An appellant who does not except to the failure of the court, before hearing the case on its merits, to pass upon exceptions to a deposition for failure to comply with Civ. Code Prac. § 583, directing that depositions be sent to and filed by the clerk of the circuit court, cannot complain of the court's ruling on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1508; Dec. Dig. § 260.\*]

#### 5. DEPOSITIONS (§ 12\*)—GROUND FOR TAKING—NONRESIDENCE OF WITNESS.

Under Civ. Code Prac. § 534, providing that a witness cannot be required to attend for examination upon the trial of a civil case if he resides more than 20 miles from the place where the court sits, the deposition of a witness, who lives 40 miles from the place where the master commissioner is taking evidence in an action, may be required to give his deposition.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 27; Dec. Dig. § 12.\*]

#### 6. JUDGMENT (§ 250\*)—CONFORMITY TO PLEADINGS—GROUNDS OF ACTION.

In an action to recover a balance due for labor performed, plaintiff cannot recover judgment for an amount expended as traveling expenses in an effort to obtain a settlement with defendants, where he did not sue for such expenses and made no allegation that defendant ever agreed to pay him therefor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 436; Dec. Dig. § 250.\*]

Appeal from Circuit Court, Perry County.

"Not to be officially reported."

Action by D. H. Williston against W. O. Sealy and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

O. H. Pollard, A. H. Patton, and Miller & Ward, for appellants. Wootton & Morgan and Greene, Van Winkle & Schoolfield, for appellee.

NUNN, J. This action was instituted by appellee against appellant G. G. Brown to recover an alleged balance, exceeding \$1,800, due him for labor performed. He obtained

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

an attachment and caused it to be levied on some horses, mules, oxen, tram cars, steam mill, and upon two rafts of square timber, etc. Appellant Brown answered controverting the claim of appellee and denying the grounds for the attachment, and alleged that he had overpaid appellee in the sum of \$101. The issues were completed between appellant Brown and appellee. Appellant W. O. Sealy presented and filed his petition, asserting ownership to one of the rafts of square timber which the attachment was levied upon as the property of Brown, and which was marked with Sealy's initials. Appellee controverted the ownership of this raft by Sealy. The action, on motion of appellee, was transferred to equity and referred to the master commissioner to take proof and report upon the issues involved. On May 13, 1908, the master commissioner commenced to take proof in the town of Hazard for appellee. On the same day counsel for appellant Brown gave notice that on the 20th day of May they would take the depositions of appellant Brown and other named witnesses in the town of Jackson, in which place Brown and his witnesses resided. The master commissioner finished taking testimony for appellee on the 16th day of May, giving appellants the balance of that day and until the 20th to reach Jackson, which is about 40 miles from Hazard, and take their depositions. The depositions for Brown were taken in Jackson before a notary public, but there was no cross-examination. The notary public, instead of directing the depositions to the clerk of the circuit court, as required by section 583 of the Civil Code of Practice, directed them to the master commissioner, and they were received by him and indorsed in the manner that the section above referred to requires the clerk of the circuit court to indorse them. The depositions of all the parties were afterwards filed with the papers of the case. The master commissioner prepared his report without considering the depositions of appellant, and found that appellant Brown was owing appellee \$904. He arrived at this sum by allowing appellee the total amount of his claims presented, and giving Brown credit for the claims admitted by appellee. He also reported that the raft of timber was the property of Brown at the time the attachment was levied thereon. Appellants filed exceptions to this report, and appellee filed exceptions to the depositions taken by Brown. The court tried the exceptions and the case at the same time, and rendered a judgment sustaining the report of the master commissioner and the exceptions to the depositions, and also gave judgment against both of appellants for the sum of \$904, with interest and for the cost.

The exceptions to appellants' depositions were properly sustained by the court, because they were not transmitted to and filed by the clerk of the circuit court, as required by sec-

tion 583 of the Civil Code of Practice. The court should, however, have passed upon these exceptions prior to entering the trial of the case upon its merits; but appellants, having failed to object or except to the action of the court in this matter, have no reason to complain of the court's ruling. Appellee presented other exceptions to the depositions, to wit, that they should have been suppressed for the reason that they were taken in Jackson and not before the court's commissioner. This objection cannot be maintained. Section 534, Civ. Code Prac., provides that a witness cannot be required to attend for examination upon the trial of a civil case if he resides more than 20 miles from the place where the court sits, nor to attend to give his depositions out of the county in which he resides. Appellants' witnesses lived in Jackson, at least 40 miles from the place where the action was pending, and where the commissioner was holding his sittings, and, consequently, the only means appellant had of obtaining their testimony was by depositions taken in Jackson, and the only legal reason that could have deprived him of the benefit of these depositions is that the depositions were not transmitted to and filed with the clerk of the Perry circuit court as required by the Code.

The judgment against appellant Brown is for too great a sum considering alone the testimony of appellee. He testified that on a fair settlement of accounts between them appellant Brown owed him only about \$780. He was asked the further question if there was anything else that he could think of due him from appellant Brown which he had not theretofore taken into account. He answered that there were some protest fees which he had paid on checks and \$95 he had expended on trips to Jackson, Ky., to obtain a settlement with appellant Brown, which he thought Brown ought to pay him. These sums, when added, make the total sum of \$904 for which judgment was rendered. The sum of \$95, his expenses to Jackson, Ky., was not a valid claim against Brown, and appellee did not sue for it. He made no allegation that Brown ever agreed to pay him therefor. He could have, with the same propriety, claimed that Brown was due him his attorney fees in this action.

The judgment against appellant Sealy for the \$904 is clearly erroneous. There is no pretense that Sealy owed appellee. The only issue between him and appellee was as to the ownership of one of the rafts of square timber. If under the facts the raft belonged to Brown at the time of the levy of the attachment, the judgment should have dismissed Sealy's claim to the property, and the court should have rendered judgment against him for the cost incurred on that issue.

For these reasons, the judgment of the lower court is reversed, and case remanded for another trial.



## JARBOE et al. v. HAYDEN.

## BURTON'S ADM'R v. SAME.

(Court of Appeals of Kentucky. April 16, 1909.)

## 1. HOMESTEAD (§§ 20, 94\*)—EXEMPTION—EXECUTION.

Ky. St. 1909, § 1702 (Russell's St. § 4661), gives a debtor a homestead if he is an actual bona fide housekeeper with a family, and the debt sued on did not exist prior to the acquisition of the homestead. Section 1708 (section 4667) provides that the homestead of a woman shall be for the use of her surviving husband and children, and, when his and their interest ceases, the proceeds shall be applied to her debts, and, if no debts exist, it is to be divided among her children. Defendant's wife owned a farm upon which she lived with defendant. On her death the wife by will left the farm to defendant in fee simple, and defendant held the land under the will, and lived upon the farm with no one dependent upon him for support. Subsequently he sold the land and with the money purchased another home which was levied on under execution for debts incurred prior to the death of the wife. *Held*, that the property was not exempt from execution.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 28, 136, 140; Dec. Dig. §§ 20, 94.\*]

## 2. WILLS (§ 800\*)—ELECTION—RIGHT TO CLAIM HOMESTEAD.

Where the husband of a testatrix elects to take the fee-simple title to the homestead under the will, he cannot thereafter claim a homestead in the property devised.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2074-2076; Dec. Dig. § 800.\*]

## 3. EXEMPTIONS (§ 16\*)—NATURE AND EXTENT—PERSONS ENTITLED—PERSON WITHOUT FAMILY.

Under Ky. St. 1909, § 1697 (Russell's St. § 4656), exempting specified personal property from execution belonging to persons with a family resident in the state, the property of one who has no family is not exempt.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 16.\*]

Appeals from Circuit Court, Marion County.  
"To be officially reported."

Actions by Charles Jarboe and another against William Hayden, and by R. A. Burton's administrator against William Hayden. Judgment for defendant, and plaintiffs appeal. Reversed.

John O. McChord and W. W. Spalding, for appellants. C. S. Hill, for appellee.

CLAY, C. These two cases involving the same questions were heard upon an agreed statement of facts, and will therefore be considered together.

The facts are as follows: John R. Jarboe and Charles Jarboe obtained a judgment against appellee, William Hayden, at the September, 1908, term of the Marion circuit court. At the January, 1908, term of the same court, R. A. Burton's administrator also obtained judgment against appellee, William Hayden. Neither of said judgments has been satisfied in whole or in part. Executions were issued on said judgments in the

month of September, 1908, in favor of appellants (plaintiffs below), and were placed in the hands of the sheriff of Marion county. Thereupon the sheriff levied said executions upon a tract of land, worth about \$500, which was occupied by the appellee as his home, and also upon a horse and buggy valued at \$150, and household furniture valued at \$25. Prior to her death appellee's wife, Mary C. Hayden, owned a small farm worth about \$500. Upon this farm appellee and his wife lived for more than 20 years. This was the only land owned by appellee or his wife. Appellee's wife died in the year 1907, leaving a last will and testament which was duly probated in the Marion county court. By this will she devised the farm, on which she and appellee lived, to appellee in fee simple. Appellee never at any time renounced the provisions of this will, but accepted and held the land under the will. Since his wife's death appellee has had no one living with him who was dependent upon him for support, but lives entirely alone. Some months after his wife's death he sold and conveyed the land devised to him by his wife for the sum of \$500, and with the identical money purchased the home upon which the executions were levied. Immediately upon leaving the home devised to him by his wife, he moved to his present home and is still occupying it as a home. The debts upon which appellants brought suit were incurred prior to the death of appellee's wife. The cases being consolidated and submitted for judgment, the trial court held that neither appellee's real estate nor personal property was subject to the executions in favor of plaintiffs below. From that judgment this appeal is prosecuted.

We shall first consider the question whether or not appellee's home is exempt as a homestead. There are two classes of homestead, one arising by virtue of section 1702, Ky. St. (Russell's St. § 4661), and the other by virtue of section 1708 (section 4667). To entitle one to homestead under section 1702 two conditions are necessary: First, the claimant must be an actual, bona fide housekeeper with a family resident in this commonwealth; second, the debt or liability sued upon must not have existed prior to the acquisition of the homestead. Both of these requirements are lacking in the cases before us. Neither at the time his wife devised her farm to him nor at any other time since her death has appellee had any one living with him who was dependent upon him for support. Furthermore, the debts sued upon were incurred prior to the time of his wife's death and before he acquired the home. It is apparent, then, that appellee is not entitled to homestead under and by virtue of section 1702. The only other statute giving the right of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

homestead is section 1708, which is as follows: "The homestead of a woman shall, in like manner, be for the use of her surviving husband and her children, situated as above, and when his and their interest ceases, it shall be disposed of in like manner and the proceeds applied on the same terms to her debts; if none, divided among her children." There can be no question that under this section appellee could have elected to claim a homestead in the land of his wife. *Ellis v. Davis*, 90 Ky. 183, 14 S. W. 74. This he did not do, but, on the contrary, elected to take under the will, and thereby acquired the property in fee simple. In a long line of decisions this court has held that a homestead may be disposed of by will, and that unless the widow renounces the will, she will not be entitled to homestead in the property devised. *Taylor v. Loller's Ex'rs*, 3 S. W. 165, 8 Ky. Law Rep. 773; *Hazelett, etc., v. Farthing, etc.*, 94 Ky. 421, 22 S. W. 646, 42 Am. St. Rep. 365; *Harrison v. Taylor*, 51 S. W. 193, 21 Ky. Law Rep. 287; *Nichols v. Lancaster*, 32 S. W. 676, 17 Ky. Law Rep. 777. The same rule, of course, by parity of reasoning, applies to the husband's homestead derived through his wife. Having elected to take the fee-simple title, he could not thereafter claim a homestead in the property devised. By taking under the will, his position was the same as if he had acquired the property by purchase. *Nichols v. Lancaster*, *supra*. Not being entitled to a homestead either by virtue of section 1702 or 1708, Ky. St., it follows that the land occupied by appellee as a homestead is not exempt from execution. As appellee has no family, it also follows that the personal property levied upon is not exempt from execution. Section 1697, Ky. St. (*Russell's St.* § 4656).

Judgment reversed and cause remanded for proceedings consistent with this opinion.

#### LANKFORD v. LANKFORD.

(Court of Appeals of Kentucky. April 14, 1909.)

#### 1. DIVORCE (§ 195\*)—COSTS—ATTACHMENT—ALIMONY—ADVANCEMENT.

An attachment granted in an action for divorce by a wife was properly sustained, where she recovered a divorce and a judgment for costs, though she did not recover alimony.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 581; Dec. Dig. § 195.\*]

#### 2. DIVORCE (§ 249\*)—CONVEYANCE TO WIFE—RECOVERY.

Where a husband during marriage conveyed real estate to his wife to defraud his creditors, he was not entitled to have the property restored to him on his wife securing a divorce, under Civ. Code Prac. § 228, providing for restoration, under such circumstances, of property conveyed by a husband to a wife by reason of their marital relation.

[Ed. Note.—For other cases, see *Divorce*, Dec. Dig. § 249.\*]

#### 3. FRAUDULENT CONVEYANCES (§ 104\*)—CONVEYANCE BY DEBTOR TO WIFE.

A husband, having sold his stock of goods and being indebted to a number of wholesale merchants, conveyed certain real estate in controversy on January 25, 1902, to S. During that year, and while S. held the title the husband compromised with a number of creditors for 30 per cent. of his claims, and on December 17th following S. and wife conveyed the property to the debtor's wife, after which a few more claims were compromised. At least two claims against the debtor were reduced to judgment, neither of which were ever paid. *Held*, that the conveyance of the property by the debtor was fraudulent for the purpose of defeating his creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 337-344; Dec. Dig. § 104.\*]

#### 4. FRAUDULENT CONVEYANCES (§ 174\*)—RIGHTS OF GRANTOR.

Where a debtor has conveyed his property with the intent to defraud his creditors, and the transaction is one involving moral turpitude in intent, the debtor cannot thereafter sue in equity to recover the property.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 533; Dec. Dig. § 174.\*]

#### 5. PLEADING (§ 369\*)—INCONSISTENT DEFENSES—ELECTIONS.

Where plaintiff pleaded inconsistent defenses to defendant's counterclaim, the court should have sustained defendant's motion to compel plaintiff to elect.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.\*]

#### 6. APPEAL AND ERROR (§ 1039\*)—RULINGS ON PLEADINGS—PREJUDICE.

Where, during the progress of a case, plaintiff abandoned one of her defenses to defendant's counterclaim and relied solely on the other, defendant was not prejudiced by the court's refusal to compel plaintiff to elect between the two which were inconsistent.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4084; Dec. Dig. § 1039.\*]

Appeal from Circuit Court, Harlan County. "Not to be officially reported."

Action by Elizabeth Lankford against R. E. Lankford. Judgment for plaintiff, and defendant appeals. *Affirmed*.

H. C. Clay, for appellant. J. G. & J. S. Forester, for appellee.

CLAY, C. Appellee Elizabeth Lankford brought this suit against R. E. Lankford for divorce and alimony and custody of their infant children. During the progress of the case, appellant, as part of his answer, set up a counterclaim to a certain house and lot which he alleged he had conveyed to appellee by reason of the marital relation that existed between them. Appellee answered this counterclaim by stating that the house and lot were purchased with a stock of goods which belonged to herself, appellant, and their son, and that appellant agreed that the house and lot should belong to her on account of the fact that she had joined with him in a certain deed to D. S. Farmer by which they

conveyed away their homestead on Turtle creek. The case was submitted for judgment, and the court granted appellee a divorce. His decision on the question of alimony and the title to the house and lot was reserved until a subsequent term of the court. In the meantime each party was given the right to take additional proof. After further proof had been taken, appellee filed an amended answer to the counterclaim of appellant, in which she alleged that appellant had caused the house and lot in question to be conveyed to her for the purpose of cheating, hindering, and delaying his creditors. On submission of the case the court entered judgment dismissing appellee's petition so far as it sought alimony from appellant, and also the counterclaim of appellant. Judgment for costs was given in favor of appellee, and an attachment which had been levied upon certain personal property of appellant was sustained, and this property directed to be sold for the purpose of paying the costs. From this judgment R. E. Lankford appeals.

The trial court did not err in sustaining the attachment. While it is true appellee did not recover alimony, she did recover judgment for costs in her suit for alimony. There was a recovery to the extent of the costs, and it was properly directed that these costs be paid out of the property that had been theretofore attached.

It is the contention of appellant that the house and lot in question were conveyed to his wife by reason of their marital relation, and that, a divorce having been granted in this action, appellant is entitled, under section 228 of the Civil Code of Practice, to have restored to him the property so conveyed. The question whether or not appellant is entitled to restoration of his property depends altogether upon the fact of whether or not it was conveyed to appellee by reason of their marital relation, or whether it was conveyed for the fraudulent purpose of defeating his creditors. It appears that appellant conducted a store under the name of "R. E. Lankford & Son." His son took \$700 of their money and left. Thereupon appellant sold the store for the house and lot in question and \$400 in cash. The deed was first taken to appellant. Thereupon he and his wife, on the 25th day of January, 1902, conveyed the property to Wade Skidmore. On the 17th day of December, 1902, Wade Skidmore and wife conveyed the same property to appellee.

There can be no question that, at the time of the conveyance from appellant to Skidmore, appellant was indebted to a number of wholesale merchants for goods contained in the stock which he sold. While the title to the premises was in Wade Skidmore, appellant compromised with a number of his creditors at 30 cents on the dollar. Some of them were compromised with before Skidmore conveyed the property to appellee. A few were not compromised with until after that date. At least two claims were reduced to judgment, and neither one of them was ever paid. Without giving the evidence in detail, we may say that there is no doubt in our minds that the conveyance to Skidmore, and from Skidmore to appellee, was made to defeat appellant's creditors. That being the case, it was not obtained by appellee by reason of the marital relation, but was obtained by her by reason of the fact that appellant thereby sought to defraud his creditors. If, as we hold, it was so conveyed, then it necessarily follows that appellant is not entitled to restoration of the property. This court has held in a long line of decisions that property will not be restored to a grantor who himself conveyed it for the fraudulent purpose of defeating his creditors. The transaction is one which involves moral turpitude in the intention in which it is done. What actually happens may be immaterial. It matters not whether the creditor was actually injured or not, if, as a matter of fact, the debtor makes a conveyance for the purpose of defrauding his creditors. He who doth fraud may not borrow the hands of the chancellor to draw equity from a fountain his hand hath polluted. *Carson et al. v. Bellies*, 121 Ky. 294, 89 S. W. 208, 1 L. R. A. (N. S.) 1007; *Southwood v. Southwood*, 98 S. W. 304, 30 Ky. Law Rep. 307.

Appellant made a motion to require appellee to elect between her two defenses to his counterclaim. There can be no doubt that these two defenses were inconsistent. Both could not have been true. During the progress of the case, however, appellee practically abandoned her first defense and relied solely upon the defense that appellant had conveyed the house and lot to her for the purpose of defrauding his creditors. While the court should have required appellee to elect, its failure so to do was not prejudicial error, and the case will not therefore be reversed.

Judgment affirmed.

## JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. March 3, 1909. Dissenting Opinion, March 19, 1909.)

**1. LARCENY (§ 19\*)—THEFT FROM THE PERSON—ELEMENTS OF OFFENSE.**

Theft from the person may be either by a taking wholly unknown to the person whose property is stolen, and privately, or it may be taken from his person so suddenly as to prevent effective resistance.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 46; Dec. Dig. § 19.\*]

For other definitions, see Words and Phrases, vol. 8, p. 6939.]

**2. LARCENY (§ 55\*)—THEFT FROM THE PERSON—EVIDENCE—SUFFICIENCY.**

Evidence held to justify a conviction of theft from the person by such a sudden taking as to prevent effective resistance by the person whose property was stolen.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 55.\*]

Davidson, P. J., dissenting.

Appeal from District Court, Anderson County; B. H. Gardner, Judge.

Ella Johnson was convicted of theft from the person, and she appeals. Affirmed.

A. G. Greenwood, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted of theft from the person.

The injured party, Joe Milck, testified that he was a single man; that on the 6th of December, 1907, he was passing the house of appellant and by her invited into her house; that he went in. He says: "She waved her hand at me, and said to come in. I thought I would go in, and maybe she would wash for my sister. I went up on the gallery, and then she went inside, and told me to come inside. I said that I just wanted to ask if she would do washing. She said something and went inside. She said to have a seat, and I did so, and she locked the door. That she came right up to me, and said, where was I staying? I told her on John street, and she asked me how long I had been there, etc. She said, 'You stay with me and do some business.' I said, 'No, ma'am, I am not out for that right now.' She said, 'Oh yes, you got plenty of money. Give me a quarter. I want to buy some beer.' I said, 'All right,' and gave her a quarter. When I was about to get up, she caught hold of me around the neck with her left arm and put me down. I saw she was working around in my pocket, and I jerked loose. I saw her run in the other room with a lot of greenbacks, and she locked the door. When she came back I told her she had better give me back the money she had robbed me of, and she came right close to me and called that name. She said, 'You son of a bitch. I will kill you.' I went out through the other room, and she followed me out into the yard." Then he describes

his going over to a neighbor's house and calling for help, etc. He said he was 34 years of age. Further testifying, he says: "She came right close up to me and sat down right close to me. She did not put her arm around me then. If she did, I did not notice it. I did not fondle her person or put my hand on her legs. I did not ask her how much she charged to do business. I did not offer her two bits, and she did not order me out of the house. I did not know what sort of woman she was, and just gave her two bits to satisfy her. When I got up to leave she got her arm around me and said, 'No, you stay here,' and by that time she was working around in my pocket. She got her left arm around me. The money was fastened in my left pocket with a large safety pin. Q. On which side of the sofa was she sitting? A. On the other side. Q. She put her right arm around your neck? A. The left arm. Q. Did she throw you over on your back? A. She held me down. Q. On the divan? A. Yes, sir. Q. She was on top of you? A. No, sir. Q. She just had her arm around your neck, and you were forced over? A. Yes. Q. Her left arm around your neck? A. Yes, sir. Q. She kept it there all the time? A. Yes, sir. Q. She worked with your pocket with the right hand? A. Yes, sir. Q. How long did you feel her working with that pocket? A. For a minute. Q. That you could feel her working with your pocket? A. Yes, sir. Q. You could feel her working with that safety pin? A. When I saw (felt) her feeling in the pocket I jerked loose. Q. You got up and you jerked loose? A. Yes, sir. Q. Did you and she scuffle around there? Did you try to get away? A. Yes. Q. Did you have to make an effort to get loose from her and free yourself from her? A. Yes, sir. Q. Before you got loose? A. Yes, sir. Q. And all the time she had you around the neck with her left arm? A. Yes. Q. Making an effort to get the money? A. Yes, sir. Q. All that time what were you doing with your left arm? A. I said, 'You turn me loose,' and then at last I sprang up, and when I got my hand around there I stood up, and it was done all in a minute. Q. Your left arm was free; it was not fastened in any way? Was it fastened in any way, or was it free? A. I tried to get loose, and I pressed against the divan. Q. Wasn't your right arm free so that you could use it to hit her? A. Yes, sir. Q. You could have drawn back and hit her in the face with your fist. A. Yes, sir. Q. How much do you weigh? A. I think I weigh about 150 pounds. Q. How tall are you? A. Five and a half feet. (The witness was nearly six feet tall, and weighed probably 15 pounds more.) Q. At the time she was working after that money, did she ever release her hold from around your neck? A. Not until I jerked loose

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

from her. Q. She held you by the neck all the time? A. Yes, sir. Q. She did not catch hold of you anywhere else? A. No, sir. Q. Did you testify on the examining trial? A. Yes, sir. Q. Your testimony was taken down? A. Yes, sir. Q. Did you testify in that trial that at the time she robbed you that she had hold of your peter? A. That was when we were sitting down. Q. Did she catch hold of you and pull you over on her? A. Yes, sir. Q. Did she have one hand around your neck and feeling of your peter? A. When she fooled around my peter she did not have her arm around my neck."

There is considerable more of this cross-examination by questions and answers, and we have selected enough to illustrate the condition of things at the time of the alleged theft. After this was all over the witness went out of the house to a neighboring house, and appellant followed him. There were conversations had there in which the witness and appellant and some of the other witnesses participated. Among other things that occurred, appellant threatened to have the witness arrested for going to her house and creating a disturbance, and he said he was going after an officer himself and have her arrested. She said in that event she would not go after an officer. Appellant was shortly afterwards arrested, charged with theft of the money, amounting to \$805. The witness testifies, however, something over \$200 of this money was dropped on the floor at the time appellant got it from his pocket.

Appellant's testimony is directly in contravention of this, she stating that the witness came in the house and wanted "to do business" with her and offered her a quarter, which she declined, demanding two dollars of him as the price for the transaction. The witness seemed to think this was entirely too high a price to pay. Appellant further states, in regard to the matters occurring on the divan, that they were seated together, and he unbuttoned his breeches, took out his private parts and placed her hand upon them; that this ended the matter, and he left; that she did not get his money, and did not know that he had it.

This we deem a sufficient statement of the case without going into all the details of the facts.

In this state of the proof, the court gave the following instruction: "If you find from the evidence that at the time of the taking or during the attempt to take said property, if it was taken, a struggle took place between the defendant and the prosecuting witness, Joe Milck, over or about said money, then the defendant would not be guilty, or if you have a reasonable doubt on this issue you will acquit the defendant." This charge presents not only the issue of robbery as opposed to the charge of theft from the person, but

was, we think, probably more favorable to defendant than it should have been. The opinions of this court from the beginning on charges of theft from the person have held quite a strict degree of proof of such particular offense necessary, and it is conceded that in this case the evidence taken altogether did raise perhaps the issue that the money, if taken from Milck, was taken under circumstances making it robbery rather than theft from the person. On the other hand, as we believe, the evidence, fairly construed, does raise the issue of theft from the person. Theft from the person may be either by a taking wholly unknown to the person whose property is stolen, without his knowledge and privately, or it may be taken from his person so suddenly as to prevent effective resistance. The last condition applies in this case. The evidence raises the issue in this case that appellant, who was evidently a lewd woman, by such blandishment as her class practice, was attempting to distract the attention by appeals to the passion of the prosecuting witness, by throwing him off his guard until she could obtain possession of his money and get his pocketbook out of his pocket. The evidence raises the issue that she had been fondling with his person; that she had her arm around his neck; and the evidence distinctly shows that she had her hand in his pocket and on his money without his consent before he was aware of the fact that such purpose of theft was in her mind. Then the struggle began, but her movements had progressed so far that effective resistance was out of the question, and she took the money from his person, and in her haste dropped some of it on the floor. There can be no question as to the law in respect to theft from the person. The only issue that could arise is as to the application of these rules to the facts as shown. The jury, on a charge pertinently presenting the issue and submitting on the one hand theft from the person, and on the other hand robbery, as a basis for acquittal, has found, in view of all the facts, that appellant was guilty of theft from the person. We believe that the verdict is not only supported by the evidence, but is a right and righteous verdict, and one that ought to be affirmed, which is now done.

DAVIDSON, P. J. (dissenting). In this case I respectfully enter my dissent from the conclusion reached by my Brethren in holding that this case is one of theft from the person. The record discloses that the alleged injured party went to the house of appellant and engaged with her in somewhat lascivious conduct. While on the divan his person was exposed to and fondled by her. The state's witness, the injured party, says that she had her left arm around his neck and reached over in his right pocket and took his money, amounting to something like \$800; that this

money was inclosed in a pocketbook and securely fastened in his pocket by a large "safety pin." Appellant only used her right hand in getting the money, under the testimony of the prosecuting witness. He was much larger and more able-bodied than was appellant. There was a struggle between them in which he resisted. This lasted a minute or longer, when appellant secured the pocketbook and money. It is evident under this witness' statement that there was a struggle in which the appellant was finally successful; that with her right hand alone she was enabled to unfasten his pocketbook, as secured by the safety pin, and take the money from his pocket during this struggle. It is further stated by the witness that some of the money was dropped on the floor in the room. This is from the state's side of the case. For a more detailed statement, see majority opinion. Under this state of case this cannot be theft from the person under our statute and the unbroken line of decisions construing that statute. The property was neither privately taken, nor so suddenly as to prevent resistance. The witness testified positively that he did resist and there was a struggle. This struggle and force used places the case beyond theft from the person. In order to constitute the offense of theft from the person, the legislative definition of that offense must be proved. If the evidence falls short of or goes beyond the ingredients of this offense as defined, then some other offense is shown. The question has been so often reviewed, and the statement above so often confirmed with no opposing opinions, I deem it unnecessary to discuss the question further than to cite some of the cases, beginning with *Flynn v. State*, 42 Tex. 301; *Jones v. State*, 22 Tex. App. 680, 3 S. W. 478; *McLan v. State*, 29 Tex. App. 171, 15 S. W. 600; *Roquemore v. State*, 50 Tex. Cr. R. 542, 99 S. W. 547; *Thomas v. State*, 51 Tex. Cr. R. 329, 101 S. W. 797; *Herr v. State*, 52 Tex. Cr. R. 53, 105 S. W. 190. In the same connection, see *Flies v. State*, 38 Tex. Cr. R. 207, 36 S. W. 93; *Swartz v. State* (Tex. Cr. App.) 27 S. W. 136; and *Gallagher v. State*, 34 Tex. Cr. R. 306, 30 S. W. 557. The latter case holds that, where the evidence constitutes robbery, it is not theft from the person. All the cases hold that, where there is robbery or ordinary theft, the crime of theft from the person is not only not proved, but is eliminated and disproved. There are a great many other cases that could be cited in support of my dissenting views, but I have thought those enumerated above sufficient. I, therefore, am firmly of the opinion that the evidence not only does not sustain this conviction, but absolutely disproves the case of theft from the person.

I, therefore, respectfully enter my dissent, and believe the judgment should be reversed and the cause remanded.

# DAVIS v. STATE.

(Court of Criminal Appeals of Texas. March 17, 1909. Rehearing Denied April 14, 1909.)

## CRIMINAL LAW (§ 1094\*)—APPEAL.

There being no bill of exceptions in the record on appeal in a criminal case, the judgment will be affirmed, where the facts support the verdict and the charge of the court is correct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2804, 3204; Dec. Dig. § 1094.\*]

Appeal from Johnson County Court; F. E. Adams, Judge.

Lige Davis was convicted of violating the local option law, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law; his punishment being assessed at a fine of \$100 and 60 days in jail.

We find no bill of exceptions in the record. The facts amply support the verdict, the charge of the court is correct, and the judgment is in all things affirmed.

# SMITH v. STATE.

(Court of Criminal Appeals of Texas. Oct. 14, 1908. On Rehearing, March 20, 1909.)

## 1. CRIMINAL LAW (§ 331\*)—INSANITY—PRESUMPTIONS—BURDEN OF PROOF.

The law presumes that every person is sane, and to establish the defense of insanity it must be proven by a preponderance of the evidence that at the time of the commission of the offense accused was laboring under such defect of reason from disease of the mind as not to know the nature or quality of the act or that he did not know that he was doing wrong.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742-744; Dec. Dig. § 331.\*]

## 2. CRIMINAL LAW (§ 822\*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS—"INSANITY."

Where the instructions when taken together made the test of insanity as to whether or not accused did or did not know the nature or result of the act he was doing, or, if he did know, that he did not know that he was doing wrong, a charge that insanity is produced by a diseased condition of the mind was not misleading, though insanity is itself a diseased condition of the mind.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995; Dec. Dig. § 822.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3635-3644; vol. 8, p. 7638.]

## 3. CRIMINAL LAW (§ 1037\*)—TRIAL—MISCONDUCT OF PROSECUTING ATTORNEY—EXCEPTIONS—SUFFICIENCY.

No error is presented where the improper remarks of the prosecuting attorney in his argument to the jury are excepted to without requesting a charge withdrawing or correcting them, unless they are of such grave character as obviously to prejudice accused's case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689-1691, 2645; Dec. Dig. § 1037.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**4. CRIMINAL LAW (§ 1037\*)—TRIAL—MISCONDUCT OF PROSECUTING ATTORNEY—EXCEPTIONS—SUFFICIENCY.**

The argument of the prosecuting attorney on the defense of insanity that he wanted a verdict of guilty because he did not want the jury to set a precedent of acquitting people on a plea of insanity, and that, if the jury acquitted accused, lawyers would plead insanity for every one that was prosecuted, etc., was not of such grave character as obviously to prejudice accused's case, and to present error it was necessary not only to except to the remarks, but to request a charge withdrawing or correcting them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689-1691, 2645; Dec. Dig. § 1037.\*]

**5. BURGLARY (§ 41\*) — EVIDENCE — SUFFICIENCY.**

Evidence held to justify a conviction of burglary notwithstanding accused's defense of insanity.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103; Dec. Dig. § 41.\*]

**On Rehearing.**

**6. CRIMINAL LAW (§ 728\*)—IMPROPER ARGUMENT OF PROSECUTING ATTORNEY.**

The argument of the prosecuting attorney that the jury should convict accused relying on insanity, and that if they wanted to recommend clemency he would assist them in obtaining a pardon, not provoked by anything said by accused's counsel, and made after the statement that he wanted a verdict of guilty and did not want the jury to set a precedent for acquitting persons on a plea of insanity, was prejudicial to accused, and an exception to the remarks, without asking a charge withdrawing them, was sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689-1691; Dec. Dig. § 728.\*]

Appeal from District Court, Wood County; R. W. Simpson, Judge.

Pat Smith was convicted of burglary, and he appeals. Reversed and remanded.

Stafford & Geddie, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**RAMSEY, J.** The appellant was indicted in the district court of Wood county, Tex., for the offense of burglary. On trial he was found guilty as charged, and his punishment assessed at confinement in the penitentiary for two years.

The facts show without dispute that appellant some time in September, 1906, entered the store of I. G. Bromberg & Co., in the town of Mineola, at night, and took therefrom a lot of merchandise of various kinds. This was not seriously disputed in the testimony, and the general fact of the entry by appellant and the taking by him of the goods is fixed substantially beyond any doubt. The defense was that appellant at the time of the burglary was suffering from such character of mental disorder or disease as rendered him incapable of distinguishing between the right and wrong of the act in question, and this insanity was that form known as "kleptomania," which is defined as an irresistible impulse to steal. This is-

sue was submitted to the jury by the court in the charge:

"Among other defenses made in this case is insanity created and produced by a diseased condition of the mind. Every man is presumed to be sane until the contrary appears to the satisfaction of the jury trying him. He is presumed to entertain, until this appears, a sufficient degree of reason to be responsible for his acts, and to establish a defense on the ground of insanity it must be proven by a preponderance of the evidence that at the time of committing the burglary (if you have found he did) the defendant was laboring under such defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing, or, if he did not know that, he did not know that he was doing wrong; that is, that he did not know the difference between the right and wrong as to the particular act charged against him.

"You are to determine from the evidence in this case the matter of insanity, it being a question of fact controlled, so far as the law is concerned, by the instructions herein given you.

"Now, if the defendant has shown by a preponderance of the evidence that at the time of the alleged burglary the defendant was laboring under such defect of reason, from disease of the mind, as not to know the nature or quality of the act of burglary as herein defined, or, if he did know that, he did not know he was doing wrong—that is, that he did not know the difference between the right and wrong as to the particular act charged against him—you will acquit the defendant upon the defense of insanity."

In addition to this charge, counsel for appellant requested the court to give the following special charge:

"Gentlemen of the jury, you are further charged that in order for the defendant to be guilty of burglary in entering the storehouse of I. G. Bromberg & Co., if you find he did so enter said house, he must have been moved by, and must have entered for, the specific purpose of committing the crime of theft; and if he entered the said house without the specific intent at the time of committing the crime of theft, as the crime has been defined to you in the main charge, then he will not be guilty. And in this connection you are further charged that though he may have entered the said house, but at the time of making the entry, if he did so, he was suffering from any character of mental disorder or disease that rendered him incapable of distinguishing between the right and the wrong of the act, or, in other words, rendered him incapable of forming and following a sane intent to commit the crime of theft, then he will not be guilty, and you will acquit.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"You are further charged that kleptomania, which is defined as an irresistible impulse to steal, is, when it arises from a diseased condition of the mind, recognized as a species of insanity, or a manifestation of insanity, and the person suffering from kleptomania, arising from a diseased condition of the mind, would not be capable of forming the specific intent to steal as the crime has been defined by the statute.

"You are further charged, in connection with the above propositions, that while the defendant is supposed to have been sane at the time of the entry into the house, if he did so enter, still, if you find from the evidence that the defendant was suffering from any mental disorder prior to and at the time of the commission of the offense, if he did it, then the presumption of his sanity would be overcome, and it is the duty of the state to show by the evidence, beyond a reasonable doubt, that the defendant was sane enough, at the time of making the entry, if he did so, to form the specific intent to steal, or, in other words, to know the difference between the right and the wrong involved in his act."

We think the latter clause of this charge, if not indeed other portions of it, was erroneous. Analyzed, it is to the effect that while in law the appellant is supposed to have been sane at the time of entering the house, yet, if the jury found from the evidence that he was suffering from any mental disorder prior to and at the time of the commission of the offense, this would overcome the presumption of his sanity, and that it is the duty of the state to show by the evidence beyond a reasonable doubt that the defendant was sane enough at the time of making the entry to form the specific intent to steal. The vice and fallacy of this charge, as we conceive, is that it in effect, in its last analysis, instructs the jury that while the presumption of law is that defendant is sane, yet if the defendant shows any form of insanity or mental disorder, that then the burden shifts to the state. The vice of this position is that if the evidence shows, and same is credited by the jury, that appellant is insane, he is entitled to be acquitted, and it would be error to instruct the jury that insanity being shown by the defendant, that any burden thereupon devolves upon the state. The true rule is stated, and better stated, in the charge of the court: That, where defendant is arraigned charged with an offense, the law presumes him to be sane, and the burden rests upon the appellant to show by a preponderance of the evidence facts constituting mental disorder or insanity. With this instruction the jury is in position to pass intelligently upon the matter in issue. We think the special charge should not have been given.

Complaint is made of that portion of the general charge of the court which reads as follows: "Among other defenses made in

this case is insanity created and produced by a diseased condition of the mind." It is complained that insanity is itself a diseased condition of the mind, and not a result of the diseased condition of the mind, and this definition was calculated to and did mislead the jury to the prejudice of the defendant's interests, in that it left the jury to infer that the defendant might have a diseased condition of the mind and yet not be insane. We think this complaint not substantial, for the reason that under the instructions of the court, taken altogether, the test was made as to whether or not the appellant did or did not "now know the nature or result of the act he was doing, or, if he did know, that he did not know he was doing wrong"; that is, he did not know the difference between the right and wrong as to the particular act charged against him.

As further ground for reversal, appellant complains of the objectionable language used by the district attorney in his closing address to the jury. It appears by bill of exceptions that, among other things, the district attorney made to the jury the following remarks: "I want a verdict of guilty in this case, because I do not want you to set a precedent in this county for turning people loose on a plea of insanity. If you turn this defendant loose, then these lawyers, like Stafford & Geddle, will be pleading insanity for everybody that is prosecuted, and, if you are going to turn this defendant loose, you had just as well tear down your courthouse and burn your docket." Exception was taken to this language, but no charge was requested from the court withdrawing or correcting same. We have frequently held that where the remarks of prosecuting attorneys in argument were excepted to, but no charge in respect to them is asked, no error is presented. The only exception to this rule is in a case where the remarks of the prosecuting attorney are of such grave character as obviously to prejudice appellant's case before the jury. *Lancaster v. State*, 36 Tex. Cr. R. 16, 35 S. W. 165; *Locklin v. State*, 75 S. W. 305, 8 Tex. Ct. Rep. 204; *Powell v. State* (Tex. Cr. App.) 70 S. W. 218; *Fredrickson v. State*, 44 Tex. Cr. R. 283, 70 S. W. 754; *Smith v. State*, 44 Tex. Cr. R. 137, 68 S. W. 995, 100 Am. St. Rep. 849; *Robbins v. State*, 47 Tex. Cr. R. 312, 83 S. W. 690, 122 Am. St. Rep. 694; *Taylor v. State*, 50 Tex. Cr. R. 500, 100 S. W. 393; *Davis v. State* (not yet officially reported) 114 S. W. 366. We do not think, in the absence of a request to disregard the remarks above quoted, that they are of such gravity, or so obviously calculated to injure appellant, as to justify, under the above decisions, a reversal of the case.

It is also complained that in the course of his argument the district attorney used the following language: "Convict this defendant, and if you want to recommend executive clemency—if you want him pardoned—come to me and I will help you get him a par-



don." Touching this language, counsel for appellant requested the court to instruct the jury as follows: "You will not consider the language used by the district attorney in his closing speech, wherein he said, 'Convict this defendant, and if you want to recommend executive clemency—if you want him pardoned—come to me and I will help to get him pardoned,' as such argument was improper." This requested charge was given. It is not shown by the bill in what connection the sentence complained of was used, or what else was said in connection therewith. The language is consistent with what we can easily conceive to have been the position of counsel for the state; that is, that the evidence showed his guilt; that they should not be swayed by sympathy, nor governed by the testimony alone of appellant's relatives as to his insanity; that the facts justified a conviction, making it their duty to convict, and justified the appeal of state's counsel for a conviction, with the additional statement that if they afterwards thought appellant entitled to executive clemency he would join them in such application. The case substantially differs, we believe, from the case of *Crow v. State*, 33 Tex. Cr. R. 264, 26 S. W. 209. In that case the following language was used: "Now, gentlemen, if you acquit this defendant (pointing his finger at him), you set free the foul murderer of an innocent young girl, and the law can never lay its hands on him again; but if you should convict him, and in doing so should by mistake convict an innocent man, then he has his right of appeal, and the Court of Appeals will reverse the case and give the defendant a new trial, and no injury will be done." These remarks were objected to by counsel for defendant in that case, and, on objection, the court trying the case said he did not know whether the language was improper or not. In that case it does not appear whether a request was made for instructions to the jury to disregard the argument or not. Much importance also seems to be attached to the fact that in that case an innocent girl had been assassinated on her bed, and that it was natural and proper for the jury to be disposed to convict the perpetrator of this most bloody and unnatural murder, and, under the circumstances, would not be inclined to acquit, though there might be some doubt of guilt. Again, importance is attached to the fact that the court stated in the presence of the jury that he did not know whether the remarks were improper or not, and that under the circumstances of that case the remarks of the district attorney, in connection with the statement of the judge in relation thereto, were calculated to injure the rights of appellant. In this case, on request, the jury were promptly instructed that the remarks complained of were improper and the jury should not be influenced thereby. In view of the fact of the frag-

mentary portion of the argument mentioned, and that the bill of exception contained no additional showing of the connection in which they were made, and the charge of the court withdrawing same, we can scarcely believe they were of sufficiently grave character as to justify us in reversing the case.

The next ground to be considered is the sufficiency of the evidence to support the verdict. There was testimony given by R. J. Smith, the father of appellant, Will Smith, his brother, Arch Alexander, his brother-in-law, and Ernest Smith, his uncle, to certain facts as to the disposition and mental capacity of appellant on which the alleged insanity is based. No other witness was produced by appellant, except certain physicians and experts, touching his mental capacity, and Prof. B. A. Stafford, a teacher by profession, who lives and had lived at Mineola several years. It appears from the testimony of appellant's relatives that he had a severe attack of typhoid pneumonia when very small; that he was very irritable; that he was given to falling asleep almost anywhere; would frequently leave his work and go away from home for two or three days, and when returning he would be unable to give an account of his whereabouts during this time; that his mind did not seem to be developed, and that he could never be made to realize the difference between right and wrong; that he had for years been in the habit of stealing things, including tools, plows, ropes, rubber hose, and a number of other things, and when found with same seemed to know or care nothing about them, and would evidence no shame, and would not use the articles stolen after he had them in his possession. It was developed on cross-examination, however, that appellant engaged in various kinds of manual labor; that he worked at a sawmill for several months as a ratchet setter, fired the engine sometimes, and that setting ratchets and firing engines were very responsible positions; that the ratchet setter has to be very apt and accurate; that he has to notice and observe figures. It also appears that appellant had been away from home—to Dallas and probably elsewhere—at work; that he earned during a part of this time as much as \$1.50 a day; that he was a tolerably good machineman; that at one time he remained at such work in Dallas for two or three months; that this was as long as two or three years before the burglary. It also appeared that appellant made his own trades and bought his own clothing. Two physicians, Dr. D. A. York and Dr. E. W. McCammish, both testified with more or less definiteness that, basing their opinion on the testimony given by the other witnesses in the case, they were of the opinion that appellant was so mentally unsound as to be incapable of recognizing the right or wrong of the act charged against him. It will be

noticed that while he had resided in Mineola all his life, where he had worked for some considerable time, no witnesses not related to him were produced upon the trial to testify as to his mental unsoundness. We can well understand how the jury would have attached much importance to this fact. While the testimony of appellant's relatives makes a strong showing of insanity, the jury in passing on this question must, and naturally would, attach some importance to this fact, and still greater importance, no doubt, to the fact that other persons who must have known appellant, and who, from their acquaintance with him, would have had some opportunity for observation, were not produced. The law presumes, and presumed, appellant sane. Just what weight of testimony is required to overturn this presumption, it may be difficult in every case to determine. The jury who heard the evidence were not convinced that the legal presumption was rebutted and disproved by the testimony produced. The learned district judge who tried the case and heard the testimony, and had opportunities for observing the witnesses, their manner and appearance on the witness stand, has overruled appellant's motion, nor can we see from the record that he was in error in so doing. We do not feel that, as presented, we should interfere.

Finding no error in the proceedings of the court below, it is ordered that the judgment of conviction be, and the same is hereby, affirmed.

#### On Rehearing.

The argument filed in this case by counsel for appellant has convinced us that the disposition heretofore made of the appeal was erroneous, and that the argument of counsel for the state was such a grave invasion of the rights of appellant and so violative of the rules of fair discussion as, under the facts, not only to justify, but require, a reversal.

As stated in the original opinion, the appellant made what seems to us to be a very strong showing of insanity. The facts of the burglary were proven beyond doubt. The only defense for all practical purposes was that of insanity. Therefore, it was of the highest importance that this issue should have been, as it was, fairly submitted to the jury, and that in the discussion thereof there should have been no such departure from the rules of fair debate as would have illegally imperiled or weakened the defense. The particular matter we have in mind is, perhaps, not as fully stated in the original opinion as may seem desirable. The state's attorney made the statement to the jury, as set out in the bill, as follows: "I want a verdict of guilty in this case, because I do not want you to set a precedent in this county for turning people loose on a plea of insanity. If you turn this defendant loose, then these lawyers, like Stafford & Geddie, will be pleading

insanity for everybody that is prosecuted, and if you are going to turn this defendant loose you had just as well tear down your courthouse and burn your docket." Counsel for the defendant excepted while the district attorney was making said remarks, on the ground that same were out of the record and were unfair to the appellant, and were prejudicial to his cause, but, the bill recites, the court did not stop the district attorney nor in any way interfere with the argument being made by him, nor rebuke him. Appellant's counsel requested a charge withdrawing the first sentence of the above remarks, and instructing the jury that the same were improper. There was no instruction requested in respect to the remaining part of the language above quoted. The portion in respect to which the instruction related was not of a grave character, and no instruction was requested in respect to the only portion of the argument that could, as we believe, in the nature of things, have prejudiced appellant's cause. The bill further recites that shortly after the use of the language above complained of, and while the district attorney was continuing his address to the jury, and continuing the line of argument as set out in his remarks above quoted, that, among other objectionable remarks made to and in the hearing of the jury as an inducement to them to render a verdict of guilty in this case, the following statement: "Convict this defendant, and if you want to recommend executive clemency—if you want him pardoned—come to me and I will help you get him pardoned." It is further recited that at once appellant's counsel objected and excepted to this speech, on the ground that same was an argument outside of the record and prejudicial to appellant's cause, and that the court failed to stop the district attorney, or say anything to him, or to take any notice of said language or of the appellant's objections thereto, except to turn to appellant's counsel and in a low tone tell him to prepare a special charge embracing the objectionable language and he would give the charge to the jury. A charge was prepared, and given by the court. In approving this bill of exceptions, the court allows the same, with the statement that when the language last above quoted was complained of he was writing his charge, and, when counsel for appellant called his attention to it, the district attorney at once began another line of argument. It is contended by counsel for appellant that in the light of the entire record this argument was so obviously hurtful and prejudicial as that, notwithstanding the instruction given by the court, the judgment should be reversed. It is urged, and such seems to be the fact, that this statement was not provoked by anything said by them, and the further statement seems clear that it was out of the record and highly improper. So, the question recurs, was it of such gravity as, in the light of the

entire case, obviously or reasonably to have prejudiced appellant's cause? Construing it in the light of the former statement that he did not wish the jury to set the precedent of acquitting defendants on the ground of insanity, it was susceptible to the construction of a plea for a conviction, not on the ground that appellant was guilty, but for fear of the precedent, and that to induce, if not coerce, the jury into rendering a verdict of guilty, he holds out to them the promise to aid in securing a pardon. In this case the jury gave the appellant the lowest penalty known to the law. This was some evidence that the issue of insanity must have been seriously considered. May not the speech of counsel for the state have induced an agreement on a verdict of guilty by holding out to the jury the hope, whether true or false, that he would aid in securing a pardon, and that as the chief law officer of the state such aid would be effective? Under the precedents which we have carefully examined, we believe, in the light of the entire record, that we cannot but hold, on further reflection, that this argument was violative of the rules of fair discussion, and probably, if not certainly, hurtful and injurious to the rights of appellant. In the recent well-considered case of *McKinely v. State*, 52 Tex. Cr. R. 182, 106 S. W. 342, Judge Davidson discusses a matter somewhat similar to this, in which he uses the following language: "In making his closing speech, the county attorney used the following language: 'Gentlemen of the jury: I want you to convict this defendant on the evidence in this case. It is true he testifies in his own behalf that he did not sell whisky to the prosecuting witness, but the prosecuting witness says that he did, and it is true the prosecuting witness is a negro; but I would believe the negro before I would believe a man like the defendant, who has time and again paid the penalty for the violation of the people's local option law, and goes manifestly without any principle around over the country bootlegging whisky in open violation of our local option law; and that is the kind of a man that is being tried before you.' The bill recites these remarks were not supported by the evidence in the case; that they were immaterial and irrelevant, outside of the record, and were erroneously recited by the county attorney. Exception was reserved. It is further shown that the court instructed the jury not to consider such remarks, but it is claimed that such instruction did not withdraw the prejudice created thereby from the minds of the jury. There was no evidence in the record that appellant had been previously convicted for violations of the local option law, nor to the effect that he had been bootlegging whisky over the country. Appellant had not put his character at issue. Permitting attorneys for the prosecution to dwell in argument on the character of a defendant when not in issue, in a way calculat-

ed to prejudice him before the jury, is error. See *Turner v. State*, 39 Tex. Cr. R. 322, 45 S. W. 1020; *Pollard v. State*, 33 Tex. Cr. R. 197, 28 S. W. 70. Nor is vituperative and abusive argument permissible, and a conviction obtained in this manner is unlawful, and, where the record on appeal shows such was permitted to prejudice the accused before the jury, the appellate court should not hesitate to set it aside. See *Crawford v. State*, 15 Tex. App. 501, and *Parks v. State*, 35 Tex. Cr. R. 378, 33 S. W. 872. And it is error for counsel in argument to state facts not in evidence. See *Tillery v. State*, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. Rep. 832; *Orman v. State*, 24 Tex. App. 493, 6 S. W. 544; *Clark v. State*, 23 Tex. App. 260, 5 S. W. 115; *Robbins v. State*, 47 Tex. Cr. R. 312, 83 S. W. 690, 11 Tex. Ct. Rep. 560, 122 Am. St. Rep. 694; *Bell v. State* (Tex. Cr. App.) 56 S. W. 913; *Harris v. State*, 98 S. W. 842, 17 Tex. Ct. Rep. 815; *Harris v. State*, 50 Tex. Cr. R. 411, 97 S. W. 704, 17 Tex. Ct. R. 270; *Powell v. State* (Tex. Cr. App.) 70 S. W. 218; *Bearden v. State*, 46 Tex. Cr. R. 144, 79 S. W. 37, 9 Tex. Ct. Rep. 813; and *White's Ann. Code Cr. Proc.* pp. 498, 500, and 501, for collation of authorities. In our opinion the statements in the argument of the closing speech for the state were of such character that the conviction ought not to be permitted to stand. Usually the instruction of the court to the jury to disregard unwarranted remarks by counsel will be regarded sufficient to prevent a reversal, but where they are of a very damaging character, and in cases that inflame or have a tendency to inflame the public mind, a different rule obtains."

This was a case of misdemeanor. This is a felony case. See, also, *Puryear v. State*, 50 Tex. Cr. R. 463, 98 S. W. 258; *Taylor v. State*, 50 Tex. Cr. R. 560, 100 S. W. 393; *Stevison v. State*, 48 Tex. Cr. R. 601, 89 S. W. 1072; and *Davis v. State* (Tex. Cr. App.) 114 S. W. 366. The reports of this court show how frequently we have been compelled to reverse cases for the improper argument of counsel for the state. Why they will persist in such improper argument, it is difficult to conceive. We have no doubt in this case that counsel entertained the sincere conviction of appellant's guilt, and that his use of the vigorous language complained of was due to his zeal and founded in his fidelity to the interest of the state. But, however much such zeal and however much such fidelity should be applauded, counsel for the state should always remember that in every criminal case they are bound and committed by every suggestion of duty and by every obligation which can bind and affect them to confine their argument to a fair discussion of the law and the facts of each case. We think on further reflection that we were in error in this matter in the original opinion, and that justice demands, and our duty makes

it a pleasure, to acknowledge the error, and to set aside and hold for naught our former judgment of affirmance.

The motion is granted, and the judgment of conviction set aside, and the cause remanded.

### BALLENTINE v. STATE.

(Court of Criminal Appeals of Texas. March 17, 1909. Rehearing Denied April 14, 1909.)

#### 1. BURGLARY (§ 46\*)—INSTRUCTIONS—AGGRAVATED ASSAULT.

In a prosecution for burglary with intent to commit rape, where the evidence showed that accused entered the house and the room where the prosecuting witness and her two daughters were sleeping, and that when she awakened he was rubbing her leg or thigh and escaped upon her making an outcry, it is not error to refuse to charge on aggravated assault.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. § 117; Dec. Dig. § 46.\*]

#### 2. BURGLARY (§ 41\*)—EVIDENCE TO SUSTAIN VERDICT.

Evidence in a prosecution for burglary with intent to commit rape held to sustain a conviction.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. § 94; Dec. Dig. § 41.\*]

Davidson, P. J., dissenting.

Appeal from Criminal District Court, Galveston County; J. K. P. Gillaspie, Judge.

Willie Ballentine was convicted of burglary with intent to commit rape, and appeals. Affirmed.

See, also, 107 S. W. 546.

Thomas C. Turnley, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** This case was reversed at a former term of this court, and the opinion in same will be found in 107 S. W. 547. In said former opinion we inadvertently stated that the issue of aggravated assault should have been given in the charge. We find in this record that appellant again complains of the refusal of the court to charge upon aggravated assault. We hold that the former opinion, in stating that the issue of aggravated assault was in the case, is erroneous, and it follows that the court did not err in refusing to charge on same in this case.

Appellant was charged with the offense of burglary with intent to commit rape. The court in its main charge gave the jury the following: "You are instructed that you must find and believe from the evidence beyond a reasonable doubt, first, that the defendant broke and entered the house alleged, and, second, he, the defendant, had the specific intent to unlawfully have carnal knowledge by force, and without her consent, of said Ida Barnett, and as same has been fully defined and described herein; and if you should find that the defendant did en-

ter said house, but you should find or have a reasonable doubt that the purpose and intent of the defendant was, when he did so enter said house, if he did so break and enter said house, was for any other purpose and intent, then find him not guilty." The court had previously defined rape and a breaking which constituted burglary in his charge. Then followed same with the above-quoted charge. The evidence in the case shows that appellant entered the house and was rubbing the leg or thigh of prosecutrix, and immediately upon her making an outcry he fled. The evidence further shows that prosecutrix's two daughters, aged 19 and 17, respectively, were in the room with her. Now, the question raised is, whether the court erred in not charging upon aggravated assault. It was not necessary, as stated above, to so charge. The court told the jury that if appellant had any other intent than rape, or if they had a reasonable doubt as to his having intent to rape, to find him not guilty. This was all that appellant could ask, and if it was not with the specific intent to rape it could not be burglary, since burglary was predicated upon that intent in the indictment. The only question for us to decide is, whether the evidence justified the verdict; that is to say, as to whether the evidence showed a specific intent to rape or justified the jury in so concluding. We hold that it did. There was nothing to indicate that appellant had any other intent. He stole nothing from the house, and he evidently was attempting to have carnal knowledge of the prosecutrix without her consent. There is nothing in the evidence to suggest that he had any reason on earth to believe he had consent to the illicit relation. He stealthily enters the house at night, and when discovered is making an effort to assault the prosecutrix, and could not have had any other purpose than to commit the crime of rape. A cry is raised by prosecutrix, and the appellant flees. We cannot say that he did not have the intent to rape. To say so would be doing violence to the facts in this case. Many decisions of this court hold that on an ordinary indictment charging burglary with intent to steal, although nothing is taken, yet the fact of entering the house at night is evidence of the fact that he intends to steal. In this case we have the evidence going farther, and showing an indecent and outrageous handling of the person of the prosecutrix. The indictment having predicated burglary upon intent to rape, the question for us to decide is whether or not this evidence justifies the verdict of the jury. We have no rule of this court under which we could reverse this case for failure of the court to charge on aggravated assault; but the only rule, as we understand the decisions of this court, would be this: That if this evidence

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

did not make out or justify the jury in concluding that appellant had the specific intent to rape, then we could reverse the case for the lack of evidence to sustain the allegation in the indictment; but certainly we have no warrant in law or reason for saying that the court should charge on aggravated assault. Appellant does not complain of the above-quoted charge. It covers every salient feature of his defense, and tells the jury explicitly that if appellant had no specific intent to rape, or if they had a reasonable doubt thereof, to find him not guilty. Under an indictment for burglary with intent to rape, there could never be a prosecution for aggravated assault. Then, on what theory could the court be held to have erred in failing to charge on aggravated assault? This is the complaint of appellant, and not that the evidence is insufficient. We inferentially held that the evidence was sufficient in the former opinion of this court by not declaring that it was not sufficient, and we have no reason to disturb the verdict on the ground that the evidence does not support the allegations in the indictment. It may be suggested that the jury might have concluded that appellant had no specific intent to rape from the sheer presence of prosecutrix's daughters, but this could be readily argued by appellant, and doubtless was properly argued by him in his address to the jury, and urged as a reason why the jury should not find that he was guilty of burglary with intent to rape; but these isolated facts would not justify us in concluding he had no such specific intent. The charge in all respects submitted the force necessary to constitute rape as stated above, and properly defined burglary as applicable to the indictment in this case.

There is no other question requiring a review at our hands in this record, and the judgment is in all things affirmed.

RAMSEY, J. (concurring). It will be observed that only this reference is made in former opinion to the matter of aggravated assault, viz.: "Aggravated assault should have been given in charge." This language is used in connection with the statement that the charge of the court is too meager, and is not sufficient in regard to the definition of force such as is necessary to constitute the crime of rape, it being charged in the indictment herein that appellant's intent in entering the house was for the purpose of committing rape by force. From the context it is evident what is meant by the sentence "aggravated assault should have been given in charge" was merely, in substance, that the jury should have been instructed that, if his purpose was other than that to commit rape by force, he would not be guilty of burglary. Of course, it was not in the mind of the court under this indictment how appellant could have been convicted of the offense of aggravated assault as that

term is defined by our Code. It is, of course, too clear for discussion that if the intent of appellant, so far as affected Mrs. Barnett, was less than the specific intent to commit the crime of rape by force, he would not be guilty of the crime of burglary. However, in the charge of the court this matter is fully covered, and the declaration and statement in the charge that, if he had any other intent in entering the building than to commit the crime of rape by force, he would not be guilty, gives appellant the benefit of every conceivable right he might have had in entering the room save and except that of the intent to commit the crime of rape, and, as I believe, sufficiently guarded and protected his interests.

DAVIDSON, P. J. (dissenting). I believe my Brethren are in error in affirming the judgment and therefore file reasons for my dissent.

A report of this case on a former appeal will be found in 107 S. W. 546. The case is practically the same on the facts as on the former appeal, except that on this appeal it is made to appear that, at the time that the state's evidence shows appellant entered the room of the prosecutrix, her two daughters, ages respectively 19 and 17, were sleeping in the room. The former appeal shows that the husband was also sleeping within a few feet in an adjoining room, separated by double doors which were open. Appellant was charged with burglary with intent to commit the crime of rape. The proof shows in this record, so far as the state's side of it is concerned, that appellant had raised the mosquito bar over the bed of prosecutrix and was rubbing her leg or thigh, and immediately upon her making an outcry he fled. In the opinion on former appeal this language was used: "We are further of opinion that the charge of the court is too meager, and is not sufficient in regard to the definition of force such as is necessary to constitute the crime of rape; it being charged in the indictment herein that appellant's intent in entering the house was for the purpose of committing rape by force. Aggravated assault should have been given in charge." On the trial from which this is an appeal, the court did not define aggravated assault. Appellant again raises the question in this language: "The court erred in its charge to the jury in not giving the charge on aggravated assault and battery, because the evidence tended to show that the assault committed, and the only assault committed, on the complainant witness, Mrs. Ida Barnett, was only an aggravated assault and battery; and if the jury believe that such was the case, then the offense alleged to have been committed would not be burglary, and the defendant would have been entitled to an acquittal." While the language in the former opinion is not as clear as it should have been, still in the connection in which it was stated it sufficiently

called the court's attention to the question. If there was but an aggravated assault, then there could not be burglary. Article 634 of the Penal Code reads as follows: "The definition of force as applicable to assault and battery, applies also to the crime of rape, and it must have been such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case." In addition to this definition of force, the statute, in defining rape, says, in substance, that it must be sufficient to overcome all resistance that may be offered or imposed by the prosecutrix. The only force mentioned in the testimony was the act of placing his hand upon her thigh and perhaps rubbing it. Immediately upon being discovered by the prosecutrix, he fled. Now, what are the "other circumstances of the case"? His entry into the house at night for some purpose; the presence of the husband of the wife and two daughters, ages respectively 19 and 17. The jury might have believed it a fair deduction from the facts that he did not intend to use force to overcome all resistance in the immediate presence of the husband of the prosecutrix and her two grown daughters; at least, it might suggest a very serious question—that of his intent to use such force as to overcome her resistance under those circumstances. Now, can it be said to the exclusion of the reasonable doubt that this assault would arise to the dignity of an assault to commit rape by force; that is, to force a woman under the environments of the case to submit to his desires in contravention of her resistance? In order to make it a burglary with intent to commit rape, the entry into the house must have been with the specific intent to commit rape by force. This is true by the statute and all the authorities construing that statute. *Sirmons v. State*, 44 Tex. Cr. R. 488, 72 S. W. 395; *Graybill v. State*, 41 Tex. Cr. R. 286, 53 S. W. 851; and *Hancock v. State* (Tex. Cr. App.) 47 S. W. 466. And at this point it may be stated, as the settled law, that it is essential that a specific intent to rape be established by the evidence, and that it must go beyond the possibility of such intent. *Cotton v. State*, 52 Tex. Cr. R. 55, 105 S. W. 185, and authorities there collated. If appellant entered the house for the purpose of having intercourse with the prosecutrix with her consent, then the crime of rape was not a part of this case, nor could the assault under such circumstances be one with the specific intent to commit the crime of rape. Under the circumstances, and owing to the fact that prosecutrix and her family were white people, and this was a negro entering the house under such circumstances, the court should have carefully guarded the case. I am of opinion that the error in refusing to instruct the jury that,

If the assault was not of a higher magnitude than aggravated assault, then the crime of burglary would not result, was of such importance that it was error on his part not to so instruct the jury. In other words, the jury should have been informed that, if appellant's intent in entering the house and in taking liberties with the prosecutrix was for the purpose of having intercourse with her consent, then the crime of rape or intent to commit rape would not be shown, and the assault would be no higher than aggravated assault, and the entry into the house, therefore, would not be burglary. In order to constitute burglary under this case, the entry must have been with the specific intent to commit the crime of rape by force; that is, by such force as would overcome all resistance on her part. This is the plain language of the statute, and therefore the criterion of such crime. I therefore think the error was of such importance as to require a reversal of the judgment.

#### HARDIN v. STATE.

(Court of Criminal Appeals of Texas. March 20, 1909.)

#### 1. CRIMINAL LAW (§ 396\*)—EVIDENCE—ADMISSIBILITY.

In a trial for perjury, based on accused's testimony that he, and not his brother, committed a homicide with which the brother was charged, accused could show that decedent knocked W. down shortly before the killing, where the state had shown that W. had knocked decedent down.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 862; Dec. Dig. § 396.\*]

#### 2. PERJURY (§ 32\*)—EVIDENCE—ADMISSIBILITY.

It was improper to allow the state to ask the constable who arrested the brother whether any one delivered a knife to him after the difficulty, where the brother was not seen with the knife, and it did not appear that he owned it, and to allow the state to show that witness, with whom the brother lived, missed his knife about two weeks before the homicide, and that he last saw it at a certain place, since neither accused nor his brother were connected with the knife.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 108, 115; Dec. Dig. § 32.\*]

#### 3. CRIMINAL LAW (§ 392\*)—EVIDENCE.

The state could not show that certain persons had left the state, where the state's good faith in not producing them as witnesses was not attacked.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 852; Dec. Dig. § 392.\*]

#### 4. WITNESSES (§ 379\*)—IMPEACHMENT.

If witnesses, who testified that accused killed decedent, previously testified, in his prosecution for assaulting decedent, that accused did not assault him, the state could show that fact; but the showing should be limited to impeachment purposes.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1220, 1221; Dec. Dig. § 379.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**5. WITNESSES (§ 345\*)—IMPEACHMENT.**

It was proper for the state, on cross-examining the brother as a witness, to show that he had been thrice tried for, and twice convicted of, the homicide, where the evidence was limited to the issue of his credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1126–1128; Dec. Dig. § 345.\*]

**6. PERJURY (§ 32\*)—EVIDENCE—ADMISSIBILITY.**

The state could not show that accused was tried for simple assault upon decedent in the difficulty in which decedent was killed, since a conviction thereof would not involve moral turpitude, nor show per se that accused swore falsely respecting the killing, and accused could not show that the assault case was dismissed on appeal.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 108, 115; Dec. Dig. § 32.\*]

**7. CRIMINAL LAW (§ 396\*)—EVIDENCE—EFFECT OF SIMILAR EVIDENCE OF ADVERSE PARTY.**

If the state in a prosecution for perjury in falsely swearing that accused committed a homicide for which his brother was being prosecuted, showed that accused told certain persons that he was not present at the homicide, accused could show other statements by him that he killed decedent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 862; Dec. Dig. § 396.\*]

**8. PERJURY (§ 32\*)—EVIDENCE—ADMISSIBILITY.**

The state could not show that the brother did not testify in the case wherein he was charged with the homicide.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 108, 115; Dec. Dig. § 32.\*]

**9. CRIMINAL LAW (§ 385\*)—EVIDENCE—JUDGMENT IN ANOTHER CASE.**

Results of a controverted judgment in one criminal case are not proper evidence in another.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 878; Dec. Dig. § 385.\*]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Walter Hardin was convicted of perjury, and he appeals. Reversed and remanded.

Ivy, Hill & Greenwood, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** Appellant was convicted of perjury, and his punishment assessed at two years' confinement in the penitentiary.

The facts in this case are, in substance, as disclosed by the opinion in the case of Richard Hardin v. State, 51 Tex. Cr. R. 559, 103 S. W. 401. In that case appellant's brother was prosecuted for murder and convicted of manslaughter. On the trial of that case appellant swore, in substance, that he killed the deceased, and not his brother Richard. The perjury in this case is predicated upon said alleged false statement. In other words, appellant and his brother were in the difficulty with the deceased, Munroe, and one or the other of them stabbed the deceased, from which wound he died. Several witnesses swear that appellant cut the deceased. Several witnesses swear that Richard Hardin (appellant's brother) cut

the deceased. In order to prove the falsity of appellant's testimony, wherein he swore that his brother Richard did not cut the deceased, it was proper and germane for the state to introduce any legitimate and legal evidence going to show that Richard Hardin, and not appellant, cut the deceased. It was equally proper and permissible for appellant to introduce any evidence that was legal to show that he, and not his brother, killed the deceased.

Bill of exceptions No. 1 shows that the state's witness Albert Smith testified that Richard Hardin stuck a knife in the deceased. The evidence of other witnesses for the state shows that Richard Hardin stabbed deceased in a difficulty occurring at night in Itasca. Witnesses for appellant testify that it was appellant who stabbed deceased. Sam Shaw, a witness for the state, had testified that, in the difficulty in which Prince Munroe was killed, Maje Wright a few moments before had knocked deceased down. Other evidence was to the effect that Maje Wright was a small man, weighing about 135 or 140 pounds. On cross-examination of Albert Smith, he was asked, in behalf of defendant, how large a man was Prince Munroe, the deceased. Appellant expected to prove by said witness that deceased was a large man, weighing about 180 pounds; but the testimony was objected to by the state, and the objection sustained.

Bill No. 2 shows that the defense offered to prove by Albert Smith that deceased knocked Maje Wright down, and the witness would have so testified. This testimony should have been admitted. It may be meager in its effect upon the trial of this case; but certainly, if it is pertinent for the state to prove that Smith knocked the deceased down, then it certainly was admissible for the defense to prove that deceased knocked Smith down.

Bill No. 3 shows that J. A. Martin, the constable at Itasca, testified that he learned of the killing of the deceased a few minutes after it occurred; that he overtook and found Richard Hardin with the Johnson girls about a mile west of Itasca, and brought him back to Itasca, and when he got him back to Itasca and put him in the calaboose he saw what he took to be blood in the palm of his hand; that Mr. Wheeler and Clevis Wheeler, his son, lived west of Itasca about a mile and a half. Counsel for the state thereupon asked the witness Martin the following question: "After the difficulty, I will ask you if any one turned over to you a knife?" Appellant objected to this on the ground that it was immaterial and prejudicial to defendant; that it was a transaction inter alla, and could not be binding on defendant, there being nothing showing any connection between Richard Hardin and said knife, and Richard Hardin

not being present. The bill shows that Richard Hardin was not seen with the knife, or that he ever owned the knife in question. Certainly this testimony was entirely inadmissible.

Bill No. 4 shows that Ben Majors, witness for the state, testified that Richard Hardin lived on his place before and at the time of the killing of Prince Munroe, and he was asked the following question by the state: "I will ask you whether, about that time, or before you heard of the death of Prince Munroe, and while Rich Hardin was living on your place, whether you owned a knife or not?" The defense objected on the ground that same was immaterial, irrelevant, and hearsay. The objections being overruled, the witness answered: "Yes; I owned a knife." The state then asked witness whether he missed that knife, to which he answered: "Yes; I missed it about two weeks before I heard of the killing." In this connection the witness testified that, the last time he saw the knife before he missed it, he had it in his buggy shed cutting washers for his buggy. If this testimony was pertinently connected, or the knife could be even inferentially shown to have been in possession of the brother of defendant, Richard Hardin, the testimony would be admissible; but, as the bill discloses the matter, we see nothing on earth to connect appellant with the knife, or his brother Richard Hardin with the knife. It follows, therefore, that this character of testimony should not be admitted against this appellant at least.

Bill No. 5 shows that the state was permitted to prove by the ticket agent at Itasca that some time ago Mr. Wheeler (father of Cleve Wheeler) bought tickets for Mississippi, and shipped as freight a lot of household furniture to Mississippi. This evidence was introduced for the purpose of showing that Mr. Wheeler and Clevis Wheeler had left the state of Texas. Appellant objected to this testimony on the ground that same was irrelevant and immaterial. It certainly was utterly irrelevant and immaterial. If these parties had been witnesses in Richard Hardin's case, and the defense had made an assault upon the state's bona fide effort to produce all the evidence showing that Richard Hardin had killed deceased, and not appellant, we could imagine some circumstances under which it might be pertinent for the court to permit the state to show why the Wheelers were not introduced as witnesses. This bill does not disclose any such condition as that suggested, and the testimony was utterly irrelevant and immaterial.

Bill No. 6 shows that the state introduced the depositions of J. J. Scrivner, given on a former trial of Richard Hardin, showing in substance that Mr. Wheeler and his son Clevis Wheeler had left the state of Texas. As stated above, this testimony was not admissible.

On cross-examination of the witness Maje Wright the state was permitted, over appellant's objection, to prove by said witness that Walter Hardin, appellant herein, after the killing of deceased, was tried in the justice court at Itasca for a simple assault on Munroe, growing out of the difficulty in which Munroe was killed, and that the witnesses in this case on trial testified on the trial at Itasca of Walter Hardin for such simple assault, and that witness heard them testify, and never heard a single one of these witnesses swear that Walter Hardin stuck that knife in deceased, and that they all testified, and that witness knew they all testified, that time in Itasca, that Richard Hardin stabbed Munroe, and not Walter Hardin. This bill does not show whether the state laid a predicate to impeach all the defense witnesses or not. We have to take the bill as it is written. If as a matter of fact the state laid a proper predicate by the witness to impeach various witnesses testifying for the defense, then it would be proper, after laying said predicate, to ask the witness the question complained of in this case. In other words, various witnesses swore in this case that appellant killed the deceased. If these same witnesses, in a case wherein appellant was being prosecuted for assault upon deceased, had previously sworn that appellant did not assault deceased, this fact could be proven; and this regardless of whether it was in the trial for assault or any other case. If testimony of this character is admitted, however, it should be limited to the sole purpose of impeaching the defense witnesses. The fact that appellant was tried for assault upon deceased could not legitimately be appropriated or used by the state to prove that he swore falsely when he says that he killed the deceased. Appellant is not responsible for the character of indictment returned against him.

Bill No. 11 shows that the state, on cross-examination of the defense witness Richard Hardin, was permitted to prove, over appellant's objection, that he had been three times tried and twice convicted on the charge of killing deceased. Appellant objected, on the ground that same was immaterial, irrelevant, incompetent, and prejudicial; that defendant should not be held responsible for the fact that Richard Hardin had been three times tried for killing Prince Munroe, and was not responsible for the fact that juries had twice convicted Richard Hardin; that said evidence, in effect, introduced before the jury the verdicts of two juries convicting Richard Hardin for the stabbing and killing of Munroe, and in effect was the opinions of said juries that Richard Hardin, and not Walter Hardin, stabbed Munroe (the deceased)—the issue in this case being whether Richard Hardin or Walter Hardin stabbed and killed deceased. It appears from the charge that the court limited this testimony



to the issue of credibility of the witness Richard Hardin. We think there was no error in this ruling of the court. See *Early v. State* (this day decided) 118 S. W. 1036.

Bill No. 14 shows that the state was permitted to prove that appellant was tried in the justice court at Itasca for simple assault on Prince Munroe, growing out of the difficulty in which Munroe (deceased) was killed. Appellant objected to this testimony on the ground that it involved no moral turpitude, and the fact that he was charged only with a simple assault on Munroe, and tried for such simple assault; instead of being charged with killing Prince Munroe, involved the opinion of the grand jury or officers or parties charging him with simple assault on Munroe, deceased. Appellant could not be chargeable with the fact that the officers, over whose acts and conduct he had no power or control, had prosecuted him for simple assault on deceased. Even if appellant was convicted of a simple assault, it does not involve, as suggested in the bill, moral turpitude; nor does it go to show per se that appellant swore falsely when he stated he did not kill deceased. It is a well-settled rule by this court that results of a controverted judgment cannot be introduced as evidence in another and different case. See *Dent v. State*, 43 Tex. Cr. R. 126, 65 S. W. 627, and *Busby v. State*, 51 Tex. Cr. R. 289, 103 S. W. 638.

Bill No. 15 complains that the state impeached the testimony of appellant's witnesses on this trial by showing that they swore differently in the assault case. This testimony was admissible, if proper predicate was laid, and the court properly limited same in his charge to the jury.

Bill No. 16 shows that appellant offered to prove that the assault was appealed to the county court from the justice court at Itasca, and was there dismissed against him, before he testified on the trial of the case against Richard Hardin, out of which this prosecution for perjury grew. Certainly, if it was permissible to prove that he was prosecuted, which we have heretofore held it was not, it would then have been admissible to prove that he was subsequently acquitted, or that the case was dismissed; but none of this testimony was admissible.

Bill No. 17 shows that Walter Hardin (appellant), on cross-examination, was asked the following question: "You told Constable John Martin and J. J. Scrivner and Fred Long, after this thing happened, that you were not there [that is, at the place of the fatal difficulty wherein Prince Munroe was killed], and was gone before the difficulty occurred?" Appellant objected, on the ground that he was under arrest, and on preliminary questions by counsel for defense, it appearing that said witness Walter Hardin (defendant) was under arrest, the defense objected, as follows: "Objects to testimony to show that he stated to these parties, while he

was under arrest, thereupon the court remarked: 'Unless it is shown that he was warned. I don't know that they are going to show that he was warned.' This proceeding occurred in the presence of the jury, and, under said remarks of the court, there was no answer to said question asked by the state." Furthermore, the state was permitted to prove by said Walter Hardin that he, shortly after the fatal difficulty resulting in deceased's death, was charged with and tried for simple assault growing out of said difficulty. On cross-examination of Walter Hardin by defendant's counsel, the following question was propounded: "I will ask you whether or not, prior to the time, between the time you was arrested and the time you were tried in Itasca, and before you heard the evidence up there, if you told any one who killed Prince Munroe?" The witness answered, "Yes, sir." The state objected to this as self-serving and hearsay, and the court sustained the exception. If permitted to answer, the witness would have stated that he told W. R. Carr, before the trial in the justice court at Itasca for simple assault, that he stabbed and killed Munroe. In the shape of this bill we cannot say whether the testimony was admissible or not. As we understand this bill, there was no answer made by the defendant to the state's question as propounded above. We have copied the bill almost literally. If the state proved that appellant made different statements from those sworn to on the trial of this case, then it would be permissible to show that the appellant made other statements in consonance with his statement here sworn to; but this bill does not disclose whether this was the condition or not.

Bill No. 18 complains of the same matter discussed in the last bill.

Bill No. 19 shows that after appellant's brother, Richard Hardin, had testified in this case that appellant, and not he, stabbed deceased, the state thereupon, on cross-examination, asked him whether he, the said Richard Hardin, had ever testified in his own case, wherein he was charged with killing Munroe (which has been tried three several times), to which question the defense objected, on the grounds that, even if Richard Hardin never testified in his own case, it was immaterial, irrelevant, incompetent, and prejudicial to defendant (Walter Hardin), as Richard Hardin had the legal right not to testify in his own case; that such fact could not be considered by the jury, nor alluded to by the jury, in determining the guilt of said Richard Hardin, and his failure to do so could not be considered as an inculpatory fact against him. This testimony was clearly inadmissible for any purpose.

We have carefully reviewed all of appellant's bills of exception; and, for the errors pointed out, the judgment is reversed, and the cause is remanded.

**ELLIS v. STATE.**

(Court of Criminal Appeals of Texas. March 17, 1909. Rehearing Denied April 14, 1909.)

**1. WITNESSES (§ 350\*)—IMPEACHMENT—CROSS-EXAMINATION AS TO CONVICTION OF CRIME.**

In a cross-examination of a witness an objection was properly sustained to a question whether she had not been arrested for various offenses during the past two years and convicted, as there was nothing to show the character of the offenses for which she was arrested or convicted.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1140-1142; Dec. Dig. § 350.\*]

**2. WITNESSES (§ 345\*)—IMPEACHMENT—CHARACTER.**

A witness in a prosecution for selling whisky in violation of the local option law cannot be impeached by showing that she had been convicted as a vagrant and prostitute, or by showing that her general reputation for chastity in the community in which she lived was bad.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1127; Dec. Dig. § 345.\*]

**3. CRIMINAL LAW (§ 968\*)—ARREST OF JUDGE—DEATH OF JUDGE.**

The death of the trial judge after conviction of accused and while a motion for new trial was pending is not a sufficient ground for arrest of judgment, where his successor passed upon the questions involved and signed the papers necessary for an appeal, and it is not shown that the successor was not appointed during the term of court allowed by law or fixed by the commissioners' court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2423, 2427; Dec. Dig. § 968.\*]

**4. CRIMINAL LAW (§ 1017\*)—APPEAL—JURISDICTION—DEATH OF JUDGE—APPOINTMENT OF SUCCESSOR.**

Where the trial judge died after conviction and a successor was appointed who passed on a motion for new trial, if he was not authorized to act in the matter, an appeal therefrom would be invalid, and the appellate court would have no jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2573; Dec. Dig. § 1017.\*]

Appeal from Johnson County Court; F. E. Adams, Judge.

Coley Ellis was convicted of selling liquor in violation of the local option law, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** Appellant was convicted of selling whisky in violation of the local option law.

1. The witness Willie Pollard was asked on cross-examination by appellant's counsel the following question: "Is it not a fact that during the past two years you have been arrested for various offenses by the officers of Johnson county, Tex., and tried and convicted of said offenses?" The county attorney interposed objections, which were sustained by the court. Appellant's counsel stated that they expected to prove by said witness that she had been frequently arrested and convicted of various offenses during said time, and that if said witness would not so testify,

then said questions were asked for the purpose of laying a predicate for the purpose of impeaching said witness. We are of opinion that as the bill presents the matter there was no error in the ruling. The character of the offense for which she was arrested or convicted is not stated. There is nothing in the bill to show that the offenses mentioned were of such character as would be permissible as a matter of impeachment, and this is the purpose stated in the bill.

2. The same witness mentioned above was further asked by appellant's counsel as follows: "Is it not a fact that during the last two years you have been frequently arrested and charged with being a vagrant, to wit, a common prostitute, and that you have, when so arrested, pleaded guilty to such charge in the courts of the city of Cleburne and Johnson county?" The court sustained the county attorney's objection to this question, whereupon appellant's counsel stated they expected to prove that said witness had been so arrested and prosecuted and had pleaded guilty to such charge on various occasions; and that if the witness would not so testify, then they expected by said question to lay a predicate for impeaching said witness. We are of opinion that the court's ruling was correct. The offense of vagrancy is not one of those violations of the law which would justify the introduction of a conviction as a matter of impeachment.

3. Another bill is reserved to the refusal of the court to permit appellant to prove by the witness Rogers the general reputation of Willie Pollard in the community in which she lived for chastity and virtue, and that it was bad. This is a similar question to that mentioned in the preceding bill of exceptions. The general reputation of a witness cannot be impeached for truth and veracity by showing her general reputation for chastity is bad or that she was a prostitute. *McCray v. State*, 38 Tex. Cr. R. 609, 44 S. W. 170; *Hall v. State*, 43 Tex. Cr. R. 479, 66 S. W. 783; *Carter v. State*, 45 Tex. Cr. R. 430, 76 S. W. 437; *Brittain v. State*, 47 Tex. Cr. R. 597, 85 S. W. 278; *Woodward v. State*, 42 Tex. Cr. R. 188, 58 S. W. 135.

4. Appellant moved in arrest of judgment upon the following grounds: First, that the Hon. F. E. Adams tried the case about the 17th day of December, 1908; that he was judge of the county court of Johnson county when the case was tried; that on or about the 25th of December, 1908, while motion for new trial was pending, Judge Adams died, and that thereafter there was no judge of the county court of Johnson county authorized to act upon the motion pending for a new trial, or to pass upon the motion or to assist in preparing the necessary and proper statement of facts or bills of exception to enable defendant to appeal. This motion is signed

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by attorneys for appellant. There was no affidavit made, and no bill of exceptions reserved verifying the matter. The matters are simply stated as grounds upon which the arrest of judgment should be sustained. The death of Judge Adams, it seems, was supplied by the appointment of his successor, who passed upon the questions involved and signed up the papers necessary for the appeal. We cannot concur with counsel in their contention. The death of Judge Adams did not end the term of court, but held that matter in abeyance until there could be a successor appointed. It is not shown nor stated that the successor was not appointed during the term of court allowed by law or fixed by the commissioners' court. We, therefore, presume the successor of the deceased judge was appointed within term time, inasmuch as he signed all the papers and acted upon the motion for a new trial. The notice of appeal itself was given while the successor of Judge Adams was upon the bench, and after the overruling of the motion for new trial. If the successor of Judge Adams was not authorized to enter orders, the notice of appeal would be invalid, and the jurisdiction of this court would not attach, and this appeal would not be legal. We are of opinion that there is no merit in this position.

As the record is before us, we are of opinion that the judgment should be affirmed, and it is accordingly so ordered.

### DIES v. STATE.

(Court of Criminal Appeals of Texas. March 3, 1909. Rehearing Denied April 14, 1909.)

#### 1. CRIMINAL LAW (§ 107\*)—VENUE—STATUTES—VALIDITY.

Act June 18, 1897, p. 16, c. 9, providing that a prosecution for rape may be maintained in the county in which the offense was committed, or in any county of the judicial district, or in any county of the judicial district the judge of which resides nearest to the county seat of the county in which the offense was committed, does not conflict with Const. art. 3, §§ 45, 56, vesting in courts the power to change the venue in criminal cases, and prohibiting the Legislature from passing any special law authorizing such change of venue.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 107.\*]

#### 2. CRIMINAL LAW (§ 107\*)—VENUE—CONSTITUTIONAL PROVISIONS—RIGHT OF ACCUSED.

The sixth amendment to the federal Constitution, providing that in all criminal cases accused shall enjoy the right to a trial by jury of the district where the crime was committed, is a limitation applicable to federal procedure only, and is not binding on the state courts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 219; Dec. Dig. § 107.\*]

#### 3. CRIMINAL LAW (§ 1166½\*)—HARMLESS ERROR—OVERRULING CHALLENGES TO JUROR FOR CAUSE.

The error in overruling a challenge of a juror for cause rejected by accused on peremptory challenge was harmless, where the court on reconsideration determined that the juror was

subject to challenge for cause and gave accused an additional peremptory challenge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3117; Dec. Dig. § 1166½.\*]

#### 4. JURY (§ 105\*)—COMPETENCY OF JUROR.

A juror testifying as to his competency on a trial for rape, that he had a prejudice against the crime, which did not extend to the person charged, that he would not be influenced by any prejudice in making up the verdict, was competent, though he also stated that he would require accused to produce evidence to vindicate himself.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 481; Dec. Dig. § 105.\*]

#### 5. CRIMINAL LAW (§ 1169\*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, on a trial for rape on a child less than 15 years old, the evidence showed that she was outraged, and there was no suggestion that it could have been done by any one but accused, the error of the court in admitting, as a part of her complaint to a third person, her statement that accused had raped her, was not ground for reversal, the evidence having been subsequently withdrawn.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1169.\*]

#### 6. CRIMINAL LAW (§ 1037\*)—MISCONDUCT OF PROSECUTING ATTORNEY—REVIEW.

The argument of the prosecuting attorney to the jury on a trial for rape that the jury should consider that a third person testified that prosecutrix had complained that accused had raped her, though improper because the court had excluded the testimony, but made in reply to statement of counsel for accused, was not so prejudicial to accused that the court on appeal could review it, in the absence of a request for an instruction directing the jury to disregard it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689-1691, 2645; Dec. Dig. § 1037.\*]

#### 7. CRIMINAL LAW (§ 1037\*)—MISCONDUCT OF PROSECUTING ATTORNEY—REVIEW.

To require the court on appeal to review an error based on the improper argument of the prosecuting attorney, counsel for accused must ask for a written instruction withdrawing the improper argument, unless the remarks are obviously of a character to impair the rights of accused, in which case it is not indispensable that a charge be requested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689-1691, 2645; Dec. Dig. § 1037.\*]

#### 8. RAPE (§ 59\*)—INSTRUCTIONS—EVIDENCE—SUFFICIENCY.

Evidence on a trial for rape held to establish the offense, rendering it proper to refuse to submit the issue of attempt to rape and assault with intent to rape.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 59.\*]

#### 9. RAPE (§ 51\*)—EVIDENCE—SUFFICIENCY.

Evidence held to justify a conviction of rape.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 51.\*]

Appeal from District Court, Baylor County; Chas. E. Coombes, Judge.

John Dies was convicted of rape, and he appeals. Affirmed.

Aynesworth, Glasgow & Nugent, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant appeals from a conviction had in the district court of Baylor

county on a charge of rape, obtained in said court on the 18th day of August, 1908, in which his punishment was assessed at confinement in the penitentiary for 50 years. The offense is alleged to have been committed in Motley county on the 5th day of July of the same year. The indictment was returned by the district court of Baylor county on August 4, 1908.

1. The first question raised questions the validity of the indictment so returned by the last-named county. This is authorized by the terms of the act of the Legislature passed on the 18th day of June, 1897. It is objected by appellant that this act of the Legislature contravenes article 3, § 56, of the state Constitution, and is also violative of the federal Constitution. All the questions raised touching this matter by appellant were carefully considered in the case of *Mischer v. State*, 41 Tex. Cr. R. 212, 53 S. W. 627, 96 Am. St. Rep. 780, and were ruled adversely to appellant's contention. It was there held, in substance, that Act June 18, 1897, Sp. Sess. 25th Leg. p. 16, c. 9, providing that prosecutions for rape may be commenced and carried on in the county in which the offense was committed, or in any county of the judicial district in which the offense was committed, or in any county of the judicial district, the judge of which resides nearest to the county seat of the county in which the offense is committed, is constitutional. It is certain that there is no provision of our state Constitution prohibiting the Legislature from authorizing a prosecution for an offense in this state in some county other than the county where the offense was committed, and that article 3, § 45, of our state Constitution, which vests in the courts the power to change the venue in civil and criminal cases, and section 56, which prohibits the Legislature from passing any local or special law authorizing such change of venue, do not prohibit the enactment of a law authorizing the prosecution of an offense in another county than that in which said offense was committed, as is provided in case of rape by the act in question. It is there clearly held that said act is not in derogation of the sixth amendment to the Constitution of the United States, requiring that criminal prosecutions shall be tried in the district wherein the crime shall have been committed, because that provision is a limitation and restriction which applies only to federal procedure, and is not binding with reference to the procedure in state courts. The opinion of Judge Henderson touching this matter is so exhaustive, is so sound and clear, and it is so well supported by authority, that we can add nothing to it. We believe it to be a clear and correct enunciation of the law, and that it should be, as it has been, followed.

2. On the trial numerous objections were made to the competency of certain jurors. The only one of these jurors as to whom a

challenge for cause could be sustained, and who was rejected on peremptory challenge, was thereafter on reconsideration held by the court to be subject to challenge for cause, and an additional peremptory challenge by the court granted. So that if there was no error in the proceedings of the court in respect to the juror J. E. Morris, none of these matters can be complained of by appellant. This juror in a general way expressed himself as having a prejudice against the crime of rape. He stated, in substance, that it did not extend to the person charged, but, as we understand, was rather expressive of his abhorrence and detestation of the offense itself. His testimony given on his examination is not wholly consistent, because in part of it, as we understand, he states he would require the appellant to produce evidence to vindicate himself. However, on redirect examination, and as a summary of his final attitude in the matter, he says: "At this time I do not know one thing in the world about the facts of this case, and I would not be influenced by any prejudice in making up my verdict in the case. I have never been a peace officer. In my present frame of mind I am weighing the fact that he is charged with the offense of rape against him. I know nothing whatever about the case, and do not know the defendant in this case. If I go into the jury box I would have to give the state and the defendant alike a fair and impartial trial, and I would require the state to make out her case beyond a reasonable doubt, and if the state failed to make out her case beyond a reasonable doubt I would turn him loose. I have no prejudice against the defendant on account of his being charged with rape. I could set aside my prejudice against the crime of rape and give the defendant a fair trial." This bill is approved, with the statement and explanation that the defendant exhausted his challenges on the jurors Rhea, Renner, Tipton, Welch, and Frazier, being his challenges Nos. 11, 12, 13, 14, and 15, without asking any of said jurors any questions whatever, when the court allowed the said defendant his sixteenth challenge in lieu of the one exhausted on the juror C. H. Mitchell; and the said sixteenth challenge was exhausted upon the juror J. E. Morris. We think there was no error in the action and ruling of the court in respect to this matter. While this juror does, in part of his testimony, express great prejudice against the crime of rape, and his examination in some portions of it is consistent with the idea that his prejudice is so great that it might extend to the defendant himself, and implies a prejudgment of his cause, after all, as we believe, it is but an expression of his sense of outrage at the too frequent cases of rape occurring over the country. This is such a feeling as would, we believe, apply to many men, if, indeed, not most good men, and to find and impanel a jury composed on-

ly of persons having no prejudice or feeling of horror in respect to a crime of this sort would only result in impaneling a jury that ought not to be allowed to try any case. We believe, and therefore hold, that there was no such error in respect to this matter as would or could prejudice appellant.

3. Again, complaint is made at the action of the court in admitting in evidence the testimony of the witness Mrs. Thomas, an aunt of the prosecutrix, Gladys Thomas, to the effect, in substance, that on the day in question, and a short time after the rape was accomplished, prosecutrix made complaint to her aunt and told her that appellant had raped her. That it was competent for her to make an outcry without giving the details of the transaction, of course, is evident. The complaint, as we understand, extends only to the fact that she identified appellant as being the person who had accomplished her outrage. This, while admitted at the time offered, was subsequently withdrawn by the court from the consideration of the jury, and in view of the fact of the certainty of her outrage, and that there is no suggestion that it was or could have been done by any one else, in view of the fact that the matter of resistance was not an issue in the case, she being less than 15 years of age, and the withdrawal of the incompetent testimony by the court and his instruction to the jury not to consider it, we do not think that the matter is of such gravity as could have injured appellant.

4. Complaint is also made of the improper argument of counsel for prosecution. The matter arose in this way, as appears by the bill of exceptions: Hon. L. W. Dalton, in his closing argument, made the following statement to the jury: "Judge Glasgow in his argument before you stated that the prosecutrix, Gladys Thomas, asked Mrs. Carrie Thomas what effect turpentine had upon any one, and that Mrs. Thomas then questioned her, and that prosecutrix then for the first time complained that she had been ravished. We objected to this argument of defendant's counsel and appealed to the stenographer, and such was found not to have been the testimony of Mrs. Thomas. You will remember, gentlemen, that I asked Mrs. Thomas if Gladys made any complaint about having been raped, and that she testified that Gladys complained to her that defendant, John Dies, had raped her, and that the court, upon the defendant's objection, instructed you not to consider that part of Mrs. Thomas' testimony that related to any complaint about the defendant; that you could only consider that part of Mrs. Thomas' testimony that Gladys had made complaint to her that some one had wronged her, but as to who she stated it was could not be considered by you." Appellant excepted to these remarks of counsel, and stated to the court that said

remarks of counsel were improper, in view of the court having excluded the testimony; and the court did not reprimand counsel, nor instruct the jury to disregard the remarks so made by him. This bill is allowed, with the explanation "that no written instructions were presented to me by defendant's counsel instructing the jury to disregard the remarks of state's counsel." We do not see that the remarks complained of were of such highly improper character as necessarily to have prejudiced appellant's cause. Counsel for the state seems to have been replying to what he claims was the inaccuracy of some statement by Judge Glasgow, and to have undertaken to remind them that in the court's ruling on this matter he had held that the witness could not be permitted to say who had made the assault upon her, but that testimony was limited solely to the fact that an assault was made. Again, if in any event the remarks of counsel were improper, it was the duty of counsel for appellant to have asked a written instruction withdrawing same. That this is ordinarily the rule is settled beyond any sort of doubt or controversy. *Jackson v. State*, 18 Tex. App. 586; *Watson v. State*, 28 Tex. App. 34, 12 S. W. 404; *McKinney v. State*, 31 Tex. Cr. R. 583, 21 S. W. 683; *Jones v. State*, 33 Tex. Cr. R. 7, 23 S. W. 793; *Morrison v. State*, 40 Tex. Cr. R. 473, 51 S. W. 358; *Willis v. State* (Tex. Cr. R.) 55 S. W. 495; and *Wilkerson v. State* (Tex. Cr. R.) 57 S. W. 956. The only exception to this rule is in cases where the remarks of counsel are obviously of a character to impair the rights of defendant or prejudice his case before the jury, in which case it has sometimes been held that it is not indispensable that a charge be requested instructing the jury to disregard the objectionable argument. Such a rule was held to be applicable in the case of *Davis v. State* (Tex. Cr. R.) 114 S. W. 366.

5. Vigorous complaint is made that the court erred in not submitting to the jury the issue and question of attempt to rape and assault with intent to rape, and in this connection it is also insisted that the evidence is insufficient to support the verdict. We do not believe that either of these contentions can be sustained. It is inconceivable to us that with the injury suffered by prosecutrix, young, untutored, and inexperienced as she was, that though the assault may have deprived her of consciousness, when this was regained that she could have been left in the slightest doubt of her deforation. The court gave the law in his charge on circumstantial evidence, but the circumstances of the injury to her parts, in the light of the physician's testimony, make as certain as any fact in human experience can be that this little girl suffered this horrible outrage at the hands of this appellant. But for a proper review of this question, it is essential that

a fuller statement of the case with its details should be given than ordinarily is the writer's custom. The facts, as they are found in the statement of facts, are substantially as follows:

"Gladys Thomas was the daughter of Horace Thomas and wife, who lived at Matador, in Motley county. He and his wife were married on June 15, 1893, and Gladys Thomas was born on December 30, 1895, and it may be stated here that there is no question as to the age of this child, and that at the time of the alleged rape she was under the age of 15. At the time of the alleged rape the appellant was working as a hired man for the prosecutrix's father. On Friday, July 3d, prosecutrix's father and mother left their home to go to Northfield to be gone three or four days, leaving at his home his three girl children, his wife's brother, Will Hendricks, and appellant, with the understanding that at night the girls were to go over to their uncle's and stay there at night, and would come back in the day to attend to the matters around the place. On Sunday, July 5th, Hendricks, early in the morning, left, leaving appellant at the house. About 9 o'clock Sunday morning the prosecutrix with her sister left Dr. Thomas', where they stayed all night, to go home to attend to the matters there, and get their Sunday clothes to go to church. Jessie, the sister of Gladys, a child about nine years old, got her clothes and went on to her aunt's home, leaving her sister there to attend to such matters as were necessary. The prosecutrix started to go to milk the cows; the appellant informed her that the cows had already been milked; and this witness, continuing, says: 'After Jessie left, I said I would go and attend to the things, and appellant said there was nothing to attend to; that they had attended to everything. I said if there was nothing to attend to I would go back. When I said this I was in the sitting room. At this time he did not do anything, and I turned and walked into my room and went to getting my clothes together to go back to Dr. Thomas'. I did not get my clothes together; I just started to get them up when he came into the room. He spoke to me and asked me if I did not want to have a good time with him, and took me by the arms with his hands, and I told him I wanted him to turn me loose. He took hold of me around the shoulders, just caught me around the shoulders, both of them, and he made this talk while taking hold of me; asked me if I wanted a good time, and I told him, "No"; I says, "No, sir, I want you to turn me loose. Turn me loose or my papa will kill you." I says, "Turn me loose or I will send you to the penitentiary." He says, "I would not do anything to hurt you for anything." I said, "I don't care if you don't; I want you to turn me loose." He threw me down on the

bed and got on top of me. He did not pull up my dress while I knew anything; he just kept holding me there, and I was trying to get up; he was on top of me; I was trying to get away all of the time. I was lying crossways of the bed. After he threw me across the bed I kept struggling, and I knocked one of the window panes out, and that is the last thing I remember until I was out and standing in the door, I think, after he threw me in the bed, only I was trying to get up, and while I was trying to get up I got hold of the bed and I knocked one of the window lights out, and that is the last thing I remember until I was up and standing in the door between my room and the sitting room; the last thing I remember he was on top of me, and all this occurred. After I got up I did not say anything at all, but walked into the kitchen and commenced hunting some tooth paste, and he came in there and asked me what I was hunting, and I told him, because I was afraid not to; I was afraid of him. He asked me what I wanted the tooth paste for, and I told him I had a very bad taste in my mouth; that something smelled bad. He told me that was my mouth. He said if I would take some turpentine that would cure it—kill that scent. At that time I had a peculiar feeling. Between the time that he came into the room where I was and the time that I was out in the kitchen I know that something had been done to me. I know that somebody had had intercourse with me. I could not hardly walk. I sorter had pains in the lower part of my stomach. When I got up from the bed one of my drawers legs had been pushed up. I saw semen on me there, and felt it on me wet. He told me about this turpentine just as soon as I got in the kitchen, and wanted me to take a tablespoonful. I would not take a tablespoonful, but took a teaspoonful, only because I knew that turpentine was strong; and he told me to take it, and I was afraid not to take it. He had never had sexual intercourse with me before that. After I took the turpentine I went back into the sitting room, where I was when I first came. I was sick then. I never did give my consent to John Dies to do me that way. After that I washed myself with salt water; I washed with salt water because he told me to; he told me to wash in salt water and nothing would ever happen to me. When he told me that if I would wash myself in salt water nothing would ever happen to me I went and bathed myself. I pulled my drawers off and then put them back on. I wore my drawers the rest of that day until I got to Dr. Thomas'. I left home just as soon as Dies got away from the place. Just as soon as he told me to wash myself in salt water he left the place, and then after that I left just as quick as I got dressed, and I went from there to Dr. Thomas', my aunt's home, to tell her, and she was not

there, and then I went from there to the Baptist church, and she was not there, and then I went on down to where she was at the Methodist meeting. I did not stay at the Sunday school, but I went on to the church and waited till she came. There was a right smart crowd there, and I could not find her. I thought I saw her coming, and I waited till she got there. I did not tell her when she got there, because when she came she went over in the back of the choir in the back of the house and I did not want to go to her, and Dies was sitting back in the house himself. Just as soon as she came home after church I told her about it. I got sick and left church before it was over. It was a right smart little while after I got home before my aunt came."

Dr. Traweek testified that on the evening of July 5th, about 4 o'clock in the evening, he made an examination of the girl, and stated that he found fresh lacerations of the hymen and lacerations of the vaginal sac. It showed to be red, and to some extent inflamed and slightly swollen. Her female organ indicated from its looks that she had been recently penetrated, within the last few hours; her hymen was penetrated and bruised slightly. The parts were slightly bruised, and had a bluish discoloration from them. I based my conclusion that penetration made recently was the cause of this laceration on account of the dilation of the parts, standing open; and next on account of the freshness of the wound." This doctor's testimony, if anything, on cross-examination, instead of weakening the force of his examination in chief, rather tended to strengthen the same.

The evidence of other witnesses shows that the bed on which the assault was charged to have been committed was disarranged and the window glass broken out as stated by Gladys Thomas. The evidence shows that she was at the house about the time she testifies she was assaulted, and that appellant was there, and that they were alone. That she was under the age of 15 years is shown by all the testimony. The record further shows that appellant had been living at the residence of prosecutrix's father for some months on friendly terms. That this young girl was set upon by appellant and ravished without her consent is as incontestably shown by such irrefragable evidence as to our minds admits of no doubt or question. We cannot agree with counsel for appellant that the penalty is excessive. On the other hand, as the evidence appears to us, the jury was both gracious and merciful in the fact that they spared his life.

We have carefully examined the record, and there is in our judgment no question raised on which we could or should reverse the judgment of conviction. It is, therefore, in all things affirmed.

# SNEAD v. STATE.

(Court of Criminal Appeals of Texas. March 20, 1909.)

## 1. INTOXICATING LIQUORS (§ 40\*)—UNLAWFUL SALES—STATUTES.

Act 25th Leg. (Laws 1897, p. 223, c. 158), forbidding the sale of intoxicating liquors in local option territory except on payment of a license, etc., forbids the sale, in a local option district, of intoxicating liquors by one who is not a druggist selling drug compounds in the preparation of which liquors are sold on the prescription of a physician, and who has not obtained the license.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 40.\*]

## 2. STATUTES (§ 158\*)—REPEALS BY IMPLICATION.

Repeals by implication are not favored, and are never made effective where the result is destructive to the public welfare, unless such construction is imperatively demanded.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. § 158.\*]

## 3. INTOXICATING LIQUORS (§ 45\*)—REGULATION—STATUTES.

The Baskin-McGregor law, Acts 30th Leg. (Laws 1907, p. 258, c. 139), imposing an annual tax on persons selling intoxicating liquors in nonlocal option territory, etc., does not impliedly repeal Act 25th Leg. (Laws 1897, p. 223, c. 158), providing for license in local option territory; the provision in the Baskin-McGregor law that the same shall not be construed to be in conflict with any local option law, and no license shall be issued at any place where the local option law is in force, referring only to licenses issued under the Baskin-McGregor law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 45.\*]

## 4. INTOXICATING LIQUORS (§ 231\*)—ILLEGAL SALES—EVIDENCE.

Where, on a trial for selling intoxicating liquors, a witness testified that he had sold liquor called "Hiawatha" to accused and a third person, the testimony of witnesses that they had drank Hiawatha bought from the third person was admissible.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 291; Dec. Dig. § 231.\*]

## 5. INTOXICATING LIQUORS (§ 231\*)—ILLEGAL SALES—EVIDENCE.

Where, on a trial for unlawfully selling intoxicating liquors, accused showed that a third person had sold the same kind of liquor and had not been prosecuted, evidence that the sheriff had told the third person to quit the sale of the liquor and that he had done so was admissible to rebut the claim that the third person was not prosecuted because the liquor was nonintoxicating.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 291; Dec. Dig. § 231.\*]

## 6. CRIMINAL LAW (§ 1169\*)—APPEAL AND ERROR—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

On a trial for unlawfully selling intoxicating liquors, the error, if any, in admitting evidence that a third person had sold the same kind of liquor and was not prosecuted therefor, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.\*]

## 7. CRIMINAL LAW (§ 1137\*)—APPEAL—RIGHT TO COMPLAIN OF INVITED ERROR.

Accused cannot complain of testimony brought out by himself.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1137.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

# 8. CRIMINAL LAW (§ 419\*)—EVIDENCE—ADMISSIBILITY.

On a trial for unlawfully selling intoxicating liquors, a witness, who had no knowledge of the amount of alcohol in certain liquor except from what third persons had told him, could not testify as to the amount of alcohol in the liquor.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 419.\*]

Appeal from Erath County Court; M. J. Thompson, Judge.

Bob Snead was convicted of unlawfully selling intoxicating liquors, and he appeals. Affirmed.

Martin & George, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant appeals from a conviction had in the county court of Erath county on a charge of selling intoxicating liquors therein without having paid the occupation tax.

1. The case presents a very serious question, and one that has been the subject-matter of discussion, controversy, and difference in this court for many years. A similar question came before us, and was decided adversely to the contention of appellant, in the case of *Cunningham v. State*, 52 Tex. Cr. R. 522, 108 S. W. 678. There was, however, as the record shows, no brief filed in that case, nor was the precise question here raised emphasized or pointed out or treated with such directness as to challenge or secure the attention that probably its importance demanded. The indictment in this case averred, in substance, that appellant sold malt liquors capable of producing intoxication without having first obtained a license so to do, and, further, that he was not then and there a druggist selling tinctures and drug compounds in the preparation of which liquors are sold on the prescription of a physician. The substantial question raised in the appeal is that this indictment charges no offense, and the position of appellant is to the effect, in substance, that the indictment charges no offense against the laws of this state.

Chapter 138, p. 258, § 1, of the Acts of the Thirtieth Legislature, provides as follows: "Hereafter there shall be collected from every person, firm, corporation or association of persons selling spirituous, vinous or malt liquors or medicated bitters, capable of producing intoxication in this state, not located in any county or subdivision of a county, justice precinct, city or town, where local option is in force under the laws of Texas, an annual tax of \$375.00." It is suggested that this article further provides that it shall not apply to the sale by druggists of tinctures and drug compounds, in the preparation of which such liquors or medicated bitters are used and sold on prescription of a physician or otherwise. The argument is that from this article it appears that a tax cannot be levied

and collected of persons who sell spirituous or malt liquors in a local option district, unless he is selling on a prescription of a physician. In this case it was agreed on the trial that local option law was in force in Erath county, and had been for several years before this offense is alleged to have been committed, and the information charges that the defendant was not then and there a druggist selling tinctures and drug compounds in the preparation of which said liquors are sold on the prescription of a physician. Article 16, § 20, of the Constitution of the state provides that the Legislature shall at its first session enact a law whereby the qualified voters of any county, justice precinct, town or city, or such subdivision of a county as may be designated by the commissioners' court of said county, may by a majority vote determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits. The Legislature, it is urged, in obedience to this constitutional provision, has passed laws authorizing the qualified voters of each county and subdivision named in said constitutional provision, by a majority vote, to determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits. Therefore, the argument is, under the Constitution and laws of the state of Texas, no person could be licensed to sell intoxicating liquors in a local option district, and a license to him to do so would be a nullity, and would be no protection to him unless he sold under a prescription issued by a physician, which is charged in this case. The contention of appellant is that, since he could not obtain a license to sell liquors in a local option territory, such issue of license or attempt to issue to him so to do would be a violation of law, since it would and should be treated as a nullity, therefore no conviction could be had for undertaking to sell or engage in selling intoxicating liquors in such local option precinct. This position is well presented in the brief filed by counsel for appellant, and was re-enforced by a clear, vigorous, and forcible oral argument.

If it was an original question, the writer confesses that he would find much difficulty in its solution; nor is it clear, in reason, that a decision adverse to appellant's contention can be rested on safe and sound grounds. However, as we believe, the identical question has been in terms decided adversely to appellant's contention. In the case of *Robinson v. State* (Tex. Cr. App.) 75 S. W. 526, the court had under consideration a similar question, as it had had not infrequently theretofore. On full consideration (Judge Henderson dissenting), Judge Brooks of this court, for the guidance of inferior courts, undertook to lay down, and did in *hæc verba* write in the decision, a form of indictment for the offense of selling intoxicating liquors

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



in local option precincts without license. For the purpose of ready comparison, we put in parallel columns the form of indictment thus prescribed by the court and the one under which the conviction was had in this case:

"That Buck Robinson, in the county of McLennan, in the state of Texas, heretofore, on the 1st day of June, A. D. 1908, did then and there unlawfully, in justice precinct No. 7 of said county, after an election had been held in said justice precinct of said county by the qualified voters thereof in accordance with law to determine whether or not the sale of intoxicating liquors should be prohibited in said justice precinct, and such election had resulted in favor of prohibition in said justice precinct, and the commissioners' court of said county had duly made, passed, and entered its order declaring the result of such election, and prohibiting the sale of intoxicating liquors in said justice precinct, as required by law, and had caused said order to be published in the manner and form and for the length of time required by law, sell spirituous, vinous, and malt liquors without first having obtained a license for the purpose of selling said liquors, and without first having paid the taxes due the state and county, and the said Buck Robinson not then and there being a druggist selling tinctures and drug compounds in the preparation of which such liquors and medicated bitters are sold on prescription of a physician. The said taxes then and there due by him to said state amounted to two hundred dollars, and the taxes then and there due by him to said county amounted to one hundred dollars; the said taxes due by him to said county having heretofore been levied by the commissioners' court of said county—against the peace and dignity of the state."

"That Bob Snead, in the county of Erath and state of Texas, on or about the 1st day of April, A. D. 1908, and before the filing of this information, did then and there unlawfully, after an election had been held in said county by the qualified voters thereof, in accordance with law, to determine whether or not the sale of intoxicating liquors should be prohibited in said county, and such election had resulted in favor of prohibition in said county, and the commissioners' court of said county had duly made, passed, and entered its order declaring the result of said election, and prohibiting the sale of intoxicating liquors in said county, and said order had been published in the manner and form and for the length of time as required by law, sell malt liquors capable of producing intoxication, without first having obtained a license for the purpose of selling said liquors, and without first having paid to the state of Texas the taxes due for selling said liquors, and without first having paid to said county the taxes due for selling said liquors; and the said Bob Snead not then and there being a druggist selling tinctures and drug compounds in the preparation of which said liquors are sold on the prescription of a physician. The said taxes then and there due by him to said state amounted to \$200, and the taxes then and there due by him to said county amounted to \$100; the said taxes then and there due by him to said county having been heretofore levied by the commissioners' court of said county—against the peace and dignity of the state."

of the apparent uncertainty of the law, Judge Brooks, in a very clear and explicit way, lays down for the guidance of prosecuting officers a correct form of information. Applicable to this charge, the information here considered is almost literally in harmony with the form there deliberately adopted, which we believe is in every respect conformable to the law, and charges an offense against the law."

We might, perhaps, content ourselves here, in view of what appears to be the settled holding of this court, but the vigor and earnestness with which the matter is urged upon us demands some further treatment. We gather that before the passage of the act of the Twenty-Fifth Legislature in 1897, p. 223, c. 158, there was no provision of law for the granting of license in local option territory, unless the same could be inferred from the act of 1893 brought forward under the Revised Statutes of 1895, as article 5080a, wherein it is stated in the proviso that nothing in this article shall be so construed as to exempt druggists who sell spirituous, vinous, or malt liquors or medicated bitters on prescription of a physician or otherwise from the payment of the tax herein imposed. The act of the Twenty-Fifth Legislature reads as follows: "Hereafter there shall be collected from every person, firm, corporation or association of persons, selling spirituous, vinous or malt liquors, or medicated bitters, capable of producing intoxication, in this state, not located in any county, subdivision of a county, justice precinct, city or town, where local option is in force, under the laws of Texas, an annual tax of \$300.00 on each separate establishment, as follows: For selling such liquors or medicated bitters in quantities of one gallon or less than one gallon, \$300.00; for selling such liquor or medicated bitters in quantities of one gallon or more than one gallon, \$300.00. \* \* \* For selling malt liquors exclusively, \$50.00. And there shall be collected from every person, firm, corporation or association of persons for every separate establishment selling such liquors or medicated bitters within this state and located within any county, subdivision of a county, precinct, town or city in which local option is in force under the laws, the sum of \$200.00; provided, the same shall not be sold in such locality except on prescription and in compliance with the laws governing sales in such localities." Then follows, also, the provision that druggists shall not be exempt who sell spirituous, vinous, or malt liquors capable of producing intoxication, on the prescription of a physician or otherwise. Since the passage of this act, prosecutions for its violation have come before this court for construction quite frequently, and in many of the cases before us the decisions rested upon and had reference to the sufficiency of the allegations in the indictment. In the case of *Snealey v.*

It will thus be seen that the information in this case follows almost literally the form deliberately prescribed by the court in the Robinson Case.

In the later case of *Cunningham v. State*, supra, appealed from Erath county, we said: "An examination of the opinions of this court would seem to indicate that there has not been entire harmony in its holdings in respect to informations and indictments charging the offense of which appellant was convicted in this case. The matter was, however, pretty fairly considered in the case of *Robinson v. State* (Tex. Cr. App.) 75 S. W. 526, 8 Tex. Ct. Rep. 137. In that case the information there considered was held to be bad, and the prosecution dismissed, and, in view

State, 40 Tex. Cr. R. 507, 52 S. W. 547, 53 S. W. 696, it was held that the adoption of local option does not abrogate the right of the Legislature to subsequently pass a law taxing the sale of intoxicants in local option precincts, and one before selling intoxicants for medicinal purposes under the provisions of the local option law must first secure a license as provided by the law. This decision was rested in the majority opinion on this ground: "We think the Legislature has a right to pass laws requiring parties in local option districts to pay a certain tax for the privilege of selling intoxicating liquors not in violation of law, as counsel for appellant in this case seems to contend, but the Legislature has the right to levy a tax upon the sale of intoxicating liquors as indicated under the provisions of the law in question where said sales were made in strict conformity to the local option law. Why not? Such a provision on the part of the Legislature is no amendment of the local option law. It neither takes from nor adds to said local option law. It nowhere increases or diminishes its penalties, adds to nor decreases its privileges, and does not change a solitary provision of the local option law." In this case Judge Davidson filed a learned and interesting dissenting opinion, and it will be observed that the concurring opinion of Judge Henderson rests the decision of the case upon somewhat different grounds from those upon which Judge Brooks bases his judgment in the matter. The indictment in the Snearley Case was quite similar to the indictment in this case, except that it failed to negative the provision in article 5060a that same shall not apply to the sale by druggists of tinctures and drug compounds in the preparation of which such liquors and medicated bitters are used and sold on prescription of physicians or otherwise, and where the tinctures and compounds are not intoxicating liquors prepared in evasion of the local option law. The dissent of Judge Davidson is rested somewhat on the ground that the indictment should negative the above-quoted proviso. The question again came before this court in the case of Williamson v. State, 41 Tex. Cr. R. 461, 55 S. W. 568. This opinion was written by Judge Davidson, and the information considered in that case was quite like the one here considered, except that it did not aver in terms, as is here done, that the defendant was not then and there a druggist selling tinctures and drug compounds in the preparation of which said liquors are sold on the prescription of a physician. While still manifesting his disagreement with the principle laid down in the Snearley Case, the information was held insufficient solely on the ground that it did not expressly negative the exceptions contained in the enacting clause defining the offense, and also such as are contained in the body of the statute creating the

offense. Judge Henderson concurred in the views expressed by Judge Davidson to the effect that the information should negative the exception contained in the law, and further expressed the opinion that the indictment should go further and allege that the liquors were sold on the prescription of a physician.

Again, the same statute was considered and construed in the case of Watson v. State, 42 Tex. Cr. R. 13, 57 S. W. 101. It was there held that, under the provisions of said article 5060a, Rev. St. 1895, as amended by the acts of the Twenty-Fifth Legislature, pp. 223, 224, c. 158, it is a *sine qua non* to a right to sell intoxicating liquors in a local option territory that the seller should first pay the occupation tax and obtain a license to sell on the prescription of a physician. It is there held that the law prohibits the sale of intoxicants in a local option territory in any manner whatever, whether on prescription or without prescription, until a license to sell on prescription has been obtained. An information seeking to charge said offense is not sufficient which does not allege that defendant engaged in selling intoxicating liquors in the local option territory without first having obtained a license to sell on prescription of a physician, and which also fails to negative the exception as to druggists selling drug compounds as provided in said amendatory statute. In that case it is said: "In other words, this law intended to prohibit was passed for that purpose, and expressly does prohibit the sale of intoxicants in a local option territory in any manner whatever, whether on prescription or without prescription, until the license to sell on prescription has been obtained; and whether he sold with or without prescription would not be a defense, unless the license had been obtained; and, if he sold with or without prescription, he would be amenable to punishment under this article, unless he first obtained a license, and not only obtained a license, but the peculiar license herein specified, to wit, to sell on the prescription of a regular, practicing physician. This law limits absolutely both the sale and the license to sell on prescription. The accused cannot justify any sale or defeat the cause of action by proving that he was selling otherwise than on prescription. No other than the statutory license would avail, and without this peculiar character of license he cannot sell in any manner whatever. He cannot answer and say that the selling was not on prescription, for the law replies that the license to sell on prescription is a prerequisite to selling at all." It is held, further, following the Williamson Case, *supra*, that in order to properly charge an offense under this statute it will be necessary, after setting out the fact that local option was in existence, to aver that the accused was engaged in the business of selling intoxicants in a local option ter-

ritory without first having obtained a license for the purpose of selling such intoxicants on prescription. Of course, the exception in favor of druggists selling drug compounds must be negatived in the indictment. In this case, in so far as the views expressed were out of harmony with the opinion in the Snearley opinion, *supra*, Judge Brooks dissents, though it being, as he says, "a bare question of procedure, I acquiesced in the latter holding (*Williamson v. State*), and concurred in the opinion herein rendered by Judge Davidson, Presiding Judge." The result, outside of the mere form of the indictment in this case, is the same as that in the Snearley Case, *supra*, and in order to maintain a uniformity of decisions on questions of indictment I acquiesced in the holding in this case and concurred in the conclusion reached. Judge Henderson's dissenting opinion is rested on the strong ground that a person selling intoxicating liquor in a local option territory is only responsible for the tax if he sells such liquor according to the law which limited the tax, and that to hold otherwise would be to put the government in the attitude of collecting a tax upon an illegitimate transaction, and, as we understand, it was his opinion that the indictment should allege that the person charged had failed to procure a license to sell in a local option territory under a prescription. It occurs to us that there are strong grounds for holding adversely to Judge Henderson's views. If it should be held that it was necessary to aver the failure to procure license to sell upon prescription, then in a prosecution where the indictment contains such an allegation it would be admissible to prove, and a conviction could be defeated by proof, that in fact he was not selling under prescription. We do not see just why it is necessary to allege that he was pursuing the occupation without license to sell upon prescription. It is, we think, sufficient to allege that he was selling, and pursuing the occupation of a retail liquor dealer in a local option territory without procuring a license which authorized him so to do, and then to negative the exception contained in the enacting clause. This is a fairly full history of the effect and result of the decisions of this tribunal which involve this question. It does not need to be said that the decisions present great and wide differences of opinion between members of the court. Finally, however, if anything can be said to be settled in the *Robinson Case*, *supra*, the matter was definitely and finally settled, and the court wrote for the guidance of prosecuting officers a literal and exact form of indictment to be followed, and sent it out with approval, and this it has subsequently adopted and approved in the unanimous opinion of the court in the case of *Cunningham v. State*, *supra*. Whatever might be my own personal views about the matter, I should not feel at liberty at this

late date to still further disturb and confuse this question by a departure from the settled rule long adopted, but feel that we should and ought to adhere to the decision heretofore rendered.

2. The next question presented by this record is whether this law has been repealed by the act of the Thirtieth Legislature popularly known as the "Baskin-McGregor Law." In approaching this question, it should always be remembered that repeals by implication are not favored, and should never be made effective where the result would be destructive and ruinous of the public welfare, unless such construction is imperatively demanded. An inspection of this law shows, we think, that it was an attempt to regulate the sale of whisky in nonlocal option territory, and that there is in this measure no provision for the granting of license in local option territory for the sale of whisky, but that the act expressly provides: "That this article or any of the provisions thereof shall not be construed to be in conflict with any local option law, now or hereafter to be in force in this state, and no license to any retail liquor, or retail malt dealer, shall be issued or shall be effective at any place where the local option law is in force and operation." Section 27, p. 268, c. 138. It is clear, therefore, by a reading of this section, that it was intended that this act should not be construed to be in conflict with any local option law, and necessarily, therefore, not to be held to be in conflict with any law in aid or having special reference to the sale of intoxicants in local option territory. The evident intent and meaning of the above-quoted provision of the Baskin-McGregor law was that it was not intended that it should be made to apply to local option territory, but that it had in mind the regulation of and sale of intoxicants in a territory where such sale was permitted, and that the provisions of the above-quoted section which says that no license to any retail liquor dealer shall be issued or shall be effective at any place where the local option law is in force means simply that the provisions of this act with regard to the regulation of the sale and procuring of license have reference to the territory where the sale is authorized, and that such provisions are not intended to apply to local option territory. It is manifest, we think, that the Baskin-McGregor law can stand and should stand in its entirety, unless amended, as a complete system for regulating the sale of intoxicating liquors in nonlocal option territory, and that said act was not passed to regulate the sale of liquors in a local option territory to affect license therefor; nor did it have such territory in mind. If this were not so, then there would be no regulation under this law permitting sale of intoxicating liquors in local option territory at all, even for the purpose expressly permitted and authorized by law. If

this construction is to obtain, then no license could be authorized for the sale of liquors for sacramental purposes, medicinal purposes, or for any other purpose, and that of necessity in every and any contingency, however great, however inexorable or pressing, one without license, who sold intoxicating liquors in a local option territory, would be without any statutory authority so to do. This contention is borne out by proper construction of the other acts of the Legislature passed at the same session regulating the sale of intoxicating liquors in prohibition territory and prohibiting certain matters therein. For instance, we find in the acts of the same Legislature a very heavy tax imposed upon persons, firms, or corporations delivering shipments of whisky in local option territory, on what is known as C. O. D. shipments. See Acts 30th Leg. p. 149, c. 72. Also occupation tax on dealers in non-intoxicants in local option territory. Page 212, c. 112. And as further and conclusive evidence of the fact that the Legislature did not intend by the passage of the Baskin-McGregor law to either affect, regulate, or repeal the license law for the sale of intoxicants in local option territory, we may cite the provisions of the act regulating the sale of intoxicating liquors, and providing that where such sales take place without license the keeper of such a house was guilty of keeping a disorderly house. See Acts 30th Leg. p. 246, c. 132. This act has been, by this court, in express terms sustained in the case of *Joliff v. State*, 53 Tex. Cr. R. 61, 109 S. W. 176. We there held in express terms that this act, chapter 132, p. 246, was as applicable to local option territory as well as to nonlocal option territory, and to this holding there was in the opinion no dissent. As further conclusive evidence on this proposition, we may cite the act of the Legislature regulating the sale of liquors, and providing that, where such sales take place without license, same shall be regarded as public nuisances. See Acts 30th Leg. p. 166, c. 81. This act in terms provides that any person, firm, or corporation who may engage or pursue the business of selling intoxicating liquors, without having first procured the necessary license, are declared to be promoters of public nuisances, and may be enjoined at the suit of the state, and this shall apply to persons who manage or conduct a place of business where intoxicating liquors are stored, kept, drank, or sold in a local option territory. Among other things, it is there provided: "Any person, firm or corporation who may, under the pretense of selling or dispensing intoxicating liquor on prescription in any county or precinct in this state wherein the sale of intoxicating liquor has been prohibited by law, and who is thus selling or dispensing intoxicating liquor, violates the law; provided, if on final hearing such injunction is sustained the license of such person shall

be revoked and he shall not thereafter be permitted to again pursue such business for a period of one year." This, of course, of necessity implies the lawfulness and authority for the grant of a license in a local option territory, and this legislation was passed at the same time and by the same Legislature that enacted the Baskin-McGregor law, and demonstrates beyond the shadow of a doubt that the Legislature did not intend by the passage of the Baskin-McGregor bill to regulate the sale of intoxicating liquors in local option territory, and by this provision, as expressed in the act above quoted, it is demonstrable that the Legislature did not intend to repeal the act with regard to granting license in local option territory. The validity of this last-named act was expressly sustained in a luminous opinion by Judge Brown, of the Supreme Court, in the case of *Ex parte Dupree*, 105 S. W. 493. It is inconceivable that this could have been done if it could be held that the Baskin-McGregor law had the effect to repeal the then existing or prior legislation regulating or affecting the sale of intoxicating liquors in local option territory. It must, therefore, we think, be manifest that the provisions of the act of the Twenty-Fifth Legislature providing for license in local option territory were not intended to be repealed by the Baskin-McGregor act, and that by the expression and language contained in the last-named act, that no license shall issue in local option territory, was meant that the license provided under the Baskin-McGregor law should not be issued in local option territory.

3. On the trial appellant objected to the testimony of certain witnesses, among others, Kay Roberts, who testified in substance that they had drank certain Hiawatha bought from one Tom Bradley. This was objected to on the grounds that the testimony was immaterial, irrelevant, and calculated to prejudice, and did prejudice, the rights of appellant before the jury; and was further objected to on the ground that the liquor drank by said witness and the others named did not appear from the testimony to be the identical liquor sold by appellant, and did not appear to be the same kind of liquor sold by him. In approving the bill evidencing these objections, the court makes the explanation that the liquor about which Roberts testified was shown by the testimony to be the same kind of liquor sold by both defendant and Bradley. We find from the statement of facts that this explanation of the court is entirely justified. In the testimony of appellant he says that all of the Hiawatha sold by him he bought from one W. T. Hammer. Hammer in his testimony says that he had theretofore been engaged in distributing Hiawatha in wholesale, and that he sold it in quantities to defendant, and also sold it to Tom Bradley. One S. Roberts also testified that he was a traveling salesman and audi-

tor for a brewing company that made Hiawatha. That this stuff he shipped to Mr. Hammer at Dublin, who was a distributor or wholesaler. He describes at some length the method of making the drink and as to its manufacture in bulk, and there is no suggestion in the evidence at all by any one that the Hiawatha sold by Bradley and that sold by appellant were different; on the contrary, it is manifest that they were the same liquors.

4. Again, appellant on the trial objected to the testimony of W. P. Hammer, who, among other things, testified as follows: "Sheriff Cox told me that there was considerable stir about the sale of the stuff, and suggested to me that I had better close up and quit the sale of it, and I did so. I had the promise of the sheriff that I would not be prosecuted if I would voluntarily stop the selling. That is the reason I quit the business." This was objected to by appellant on the ground that it was immaterial, irrelevant, and calculated to prejudice the rights of the defendant before the jury, and because the same in no manner constituted a circumstance against the defendant. In approving the bill, the court states that this testimony was permitted by him after the defendant had shown by Hammer that he had sold the same liquors and was not being prosecuted, and this testimony was offered to explain why the witness was not being prosecuted. No doubt, if this testimony had not been admitted, it would have been urged by counsel for appellant before the jury that the fact that Hammer was engaged in selling the same liquor without prosecution was a strong circumstance going to prove that it was known to the prosecuting officers that in fact the liquors were not intoxicating. We are inclined to believe that the court was justified in admitting this testimony. If this were not true, it could nevertheless not have prejudiced appellant in this case. The fact that Hammer was not being prosecuted for having sold the same liquor could in the nature of things be no defense for appellant having done so, if it was in fact intoxicating.

5. Again, while the witness White was on the stand, he testified, over objection of appellant, among other things, to this effect: "I have seen people drunk around about defendant's place of business, and have made some arrests there. The people I saw and arrested there were supposed to be drunk on alcohol; they said they were drunk on alcohol." This testimony was objected to because irrelevant and calculated to prejudice appellant before the jury, and because it did not appear from such testimony that the parties referred to by said witness were drunk on the liquor alleged to have been sold by appellant, and because it did not appear from said testimony that said parties were drunk on alcohol. In explaining this bill, the judge states that the testimony that the

parties referred to said they were drunk on alcohol was drawn out by appellant. It is true that this testimony, however adduced, should and could, in the nature of things, have little relation to the case; but in the light of the court's explanation, certainly appellant is without just ground of complaint.

6. On the trial, appellant proposed to prove by the witness S. Roberts the facts thus stated in his bill: "That he had been working with the brewery which furnished and manufactured the Hiawatha in question to defendant for a period of 14 years; that he had been in and about the said brewery, and was familiar with the process of the manufacture of the said Hiawatha, and had seen said brewery make beer and Hiawatha; and that he was informed by the chemist of said brewery that said Hiawatha contained less than 2 per cent. of alcohol, and that in no case did the alcohol in said Hiawatha exceed 1.85 per cent., and that same contained only 1.75 per cent. alcohol, and had said witness been permitted by the court he would have so testified." This testimony was excluded, and in approving the bill of exceptions the court states that it was excluded because the witness testified that he had no knowledge of how much alcohol was contained in the Hiawatha, except what the brewmaster and chemist had told him (witness), and that the evidence was objected to because hearsay. An inspection of the statement of facts confirms the truth of the explanation made by the court, and in the light of this explanation the testimony was clearly hearsay. If the witness had been on trial and had sought to justify his own act of selling on the ground of this information from the chemist, it would have been admissible, but not as testimony to be introduced to prove the non-intoxicating quality of the liquor.

7. The seventh ground of appellant's motion complains of the following sentence of the court's charge: "And having paid to the state of Texas the taxes due for selling such liquors." This sentence was singled out and objected to because, as claimed, it authorized the jury to convict defendant if he had paid to the state of Texas the taxes due for pursuing such occupation. We do not believe that, taking the charge of the court in which this sentence appears as a whole, it is subject to any fair criticism.

This language occurs in the third paragraph of the court's charge, as follows: "Now if you find and believe from the evidence beyond a reasonable doubt that Bob Snead, in Erath county, Tex., on or about the 1st day of April, 1908, did sell malt liquors capable of producing intoxication, without first having obtained a license therefor, and having paid to the state of Texas the taxes due for selling such liquors, then you will find the defendant guilty, and assess his punishment at a fine of not less than \$200 nor more than \$400, or by imprisonment in the county jail

for not less than 10 days nor more than 90 days, in your discretion." That the word "without" was intended to be applied to the sentence challenged, "and having paid to the state of Texas the taxes due for selling such liquors," is, we think, too obvious to need discussion.

8. There are some other issues and questions raised in the appeal which we have carefully noted and examined, and in respect to which we think there is no error furnishing a just cause for reversing the case. We have reviewed the case probably at more length than may seem necessary. The first question discussed is important and not free from difficulty. We have reviewed the decisions of this tribunal at great length for the purpose of making our position clear, and as a basis for what we trust will be a final and conclusive decision of this issue.

Finding no error in the record, the judgment of conviction is affirmed.

### JACKSON v. STATE.

(Court of Criminal Appeals of Texas. March 10, 1909. On Rehearing, April 14, 1909.)

#### 1. CRIMINAL LAW (§ 1144\*)—APPEAL AND ERROR—REVIEW—PRESUMPTION AS TO FACTS NOT SHOWN BY RECORD.

Where there is no statement of facts in the record on appeal, it will be assumed that the proof sustained a conviction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1144.\*]

#### 2. CRIMINAL LAW (§ 1097\*)—APPEAL—NECESSITY OF STATEMENT OF FACTS.

In the absence of a statement of facts on appeal from a conviction of murder, the question whether the evidence fails to show that accused bore any malice toward deceased, or that he purposely killed deceased, will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1097.\*]

#### 3. CRIMINAL LAW (§ 730\*)—TRIAL—REMARKS OF PROSECUTING ATTORNEY—ACTION OF COURT.

In a prosecution for murder the prosecuting attorney commented on the appearance of the accused, and the jury were instructed not to consider any argument not on the evidence, and that counsel had no right to abuse accused or make any remark as to his personal appearance. The prosecuting attorney commented on the probable influence brought to bear on one of the witnesses for defendant, and was again admonished to confine himself to the facts, and the jury were instructed not to consider the argument of counsel not based upon the facts. *Held*, that the remarks of counsel constituted no ground for reversal of the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.\*]

#### 4. CRIMINAL LAW (§ 721½\*)—TRIAL—REMARKS OF COUNSEL.

A statement by the prosecuting attorney to the jury in a murder case that if he believed the accused was innocent he would move to dismiss the case, and a comment on the fact that accused's father, who was the first one to arrive on the scene of the murder after it was

committed, was not called by defendant, are within the province of the prosecuting attorney.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1673; Dec. Dig. § 721½.\*]

Appeal from District Court, Polk County; L. B. Hightower, Judge.

Smithy Jackson was convicted of murder, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Polk county on a charge of the murder of one Gerdie Jackson. He was tried on December 14, 1908, and convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life.

1. As the record comes to us, there is no statement of facts, and it must, of course, be assumed that the proof justified and sustained the verdict and judgment of conviction. There is no complaint in the motion for new trial of the charge of the court, nor upon an examination of same does it seem that it is subject to any objection or criticism.

2. The fifth ground of the motion is based on the charge that the verdict of the jury is contrary to the law and evidence, and is supported by neither the law nor the evidence, in this: that the greater weight and preponderance of the evidence fails to show that appellant at the time of the homicide bore any malice toward the deceased, nor does it show that he purposely killed his wife, but that the greater weight and preponderance of the evidence does show that the defendant killed, or that the gun which was fired and produced her death was accidentally fired, and that there was no intention on his part to kill or shoot, the deceased, but that the gun was accidentally discharged in a scuffle between the defendant and the deceased in which appellant was attempting to take the gun from his wife. It needs no citation of authorities to support the statement that, in the absence of a statement of facts, this ground of the motion cannot be reviewed.

3. The only remaining matters urged, either in the motion for new trial or shown by bill of exceptions, relate to complaints made of the argument of the county and district attorneys. It is urged in the motion, and the bill shows, in substance, that in the course of the discussion of the case Mr. C. Bethea, county attorney, among other things, said to the jury: "Think of the defendant in this case; this brute, this missing link in the chain of beings." On objection being made to this character of argument or kind of statement, the court instructed the jury as follows: "Gentlemen of the jury, you are instructed not to consider any argument not upon the facts or evidence in this case. Counsel has no right to vilify or abuse an

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

accused on trial, nor make any remark as to his personal appearance, and the jury will not consider such remark of counsel." Again, in the closing discussion, J. L. Manry, district attorney, made the following statement: "Judge Holshousen, one of the counsel for the defendant, says, 'You, gentlemen of the jury, should not try this case by what I say, nor by what any other counsel in this case may say.' I am not under oath, neither is the district attorney, but I say that, when I took the oath of office as district attorney, I then swore that I would see that justice was done to the innocent as well as the guilty, and, so help me God, I have done so, and so long as I represent this constituency I will continue to do so. I have the right to file a motion to dismiss a case when I think the defendant is not guilty; I always file motions to dismiss, as you, or some of you, may know, and as his honor on the bench knows, and, if the defendant was innocent in this instance, I would do so in this case." On objection being made, the court stated to the jury that counsel should stick to the facts in the case. There was no charge requested by counsel for the appellant instructing the jury to disregard these remarks. While we believe it is the better practice not to indulge in such vehement expressions of personal opinion, after all, the statement complained of was no more than a vigorous assurance on the part of counsel for the state of his belief in the guilt of the appellant, and the further assurance that if he had believed him innocent he would have dismissed the case.

4. Again, in the course of his argument, Mr. Manry used this language: "The witnesses the state has put on the stand and who testified to the material facts in this case are not related to either party; they are Houston Butler and Barnes Howard; they are disinterested; but who are the principal witnesses for the defendant? They are old Lou Jackson, the wife of the father of the defendant, and the defendant himself. Why did not the counsel for the defendant put Milton Jackson (father of the defendant) on the stand? The proof shows that Milton was his father, that he was on his gallery in sight of the defendant's house and was the first to get to the deceased after she was shot, and who knows more about this case than any one else. Milton Jackson is here in attendance on the court as a witness; why did not the counsel put him on the stand? They know that they could not afford to do it, and I know it, and you know it. Old Milton Jackson has not testified, and they dare not put him on the stand." Objection was made to this argument. The bill recites that the district attorney turned and said to the court: "I was discussing the fact that the defendant did not put his father on the stand." Whereupon the court, in addressing the district attorney, said, "Go ahead." The argument of the district attorney was well within his rights. The failure of a defend-

ant to place upon the witness stand one so closely related to him as his father, who is shown to be present, and who must, in the nature of things, have been advised of the circumstances of the crime charged, is a proper subject of comment and discussion. In ordinary experience the inference is fair that the testimony of the person so related would have been unfavorable. Even under our strict construction in respect to the testimony of the wife, it has been held that the failure of the defendant to use her as a witness, where the circumstances show she would have known the facts in the case, is a proper subject of comment. Again, in the course of the discussion, the district attorney used this language: "They ask you to take the testimony of old Lou Jackson and acquit the defendant of this crime. I say to you, gentlemen of the jury, that old Lou Jackson is the wife of Milton Jackson (the father of this defendant), and if this defendant is a chip off of the old block, then Lou Jackson was afraid to tell the truth; she was afraid that she would go the way defendant's wife did." The bill recites that, when this language was used, counsel for appellant objected; but the district attorney, without heeding such objection, continued his remarks. Whereupon counsel for appellant addressed the court, insisting that appellant was entitled to be heard, and that it was not proper for the district attorney to use such remarks to the jury. Whereupon the court said he did not hear or understand what the remarks were that the district attorney had made to the jury; that Mr. Manry then stated and explained to the court that appellant's counsel were correct as to what he, the district attorney, had said, only that they did not go far enough, in that he was explaining to the jury the reasonable and probable influence surrounding the witness Lou Jackson. At this juncture counsel for appellant requested the court to instruct the jury not to consider such remarks. Whereupon the court admonished the district attorney to confine himself to the facts in the case, and orally instructed the jury not to consider the argument of counsel not based upon the facts. There was no request for additional instructions in writing touching this matter. While it may be and probably is true that the statements last above quoted were not justified by the record, we can conceive a state of case where they would not have been specially improper, and this condition of the testimony, for aught we know, may have existed. We have reviewed the matters complained of at greater length than their importance requires, and have done so only because of the grave penalty assessed.

The judgment is affirmed.

On Rehearing.

This case was affirmed at the late Dallas term. When the case was considered on original submission, the clerk of this court

at Tyler had inadvertently failed to send to Dallas the statement of facts which had been properly filed in the court below and duly certified to this court.

The motion for rehearing reasserts the proposition, which was presented in the court below, that the verdict of the jury was contrary to the law and unsupported by the evidence, in that it failed to show that the killing was purposely done, and that the evidence did not sustain the conviction of murder in the first degree. We have treated, in considering the motion for rehearing, the statement of facts as being duly filed, and as if it had reached us in due order. The evidence raises the issue that the killing was accidental, and there is strong evidence tending to sustain this view; but in view of the fact that appellant had been frequently separated from his wife, had been living in open and flagrant adultery with another woman, had made frequent and recent threats to kill his wife, we are not prepared to hold that the verdict of the jury was without evidence to support it. We deem it unnecessary to recapitulate the evidence here, but after a careful examination of the entire case, in the light of the whole record, considering the facts as they appear in the statement of facts, we would not feel authorized to set aside the verdict of the jury and reverse the case on this ground.

The other questions are fully discussed in the original opinion, and require no further elaboration.

The motion for rehearing is accordingly overruled.

#### INTERNATIONAL & G. N. R. CO. v. WASHINGTON.

(Court of Civil Appeals of Texas. Feb. 24, 1909. Rehearing Denied March 31, 1909.)

##### 1. CARRIERS (§ 321\*)—ACTION FOR ASSAULTING PASSENGER—INSTRUCTIONS.

In an action by a passenger for an assault by a porter on defendant's train, the court instructed to find for defendant if plaintiff assaulted the porter, and the porter in repelling the attack struck him, and exercised that degree of care in repelling the attack which a very cautious person would have exercised under the same circumstances, and, if he did not exercise such care, to find for plaintiff. The court refused a requested instruction to find for defendant if plaintiff assaulted the porter with an open knife, and the porter in self-defense struck him with his fist, and used no more force than was necessary to repel the assault, and that what he did was necessary to repel the assault, and a person of ordinary prudence in the exercise of the care mentioned in the court's charge would have done as the porter did in repelling an assault. *Held*, that the requested instruction should have been given, because it presented the law of self-defense more specifically and affirmatively than did the court's charge, though both instructions placed on defendant a greater burden than did the law.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.\*]

##### 2. CARRIERS (§ 283\*)—DEGREE OF CARE AS TO PASSENGER ASSAULTED IN SELF-DEFENSE.

Where a passenger is assaulted by a trainman in self-defense, the high degree of care which applies to carriers in other cases where passengers are injured does not apply.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1119-1124; Dec. Dig. § 283.\*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by King Washington against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

King & Morris and Baker & Thomas, for appellant. Tom M. Hamilton and J. W. Cocke, for appellee.

KEY, J. In this case appellee recovered a verdict and judgment against appellant for \$250 as damages for an assault made upon him while a passenger by a porter on appellant's train. There was testimony tending to show that the plaintiff made an assault upon the porter with a knife, and that the porter acted in self-defense. On that phase of the case the trial court instructed the jury as follows: "If you believe from the evidence that the plaintiff assaulted the defendant's said porter, and that said porter in repelling such attack struck the plaintiff and thereby injured him, and that in so doing he exercised that high degree of care to avoid injuring plaintiff hereinbefore charged to have been his duty—in other words, if you believe that he exercised that degree of care in repelling the attack which a very cautious and prudent person would have exercised towards plaintiff under the same or similar circumstances to avoid injuring him—then, if you so find, you will find for the defendant; but in this connection you are instructed that if you should find that plaintiff did make an assault upon defendant's porter, unless you find that said porter exercised that high degree of care to avoid injuring him in repelling said attack that a very cautious and prudent person would have exercised towards plaintiff under the same or similar circumstances, then you cannot find for defendant under this paragraph."

Appellant requested, and the court refused, the following instruction: "If you believe from the evidence that defendant's porter was assaulted by the plaintiff with an open knife in his hand, and that the defendant's porter, in defense of himself and his person, struck the plaintiff with his fist, and that said porter did not use any more force or resistance than was necessary to repel plaintiff's assault, if any, and you believe that, which you may find he did, was necessary to repel said assault, if any, and that a person of ordinary prudence in the exercise of the care mentioned in the court's charge



would have done as did defendant's porter in repelling the said assault, if any, you will find for defendant." But one assignment of error is presented in appellant's brief, and it complains of the refusal of the requested instruction. We think appellant had the right to have the requested instruction given because it would have presented the law of self-defense more specifically and affirmatively than did the court's charge. However, we are of the opinion that both the charges, the one given by the court and the one refused, placed upon appellant a greater burden than did the law. In *Railway Co. v. Jopes*, 142 U. S. 24, 12 Sup. Ct. 109, 35 L. Ed. 919, which is quite similar to this case, the Supreme Court of the United States held that if the conductor of the railway acted in self-defense in shooting the plaintiff, who was a passenger, that the railway company was not liable, and that the doctrine of the high degree of care which applies in other cases when a passenger is injured had no application. In *Railway Co. v. La Prelle*, 27 Tex. Civ. App. 496, 65 S. W. 488, this court recognized and announced the same doctrine. But if it should be held that by requesting the refused instruction appellant acquiesced in and adopted the degree of care mentioned in the court's charge, still the refused instruction constituted a more direct application of the law to the case as developed by the testimony, and the court erred in refusing it. *Railway Co. v. McGlamory*, 89 Tex. 635, 35 S. W. 1058.

For the error pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

#### MUELLER et al. v. BELL et al.

(Court of Civil Appeals of Texas. March 3, 1909. Rehearing Denied March 31, 1909.)

#### 1. BROKERS (§ 55\*)—SALE OF REAL ESTATE—RIGHT TO COMMISSIONS—EMPLOYMENT OF SEVERAL AGENTS.

The employment of an agent to sell real estate does not preclude the employment of others, and, where more than one is employed, the first to effect a sale is entitled to the commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 82, 83; Dec. Dig. § 55.\*]

#### 2. BROKERS (§ 48\*)—COMMISSIONS FOR SALE OF REAL ESTATE—NECESSITY OF EFFECTING OR PROCURING SALE.

An action by a real estate broker for commissions will not lie till he has effected or procured a sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 65; Dec. Dig. § 48.\*]

#### 3. CONTRACTS (§ 47\*)—CONSIDERATION AS ESSENTIAL INGREDIENT.

A consideration is an essential ingredient of a contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 220; Dec. Dig. § 47.\*]

#### 4. BROKERS (§ 40\*)—SALE OF REAL ESTATE—RIGHT OF THIRD PERSONS TO COMMISSIONS.

One who is the procuring cause of a sale of real estate, but not himself the agent of the owner, is not entitled in his own right, as against the owner, to any of the commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 38; Dec. Dig. § 40.\*]

#### 5. BROKERS (§ 55\*)—SALE OF REAL ESTATE THROUGH SUBAGENT—RIGHT TO COMMISSION.

If brokers effect a sale of land through a subagent, they are entitled, under their contract with the owner, to the commission, and have a right to demand, on notifying him of the subagency, that he pay them, and not the subagent, on consummation of the sale, and it would make no difference in such case whether he agreed to pay it to them or not, or whether or not the subagent was paid anything.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 82-84; Dec. Dig. § 55.\*]

#### 6. APPEAL AND ERROR (§ 1002\*)—REVIEW—CONFLICTING EVIDENCE—CONCLUSIVENESS OF VERDICT.

Where the evidence would authorize a finding either way as to a material fact, it is purely a matter of fact for the jury to decide, and the appellate court is not authorized to set aside the verdict in such a case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3935; Dec. Dig. § 1002.\*]

Appeal from Karnes County Court; A. J. Parker, Judge.

Action by C. L. Bell and another against Henry Mueller and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

This suit was brought by appellees, C. L. Bell and D. O. Klingemann, against the appellants, Henry Mueller and Albert Schroeder, to recover the sum of \$336.60. The grounds upon which the judgment was sought will appear from the allegations in plaintiffs' petition, which are, in substance, as follows: That on August 25, 1907, plaintiffs, under the firm name of Bell & Klingemann, were engaged in selling lands as agents for those who desired to sell such property; that on said date Henry Mueller owned a tract of 396 $\frac{1}{2}$  acres situated in Karnes county, and employed plaintiffs to sell the same at a net price of \$35 per acre, plaintiffs to receive all over that price they should sell the tract for; that on August 29, 1907, the defendant Schroeder represented to them that he had a prospective purchaser for the land, whose name was Charles Burrell, and proposed to assist plaintiffs in selling the land to Burrell, or any one else, if they would pay him \$100 out of their commissions; and that thereupon they entered into a verbal contract with him, whereby Schroeder agreed to assist plaintiffs in selling the land to Burrell, or any one else, at the price of \$27 per acre, plaintiffs agreeing to pay him \$100 for his services in event of his assistance in making the sale, to be paid out of the commissions received by them after consummation of the sale; that immediately thereafter Schroeder, with the intent

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to defraud plaintiffs out of their commissions, went with Burrell to Hays county, where Mueller resided, and represented to him (Mueller) that Burrell would purchase the land at \$36.60 per acre; that Mueller then, on September 3, 1907, came to see plaintiffs, and informed them of Burrell's offer to purchase through Schroeder, and was thereupon informed by plaintiffs that Schroeder was acting with them in making such sale, and that, if the sale was closed, Schroeder was to receive \$100 of the commissions; that thereupon Mueller assured them that if he made the sale to Burrell through Schroeder, he (Mueller) would retain all the commissions, to wit, \$386.60, and pay the same to plaintiffs, leaving them to settle with Schroeder, to which plaintiffs agreed; that plaintiffs heard nothing from Mueller nor Schroeder until several days afterwards, when they were informed that Mueller had sold the land to Burrell for \$36 per acre; that plaintiffs then demanded of Mueller their commissions of \$386.60, who then informed them that he had paid the commission to Schroeder, and for that reason he refused to pay plaintiffs anything; that Albert Schroeder and Henry Mueller entered into an agreement by which they sought to defraud plaintiffs of their commission, and are still acting together in such fraudulent transaction; that if Mueller paid the commission to Schroeder, as he claims, he did so against the positive instructions of plaintiffs, and in violation of his agreement with them that he would not do so, and that if Mueller did so pay Schroeder, Schroeder promised and agreed to become personally liable for the payment of the amount to plaintiffs, and to hold Mueller harmless against any judgment that might be recovered for the same by plaintiffs; that, though often requested to pay plaintiffs said sum of money, Schroeder has failed, and still refuses, so to do. Wherefore plaintiffs alleged that, if Mueller did pay the whole of the commissions to Schroeder, then the latter is liable to them in the sum of \$386.00, and that Mueller is also liable to them in said sum, and that if Mueller did not pay any portion of the commission to Schroeder, then Mueller and Schroeder are liable to plaintiffs for said sum.

The defendant Mueller answered by general and special exceptions to plaintiffs' petition, by a general denial, and pleaded specially that in August, 1907, he was the owner of the land referred to in plaintiffs' petition, and that, desiring to sell the same, he conferred with several real estate agents, among whom were plaintiffs and John Hartman, in respect to effecting a sale thereof, and offered to give the first party who actually sold the land for him all it sold for above \$35 per acre; that he made no exclusive contract in regard thereto with any agent, it being understood that the first one who should actually consummate a sale

would be entitled to the compensation above stated; that afterwards, in August or September, 1907, Albert Schroeder represented to him that he had a purchaser for the land, if satisfactory terms could be agreed upon; that such terms were then agreed upon, and Schroeder was instructed to go ahead and close the sale; that he (Mueller) then went to Karnes county, and while there informed plaintiffs of the contemplated sale of the land by Schroeder to Burrell; that thereupon plaintiffs stated that Schroeder was in their employ and working for them in the matter, and was to receive only a part of the commission; that, without seeing Schroeder, he (Mueller) returned to his home in Hays county, and the deal with Burrell was finally closed by Schroeder and the sale made; that thereupon Schroeder came to him and demanded his commission; that he then told Schroeder that a portion of the commission was claimed by plaintiffs, upon the assumption that he was acting for them in effecting the sale; that Schroeder denied that he was acting for plaintiffs in the transaction, but claimed he was acting for John Hartman, one of defendant's authorized agents, and brought Hartman before defendant, who then corroborated his statement by declaring that Schroeder was acting for him in the matter; and that Hartman and Schroeder then demanded of him a commission of \$1 per acre, the land having been sold at \$36 per acre; that, believing Hartman and Schroeder were acting in good faith, and that Bell & Klingemann were mistaken in the matter, he then paid the entire commission to Hartman and Schroeder, and took their receipt for the same; that before making the payment Hartman and Schroeder, for the purpose of inducing him to make the same, represented to him that they were the persons justly entitled thereto, and agreed to guarantee and protect him against the claim of any other parties to the commission; that he (Mueller) acted in good faith in paying the commission to Hartman and Schroeder, and believed, and still believes, that they were justly entitled to receive the same; that the only person who had conducted any of the negotiations leading up to the sale was Schroeder, and that it was fully consummated by him; that plaintiffs were not known in the transaction, nor were they mentioned by Schroeder, nor did they perform any character of service in or about the sale, nor were they active, efficient agents or the procuring cause of the sale, that Schroeder consummated and completed the sale, and performed all the services concerning the same, and, so far as known to defendant, he was the only person entitled to any part of the commission, save plaintiffs' statement that they were entitled to a portion thereof under their contract with Schroeder, which statement Schroeder denied, but admitted that he was acting under a contract with Hartman; that defendant

had the right to believe Schroeder and Hartman—did believe them—and paid the money in good faith to Schroeder, who actually made the sale, and to Hartman, under his instructions, and that he (Mueller) owes no part thereof to plaintiffs, nor to any one else.

The defendant Mueller also made John Hartman a party defendant to the action, and, in a cross-action against him and Schroeder, after alleging the payment of \$386.60 to them, under the circumstances averred in his answer, as commissions, he alleged that a portion of said commission is claimed by Bell & Klingemann, under a contract with Schroeder; that if Schroeder and Hartman are not entitled to the commission, and plaintiffs are, then Schroeder and Hartman have wrongfully received from him (Mueller) the sum of \$386.60, which they induced him to pay by false and fraudulent representations, which he believed and relied upon as true, made by them for the purpose of deceiving him, when they, and each of them, knew the same to be false, and that he acted upon said representations to his damage, and is entitled to judgment over against Hartman and Schroeder for any sum that may be adjudged against him in favor of plaintiffs. He also alleged in his cross-bill that, prior to the payment of said sum to Hartman and Schroeder, they jointly agreed and guaranteed to protect him against the claims of any other parties for said commission, and that if the same, or any part thereof, is adjudged against him, they are liable to him for a like sum on their guaranty to protect him against such judgment.

The defendants Schroeder and Hartman appeared and answered plaintiffs' petition by general and special exceptions, a general denial, and pleaded specially that in August, 1907, the defendant Mueller agreed with Hartman that, if he would sell the land referred to in plaintiffs' petition, he (Mueller) would pay him as a commission all that was received for the land over the sum of \$35 per acre; that Mueller made no exclusive contract with Hartman, or with any other person, it being understood that the first one who actually consummated a sale should be entitled to such commission; that some time in August or September, 1907, after the agreement above mentioned was made, the defendant informed Mueller that he had secured a purchaser for the land if the terms could be agreed upon; that the terms were agreed upon, and Schroeder closed a sale of the land with Burrell at \$36 per acre; that Schroeder, in making the sale, was acting for Hartman, and not in any manner for plaintiffs; that he was the only person who conducted the negotiations for the sale, and that it was finally consummated by him; that plaintiffs were not known in the transaction, and did not perform any character of service in or about said sale, and were

not the active, efficient agents or procuring cause of the same; and that Schroeder, as the agent of Hartman, consummated and completed the sale, and performed all the services concerning the same, and is the only person, except Hartman, entitled to the commissions.

These defendants filed no answer to defendant Mueller's cross-bill against them. And they announced in open court that no defense was made by them to the cross-action. The general and special exceptions of the several defendants to plaintiffs' petition having been presented to and overruled by the court, the case was tried before a jury, who returned a verdict in favor of plaintiffs against Henry Mueller for \$236, and in his favor against Hartman and Schroeder for a like amount, upon which judgment was accordingly entered. This appeal is prosecuted by all of the defendants from the judgment in favor of plaintiffs against Mueller.

We have thus made a full statement of the pleadings of the parties, the rulings of the court on exceptions to them, and the result of the trial, in order to make clear our opinion upon the questions presented for determination.

R. E. McKie, H. M. Wurzbach, and H. M. Little, for appellants.

NEILL, J. (after stating the facts as above). We deem it unnecessary to consider seriatim the various assignments of error presented by appellants' brief. There can be no question about the correctness of the propositions that the owner of real estate, by the employment of an agent to sell his property, does not thereby preclude himself from employing other agents for the same purpose; and, where more than one broker is employed, the one who first completes the sale is entitled to the commission, and that an action by a real estate broker for commission will not lie until he has effected or procured a sale of the property. *Duval v. Moody*, 24 Tex. Civ. App. 627, 60 S. W. 269; *Newton v. Conness* (Tex. Civ. App.) 106 S. W. 893; *Burch v. Hester* (Tex. Civ. App.) 109 S. W. 399. Nor can it be doubted that a consideration is an essential ingredient of a contract. The only matter of difference between the parties is the application of these principles to the case under consideration, appellants contending that it does not appear from plaintiffs' petition that they were the procuring cause of the sale, but that Schroeder was, and that it does not appear therefrom that there was any consideration for Mueller's promise not to pay the commissions to Schroeder but to them, and that it appears from the evidence that John Hartman was also Mueller's agent, and that he effected the sale through Schroeder. The first two of these contentions go to the sufficiency of the petition, and, if they should not be sustained, then they are urged against the suffi-

ciency of the evidence to sustain the verdict. The last contention, as is apparent, is purely a question of fact.

It appears from the pleadings on both sides, as well as from the undisputed evidence, that Schroeder was not himself the agent of Mueller, and that therefore, though he was the procuring cause of the sale to Burrell, he was not in his own right, as against Mueller, entitled to any of the commissions. *Fordtran v. Stowers* (Tex. Civ. App.) 113 S. W. 631. It was alleged by plaintiffs that he was their subagent, and that they effected the sale through him as such agent. If this be true, then there can be no question, as between plaintiffs and Mueller, about the former being entitled under their contract with the latter for the commission claimed, nor about their right to demand, upon notifying Mueller of the relationship of agency existing between them and Schroeder, as they alleged they did, that he should pay the commissions to them, and not to Schroeder upon the consummation of the sale. If these allegations be true, it would make no difference whether, upon being so notified, Mueller agreed to pay the commission to them or not; for in such event it was his duty, springing from his original contract with plaintiffs, without any further agreement, to pay them the commission they had earned through the offices of their subagent. As there was no contractual relation between him and Schroeder, it was a matter of no concern to Mueller whether Schroeder was paid anything for effecting the sale or not; for that was purely a matter between plaintiffs and Schroeder, and which could in no manner affect him had he obeyed plaintiffs' instructions to pay the commissions to them. In view of this we make no doubt that plaintiffs' petition stated a good cause of action against the defendant Mueller.

As has been before intimated, it is shown by the undisputed evidence that Schroeder did not, in effecting the sale, act as the agent of Mueller, but that he acted as the subagent either of plaintiffs or John Hartman, who was also one of Mueller's agents to sell the land, in procuring Burrell as its purchaser. Then, as between them and Mueller, either the plaintiffs or Hartman were entitled to the commissions on the sale. This depends upon for whom of these parties Schroeder acted as an agent in making the particular sale in question. Upon this question hangs the whole case. This was purely a matter of fact for the jury to decide; for the evidence was such as would authorize a finding either way. The issue, thus sharply drawn, was clearly submitted to the jury in an appropriate charge, and the verdict made to rest on it alone; and the jury having found in favor of plaintiffs upon it, we are without authority to set aside its verdict.

There is no error assigned which requires a reversal of the judgment, and it is affirmed.

# ENGLISH v. WILLIAM GEORGE REALTY CO.†

(Court of Civil Appeals of Texas. March 10, 1909. On Rehearing, April 7, 1909.)

## 1. BROKERS (§ 84\*)—RIGHT TO COMMISSIONS—BURDEN OF FACTS TO BE PROVED.

The burden is on brokers suing for commissions on a sale of land to prove, not only that they were defendant's agents to effect the sale, but that they were the procuring cause of the sale, which was consummated.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 104, 105; Dec. Dig. § 84.\*]

## 2. BROKERS (§ 53\*) — PROCURING SALE OF LAND.

The fact that brokers, several months prior to a sale of land by the owner, introduced one of the purchasers to him, there being no further negotiations between them, does not make them the procuring cause of the sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 74; Dec. Dig. § 53.\*]

## 3. BROKERS (§ 48\*)—RIGHT TO COMMISSIONS—NECESSITY OF PROCURING.

In the absence of any usage or contract, express or implied, or conduct of the seller preventing completion of the bargain by the broker, action for commissions will not lie till it is shown that he has effected or procured a sale, and it is not enough that he has devoted his time, labor, or money in the interest of his employer, as unsuccessful efforts, however meritorious, offer no ground of action.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 65; Dec. Dig. § 48.\*]

## 4. BROKERS (§ 56\*)—PROCURING SALE OF LAND TO FIRM.

Though a sale of land by the owner himself to a firm would not have been made but for a broker's unsuccessful attempt to sell to a partner individually, the sale was not made to the broker's customer, so as to entitle him to a commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 88; Dec. Dig. § 56.\*]

### On Motion for Rehearing.

## 5. BROKERS (§ 54\*)—PROCURING SALE OF LAND—RIGHT TO COMMISSIONS.

To render a land owner liable for commissions in the sale of his land, the broker employed by him must have procured a purchaser, ready, able, and willing to buy on the terms fixed by him.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75, 76; Dec. Dig. § 54.\*]

## 6. BROKERS (§ 46\*)—SALE OF LAND—COMMISSIONS TO BROKER NOT HAVING EXCLUSIVE AGENCY.

The owner of land, sold by himself alone in good faith, is not liable for commissions to a broker who was not given an exclusive agency.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 47; Dec. Dig. § 46.\*]

## 7. BROKERS (§ 49\*)—SALE OF LAND—RIGHT TO COMMISSIONS—NECESSITY OF PROCURING BUYER ON OWNER'S TERMS.

Where a broker procures a buyer of land on terms different from those proposed by the owner, he is not entitled to commissions on a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Application for writ of error pending in Supreme Court.

sale afterwards made by the owner, though on terms substantially the same as those rejected.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 72; Dec. Dig. § 49.\*]

**8. BROKERS (§ 56\*)—SALE OF LAND—NEGOTIATIONS WITH PRINCIPAL.**

To entitle a broker to recover for commissions on a sale of land direct by the owner to a purchaser originally introduced to the owner by the broker, the latter must show, not only that he introduced the buyer, but affirmatively that the buyer was induced to apply direct to the owner by the means employed by the broker.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 86, 87; Dec. Dig. § 56.\*]

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by William George and another, doing business in the name of William George Realty Company, against Ed. English. From a judgment for plaintiffs, defendant appeals. Reversed and rendered.

F. Vandervoort and Terrell & Terrell, for appellant. Hicks & Hicks, for appellees.

NEILL, J. This appeal is from a judgment recovered by William George and D. C. Rich-ey, partners under the firm name of William George Realty Company, against Ed. English for effecting the sale of certain lands of the latter. The undisputed evidence shows that on April 4, 1907, Ed. English sold to Matthew Cartwright, L. D. Cartwright, Lane Taylor, and W. B. Lupe, partners, doing business under the firm name of Cartwright, Taylor & Lupe, 4,137<sup>1</sup>/<sub>100</sub> acres of land for the sum of \$41,370, which was at the rate of \$10 per acre. In the spring of 1906 appellees, as real estate brokers, under a contract with appellant to procure him a purchaser for the land, listed the same at \$12.50 per acre, the agreement between the parties being that appellant should pay appellees a commission of 5 per cent. of the amount for which the land should be sold, if they would bring him a purchaser at the price of \$12.50 per acre, or as near that as possible, and that, if they got a bid, to submit it to appellant. The principal question of fact is whether appellees were, under this agreement, the procuring cause of the sale.

It is undisputed that, in pursuance of the agreement, on or about February 12, 1907, the appellee George, acting for and in behalf of his firm, induced Matthew Cartwright, one of the purchasers, to go with him from Carrizo Springs to appellant's residence, situated on the land, where he introduced him to appellant with a view of effecting a sale of the premises; that on that day the appellant, for the purpose of selling to him, rode over the land with Mr. Cartwright and showed it to him; that Cartwright became interested in the matter, and asked appellant what was the least price he would sell for, and was answered \$12.50 per acre. Nothing more was said between the parties regarding

the sale. But in returning to Carrizo Springs Cartwright authorized George to inform appellant that, if he would take \$10 per acre, he would consider the matter of its purchase, after a more thorough examination of the premises. This proposition was submitted by George to appellant, and was declined. Nothing more was said or done between Matthew Cartwright, in person, and the appellant regarding the sale of the land until its sale to the firm, of which Cartwright was a member was agreed upon and consummated.

L. D. Cartwright is the son, and Lane Taylor and W. B. Lupe are the sons-in-law, of Matthew Cartwright. After the latter's return from Carrizo Springs to San Antonio, the place of business of his firm, he informed Taylor and Lupe about the English place, telling each of them that, from what he had seen of it, it was a good piece of property. Afterwards Lane Taylor met appellant at Cometa, near where the latter lived, was introduced to him, and gave him his card, and a short time afterwards Taylor returned from San Antonio to Boynton's place, about a quarter of a mile from English's, for the purpose of transacting some business there with another party, and, on the trip, went from Boynton's to English's place where he met him and, after inspecting the land, entered into a written agreement (which he calls an option) with him, which is as follows: "March 22, 1907. Cartwright, Taylor & Lupe, San Antonio, Texas—Dear Sirs: You are hereby appointed my exclusive agents to sell the following described property: About 4,000 acres located in Zavalla county, Texas, about one-fourth miles southeast of Cometa; price \$11.25 per acre, one-third cash balance four equal notes payable in one, two, three and four years at 6 per cent. interest; interest payable each year. In event of sale during term of this agency I agree to pay you a cash commission of 25 cents per acre. My title is good. I agree to furnish an abstract of title. This agency to continue until April 7, 1907, at noon. Duplicate received. Ed. English." About 10 days after this option, as it is called, was given, L. D. Cartwright and W. D. Lupe, the other two members of the firm, went from San Antonio, via Eagle Pass, to English's place, and, after a two days' examination of the land, offered him \$10 per acre for it, which English then declined. Cartwright and Lupe then told him that, if he took a notion to accept that price to call them up at Eagle Pass that evening. When they left, English talked the matter over with his wife, and they concluded to accept their offer, and English then phoned Cartwright at Eagle Pass that he would be there next day. Accordingly he overtook Cartwright and Lupe at Eagle Pass, and went to San Antonio with them and closed the sale at \$10 per acre.

\*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

The question is, Do these facts show that the plaintiffs were the procuring cause of the sale made by the defendant, English, on April 4, 1907, to Matthew Cartwright, L. D. Cartwright, Lane Taylor, and W. B. Lupe? The only one of these parties ever introduced by either of plaintiffs to the defendant, as is shown from the undisputed facts, was Matthew Cartwright, which was on February 12, 1907. He was not willing to buy the land at the price plaintiffs were authorized to sell it for, nor was defendant willing to take the price that would induce Cartwright to more thoroughly examine the land in order to determine whether he wanted to try it. Thus ended all negotiations between Cartwright, on the one hand, and either plaintiffs or English on the other, in regard to the sale of the land. The plaintiffs, as the agents of English, never brought English and either of the other parties together, never entered into any negotiations with either of them, or renewed their efforts with Matthew Cartwright, to effect a sale of the land. In short the sale was brought about, and finally consummated, entirely independent of the agency of plaintiffs, or either of them; all the negotiations having originated between, and been conducted to, a finally by the defendant and the purchasers of the land.

The burden was upon plaintiffs to prove, not only that they were defendant's agents to effect the sale, but that they were the procuring cause of the sale which was consummated. The fact that they had, at a time several months prior to the time the sale was effected, introduced one of the purchasers to English, and made a fruitless effort to sell the land to him—there being no further negotiations between them—is not sufficient to warrant a finding that they were the procuring cause of the sale which was actually made. As is said in *Duval v. Moody*, 24 Tex. Civ. App. 627, 60 S. W. 269: "It is now the well-settled doctrine that, in the absence of any usage or contract, express or implied, or conduct of the seller, preventing the completion of the bargain by the broker, an action by the broker for his commissions will not lie until it is shown that he has effected or procured a sale of the property, and it is not enough that the broker has devoted his time, labor, or money in the interest of his employer, as unsuccessful efforts, however meritorious, offer no ground of action, and that, where his acts effect no agreement or contract between his employer and the purchaser, the loss must be his own. In such cases he loses his labor and efforts which he staked upon success; and, if there is no contract, there is no reward, as his commissions are based upon the contract of sale." See, also, *Newton v. Conness* (Tex. Civ. App.) 106 S. W. 893; *Burch v. Hester* (Tex. Civ. App.) 109 S. W. 400; *Mueller v. Bell* (this day decided) 117 S. W. 993.

In addition, we think that, although it can be said that but for George's action in at-

tempting to sell to Cartwright, the sale to Cartwright, Taylor & Lupe would not have taken place, yet the sale that was made was not a sale to George's customer, Cartwright. Not only did the endeavor of George to effect a sale to Cartwright fail, and come to an end, but the sale that was afterwards consummated was not made to his customer. It nowhere appears that Cartwright alone had the ability to make the purchase, and there is no evidence of fraudulent conduct on the part of English in refusing to sell to Cartwright and then afterwards selling to the four persons composing the firm of Cartwright, Taylor & Lupe.

Hence we concluded that we erred in affirming the judgment of the district court, wherefore the motion is granted, our judgment affirming that of the trial court set aside, our original opinion withdrawn, the judgment of the district court reversed, and judgment is here rendered that plaintiffs (appellees) take nothing by their suit, and that defendant (appellant) go hence without day, and that he recover of and from the plaintiffs all costs (both in the district and this court) in this behalf incurred.

Reversed and rendered for appellant.

#### On Rehearing.

FLY, J. In order that the bearings may not be lost sight of in this case it will be well to keep in view the contract made by and between appellant and William George. We take the statement of the latter as being correct: "The contract or agreement between us was that as agent I was to receive a commission of 5 per cent. from Mr. English for bringing him a purchaser, the price to be \$12.50 or as near that as possible, and that if I had a good bid to submit it, but it was listed at \$12.50." Appellee did not get a purchaser at that price, or any other, and the only service performed by him was to take a man to appellant, who refused to give the price demanded, and who made an offer considerably less than that for the land which was refused by appellant. Appellee did nothing more towards securing a purchaser for the land. The man who offered \$10 an acre for the land was taken to appellant by appellee in January, 1907. He was Matthew Cartwright, and the uncontroverted testimony shows that he was out hunting a tract of land, not for the firm of which he was a member, but for himself, and he stated "had I bought the English place, it would have been for myself." Matthew Cartwright told the members of the firm, as composed at that time, of the English land, but said: "I did not recommend them to buy it, and it was not contemplated that they would buy it at that time." Afterwards Taylor, a member of the firm, to whom the land was eventually sold, went to Carrizo Springs to show another piece of land to a prospective purchaser, and with-

out any intention of buying the English land. The firm, to which a new member had in the meantime been added, had not in any manner considered the question of buying the land. The firm was engaged in the real estate business. Taylor met appellant by accident, and in the conversation with him merely solicited the agency for sale of the land. Afterwards Taylor was again in the vicinity of the land, and obtained an agency, also denominated an "option," to sell the land. The agency was an exclusive one. The option or agency was obtained by Taylor for his firm, not with any intention of buying for his firm, but under the belief that the firm had men in North Texas to whom it was thought the land could be sold. Taylor swore: "Neither time did I go down to Cometa for the purpose of purchasing this land for Matthew Cartwright, or for any one else. There was no request or agreement on part of Matthew Cartwright that I should go and see if I could buy it. There was no idea in my mind the first time I went there to see Mr. English of buying that land. After he gave me the exclusive contract, when I came back I showed it to the members of the firm, and in the meantime we heard from our North Texas parties that, owing to a recent marriage, or something of some of the partners, he wouldn't be able to come down, and then we all got to discussing the proposition, and decided, if we could buy it at a reasonable figure, we would go in and buy it." There was no connection whatever between the visit of Matthew Cartwright to the English land and the accidental meetings of Taylor and English which resulted in the sale of the land to the San Antonio firm.

Did William George procure and take to appellant a man who was ready, able, and willing to buy the land on the terms fixed by him? Every particle of the testimony answers in the negative. Did the visit of Matthew Cartwright, in company with George, to the house of appellant in January or February, or his offer to buy, if he liked the land, at a lower price than that fixed by appellant, have any causal connection with the subsequent visits of Taylor, and the final purchase of the land by a firm of which Matthew Cartwright was a member, but a different firm from the one of which he was a member at the time he visited appellant? The uncontroverted testimony answers the question emphatically in the negative. Then, if appellant is to be bound, it must be upon the ground that he induced Matthew Cartwright to go to see appellant and to make a conditional offer of a sum considerably less than that for which appellant had agreed to sell, and that the land was afterwards sold, not through that visit, to a firm of which Matthew Cartwright at that time was a member. Appellee does not claim that he procured a purchaser, in the person of Matthew Cartwright, who was

ready, willing, and able to buy on the terms fixed by appellant, for if it did, it would base its right to recover on a refusal of appellant to sell to Matthew Cartwright. Appellee seeks a recovery alone on the ground that it was the procuring cause of the sale made by appellant in April, 1907. It is evident from the testimony that appellant did not at any time contemplate selling his land at \$10 an acre and paying any one a commission out of that sum. He rejected such an offer when made by George, and it was the definite agreement, when he sold the land at \$10 an acre, that no commissions should be deducted from it. All his conversations with George in regard to a commission were made on a basis of a maximum price of \$12.50 an acre, and not less than \$10 an acre net to him.

William George was never given the exclusive agency for sale of the land, and, selling as he did, in good faith, without the agency of appellee, appellant is not liable for the commission. The offer procured by George was fully and finally rejected by him. That offer involved the payment of 5 per cent. commissions, and he refused it that time and ever afterwards. George produced a buyer on terms different from those proposed by appellant, and he is not entitled to commissions because a sale was afterwards made, even though it had been on terms substantially the same as those proposed but rejected by appellant. Upon what principles of right and justice a sale, made on different terms proposed by one prospective purchaser to another purchaser, would entitle appellee to a recovery of commission has not been made to appear in this case. The underlying basis of all claims by brokers to commissions is that they were the procuring cause of the sale. No matter how great the exertions of the brokers may have been, they cannot recover for their services if the contract of sale was made without their intervention. *Clark & Skyles on Agency*, § 778, pp. 1670, 1671, and authorities cited. It devolved upon George to show, not only that he introduced Matthew Cartwright to appellant, but affirmatively that the purchaser was induced to apply to appellant through the means employed by the broker. Not only was this not done, but, on the other hand, it was made to appear by all the evidence on the subject that there was not the remotest connection between the sale and the visit of Matthew Cartwright to appellant. This was clearly decided in a New York case, in which the facts were much stronger in favor of the broker. *Wylie v. Bank*, 61 N. Y. 415. In that case the property was valued at \$80,000, and the broker obtained an offer for \$75,000, which was rejected by his principal. The property was afterwards sold to the same party for \$80,000, and the court held that the broker was not entitled to his commissions. The court said: "He failed to find

or produce a purchaser upon the terms prescribed in his employment, and the bank was under no obligation to wait any longer that he might make further efforts."

In the case of *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441, the following language, aptly appropriate in this case, was used: "It follows, as a necessary deduction from the established rule, that a broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money, with ever so much of devotion to the interests of his employer, and yet if he fails, if, without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which was staked upon success. And in such event it matters not that, after his failure, and the termination of his agency, what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met; he may have created impressions which, under later and more favorable circumstances, naturally lead to, and materially assist in, the consummation of a sale; he may have planted the very seeds from which others reap the harvest—but all that gives him no claim. It was part of his risk that, failing himself, not successful in fulfilling his obligation, others might be left, to some extent, to avail themselves of the fruit of his labors."

The motion for rehearing is overruled.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. JONES.

(Court of Civil Appeals of Texas. Feb. 17, 1909. Rehearing Denied March 31, 1909.)

##### 1. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—QUESTIONS FOR JURY—NEGLIGENCE.

Where a switchman in alighting from an engine stepped on a bolt, which threw him, such bolt being one commonly used by the company in repairing cars, which was sometimes done on the track on which the switchman was injured, and it not being shown that any car had passed along the track from which the bolt might have fallen, or that any person other than employes had been seen near the track or had access thereto, the circumstances were sufficient to take the question of the company's negligence to the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.\*]

##### 2. MASTER AND SERVANT (§ 286\*)—QUESTION FOR JURY.

In an action for injury to a switchman, who, in alighting from an engine, stepped on a bolt, and was thrown, witnesses for the company

testified that they had inspected the track not more than half an hour before the switchman was injured from the fact that it was their custom to do so, and not because of any distinct recollection of such inspection. The most of them testified that they saw no bolt on the track, and believed they would have seen it had it been there, but some admitted that they might have overlooked it. One testified that he did not remember whether he saw a bolt, but, if he did, he removed it. *Held*, that a directed verdict for the company on the ground that the uncontroverted testimony showed that it had properly inspected its track was properly refused, as the jury would not be required to accept the testimony of such witnesses as establishing an inspection.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.\*]

##### 3. APPEAL AND ERROR (§ 1001\*)—REVIEW—QUESTIONS OF FACT—VERDICT.

Where there is evidence to support a verdict, the appellate court is not justified in setting it aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

Appeal from District Court, Bell County; John M. Furman, Judge.

Action by John P. Jones against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

Coke, Miller & Coke and Tyler & Tyler, for appellant. A. L. Curtis and Winbourn Pearce, for appellee.

**KEY, J.** This is a personal injury suit, which resulted in a verdict and judgment for the plaintiff for \$9,000, and the defendant has brought the case to this court, and submitted it upon a number of assignments of error. The plaintiff charged in his petition that, while he was performing his duties as an employé and switchman for the defendant in its yards at Temple, he stepped off a slowly moving engine on to a bolt which the defendant had negligently permitted to be and remain on its track, which caused him to fall and sustain the injuries alleged; that defendant negligently failed to provide plaintiff a safe place to work; that plaintiff did not know of the presence of the bolt on the track, but the defendant knew, or ought to have known, that it was there. The defendant answered by general and special demurrers, general denial and pleas of assumed risk, and contributory negligence.

The first assignment of error is addressed to the action of the court in refusing a requested instruction directing the jury to find a verdict for the defendant. Under this assignment, it is contended on behalf of appellant that no evidence was submitted tending to show any negligence on its part, and therefore the court should have given the instruction requested. The only testimony concerning the existence of the bolt upon the track was given by the plaintiff, and is

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1507 to date, & Reporter Indexes



as follows: "I live in Temple. In November, 1907, I was engaged as a switchman for the Katy at Temple. My duties as switchman were to switch box cars, and make up trains in the Temple yards. In addition to the main line of the Katy at Temple, it maintains switch yards there in town, and I was working in the yards. On the 23d of November I was working for the company in the yards, and I was injured on that day. I was making up the north local and rode through a switch, and, as the engine went over, I stepped off and stepped on a bolt, and it threw me, and I fell on my side and hit on a rail, and injured my side. At that time we were getting the north local cars in station order. The engine was just slowly moving along as I stepped off. That act was one that was usually and customarily performed by other switchmen and myself. My foreman, the yardmaster, and all did it all the time. I had done it in the presence of the foreman and had seen him do it. In stepping off of the engine which was moving slowly, I stepped on a bolt, which turned with me, and I fell on my right side, and my side struck the steel rail which the trains run on. I was struck on the right side, right across here [indicating]. I did not see the bolt. After I stepped on it, I got up to see what had thrown me, and saw the bolt lying there. I have the bolt here (exhibiting it to the jury). I suppose the bolt is between eight and ten inches long, about one inch in diameter, is round, and made of iron or steel. When I picked the bolt up, it was lying in the middle of the track. In throwing the switch I had to throw, that was the place I would have stepped in stepping off the train in the discharge of my duty. The bolt was lying right between the rails where the new house track leads off from the city or team track—right near there. That is a place in the yards where switching is frequently done by the employes of the company. We make the local up every morning. After I fell, I got up and went on switching. \* \* \* The engine was going north on the city or team track when I stepped off of it. We were going to back in on the new house track from the city track. I was standing on the foot board on the hind end of the engine. The engine was facing north. It was traveling slowly. It was necessary for me to get off of the engine and throw the switch, so that we could back in on the house track. I knew where the switch was at the time I stepped off of the engine. I had nothing to do but step off and walk over and throw the switch. It was daylight when I stepped off. I could see the ground, but did not look at it when I stepped off. I just stepped off like any other man would, and like I always did. At the time I stepped off, I had nothing to do but step off, and did not know that there was anything to prevent me from looking to the ground.

I suppose, if I had looked right down when I stepped off, I would have seen the bolt. If I had seen the bolt, I would not have stepped on it, and, if I had not stepped on it, I would not have been injured according to my theory of the case. I cannot say whether I would have been injured or not if I had looked at the ground before I stepped off. The bolt might have been lying where I stepped and I might have been looking 10 or 12 feet away. I just stepped in one place, and, when I step off an engine, I do not step all over the country. I believe I have seen pieces of coal and cinders on the Temple yard. I have never been thrown down by stepping off an engine onto one of those obstructions, and I do not think I ever saw any one else thrown. I think anything that will roll and throw a man if he steps on it. I think if he stepped off of an engine onto a rock or a piece of coal or old bolt it would be calculated to throw him. Before I was injured, I never thought anything about stepping on one of those things, or what would happen if I did. If I had thought about it, I would have concluded that it would throw me down, because I should think that, if a man stepped on anything that would roll, it would throw him. I cannot say positively that I would have seen this bolt if I had looked at the ground. The engine was moving along and I might have been looking at another place. I think the engine was moving slowly enough that I could have told the exact spot I was going to put my foot when I stepped off of it if I had looked down. I could have looked at that exact spot, and told whether or not there was any obstruction there if I had had any idea there was anything there. I knew there was obstructions on the track sometimes. I first saw the bolt after I fell, and got up and looked to see what had thrown me. The bolt is about eight or ten inches long, about an inch in diameter, is round, and made of iron or steel. \* \* \* I do not know how I stepped on the bolt. I suppose I put my foot down on top of it. The ground is hard around where I fell. It is supposed to be smooth between the rails. I don't know which part of my foot hit the bolt, but I suppose it was my toe. I fell over to the side. I do not know which way the head of the bolt was. I did not notice whether the bolt was lying lengthwise or crosswise of the track. \* \* \* When I fell, I fell exactly acrossways of the track, what we call west there. The bolt rolled east. It was right on the side of the track when I picked it up. I do not know how far it rolled, but I am certain it rolled. When I stepped on it, I knew something rolled, but I did not know what it was until I got up and looked. The bolt was behind me because I fell west and it rolled east, and I could not tell how far it rolled. I stepped off of the engine, angling west across the track. I suppose you would call it southwest. The engine was

going north, and I stepped southwest, and put my foot on a bolt which rolled east and I fell west."

Counsel for appellant contend that the testimony quoted does not tend to show any negligence on appellant's part, and that the burden rested upon the plaintiff to go further, and produce testimony tending to show that, before the accident happened, appellant had knowledge of the existence of the bolt upon the track, or that it had been there for such length of time as that by reasonable diligence it could have ascertained that fact. We cannot sanction that contention. On the contrary, we think counsel for appellee submits a sounder proposition in these words: "Where it is shown that at the time of the accident the place provided for the servant to work was an unsafe place by reason of an obstruction, and the obstruction was one of the implements or things used by the master in the conduct of its business, it is to be inferred that such obstruction was left upon the premises through the agency of the master." The testimony shows that the bolt in question was what is called a draft bolt, that such bolts are commonly used by appellant to put down through the inside of the car through the sill and draft timber; that appellant's inspectors and repairers frequently take these bolts out of the cars and replace them with new bolts. This was sometimes done on what was called the rip track in the yard, and in some instances had been done on the track upon which appellee was injured, and such bolts were sometimes found by the inspectors on the track where they had been left in making the repairs referred to. It was not shown that any car had passed along this track after the time appellant's witnesses say they inspected it, and from which the bolt might have fallen. Nor was it shown that any person other than appellant's employes had been seen upon or near that track within the time referred to, or that such other persons had access to the track, thereby offering an opportunity for some third person to place the bolt on the track. *McCray v. Railway Co.*, 89 Tex. 168, 34 S. W. 95, was a case in which a brakeman sitting on the side of a car in a train running between stations was killed by a steel rail, part of the load of a car in front of him, falling therefrom, one end striking the ground and the other sweeping along the side of the train and striking him. Without other proof of negligence in the loading of the car of rails, the Supreme Court held that the circumstances were sufficient to take the case to the jury, and that it was error to direct a verdict for defendant. The opinion quotes with approval the following rule applicable to such cases: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not

happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

In the case at bar, the place where appellee stepped off the engine in performance of his duties in the service of appellant was a place furnished by appellant for him to perform such service. It was under appellant's management and control, and the accident was such as in the ordinary course of things would not have happened if appellant had used proper care. Possibly some third person may have placed the bolt on the track only five minutes before appellee was injured, but that would take the case out of the ordinary course of things. That argument would apply with equal force to the *McCray* Case, because in that case it was possible for some third person to have interfered with the car after it was loaded and brought about the disaster which resulted; but in that case, as in this, in such circumstances, the accident would not have occurred in the ordinary course of things. Such outside interference would bring in an unusual or extraordinary circumstance, and therefore the accident would not happen in the ordinary course of things. Furthermore, the testimony indicates that the bolt which caused the accident to happen belonged to appellant; and, while it was possible for some third person to have obtained possession of it and left it on the track, that hypothesis is supported by nothing in the testimony and is improbable. On the other hand, the theory that it reached that destination through appellant's instrumentality is much more probable, and finds support in the testimony showing that it was found in appellant's yard, where such bolts were sometimes left by its employes, and the testimony tending to show that the bolt itself was appellant's property. We say the proof tended to show the latter fact, because a witness testified that appellant's cars were equipped with such bolts, and that appellant sometimes used them in repairing cars in the yard, and the bolt in question was on appellant's track in its yard, which yard presumably was in appellant's exclusive possession.

In *Washington v. Railway Co.*, 90 Tex. 314, 38 S. W. 764, which was an action by a widow to recover damages for the death of her husband, the deceased was last seen walking in a railway cut in the city of Houston along a footpath by the side of the track leading towards a ravine, over which was a railway bridge, so constructed as to admit of easy passage by footmen, and much used by residents of that part of the city. In this cut a train, which had separated, was wrecked by a collision of the rear portion with that in front, which had stopped to set a switch. There was no evidence as to the cause of the separation, or as to what precautions, if any, were necessary or were taken to avoid the ac-

cident. The body of the deceased was discovered underneath the wreck. The Supreme Court held that the facts recited were sufficient evidence of negligence to require the case to be submitted to the jury. *I. & G. N. R. R. Co. v. Johnson*, 23 Tex. Civ. App. 160, 55 S. W. 772, was an action for damages on account of the death of a son who was an employé of the defendant, and this court held that, while the burden of proving negligence on the part of the defendant rested upon the plaintiffs, when it was developed by the testimony that the derailment and wreck which resulted in the death of Johnson was caused by an open switch on the defendant's road, and that he himself was not in fault, these facts were sufficient to justify a finding of negligence against the defendant, unless it submitted testimony excusing itself from fault in reference to the switch being open. In *Thompson v. Railway Co.* (Tex. Civ. App.) 106 S. W. 910, the opinion quotes with approval from a North Carolina case, stating the rule in these words: "As the law places upon the company the positive duty of providing a safe track, including the incidental duties of inspection and repair, its unsafe condition, whether admitted or proved, of itself raises the presumption of negligence. This is always the case where there is a positive duty imposed by law." In *Railway Co. v. Harris* (Tex. Civ. App.) 107 S. W. 110, in the course of the opinion it is said: "Not only was it proved that the accident occurred, but the cause was shown, and a charge to the effect that proof of the mere happening of the accident did not entitle appellee to recover had no place in the case. Appellee proved that he was setting the brakes on a car when the chain broke, causing him to fall from the car. That made a prima facie case, and appellant had the burden of showing that the accident was unavoidable, and that it had used care to furnish reasonably safe appliances for appellee." See, also, *Railway Co. v. Roach*, 114 S. W. 418, recently decided by this court, and *Crawford v. Kansas City Stockyards Co.*, 114 S. W. 1058, recently decided by the Supreme Court of Missouri. It would also seem that the reasoning of the court in *Ryan v. Railway Co.*, 65 Tex. 19, 57 Am. Rep. 589, and *Railway Co. v. Horne*, 69 Tex. 648, 9 S. W. 440, should have force in cases of this kind.

The *Ryan Case* was an action against the railway company for the value of certain goods upon an allegation that they were received by the defendant for shipment, and not delivered at their destination, but were converted to the use of the company. The answer was that the goods were destroyed by fire without any negligence on the part of the carrier. The bill of lading, which constituted the contract between the parties, exempted the carrier from liability in the event of the destruction of the property by fire. The Supreme Court held that the burden of proof rested upon the railway company to show

that the fire was not caused by its negligence. One of the reasons assigned by Chief Justice Willie for the conclusion reached was that the law will place the burden of proof on him who best knows the facts and is in the better position to develop them. In the *Horne Case* it was held proper to instruct the jury that, if grass growing on the land of the plaintiff was destroyed by fire caused by sparks escaping from the defendants' engine, such facts would make a prima facie case of negligence against the defendant. In the course of the opinion the Chief Justice said: "We are aware that numerous authorities can be found in which it is made the duty of the party complaining of injuries done to his property by reason of fire kindled from such sparks to show negligence on the part of the company, but we think that those decisions which throw the burden upon the company of showing that the sparks did not escape because of any negligence on its part are best supported by reason. They place the burden of proof upon the party having the means of producing the necessary evidence upon the subject. The employes know the condition of the engine and of the appliances used to prevent the escape of fire, and they should be informed as to whether these were sufficient for that purpose. The injured party would not, as a general thing, be possessed of any such information, and he could not ordinarily obtain it. To require him to make the proof would, in most instances, be a denial of justice, and would allow the party doing the wrong to escape by concealing the facts which brought it about. Hence our courts have adopted the salutary rule of presuming the existence of negligence against the party who has the means of disproving it and fails to make use of them (*Ryan v. Railway Co.*, 65 Tex. 20, 57 Am. Rep. 589), and have followed that line of decisions which casts the burden in such cases upon the company, and, as we believe our former decisions upon the subject are founded upon good reason, we are not inclined to change the rule assumed by them." In the case at bar to adopt the rule contended for by appellant would place upon appellee a very onerous burden. Appellant's negligence consisted of the failure to properly inspect the place furnished appellee to perform the service in which he was engaged. To place upon appellee the burden of proof would be to require him to prove a negative—that is, to produce proof showing that appellant had not performed its duty of inspection—and it would have been very difficult, if not impossible, for him to have made such proof; whereas, if such inspection had been made, it was peculiarly within the knowledge of appellant, and it had the ready means of proving it. For the reasons stated and upon the authorities cited we hold that no error was committed in refusing to instruct a verdict for appellant.

The second assignment complains of the re

fusal to give another requested instruction directing a verdict for the defendant, for the additional reason, as stated in the charge, that the defendant had proved by uncontroverted testimony that it had properly inspected the track, and therefore was not guilty of negligence. Appellant submitted testimony of four witnesses which would have supported a finding by the jury that it had properly and sufficiently inspected the track and was not guilty of negligence, but the jury was not compelled to give credence to the testimony of the witnesses referred to, and the instruction was properly refused. The witnesses referred to were not disinterested, because they were appellant's employes. It seems that their attention was not called to the matter of inspection on that particular day until long after, and, while they each testified that they inspected the track referred to not more than half an hour before the time appellee said he was injured, they so stated mainly because of the fact that it was their custom to inspect the yard every day at the time referred to, and not because of any distinct recollection of an inspection on that particular day. The most of them said that they saw no such bolt on the track, and believed that they would have seen it if it had been there, but some of them admitted that they might have overlooked it. One of them said that he did not remember whether he saw such bolt or not, but, if he did, he removed it, and did not leave it upon the track. We hold that the jury was not required to accept the testimony referred to as establishing the fact that appellant had properly and sufficiently inspected the track in question.

Numerous objections are urged to the court's charge and to the refusal of a number of requested instructions. We think the charge of the court was full, fair, and reasonably accurate, and that no error was committed in refusing the requested instructions.

The verdict of the jury is also assailed, but there is testimony in the record which supports it, and this court would not be justified in setting it aside.

No reversible error has been shown, and the judgment is affirmed.

**Affirmed.**

#### TEXAS MIDLAND R. CO. v. GERALDON.†

(Court of Civil Appeals of Texas. Feb. 18, 1909. Rehearing Denied March 25, 1909.)

#### 1. APPEAL AND ERROR (§ 1002\*)—REVIEW—FINDING OF FACT—CONFLICTING EVIDENCE.

The truth of a finding of fact on conflicting evidence, involved in a general verdict, will be assumed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

#### 2. RAILROADS (§ 274\*)—DUTY TO LICENSEES IN GENERAL—PERSONS IN WAITING ROOM.

The law does not permit even trespassers to be exposed wantonly to perils of life or health, and a railroad company owes a licensee on its premises the duty of taking ordinary care to avoid injuring him, which duty applies to licensees in its waiting rooms as well as elsewhere.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 868; Dec. Dig. § 274.\*]

#### 3. RAILROADS (§ 274\*)—DUTY TO LICENSEES IN GENERAL—PERSONS IN WAITING ROOM.

Where plaintiff and his family had been permitted to remain in defendant's depot waiting room till closing time for the night, a request to stay there till it quit raining, so as not to endanger his wife's health by exposure for which they were unprepared, was reasonable and should have been granted, though an inconvenience to the agent, and an expulsion under such circumstances is a tort for which the company is liable, independent of any contractual relation.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 274.\*]

#### 4. CARRIERS (§ 246\*)—PASSENGERS ON RAILROAD—QUESTION FOR JURY.

Evidence held to present a question for the jury as to whether or not plaintiff and his wife were passengers, against whom defendant railroad company was not entitled to close its depot and require them to leave at a particular time.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 246.\*]

#### 5. CARRIERS (§ 384\*)—ACTIONS FOR EXPULSION FROM WAITING ROOM—EVIDENCE—SUFFICIENCY TO WARRANT SUBMISSION TO JURY.

In an action against a railroad company for expulsion of plaintiff and his wife from a depot waiting room, evidence held to warrant submission of an issue as to the wife being frightened.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 384.\*]

#### 6. DAMAGES (§ 216\*)—INSTRUCTIONS—DOUBLE RECOVERY.

A double recovery was not authorized by an instruction which entitled plaintiff to recover for the physical and mental pain suffered by his wife by reason of fright and getting wet, and for humiliation and pain of mind caused to plaintiff by reason of being ejected from the waiting room in defendant's depot and searched by an officer.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 216.\*]

#### 7. CARRIERS (§ 384\*)—ACTION FOR EXPULSION FROM WAITING ROOM—INSTRUCTIONS.

In an action for injuries caused by being ejected from the waiting room of a depot, the charge required the jury to find, before returning a verdict for plaintiff, that the station agent wantonly or maliciously threatened to have plaintiff and his wife and child ejected by an officer and ordered the town marshal to take charge of them or put them out. There was evidence the agent was angry and spoke in a rough, loud, and harsh manner, and in such mood ordered the marshal to take charge of them, and it conclusively appeared that at the time the agent called the officer to remove them they were not violating any law or injuring any property, and requested the agent to wait till it quit raining before compelling them to leave because of his wife's condition. Held, that the charge was more favorable to defendant than was authorized by law under the facts, and reversible error could not be predicated thereon.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 384.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Application for writ of error pending in Supreme Court.

**8. DAMAGES (§ 216\*)—INSTRUCTIONS AUTHORIZING DOUBLE RECOVERY.**

In an action for expulsion of plaintiff and his wife from a depot waiting room, a charge authorizing the jury in one paragraph to find for plaintiff such sum as will reasonably compensate him for such mental and physical pain as his wife suffered, if any, and in another paragraph such sum as will reasonably compensate him for such humiliation or pain of mind suffered by him, is not subject to objection as authorizing a double recovery for humiliation and pain, nor calculated to cause the jury to allow such a recovery.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 216.\*]

**9. CARRIERS (§ 383\*)—EXPULSION FROM WAITING ROOM—EVIDENCE—SUFFICIENCY TO JUSTIFY SUBMISSION OF ISSUE.**

Evidence, in an action for expulsion from the waiting room of a depot, *held* to require a submission to the jury whether the station agent caused plaintiff to be searched by an officer for a pistol.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 383.\*]

**10. TRIAL (§ 140, 142\*)—QUESTIONS FOR JURY—CREDIBILITY OF WITNESSES AND INFERENCES FROM FACTS.**

The credibility of witnesses and inferences to be drawn from the facts are for the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 334, 335, 337; Dec. Dig. §§ 140, 142.\*]

**11. CARRIERS (§ 383\*)—ACTION FOR EXPULSION FROM WAITING ROOM—PEREMPTORY INSTRUCTION FOR DEFENDANT.**

In an action for expulsion from a waiting room of a depot, *held*, that on the evidence a peremptory instruction to find for defendant was properly refused.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 383.\*]

**12. CARRIERS (§ 372\*)—EJECTION FROM WAITING ROOM—PERSONS LIABLE.**

An officer, called by a station agent merely to put persons out of the waiting room, would not be acting officially in complying, so as to exempt the railroad company from responsibility for humiliation suffered therefrom.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 372.\*]

**13. CARRIERS (§ 372\*)—WRONGFULLY SEARCHING PASSENGER FOR CONCEALED WEAPONS—LIABILITY FOR ACTS OF STATION AGENT.**

If the station agent wrongfully causes an officer to search a passenger in the waiting room and points him out to an officer as a violator of the law, when he is not, the company would not be relieved from responsibility for his acts on the ground that he believed, or had been informed, that the passenger had a pistol.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 372.\*]

**14. WEAPONS (§ 11\*)—"TRAVELER" ENTITLED TO CARRY ARMS.**

A passenger in the waiting room of a depot just before the arrival of a train which he intends to take is a "traveler" within the meaning of the law, and has a legal right to carry arms.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. §§ 10-14; Dec. Dig. § 11.\*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7076-7079, 7820.]

**15. APPEAL AND ERROR (§ 1060\*)—HARMLESS ERROR—ARGUMENT OF COUNSEL.**

Reversible error cannot be predicated on the words of an attorney in argument, where they were promptly withdrawn by him, and the amount of the verdict does not show reasonably

that the jury could have been inflamed or impassioned thereby.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4135; Dec. Dig. § 1060.\*]

*Appeal from District Court, Hunt County; R. L. Porter, Judge.*

Action by F. A. Geraldton against the Texas Midland Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee brought this suit against appellant to recover damages on account of injuries and physical and mental pain occasioned his wife, and humiliation caused to himself, by reason of the alleged several wrongs committed against them by appellant. By his petition appellee claims: That he and his wife on May 24th went to the passenger depot of the appellant at its station of Enloe, for the purpose of taking passage on its regular passenger train to Commerce, which was due to leave that station late in the afternoon, and that when they arrived at said station they found that the train had already gone, and they continued to remain in the depot waiting room for their next train by permission and without objection on the part of the depot agent until after the north-bound passenger train going to Paris passed at about 10 o'clock p. m.; that at the time the train passed it was raining, and continued to rain for several minutes after said train passed; that immediately after the train passed, and while it was still raining, the appellant's agent entered the waiting room and demanded that they leave; that upon appellee's request that he and his wife and child be allowed to remain there in the room and not be required to leave the same until it ceased raining, the said agent, in a rough, angry, and insulting manner, informed them that they would have to leave at once, and if they did not do so he would have the town marshal eject them, and thereupon unnecessarily and without provocation therefor called the town marshal, and they were forced to leave the room and go out into the rain; that appellee's wife at the time had her regular menstrual sickness, and by reason of being forced into the rain got wet, and her sickness suddenly ceased and failed upon her, causing serious and permanent injuries as claimed. Appellee also alleges: That on the next morning after the ejection, when he and his wife and child returned to the said station to take the passenger train to Commerce, and after they became passengers, and in order to further humiliate them and bring them into public disrepute and ridicule, the agent of appellant called an officer of the law and advised, procured, and instructed said officer to search the appellee then and there for concealed weapons, which the said officer proceeded to do before many people present and in the agent's presence and by his advice; that appellee was greatly humiliated thereby;

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and that appellee did not have any weapon about his person. The appellant answered by general denial. The case was tried to a jury, and in accordance with their verdict a judgment was entered for the appellee, and the appellant brings the case on appeal seeking to have the same revised for the errors assigned.

The evidence substantially shows that appellee and his wife and child, and a Mr. Martin and his wife and children, on May 24, 1906, came from a distant point in the country to the passenger depot of the appellant at Enloe, a small village, for the purpose of taking the first passenger train out to Commerce. Arriving at the depot between 5 and 6 o'clock in the afternoon, appellee learned that the late evening train had already gone out. He then proceeded to box up some goods which he had on the depot platform for shipment. While he was at work boxing up these goods, his wife and child, and Martin and his family, remained in the depot waiting room. He finished boxing up his goods for shipment between 8 and 9 o'clock and went into the depot waiting room, where the other members of the party were, and Martin went out and brought back a lunch, and they all ate the lunch. The depot agent saw and knew they were on the premises and in the waiting room, and made no objection to their being and remaining there. Shortly after boxing up the goods for shipment it began to rain. When the party came to the depot it was good weather and not raining. Appellee then learned that the next train to Commerce would not arrive until 5 o'clock in the morning. Upon this knowledge the party decided among themselves to remain in the waiting room until the train arrived. About 10:10 p. m. appellant's north-bound passenger train came in. It was raining at the time the train came. Between 15 and 20 minutes after the said train had left the station, the appellant's depot agent entered the waiting room and informed appellee that he and his wife and the others would have to leave, as he wanted to close up the depot and go home. There is a conflict of evidence as to what the agent said and did at the time he demanded of the appellee and his wife to leave the room, and as to whether it was raining at the very time they left the depot waiting room. The verdict of the jury settled this conflict in favor of the appellee, and we assume the truth of the finding involved in a general verdict. The evidence offered by appellee and his witnesses in this respect shows that when the agent came into the waiting room he said: "Where are you folks going?" Appellee replied: "To Commerce." The agent said: "Then you will have to get out of here. I will have to close up." The appellee said he "didn't see how we could get out, and it raining that way, with our women and children," and requested the agent at the same time "to wait until it quit raining," telling

the agent at the time "my wife ain't in no condition to get out in the rain," intending for it to be so understood by the agent that his wife had her menstrual flow and period on her at the time, and she was in fact in her menstrual period. The agent answered the request by: "It don't make any difference. You will have to get out just the same." The appellee then replied: "You will have to put me out. I won't get out in the rain." To this the agent answered: "If you don't get out, I will call the marshal and have you put out." And further said at the same time: "This is no lodging house. Haven't you got any money?" Appellee said: "Yes, sir; I have money." And the agent thereupon without further say called to the marshal, who was standing at the window, and ordered him to come and eject them. The marshal appeared, and the wife became very much frightened, and thereupon the appellee said, "Before I'll be arrested we will get out," and they all proceeded along with the marshal to leave the room. The agent's manner and conduct is shown by the evidence to have been rough, angry, and harsh. Appellee and his wife then proceeded at once to the only lodging house in the place, which was run by the town marshal, and which was variously estimated by the witnesses to be from 150 to 300 yards distant from the depot, about one-third of the way covered by awnings. It was shown by the evidence offered by the appellee that it was raining at the time of the ejection, and plaintiff's wife got "damp to the skin," and from the wetting her menstrual flow checked and failed upon her, and from the effects of which her health became seriously and permanently impaired, and she suffers much. It ceased to rain in a very few minutes after the appellee and his wife got to the lodging place.

The next morning appellee and his wife returned to the depot to take the train to Commerce and purchased their tickets. Just before the arrival of the train on which they were to go to Commerce, a deputy sheriff came into the waiting room and publicly, in the presence of the other passengers, made a search of the person of the appellee for deadly weapons. He did not find any weapons on the person of the appellee, but found only a claw hammer which he had in his pocket, and which he had used in boxing up his goods. There is evidence to sustain the finding of the jury that the appellant's depot agent procured and instigated this search to be made, without probable cause therefor, and we assume the truth of these findings. The evidence shows that the search by the officer was made upon the information, advice, and suggestion of the agent, and without warrant therefor, and that the search caused humiliation and embarrassment to the appellee. From the facts in this case we conclude that the appellant was guilty of the wrongs complained of in the petition, and that the evi-

dence is sufficient to sustain the amount of recovery herein for the physical injuries and pain and suffering and humiliation caused the appellee and his wife.

Ogden, Brooks & Napier and A. H. Dashlei, for appellant. Looney & Clark and Mulkey & Hamilton, for appellee.

LEVY, J. (after stating the facts as above). The important question of the case is presented by the first assignment of error, which complains of the refusal of the court to give the following special charge to the jury asked by appellant: "Under the undisputed evidence in this case, the plaintiff and his wife were not passengers of the defendant on the night of May 24th, when they claim to have been put out of the depot, and therefore the defendant had a right to close its depot and to require plaintiff and his wife to leave the same, and they are not entitled to recover against the defendant anything by reason of any injuries they may have sustained by getting wet after leaving the depot, and you will not consider the injuries so claimed in arriving at your verdict." The effect of the charge was to peremptorily instruct the jury that in the circumstances appellee could not recover because they were not passengers. Considering the circumstances in this connection, it clearly appears that appellee and his wife were not bare intruders upon the premises of the appellant, but came there for the purpose of transacting business with it as a common carrier. They remained upon the premises for some time, preparing their goods for shipment. After finishing boxing their goods, they then went immediately into the waiting room, without objection on the part of the agent, and with his knowledge. It soon afterwards began to rain. When they came to the depot it was not raining. This condition of the weather caught them at the depot unprepared for it, and they were strangers in the village, which had bare accommodations. While it was raining appellant's agent required them to leave the depot in order to close it up and go to his home. Appellee protested against leaving the room at the time because of the physical condition of his wife, which was made known to the agent, and he asked him "to wait until it quit raining," which it did in a short time thereafter. The agent refused to wait, and at once, through means and aid of an officer of the law, compelled them to leave the room and go out in the rain, and the wife got wet, and, being in her monthly sickness, became sick, which resulted in serious injury to her.

We do not think that, because appellee and his wife were not "passengers" in a legal sense, in view of the peculiar circumstances of the case, the appellant was absolved from any legal obligation to exercise reasonable care and prudence in expelling appellee's wife from the waiting room at the time. The law does not permit even trespassers to be ex-

posed wantonly to perils of life or health. It is a well-established rule that a railroad company owes a licensee upon its premises the duty of taking ordinary care to avoid injuring him. The same duty applies in its waiting room, as elsewhere on its premises, to such licensees. Being in the waiting room by permission, and at the time of the expulsion from necessity of the situation, it was the duty of the appellant to the appellee and his wife to permit them to remain in the depot "until it quit raining," and to refrain from expelling them while it was raining. It is shown to have stopped raining in a very few minutes thereafter. The expulsion, occurring at a time and under the circumstances as disclosed in the facts, was a negligent disregard of the duty that was owing to appellee and constitutes an actionable tort. An action for negligent expulsion is not restricted to a contractual relation, but recovery may be had as for a tort. Thompson on Negligence (Supplement) § 3262. A carrier has the right to eject a person from its train who falls and refuses to pay fare, but the right to eject must be exercised in a proper manner and at the proper time and place, and by negligently ejecting such person in a manner or at a time or place as to endanger his safety or health makes the carrier liable for the consequences proximately resulting from such expulsion. 2 Hutchinson on Carriers, § 1084; 6 Cyc. p. 563. We can see no valid reason why the same rule of law that governs the carrier in ejecting a person from its train who has failed to pay fare should not obtain and be applicable to this instant case. The legal principle involved in the rule is the same, whether the negligent expulsion occurs from the vehicle or from the waiting room, as under the facts in this case. The rule is founded on the principle that it is the duty of the carrier to refrain from exercising the right of expulsion in a manner and at a time where injury would result to the person ejected. Such rule holds to the person ejected the right to his safety of health, limb, and life; and to the carrier the obligation of due regard to his safety from such injuries in the exercise of the right to expel. For a violation of this duty or obligation to the person expelled an action in tort will lie. If it is a tort to expel a female from a train under conditions that endanger her health, it is none the less a tort to expel her from the depot waiting room under the circumstances of this case. The right of an owner of a house to terminate the privilege of a person invited into such house to continue to remain therein exists under proper limitations, but he commits a tort if he expels such person therefrom in a negligent or wrongful manner.

In the light of these rules of law, appellant owed the duty to appellee's wife, in the particular circumstances of the case, to not expel her from the depot waiting room while it was raining, knowing at the time that in

her physical condition to get wet would endanger her health. The request to stay in the room, under the circumstances, "until it quit raining," was reasonable, though an inconvenience to the agent; but the law regards life and health as paramount to mere inconvenience. In no wise does such rule of law interfere with the right of the appellant to the proper use of its property, nor with the right to make reasonable regulations concerning the closing of its depots; but it restricts the right of expulsion therefrom of a person to whom it owes the duty of ordinary care to the proper exercise of ordinary care and prudence. The force of the rule applicable to negligent expulsion is laid down in the case of *Brown v. Railway Co.*, 51 Iowa, 235, 1 N. W. 487, where the court, in passing on an instruction given the jury, says: "In exercising the right of ejection, reasonable and ordinary care should be employed. In determining whether such care has been exercised all the circumstances should be considered, as the physical condition of the person ejected, the time, whether in daylight or late at night, the place of the ejection, the character of the weather, whether pleasant or inclement. The rules of law, as well as the dictates of humanity, require that the ejection shall occur at such place and be conducted in such manner as not unreasonably to expose the party to danger." We are of the opinion that the facts presented an issue for the jury to determine, and that the court did not err in refusing the special charge. We do not think the cases of *Railway Co. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. 778, and *Railway Co. v. Griggs* (Tex. Civ. App.) 106 S. W. 411, presented the question here involved in this case, and therefore would not be applicable nor rule the case. The facts in those two cases make them clearly distinguishable from the instant case. The assignment is overruled.

By its second assignment of error the appellant complains of the third paragraph of the court's charge. There was no error in the charge as complained of. There was evidence on which to submit an issue as to the appellee's wife being frightened, and authorize a recovery by reason thereof. The agent's calling the officer, and the officer's appearing, were acts sufficient to impress a woman with fear in her then situation. Appellee's wife testified: "I had never been arrested. Nobody ever threatened to arrest me. That man threatened to have us put out by an officer, and the way he talked scared me and made me weak and nervous, and I could hardly stand up." The doctor testified that sudden fright or excitement might and would likely upset the functions of the body, and especially the menstrual flow of a woman. If appellant wrongfully ejected appellee's wife at the time and under the circumstances and in an improper mode and manner, he was entitled to recover for all the damages

proximately resulting from the wrongs. A double recovery was not authorized by the instruction. The instruction authorized a recovery for the physical and mental pain suffered by the wife by reason of fright and getting wet while her menstrual period was on her, and the fourth paragraph authorized a recovery for humiliation and pain of mind caused to the appellee himself by reason of being ejected by and searched by an officer. The second assignment of error is therefore overruled.

The fourth assignment is overruled. The appellant cannot predicate reversible error in the case, on the issue of being ejected by means of an officer of the law, upon the charge requiring the jury to find before they could return a verdict for the appellee, that the agent, "without probable cause therefor, wantonly or maliciously threatened to have them ejected by an officer, and ordered the town marshal to take charge of them or to put them out." Such charge was more favorable to appellant than authorized by law under the facts. There was evidence to support the finding required by the instruction. The appellee and his wife and other witnesses testified that the agent became and was angry, and spoke in a rough, loud, and harsh manner, and in such mood ordered the marshal to "take charge of them." It conclusively appears that at the time the agent called the officer to remove the appellee and his wife they were not violating any law or injuring any property. Such facts, considered in connection with the further facts that appellee and his wife were not bare intruders in the waiting room, and requested the agent to wait until it quit raining before he compelled them to leave, because of his wife's condition, are strong facts going to show a negligent disregard of the obligation due by the appellant to the appellee at the time. As determined in the preceding assignment, the charge is not subject to the objection that it authorized a double recovery for humiliation and pain, nor was it calculated to cause the jury to allow a double recovery for the same. In the third paragraph the language of the charge was that the jury should find for appellee "such sum as will reasonably compensate him for such mental and physical pain as she suffered, if any." In the fourth paragraph it authorized the jury to find for the appellee "such sum as will reasonably compensate him for such humiliation or pain of mind, if any, suffered by him."

The fifth and sixth assignments are considered together, and are overruled. There is evidence in the record sufficient to require the court to submit to the jury for finding whether the agent instigated and caused the appellee to be searched for a pistol by an officer of the law. The facts testified to by the appellee's witnesses are to the effect that the officer came into the waiting room, and, after holding a short conversation with the



agent at the window, turned around and then asked the agent, "Which man is it that has the gun?" and that the agent pointed directly to the appellee, and said, "That fellow sitting right over there." The officer testified that, "as I came from home to take this early morning train, the agent was standing in the north part of the station, and he remarked to me that he had looked for me the evening before, and made the remark that he thought plaintiff had a gun on that evening before. I passed on down and went to the sitting room at the station, and as I went in some one pointed this man out to me, and I don't remember who the man was. Whoever it was said there was the man supposed to have the gun, and that he had it on then. So I went up and told plaintiff I would search him, I searched him and found a hammer." From these facts the jury would be authorized to find that the agent informed the officer that appellee had a gun on, and that he urged the officer to search appellee. The credibility of the witnesses and inferences to be drawn from the facts are for the jury. These circumstances, considered in connection with appellant's evidence, presented evidence, as a whole, of such a character that ordinary minds might differ as to the conclusion to be drawn from it. *Lee v. Railway Co.*, 89 Tex. 588, 36 S. W. 63.

The court did not err in refusing to give to the jury a peremptory instruction in the case to find for appellant, and the seventh assignment is overruled.

The court did not err in refusing to give the special charge complained of in the eighth assignment. The appellee was not violating any penal law, or inflicting or threatening to inflict any injury to property, and, as the agent called the marshal to merely put them out of the waiting room, such act of ejection on the part of the officer would not be in his official character so as to exempt the appellant from responsibility for the humiliation suffered by appellee in consequence of the ejection. *Railway Co. v. Parsons* (Tex.) 113 S. W. 914; *Jardine v. Cornell*, 50 N. J. Law, 485, 14 Atl. 590.

The special charge which the court refused, and is made the basis of the ninth assignment, is to the effect that if the depot agent had been informed by a reliable or credible person, and so believed, that appellee had a pistol on, then the agent had the right to point out appellee to the officer in response to the officer's inquiry of where was the man that had the gun on. The court did not err in refusing the charge. At the time appellee was a passenger, and the agent of appellant owed him the duty to protect him against personal rudeness and every wanton interference. Appellee was sitting in the room with a child in his arms, and violating no law, nor threatening to do so, by either acts or conduct. If appellant's agent wrongfully caused and urged the of-

ficer to search him, and pointed him out to the officer as a violator of the law when he was not, then the appellant would not be relieved from responsibility for the agent's act upon the ground that the agent believed or had been informed that appellee had a pistol on. If the appellee had a pistol (which the evidence shows he did not), he was a traveler within the meaning of the law, and had the legal right to carry arms. As he was violating no law at the time, he was not liable to arrest.

By the tenth and eleventh assignments it is contended that the court erred in not sustaining the second and third special exceptions to the petition. The precise objection presented by appellant is that the petition showed on its face that plaintiff and his wife were not passengers, and the agent had the right to require them to leave the depot. The ruling made on the first assignment disposes of this contention against the appellant. While it does appear in the petition that the appellee pleaded that he and his wife decided, after they missed their train in the late afternoon, to remain in the depot and sit up in order to catch the next early morning train, yet an inspection of the entire petition and the proper interpretation of all the allegations will show that his right to recover is not predicated upon any claim that it was the duty of the appellant's agent to let them remain there all night and to keep open the depot all night for the convenience or accommodation of appellee and his wife; but the facts alleged rest the cause of action upon the legal contention that, appellee and his wife being in the waiting room at the time and with the knowledge of the agent, it was the duty of the appellant, acting through its depot agent, to refrain from exercising the right of ejection at a time when it would appear to a person of ordinary prudence that to eject the appellee's wife would result in injury to her. The court submitted the case to the jury upon the ground of negligent expulsion only under a proper charge.

The court did not err in admitting the testimony complained of in the twelfth assignment of error. The testimony was admissible as expressions of present suffering and exclamations of pain at the time. The bill of exception, however, shows that this testimony was afterwards withdrawn from the jury, and the court specially directed them not to consider it. The assignment is overruled.

Though improper for counsel to so do, yet reversible error could not be predicated in this case upon the language of counsel in his opening argument complained of in the thirteenth assignment. The force of the words was promptly withdrawn by the attorney in his further and extended statement to the jury in respect thereto. Considering the amount of the verdict in the case, it does

not show reasonably that the jury could have been inflamed or impassioned by the language used.

The fourteenth, fifteenth, and sixteenth assignments of error complain of the refusal of the court to grant a new trial. We do not think the court erred. The evidence is sufficient, we think, to support the findings of the jury in this case.

Finding no error in the case, it was ordered affirmed.

#### ZIEHME v. MILLER.

(Court of Civil Appeals of Texas. March 3, 1909. Rehearing Denied March 31, 1909.)

##### 1. APPEAL AND ERROR (§ 999\*)—VERDICT—CONCLUSIVENESS.

A verdict is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3924; Dec. Dig. § 999.\*]

##### 2. APPEAL AND ERROR (§ 1029\*)—HARMLESS ERROR—ONE NOT ENTITLED TO RECOVER.

Any error against one not entitled to recover is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4035, 4036; Dec. Dig. § 1029.\*]

Appeal from Milam County Court; John Watson, Judge.

Action by A. E. Ziehme against G. S. Miller. From a judgment of the county court for defendant, on his appeal from a justice's judgment for plaintiff, plaintiff appeals. Affirmed.

Cox & Cox and W. T. Hefley, for appellant.

RICE, J. Appellant brought this suit originally in the justice's court against appellee to recover the sum of \$200, with interest thereon, for merchandise sold appellee, as claimed by him, alleging that he shipped by express to appellee certain goods, wares, and merchandise upon a certain order alleged to have been executed by appellee and delivered to appellant's salesman, and upon which said goods were shipped; that appellee refused to receive the same, notwithstanding he had ordered said goods; and that said amount was long since due. Appellee replied by general demurrer, general denial, and by plea of non est factum, denying the execution by him of the alleged order upon which the goods were claimed to have been shipped by appellant. Appellee likewise pleaded that he executed and delivered to appellant's salesman another and different order from the one sued upon, for certain articles mentioned therein, amounting to the sum of \$200, and which said order was essentially different in conditions and terms of payment from the one sued upon, alleging that appellant had failed to ship the articles in said order mentioned, whereby he was damaged in the sum of \$200, which he pleaded in reconvention;

but, as the court instructed the jury to find against appellee on this plea, it will not be necessary to notice the same further.

Upon trial in the justice's court appellant recovered; but upon appeal to the county court there was a jury trial and verdict for appellee, upon which judgment was rendered that plaintiff take nothing by his suit and that defendant recover his costs. There are numerous assignments of error in the record; but in the view we have taken of this case it will be unnecessary to consider them further than to say that, in our judgment, none of them are well taken. The court in its general charge, in effect, instructed them to find for the plaintiff if they believed that appellee executed the order sued upon; and, the jury having found against appellant on this issue, we think, so far as this court is concerned, that this finding against appellant must be held to be conclusive of the matter, and, if it be granted that other errors had been committed upon the trial as to other matters, which is not conceded, still, in view of this fact, they must be regarded as harmless, because, if appellee did not execute the order sued upon, and did not, as shown by the proof, accept the goods thereunder, it is evident that appellant has no cause of complaint and is not entitled to recover.

We find no error in the record, and the judgment is affirmed.

#### ARMSTRONG v. NEVILLE et al.

(Court of Civil Appeals of Texas. March 24, 1909.)

##### 1. HOMESTEAD (§ 162\*)—"ABANDONMENT"—REMOVAL COUPLED WITH INTENTION NOT TO RETURN.

To constitute an "abandonment" of a homestead, it must affirmatively appear that there was not only a removal from the home, but a removal coupled with a fixed intention never to return.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 315-319; Dec. Dig. § 162.\*]

For other definitions, see Words and Phrases, vol. 1, p. 8; vol. 8, p. 7559.]

##### 2. HOMESTEAD (§ 181\*) — ABANDONMENT — DETERMINATION OF QUESTION — DEGREE OF PROOF.

The abandonment of a homestead is a question of fact, and should not be found to exist unless the removal and accompanying facts clearly show it beyond almost all reasonable ground of dispute.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 353; Dec. Dig. § 181.\*]

##### 3. HOMESTEAD (§ 162\*)—ABANDONMENT—INTENTION TO RETURN ON CERTAIN CONDITIONS.

That a man left his homestead with the intent not to return unless his financial condition should become such that he could not live elsewhere, and signified his intention to temporarily reside in another place if he could sell the homestead, did not show a fixed intention

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

never to return to the homestead, necessary to abandonment thereof.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 315-319; Dec. Dig. § 162.\*]

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Trespass to try title by George W. Armstrong against F. I. Neville and another, in which R. J. Rogers intervened, claiming title as a purchaser from the mentioned defendant and wife. There was judgment by default against defendants, and judgment for intervener as against plaintiff, who appeals. **Affirmed.**

Dies, Singleton & Dies, for appellant. Greers & Nail, for appellees.

FLY, J. This is a suit instituted by appellant against F. I. Neville and Ed J. Shell to try title to lot No. 1, block 20, in the town of Sour Lake, and one-half an acre of land off the James Blythe league in Hardin county. Neville filed a general demurrer, general denial, and pleaded not guilty. R. J. Rogers intervened, claiming title to the lot in Sour Lake by virtue of a purchase from F. I. Neville and wife, that he was a purchaser in good faith, and that the same was the homestead of his vendors and not subject to sale under execution, by which appellant claimed the land. Neville withdrew his answer, and Shell failed to answer, and judgment by default was rendered against them. On a trial by the court between appellant and the intervener, judgment was rendered for the latter.

The lot in question was bought by Neville, and a house built thereon for a home for himself and wife, and they moved into the house as soon as it was completed, in July, 1903, and for two years occupied the house as their home, when they rented the property and moved to the city of Houston, but did not acquire a homestead in that or in any other place. In April, 1903, appellant obtained a judgment against F. I. Neville, and on August 10, 1905, about one month after Neville and wife had removed to Houston, procured an execution and had the same levied on the property in question, and the same was sold on September 15, 1905, and he became the purchaser for \$55. On the following day Neville and wife executed a deed to the property to the intervener, R. J. Rogers.

Mrs. Neville testified as follows: "I am 26 years old and reside at 301 Twentieth street, Houston Heights, Tex. We do not own the place we are residing in. I was married September 16, 1902, to Frank I. Neville, and I still live with him and have not been separated from him at any time. We moved into the Sour Lake home about the middle of November, 1903, and lived there with my husband, F. I. Neville, until the latter part of July, 1905. We claimed the prop-

erty in controversy in this suit, and which we sold to Mr. R. J. Rogers, as our homestead. We claimed it as our homestead until we sold it. It was our intention to go back to it even after we came over here as soon as Mr. Neville's business interests permitted it. He is an oil man and was working at Humble, and I came to Houston from Sour Lake to be near him. I did join in the deed conveying said property to R. J. Rogers, and I did claim said property as my homestead up to the time I executed said deed. We did intend to go back to Sour Lake as soon as my husband's business interests could be so arranged that we could go back. My parents were also living there at the time, and I had no other home in view but Sour Lake. We have not made our home in Sour Lake since we left—that is, we have never gone back there to live—but we claimed our home there until we sold our home there."

F. I. Neville swore as follows: "I am a married man, and at present reside temporarily in Houston, Harris county, Tex., and have not purchased any property in Houston. I am renting the property upon which I am living and have not owned any place in Houston, Tex. I have lived in the state of Texas about four years and six months. Since my residing in the state of Texas I have been engaged in the following occupations: Salesman, and distributing agent for oil well supplies and in drilling oil wells and being connected with the general production of oil. It is a fact that I have recently been selling and trying to sell all of my property in Texas, with the view of going to Canada to investigate general prospects there. To the best of my knowledge and belief I do not at the present own any property which I could rightfully claim to own. I left Sour Lake, Tex., three months ago and came direct to Houston, Tex. Upon leaving Sour Lake I rented my place, but have since sold it. I did not intend to return to Sour Lake unless my financial condition should be reduced to such a point that I could not live elsewhere, thereby obliging me to return to Sour Lake. Shortly after leaving Sour Lake, I did temporarily make my home in Houston, and I did declare that I would not return to Sour Lake again unless my financial condition should compel me to, as stated in the first part of my answer to this interrogatory. If the oil field at Sour Lake should develop sufficiently to justify, I would again return to Sour Lake and make my home there. I have recently and frequently declared that I was selling out all my personal property in Texas, preparatory to going temporarily to Canada. I did a short time ago, during the summer of 1905, tell D. F. Singleton on the street of Beaumont, Tex., that I had sold all of my property in Texas, except my place in Sour Lake, and that as soon as I could sell

that property I would go to Canada temporarily and proceed to develop some land for oil, which I had leased in Canada. I made the same statement to L. A. Carlton upon the same day in the city of Beaumont, Tex. At about the time I moved from Sour Lake to Houston, in a conversation held in Houston with Geo. W. Armstrong, I told the said Geo. W. Armstrong that at that time I had a deal pending for the purchase of a home in Houston, and was moving to it, that I am now renting said place, and that I hold an option of purchase on said property, so that I may at any time I so desire purchase the property. I also told said Geo. W. Armstrong that I did not intend to return to Sour Lake except upon conditions as expressed in my answer heretofore stated."

It clearly appears from the statement of the case that the only question presented is whether the facts show an abandonment of the homestead at the time of the sale under execution on September 5, 1905. To constitute an "abandonment" of the homestead, it must affirmatively appear that there was not only a removal from the home, but a removal coupled with an intention never to return. No length of time of absence from a homestead will constitute an abandonment, although an absence may be continued for so long and under such circumstances as to authorize the conclusion that no intention to return and occupy the homestead existed. In this case length of time can have no influence in tending to show abandonment, because the property was levied on about a month after the owners had left it. Neville and wife did not acquire another homestead, and the abandonment must arise, if at all, from the removal and the declarations of the husband that he did not intend to return to his home unless compelled to do so by his financial condition. A desire to sell the homestead, under the circumstances of this case, did not evince an intention to abandon it, if it could not be sold. As said by the Supreme Court in *Cline v. Upton*, 56 Tex. 319: "Abandonment is a question of fact to be determined like any other fact, and, considering the beneficent purpose of the exemption, ought never to be found to exist unless the removal and accompanying facts clearly show that the party, in removing, never intended to return to the homestead and use it as a home." To establish such fixed intention not to return "it must be undeniably clear and beyond almost the shadow, at least, of all reasonable ground of dispute, that there has been a total abandonment with an intention not to return and claim the exemption." *Gouhenant v. Cockrell*, 20 Tex. 98.

In this case the husband swore that under certain conditions he intended to return to his home, but if those conditions did not arise he would never return. When it was proved that the property was the homestead

of Neville and wife, the burden rested upon appellant to clearly and conclusively prove a removal from the property with an intention not to return, and the mere declaration of the husband to the effect that he did not expect to return unless his financial condition demanded it does not seem as clear and satisfactory testimony as should be required to strip a home of its homestead character. *Scott v. Dwyer*, 60 Tex. 135; *Rollins v. O'Farrel*, 77 Tex. 90, 13 S. W. 1021. The evidence should establish a removal and a fixed intention never to return to the home, and such fixed intention is not shown by evidence of an intention to return should certain conditions arise. The owners of a homestead might intend to never return if they could obtain a certain price for their home, but, if not, to return, and such intention would protect the homestead. *Thomas v. Williams*, 50 Tex. 289; *Cox v. Harvey*, 1 Posey, Unrep. Cas. 268; *Sanders v. Sheran*, 66 Tex. 655, 2 S. W. 804. But if it be conceded that the evidence of the husband, standing alone, showed an intention to never return to the home in Sour Lake, yet the wife swore positively not only that it was her intention to return, but that "we," meaning herself and husband, "claimed it as our homestead until we sold it. It was our intention to go back to it, even after we came over here, as soon as Mr. Neville's business permitted it." This evidence, if contradictory of that of her husband, was taken as true by the trial judge, and it established the fact that there was no abandonment of the homestead. There is nothing in the removal from the homestead and its subsequent sale inconsistent with her statement that she and her husband intended to return to the home. The contract of sale was made by the husband on the same day that the execution sale took place, and perhaps was brought about by the latter. There is no evidence of an effort to sell the land before that time.

The judgment is affirmed.

#### PECOS & N. T. RY. CO. et al. v. EPPS & MATSLER.

(Court of Civil Appeals of Texas. March 11, 1909.)

#### 1. JUDGMENT (§ 217\*)—FINAL JUDGMENT—DISPOSITION OF ISSUES.

A judgment for plaintiff, whether nil dict or on trial, is not final, unless it disposes of the matters pleaded by defendant setting up a cross-action against codefendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 394; Dec. Dig. § 217.\*]

#### 2. JUDGMENT (§ 107\*)—FINAL JUDGMENT—DISPOSITION OF ISSUES.

The error of the court entering a default judgment for plaintiff without disposing of the issues raised by defendant setting up a cross-action against codefendant is not excused by

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the fact that the court's attention was not called to the pleadings.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 107.\*]

### 3. JUDGMENT (§ 126\*)—DEFAULT JUDGMENT—EVIDENCE.

Where, in an action against carriers for negligent handling and delaying a shipment of cattle the carriers pleaded the general denial, a default judgment for plaintiff could not be sustained on evidence of the amount of damages alone, but it was incumbent on plaintiff to prove liability as well.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 228-230; Dec. Dig. § 126.\*]

Appeal from Hale County Court; George L. Mayfield, Judge.

Action by Epps & Matsler against the Pecos & Northern Texas Railway Company and another. From a judgment refusing to set aside a default judgment for plaintiffs, defendants appeal. Reversed and remanded.

J. M. Chambers, Madden & Trulove, Ben H. Stone, Spoons, Thompson & Barwise, and Turner & Boyce, for appellants. Mathes & Williams, for appellees.

LEVY, J. The suit was brought in the justice court by the appellees against the two appellants jointly to recover damages for alleged negligent handling and delaying a shipment of cattle. In a trial of the case in the justice court without a jury, judgment was entered in favor of the appellees against the Ft. Worth & Denver City Railway Company for the amount sued for, and in favor of the other appellant against the appellees. The Ft. Worth & Denver City Railway Company appealed the case to the county court. At the April term of the county court following the appeal to that court, and upon the call of the case, the court rendered a judgment by default against both appellants in favor of the appellees for the amount sued for. The transcript in the justice court shows that each appellant in that court had pleaded a general denial and special defenses; the Ft. Worth & Denver City Railway Company pleading in cross-action against the Pecos & Northern Texas Railway Company for such damages as might be awarded against it in favor of the appellees. The day after default was entered each appellant appeared and filed a written motion in the county court asking that such default be set aside, and duly presented the same to the court, which was by the court overruled. The motion was verified by affidavit, and set forth the reasons why the attorneys of each appellant were not present, and the defense they had to the cause of action. The motion set up, among other things, that the case was set by agreement of all the parties for the Monday on which the default judgment was entered.

We think it sufficiently appears that the judgment by default in this case was illegal-

ly entered, and that the appellees are entitled as a matter of strict legal right to have the judgment vacated. The answers of the appellants were on file when the judgment by default was entered. The cross-pleading of the appellant the Ft. Worth & Denver City Railway Company stated a sufficient cause of action. The court did not undertake to dispose of the rights of this appellant under these pleadings. The defendant in the case who sets up a separate defense or cross-action is entitled to have same disposed of in the case by the judgment of the court the same as the plaintiff in the case would have. The failure to dispose of the pleading was error. Where the parties defendant appear and answer, no judgment rendered in such case is final, whether nil dicit or on trial, which does not determine the rights of the parties in the cause under the pleadings, and preclude further inquiry as to their rights in the premises. See *Railway Co. v. Stephenson* (Tex. Civ. App.) 26 S. W. 236. The court's attention was called to the pleadings being on file by the motion. And, even if it were not called to his attention before judgment, the error would not be relieved by that fact.

The judgment by a proper construction shows that the only evidence heard by the court was as to the amount of the plaintiffs' damages. The general denial of the appellants being on file, it was incumbent on the appellees to prove liability as well as the amount of damages. A simple judgment by default cannot legally be taken where answers of the defendant are on file. *Able v. Chandler*, 12 Tex. 88, 62 Am. Dec. 518; *Kinnard v. Herlock*, 20 Tex. 49; *Sevier v. Turner* (Tex. Civ. App.) 33 S. W. 294.

The case was ordered reversed and remanded.

### PECOS & N. T. RY. CO. et al. v. HARLAN. (Court of Civil Appeals of Texas. March 11, 1909.)

Appeal from Hale County Court; George L. Mayfield, Judge.

Action by E. Harlan against the Pecos & Northern Texas Railway Company and another. From a judgment refusing to set aside a default judgment for plaintiff, defendants appeal. Reversed and remanded.

Spoons, Thompson & Barwise, Turner & Boyce, J. M. Chambers, Madden & Trulove, and Ben H. Stone, for appellants. Mathes & Williams, for appellee.

HODGES, J. This is a suit for damages for injury to live stock in the course of shipment. The action was commenced in the justice court, where judgment was rendered in favor of appellee against both of the defendants in the suit. An appeal was perfected to the county court. When the case was there called for trial, a judgment by default was rendered in favor of the appellee. The circumstances under which such default was taken in this case are practically

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the same as those involved in the case of Pecos & Northern Texas Railway Company et al. v. Epps & Matsler (this day decided by us) 117 S. W. 1012. The reason there stated for reversing that judgment is equally applicable to this case.

The judgment of the county court is reversed, and the cause remanded.

**TEXAS & N. O. R. CO. v. BROUILLETTE.**  
(Court of Civil Appeals of Texas. Dec. 19, 1908. Rehearing Denied Jan. 28, 1909.)

**1. TRIAL (§ 252\*)—INSTRUCTIONS.**

Plaintiff, a child between two and three years of age, started to go around a passenger train standing on defendant's track, and when he had reached the track and was close behind the rear car was injured by the train backing down upon him. The depot was on the side to which he was going, and all the train crew and the passengers were upon that side, except the engineer, who was oiling the engine. Before backing the train the brakeman went to the rear of the train, but failed to see plaintiff, who was standing quite close to the car platform and between the rails. *Held*, that it was error for the court to charge that it was the duty of defendant's employees to use ordinary care to discover an infant of tender years, who might be near the track, and that if by the exercise of such care they could have seen the child approaching, but failed to discover it, to find for plaintiff; there being no evidence to show that any of the trainmen saw the child, or had reason to anticipate his approach.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

**2. RAILROADS (§ 369\*)—INJURY TO PERSONS ON TRACK—FAILURE TO KEEP LOOKOUT.**

It is the duty of employees of a railway company, in operating a moving train, to keep a lookout for the safety of persons upon or approaching a street or other public crossing, and a failure so to do, resulting in an injury, is actionable negligence; but a failure to discover a small child at the rear of a standing train, where there is no reason to anticipate the approach of the child, is not negligence, where the company has taken the usual precautions to ascertain whether any one is on the track before backing the train.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 369.\*]

Appeal from District Court, Orange County; W. B. Powell, Judge.

Action by Fred Otis Brouillette, by his next friend, against the Texas & New Orleans Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Baker, Botts, Parker & Garwood, Parker & Hefner, and Will E. Orgain, for appellant. Holland & Holland, for appellee.

McMEANS, J. Fred Otis Brouillette, 2 years and 7 months old, lived with his father in the City Hotel, situated on Green avenue, in the city of Orange, a short distance north of appellant's railroad and depot. On November 16, 1908, about noon, appellant's passenger train, headed west, came into Orange and stopped at the usual place; the engine being at a water tank just west of the

depot, where it took water. This occupied some four or five minutes. Usually while taking water the passengers alighted and embarked, and baggage was discharged and loaded; but sometimes, when there was a large amount of baggage to be loaded, the train, after taking water, would be backed until the baggage car would be opposite the baggage room, and the baggage would be loaded from that point. On the occasion in question the large amount of baggage to be loaded required that the train be backed, and in backing it the appellee was run over and injured.

When the train came into Orange, E. G. Brouillette, father of Fred Otis, was in the City Hotel, and immediately upon the arrival of the train started to the depot, which is situated south of the railway track, leaving Fred Otis, with an older brother, inside the hotel, sitting at the table. The train having stopped across and blocked Green avenue, and the cars of the train being vestibuled, so that he could not pass between them, Brouillette gained the depot by walking eastwardly by the side of the standing train and crossing the track at the end of the rear car. The first seen of Fred Otis, after his father left him in the hotel, was just as the train started to back, and he was then falling upon the track, having been struck and knocked down by the rear end of the rear car of the train. He was then between the rails, but nearest the north rail. The physical facts, as well as the testimony of all the witnesses, tend to prove that the child, at the very moment the train began to back, was standing on the track immediately behind the last car. The presumptions arising from the facts are that the child attempted to follow his father to the depot, taking the same route, and had just reached and gotten upon the track as the train began to back. He was not seen by any witness, or by any of the trainmen, when he left the hotel, nor while approaching the place where he was hurt.

The evidence further shows that the greater portion of the city of Orange and appellant's depot were south of the track, that passengers got on and off the train on that side, that all persons having business there when the trains came in transacted it on that side, and that, the train being entirely vestibuled, only the doors on the south side were opened, while those on the north always remained closed, and that the duties of the train operatives directed their attention and activities to the south side, except that of the engineer, who, while his station was on the right, or north, side of the engine, on this occasion occupied most of his time while the engine was taking water in oiling his engine. None of the train crew, except the conductor, knew until the train was ready to start that it would have to be backed for

\*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

baggage. The conductor motioned to the brakeman to go back and guard the rear of the train and see that the track was clear, and the great weight of the evidence conclusively shows, we think, that the brakeman, in obedience to the signal of the conductor, went to the rear of the train, looked to see if the track was clear, and, seeing no one upon it, swung himself on the platform steps and gave to the conductor the signal to back, which was repeated to the engineer, who, after looking back down the train to see if the track was clear on his side, and it appearing that it was, immediately put the train in back motion. At the time the brakeman looked at the track, we think it clear from the evidence that the child was standing on the track so close to the car as not to be discovered by a person of ordinary care standing at or upon the steps of the car platform, where the brakeman stood; but to have seen him it would have been necessary for the brakeman to go behind the car to look to see if any one might be there, or to stoop and look under the car.

Under this state of facts the court charged the jury, in effect, that it was the duty of the employes to use ordinary care to discover an infant of tender years who might be near the track, and that if, by the exercise of such care, they could have seen the child approaching from the hotel to the place where it was hurt, but failed to discover it, to find for plaintiff. The giving of the charge was error which requires a reversal of the judgment. It is undoubtedly the duty of employes of a railway company, in operating a moving train, to keep a lookout for the safety of persons upon or approaching a street or other public crossing, and a failure of duty in this regard, whereby an injury occurs, would be actionable negligence. *Railway v. Belew*, 26 Tex. Civ. App. 8, 62 S. W. 99. To justify a recovery in any case, however, the facts must show the existence of a duty upon the part of the railroad company to the person injured. If no such duty is shown, then there can be no negligence, and, being no negligence, there can be no liability upon the part of the railroad company. *Railway Co. v. Vallejo* (Tex.) 113 S. W. 4.

The evidence shows that from the time the child was left in the hotel until it reached the track the train was standing, and that none of the trainmen saw the child at any time, or knew of its approach toward the train. All were engrossed in their respective duties, and all were on the opposite side of the train, except the engineer, who was engaged in oiling his engine. It cannot be said that the trainmen owed to the appellee the duty of watching the intervening space between the track and the hotel while the train was standing still. Doubtless they could have seen the child, had they watched, because it must have passed in plain view of any one that might

have been looking from the train in that direction; but, as the train could not have injured any one until it was moved, the failure to look while it was standing still was not an omission of any duty appellant owed to the appellee, and therefore not actionable negligence. There was nothing in the situation that required them to anticipate that the child, or any person wanting in ordinary discretion, would approach the train, or that the approach of such a one at that time would be fraught with danger. Had any of the trainmen in fact seen the child as it passed down to the rear of the train, or had the train been in motion at the time the child approached in the space which gave an open view to the operatives, a different question would be presented. *Railway v. Nesbit*, 43 Tex. Civ. App. 630, 97 S. W. 826; *Railway v. Hammer*, 34 Tex. Civ. App. 354, 78 S. W. 708. The fact that the child might have been seen while it was making its way to the place where it was injured did not, under the facts of this case, create a duty upon the part of the employes to discover it; and the charge submitting as an issue of negligence the failure of the trainmen to discover it was affirmative error, and the assignment raising the point is sustained.

The other assignments need not be passed upon. For the error indicated, the judgment of the district court must be reversed, and the cause remanded.

Reversed and remanded.

W. L. MOODY & CO. et al. v. MARTIN.

(Court of Civil Appeals of Texas. March 16 1909.)

1. VENDOR AND PURCHASER (§ 229\*)—RIGHTS AND LIABILITY OF PARTIES—BONA FIDE PURCHASERS—NOTICE—CONSTRUCTIVE NOTICE.

One who has notice of such facts affecting title to real estate as would lead to a discovery of the truth upon proper inquiry, and who stops short in his inquiry of that point to which a prudent man, under the circumstances, would go, is not a purchaser in good faith.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 477; Dec. Dig. § 229.\*]

2. MORTGAGES (§ 154\*)—CONSTRUCTION—LIEN—BONA FIDE PURCHASER—NOTICE.

Defendants took a deed of trust with actual notice that a vendor's lien had been reserved in a prior deed to secure two purchase-money notes, one of which was canceled. The maker told defendants that the other note had been paid and lost, and afterwards told them that a transferee had it. The latter stated that it had been paid, but was not asked as to who had it, nor as to where it was, nor as to who had paid it. *Held*, that as proper inquiries would have elicited information that the note was held by plaintiff, who had paid value for it, the defendants were charged with knowledge of those facts, and were not bona fide purchasers.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 344-353; Dec. Dig. § 154.\*]

**2. MORTGAGES (§ 155\*)—CONSTRUCTION—LIEN—BONA FIDE PURCHASERS—PRE-EXISTING DEBT—CONSIDERATION.**

One who takes a deed of trust to secure a note given as additional security for a pre-existing debt and credits the discounted amount of the note on the debt is not a purchaser in good faith.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 355-359; Dec. Dig. § 155.\*]

Appeal from District Court, Nacogdoches County; James I. Perkins, Judge.

Action by Thomas Martin against W. L. Moody & Co. and others. From a judgment for plaintiff, the defendant W. L. Moody & Co. appeals. Affirmed.

King & Strong, for appellant. Ingraham, Middlebrook & Hodges, for appellee.

**FLY, J.** This is a suit instituted by appellee against W. M. Tinkle, Jesse Tinkle, Annie Tinkle, and the firm of W. L. Moody & Co. to recover on a note for \$500 executed by W. M. Tinkle, Jesse Tinkle, and Annie Tinkle to E. B. Fisher, and to foreclose a vendor's lien on a lot in the town of Garrison as against all the parties. Appellants claimed to have a deed of trust under which they bought the land, and that they occupied the position of innocent purchasers. The cause was tried by the court and judgment rendered in favor of appellee as prayed for in his petition.

On February 1, 1904, E. B. Fisher and wife conveyed to W. M. Tinkle and Annie Tinkle, wife of Jesse Tinkle, the lot in controversy, being lot 6 in block 15, town of Garrison, Nacogdoches county, the consideration being \$1,000 in cash and two notes for \$500 each, one due in 60 days and the other on January 1, 1905. A vendor's lien was expressly reserved in the deed to secure the payment of the promissory notes, and the deed was filed for record in Nacogdoches county on October 13, 1906. In May or June, 1906, appellee bought one of the notes from the holder, paying therefor a valuable consideration. The note was not recorded, but was fully described in the recorded deed. On July 8, 1905, W. M. Tinkle, Annie Tinkle, and J. C. Tinkle executed a deed of trust to appellants on lot 6, block 16, in town of Nacogdoches, which is presumably the same land on which the lien is claimed, although placed in a different block. The instrument was filed for record on July 11, 1905. On March 5, 1907, the land was sold by the trustee and bought by appellants. At the time appellants took the deed of trust they had actual notice that a vendor's lien had been reserved to secure two notes in the deed to the Tinkles. One of the notes, canceled, was exhibited to appellants, and they were told that the other was paid, but not that it had been canceled. Jesse Tinkle told appellants that the note had been paid, and he lost it, and afterwards told them that Barney

Campbell, of Garrison, had the note. No effort was made to obtain the note, nor to ascertain from Campbell whether the note had been transferred to another party or had been canceled. The debt which the deed of trust was given to secure was evidenced by a note executed on July 6, 1905, and the deed of trust was executed on July 11, 1905. After the deed of trust was given, appellants thus described what they did: "On July 16th we received from Tinkle & Co., Garrison, Tex., the deed of trust, duly recorded, securing the loan which we made them on July 6th, and we then discounted their note for \$1,000, which had already been given us, crediting their account with the net proceeds of said note, \$976.22." At the time that the note was executed by Tinkle & Co. to appellants, and the loan of \$1,000 made, the former were indebted to the latter in the sum of \$6,688.27, and then held 153 bales of cotton belonging to the Tinkles. Appellants knew of the deed from Fisher to Tinkle & Co., and knew that it retained a vendor's lien at the time they took the deed of trust. Tinkle & Co. knew the note had not been paid by them.

Appellants were not purchasers in good faith, without notice, of the property in controversy for a valuable consideration. They were fully cognizant of the existence of the lien for the purchase money at the time that they received the deed of trust. They knew that two notes had been executed and the contradictory statements of Jesse Tinkle as to what had become of one of the notes was sufficient to arouse the suspicion of any prudent man. No effort was made to locate the second note. Campbell, who it seems had held the note at one time, was not asked if the note had been canceled, but as to whether it had been paid, and he answered that the note had been paid. He was not asked as to who had the note, nor as to where it was, nor as to who had paid it. It would seem that these inquiries would naturally have suggested themselves to any one of ordinary prudence desiring to ascertain whether or not the remaining note was still a valid claim against the property. "It is very true that a purchaser of real estate will not be affected with notice of a defect in the title which he purchases by every idle rumor that may chance to be floating about to the effect that the title is not a good one, provided he uses proper care in investigating the title which he purchases. So if a purchaser has certain information of a particular defect in the title which he proposes to purchase, and pursues a proper inquiry into the truth of the information which he receives, and ascertains facts which would satisfy a prudent man that the defect to which his attention has been called does not in point of fact exist, he may still be a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



purchaser in good faith. But the case is different where a party who proposes to purchase real estate has notice of such facts as would lead to a discovery of the truth upon proper inquiry, and who stops short in his inquiry of that point to which a prudent man under the circumstances would go." *Bacon v. O'Connor*, 25 Tex. 213. Appellants knew that a promissory note for the purchase money had been in the hands of Campbell, and proper inquiries made of him would have elicited information that it was in the hands of appellee, and that he had paid value for it, and that it was a charge against the land. They are therefore charged with a knowledge of those facts. *Goldman v. Blum*, 58 Tex. 686.

The evidence indicates that no money was actually loaned by appellants, but that the note was given as additional security for a pre-existing debt, and that the discounted amount of it was credited on that debt. If that be true, appellants did not pay value for the land. *McKamey v. Thorp*, 61 Tex. 648; *Overstreet v. Manning*, 67 Tex. 657, 4 S. W. 248; *Morrison v. Adoue*, 76 Tex. 255, 13 S. W. 166.

The judgment is affirmed.

#### ADAMS v. GARY LUMBER CO.

(Court of Civil Appeals of Texas. March 11, 1909.)

##### 1. APPEAL AND ERROR (§ 725\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error to an overruling of an exception to the answer is insufficient where the record shows that it is directed only against the fourth paragraph and the answer is not subdivided into numerical paragraphs, and is not so arranged in the transcript as to enable the appellate court to determine with certainty the part objected to.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3003, 3004; Dec. Dig. § 725.\*]

##### 2. PLEADING (§ 90\*)—ANSWER—SUFFICIENCY.

An answer to a suit on notes by general demurrer, general denial, and specifically pleading that the notes were given for machinery sold by plaintiff under a warranty, that the contract was partly oral and partly written, that the machinery proved to be defective and unfit for the purpose for which it was bought, and was practically worthless, pleaded one defense, breach of warranty, and not separate defenses, and was good as against a general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 184-194; Dec. Dig. § 90.\*]

##### 3. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL—MATTER COVERED.

An instruction covered by the general charge is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.\*]

##### 4. SALES (§ 446\*)—COUNTERCLAIM FOR BREACH OF WARRANTY—INSTRUCTIONS.

An instruction that, if the machinery proved defective and defendants did not within 10 days after receiving the machinery notify plaintiff thereof as required by the contract, de-

fendants could not rely on the defects, was properly refused as leaving out of consideration defendants' rights if the defects were not discoverable until after expiration of the 10-day limit.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1315, 1316; Dec. Dig. § 446.\*]

##### 5. APPEAL AND ERROR (§ 730\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error complaining of a paragraph of the charge will not be considered where the paragraph contains more than one proposition of law, and submits more than one issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3013, 3014; Dec. Dig. § 730.\*]

##### 6. APPEAL AND ERROR (§ 232\*)—REVIEW—OBJECTIONS BELOW—SCOPE.

Only such objections to evidence as were made at the trial will be reviewed, and hence the admission of evidence partly irrelevant and partly admissible is not reversible error where the only objection made below was to the witness' competency.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 232; Trial, Cent. Dig. §§ 211-222.]

##### 7. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of irrelevant evidence is not reversible error, unless prejudice is shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154; Dec. Dig. § 1050.\*]

Appeal from District Court, Panola County; W. C. Buford, Judge.

Action by W. T. Adams against the Gary Lumber Company. From the judgment, plaintiff appeals. Affirmed.

H. N. Nelson, for appellant. Brooke & Woolworth, for appellee.

HODGES, J. The appellant, W. T. Adams, instituted this suit against the appellee in the district court of Panola county upon three promissory notes aggregating \$800, bearing interest at the rate of 8 per cent. per annum, and providing for 10 per cent. attorney's fees if placed in the hands of an attorney for collection. They also contained a provision to the effect that, if default was made in the payment of any one of the notes, the holder had the option of declaring all of them due and the right to proceed legally for their collection. The defendant answered by a general demurrer, general denial, and specially pleaded that the notes were given as a part of the consideration for the purchase of sawmill machinery which was sold to it by appellant under a contract of warranty; that the contract consisted partly of written and partly of oral agreements; that the mill and machinery, after being properly placed in position, proved to be defective and unfit for the purposes for which it had been purchased; and that the material out of which the different parts were made was of such inferior grade and quality as to render the entire plant practically worthless. The appellant by a supplemental

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

petition demurred generally and specially to the answer. Upon a trial before a jury a verdict was rendered in favor of the appellant for the sum of \$300 from which he appeals.

There was much testimony adduced upon the trial tending to show that the machinery was defective, and not as represented. Appellant offered in evidence a written contract signed by the parties, wherein it was agreed that, if anything was found short, broken, defective, or not as specified, notice thereof should be given in writing to the appellant within 10 days after the machinery was received that appellant might correct the same, or the same should not be allowed, and no claim for any material furnished or work done by the appellee should be allowed, as the appellant reserved the right to furnish such material or work. The contract also contained the following warranty: "The above-described machinery is warranted to be made or that it will be made of good material, and when correctly and properly set and adjusted that it will do as good work as machinery of same class and size."

The first assignment of error complains of the refusal of the court to sustain appellant's second special exception to the defendant's answer. A reference to that exception as contained in the record shows that it is directed only against the fourth paragraph of the appellee's answer, and appears to be an attack upon that portion of the pleading because of its legal insufficiency. This character of attack is further indicated by the proposition which follows the assignment. The answer of the appellee is not subdivided into numerical paragraphs, nor is it so arranged in the transcript as to enable us to determine with any degree of certainty just what portion of the answer is objected to. The assignment, therefore, is not sufficiently specific to authorize its consideration. If by that exception appellant intended to attack the legal sufficiency of the entire answer upon the grounds embodied in the proposition which followed, we think it was correctly overruled by the court. The appellee did not undertake to set up separate and distinct defenses in different portions of its answer, but its defense appears to consist of allegations so connected as to form one plea; and that was a failure of the machinery to measure up to the quality warranted. We think the defense as set forth in the answer is good as against a general demurrer, or any of the exceptions urged against it.

The refusal of the court to give the following special charge is made the basis of assignment No. 2: "Gentlemen of the jury, the contract introduced in evidence in this case provides that, if anything is found short, broken, or defective or not as specified, notice thereof shall be given in writing to W. T. Adams within 10 days after machinery is received by the defendant. Now,

if you believe that said machinery or any part thereof was defective, and that the defendants did not within 10 days after they received the machinery notify the plaintiff in writing as to such defects, then you are instructed to not find anything for defendants for such defects (if any), but find for the plaintiff the amount of the notes, principal interest, and attorney's fees, the amount sued for." The issue embodied in this special charge, or so much of it as was proper to be submitted under the facts of this case, was embraced in the general charge of the court, and, as we think, correctly presented. The charge requested was properly refused, not only on that account, but because it does not within itself state a correct proposition of law as applicable to the facts of this case. It, in effect, authorized a verdict in favor of the plaintiff even if there were defects in the machinery against which a warranty had been given, without regard to whether those defects had been discovered or were discoverable until after the expiration of the 10-day limitation expressed in that clause of the contract. This would have restricted the right of appellee to recover damages to only such defects as developed and were observed within 10 days after it received the machinery. The court properly refused the instruction.

The third assignment complains of the third paragraph of the general charge of the court. This portion of the charge contains more than one proposition of law, and presents more than one issue, and the assignment fails to indicate which part of the paragraph is objected to. The proposition following the assignment is merely an abstract statement of the law. We have examined the paragraph of the charge referred to, and, in the absence of a specific designation of the error complained of, we think the assignment should be overruled.

In the fourth assignment of error the appellant complains of the refusal of the court to sustain his objections to the testimony of the witnesses Ross and Patterson, and in overruling the sixth paragraph of his motion for a new trial. No separate bill of exceptions appears to have been reserved to the admission of this testimony, but the objections were made and exceptions noted in the statement of facts. The particular objection urged to this testimony was stated as follows: "I object to the witness testifying because he says he never saw the Gary mill, and don't know anything about the kind of material in it." A part of the information sought to be elicited from each of these witnesses was that the material out of which portions of the machinery of the Gary mill (the one in controversy) were made was of an inferior grade. It seems that each of them had seen and were familiar with other machinery made by the same company that sold the Gary mill, and were basing their

estimates of the quality of the material in the latter upon its similarity to that with which they were acquainted. One or probably both of the witnesses was permitted to examine a sample of the material taken from the Gary mill, and in that connection to state that it was very much like the material in other mills with which he was acquainted made by that company, and which had proved to be of inferior quality. A portion of the testimony of these witnesses was, we think, inadmissible because irrelevant; and, had the proper objections been made to the particular questions and answers in which the effort was made to bring out such irrelevant testimony, they should have been sustained. Other portions of their testimony pertained to other issues in the case, and were clearly not subject to any such objection. On appeal only such objections to the admission of evidence will be considered as were made at the time in the trial court. *Wheeler v. Tyler Ry. Co.*, 91 Tex. 356, 43 S. W. 876; *Compagnie Des Metaux Unital v. Victoria Mfg. Co.* (Tex. Civ. App.) 107 S. W. 651. The objections upon which this assignment is based, as presented to us, being addressed to the competency of the witnesses to testify, we cannot say that the court erred in overruling them. The mere fact that irrelevant testimony was wrongfully admitted will not in all cases require the reversal of a judgment. The appellant must be able to point out some prejudicial results likely to follow from such error. This is not done in the case here under consideration. There is no complaint that the verdict was without evidence to support it.

The judgment is affirmed.

#### WALLACE & REED v. REED BROS.

(Court of Civil Appeals of Texas. March 17, 1909.)

##### 1. PARTNERSHIP (§ 146\*)—REPRESENTATION OF FIRM BY PARTNER—RIGHT TO EXECUTE NOTE.

A note executed by a member of a trading partnership in its name is binding on the partnership; otherwise, if it is a nontrading partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 242-255; Dec. Dig. § 146.\*]

##### 2. PARTNERSHIP (§ 218\*) — ACTIONS — QUESTIONS FOR JURY.

Whether the purchase and sale of cotton and cotton seed was within the apparent scope of a partnership, so as to constitute it a trading partnership, a member of which would have authority to bind it by a note, held for the jury.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 218.\*]

##### 3. APPEAL AND ERROR (§ 601\*) — STATEMENT OF FACTS — ORIGINAL STATEMENT.

The original statement of facts, and not a copy, must be filed in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2652; Dec. Dig. § 601.\*]

##### 4. COSTS (§ 256\*)—ON APPEAL.

Where, had the law been complied with, requiring the original statement of facts and not a copy to be filed in the appellate court, about 78 per cent. of the transcript would have been omitted, the cost of that part of the transcript and the costs resulting from a motion by appellees to strike out the copy of the statement and of a motion by appellants tendering the original and asking to have it considered, and if necessary, for a writ of certiorari, will be adjudged against appellants, though there is a reversal in their favor.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 968-971; Dec. Dig. § 256.\*]

Appeal from District Court, Bell County; John M. Furman, Judge.

Action by Reed Brothers against Wallace & Reed. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

For opinion of Supreme Court answering certified questions, see 116 S. W. 35.

Durrett & Pendleton, for appellant. A. J. Harris and A. M. Monteth, for appellees.

KEY, J. Appellees brought this suit against appellant, Mrs. Eliza Wallace and one R. J. Reed, seeking to recover upon a promissory note executed by R. J. Reed in the name of the firm of Wallace & Reed. Mrs. Wallace filed an answer, in which she denied the execution of the note, denied the authority of R. J. Reed to borrow money and execute a note in the firm name of Wallace & Reed, denied that there was any partnership between herself and R. J. Reed for the purchase and sale of cotton and cotton seed for profit or otherwise, and alleged that the only partnership that existed between them was for the purpose of operating a cotton gin, and was a nontrading partnership. The undisputed testimony shows that the note sued on was given for borrowed money obtained by R. J. Reed and used by him while operating and at the gin in purchasing cotton and cotton seed. It was also shown that Mrs. Wallace did not sign the note, nor authorize R. J. Reed to borrow the money or sign the note, otherwise than as such authority might result from the fact that he was her partner. Like the case of *Reed Bros. v. Wallace & Reed*, heretofore decided by this court and reported in 101 S. W. 1198, the liability of Mrs. Wallace depends upon one question, and that is whether or not the purchase and sale of cotton and cotton seed was within the apparent scope of the partnership. In other words, whether or not the contract of partnership, and the manner in which the business was conducted, made it a trading partnership. If it did, R. J. Reed had the power to sign the firm name and bind the firm by the execution of the note, and, if it did not, he had no such authority. In the former case, the testimony being undisputed and all in favor of Reed Bros., we reversed and rendered judgment for them. At the trial of this case, and on account of

our decision in the former case, the trial judge instructed a verdict for Reed Bros., and that instruction is assigned as error.

The testimony in this case is different in some material respects from that contained in the former record. In that case the uncontroverted testimony showed that by the terms of the contract of partnership R. J. Reed was to conduct the business as it had been conducted by Mrs. Wallace's husband, who had recently died, and it was shown by like testimony that Mr. Wallace in operating the gin purchased cotton and cotton seed in substantially the same manner as was afterwards done by R. J. Reed while conducting the business for himself and Mrs. Wallace. It was also proved in the former case and by uncontroverted testimony that it was the custom of those operating gins in that vicinity, and at the time under consideration, to buy cotton and cotton seed. In this case there was much testimony to the same effect, but there was some tending to the contrary; and the testimony of Mrs. Wallace and one or two other witnesses tended to show that Mr. Wallace, while he operated the gin, did not purchase any cotton and took cotton seed only for the purpose of compensation for ginning cotton. Such being the condition of the evidence, and without intimating any opinion as to how the case should be decided, we hold that it should have been submitted to the jury, and that the trial court committed error in directing a verdict for the plaintiffs.

The transcript contains a copy of the statement of facts, which appellees have moved to strike out, because the existing law regulating the subject requires the original statement of facts to be filed in this court and prohibits the same being copied in the transcript. That motion has been sustained. *T. & P. Ry. Co. v. Stoker* (Tex.) 113 S. W. 3.

On the same day that the motion referred to was filed, appellant tendered to the clerk of this court the original statement of facts and filed a motion asking to have it considered as a part of the record in this cause, and, if necessary, to issue a writ of certiorari. That motion has also been sustained to the extent of permitting the original statement of facts to be filed here and considered by this court. In view of these facts, we do not think appellees should be required to pay all the costs of this appeal. An appellant is responsible for the condition of a transcript prepared for him and by him filed in the appellate court; and in this case, if the law had been complied with, about 78 per cent. of the transcript would have been omitted, and neither the motion to strike out nor the motion for certiorari would have been filed in this court. Hence the costs resulting from filing the two motions referred to and 78 per cent. of the cost of the transcript will be adjudged against appellant. All the other

costs of the appeal will be adjudged against appellees.

For the errors pointed out, the judgment will be reversed and the cause remanded.

# **WALKER v. INTERNATIONAL & G. N. RY. CO.**

(Court of Civil Appeals of Texas. March 18, 1906.)

## **1. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—BRIEF STATEMENTS ACCOMPANYING PROPOSITIONS.**

Under Court of Civil Appeals Rule 31 (67 S. W. xvi), requiring each proposition to be accompanied by a brief statement of such part of the proceedings as is necessary to explain and support the proposition, an assignment that the verdict is not supported by the evidence will not be considered where the only statement consisted of references to the pages of the stenographer's transcript containing the testimony of several of the witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

## **2. CARRIERS (§ 320\*)—INJURIES TO PASSENGER—ACTS OF FELLOW PASSENGERS—JURY QUESTION.**

In a passenger's action for damages for permitting another passenger to insult and abuse plaintiff and his wife, whether defendant's employes were negligent in permitting the person who insulted plaintiff to enter the negro coach, and whether the brakeman was negligent in not forcibly removing him upon hearing the insulting words, *held for the jury*.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1126; Dec. Dig. § 320.\*]

## **3. CARRIERS (§ 282\*)—INJURIES TO PASSENGER—COLORED PERSONS—DUTY TO PROTECT.**

A passenger in the colored coach who had paid his fare was entitled to the same degree of protection from injury as other passengers, and the company's employes were bound to use a high degree of care to protect him from injury or insults.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1107; Dec. Dig. § 282.\*]

## **4. APPEAL AND ERROR (§ 730\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY—INSTRUCTIONS.**

An assignment of error in charging that if the jury believed "that plaintiff while a passenger, was insulted and abused by a white passenger in the compartment set aside for negro passengers, and that the white passenger was merely loitering in the colored compartment, and was not there with the knowledge of the company's employes," without stating the conclusion predicated on the facts recited, was too incomplete for consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3013-3015; Dec. Dig. § 730.\*]

## **5. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—STATEMENTS—NECESSITY.**

An assignment of error not supported by a sufficient statement will not be sustained on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

## **6. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—STATEMENTS—RULINGS AS TO INSTRUCTIONS.**

Under Court of Civil Appeals Rule 31 (67 S. W. xvi), requiring each proposition to be accompanied by a brief statement of such part

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the proceedings as is necessary to explain and support the proposition, an assignment of error on the refusal of an instruction which merely referred to the pages of the record containing the charge and the testimony of several of plaintiff's witnesses would not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

**7. TRIAL (§ 260\*)—INSTRUCTIONS—REQUEST.**

Requested instructions were properly refused where they were contained in those given, so far as they were applicable to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.\*]

Appeal from District Court, Harris County; Lewis Fisher, Judge.

Action by C. J. Walker against the International & Great Northern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. R. Hill, for appellant. John M. King and Wilson & Dabney, for appellee.

**PLEASANTS, C. J.** This suit was brought by appellant against the appellee to recover damages for mental anguish caused himself and wife by the alleged negligence of the defendant in permitting a passenger with them on one of defendant's trains from Laredo to San Antonio to unlawfully enter the coach in which they were riding, and to insult, abuse, and threaten plaintiff and his wife. Damages are claimed in the sum of \$1,975. In addition to general and special exceptions and general denial, the defendant's answer contains the following special pleas:

"And for further alternative plea defendant says, if any threats were made or discourtesy or abuse shown by any passenger to plaintiff or his wife, that same was the act of said passenger for which defendant is no wise liable, and was provoked, caused, and brought on (if any such state of facts existed) by plaintiff's wife in the manner in which she acted with the consent and acquiescence of her husband in raising an issue and controversy with said passenger, and that her action under all the circumstances was negligence, which both caused and contributed to cause any interference with her or her husband.

"Further answering in the alternative, defendant says, if any passenger threatened or abused plaintiff and wife, that defendant had no reason to anticipate that any passenger would do so, nor could defendant prevent such conduct, which, if done, was the act of said passenger, and not of this defendant, and defendant did all it could do to protect said plaintiff and wife.

"For further answer in the alternative defendant says, if any passenger abused or insulted plaintiff or his wife, defendant says that no white passenger was assigned or permitted to occupy the negro coach by defendant, and that, if any white passenger went into the negro coach or compartment, it was merely some person who loitered in going

through said coach, which fact was not known to the conductor in charge of the train who was the only person who had authority either in law or in fact to remove said passengers, and that, if said white passenger either abused or threatened plaintiff or wife, it was the individual act of said passenger, and was caused and brought about by the act of plaintiff's wife in herself, with the acquiescence and consent of her husband, raising a controversy with such passenger about a matter which did not concern her, which controversy was over in a few minutes, before the same could be prevented by defendant."

The trial in the court below with a jury resulted in a verdict and judgment in favor of defendant.

The evidence shows that on the 22d day of February, 1907, plaintiff and his wife were passengers on one of defendant's trains going from the city of Laredo to the city of San Antonio. They are negroes, and were traveling in the car provided by the defendant for such passengers. Shortly after the train left Laredo, a white man who was also a passenger on said train entered the coach in which plaintiff and his wife were riding, and, stopping in the aisle, began a conversation with another colored woman, who was riding in said coach, in the course of which he used insulting language to her. Plaintiff's wife, evidently observing the discomfort of the woman with whom the man was talking, called to her, and asked if "that man was insulting her," whereupon the man turned his attention to plaintiff's wife, and used indecent and insulting language to her, and also threatened plaintiff with violence if he attempted to resent the insult to his wife. This man was not assigned to this car by any of defendant's employes, and it is not shown that any of said employes knew that he was in the car until the disturbance began. A brakeman on the train came into the car on his way to the white coach just about the time the insulting language was addressed to plaintiff's wife, and was called upon by several of the passengers in the car to take the man out. In compliance with such request, he went to the man, put his hand on him, and told him he would have to go out. Not receiving ready obedience to his commands, the brakeman went in search of the conductor for the purpose of having him take the offender out of the car. Before reaching the conductor, he found a peace officer who was a passenger on the train, and who at the request of the brakeman went at once to the negro coach, and took the man out. Plaintiff and his wife were greatly humiliated and frightened by the insults and threats of this man. The man was not in the car more than five minutes, probably not so long, and did not take a seat therein. He was evidently under the influence of liquor.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

The first assignment of error assails the judgment on the ground that the verdict of the jury is not supported by the evidence, "in this: The undisputed evidence shows that appellant and his wife were passengers on appellee's train on or about the 22d day of February, 1907, and that Boomer Lawrence, a white passenger on said train, came into the colored compartment where appellant and his wife were riding, and in the presence and hearing of C. Y. Bledsoe, a brakeman on appellee's train, the said white passenger used vulgar, indecent, and profane language to appellant and his wife, and made threats against them. The brakeman heard the language and threats, and, after being appealed to by appellant's wife for protection, he tapped the white passenger on the shoulder, and said, 'Partner, you must get out of here.' With this request he made no further effort to remove or eject said white passenger from the colored compartment, but left him there cursing and abusing appellant and his wife while he (the brakeman) went in search of the conductor." The proposition of law advanced under this assignment is that, when the brakeman saw the white man in the colored coach and heard the language and threats used by him, it was the duty of said brakeman "then and there to have removed or ejected said white passenger from the colored compartment." The statement supporting this proposition consists only of references to the pages of the stenographer's transcript upon which the testimony of several of the witnesses who testified on the trial can be found, and contains no statement of any of the evidence. Under the rules prescribing the manner in which briefs should be prepared, the assignment cannot be sustained for want of a sufficient statement. Rule 31 (67 S. W. xvi); *Johnson v. Lyford*, 9 Tex. Civ. App. 85, 29 S. W. 57; *Colorado Canal Co. v. McFarland & Southwell* (Tex. Civ. App.) 109 S. W. 437; *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613. If, however, the statement was sufficient and the undisputed evidence established all the facts recited in the assignment, said assignment could not be sustained, because upon such facts it cannot be held as a matter of law that the employes of the defendant in charge of the train were guilty of negligence in allowing the white man to enter the negro car, or that the brakeman was guilty of negligence in not forcibly removing him therefrom immediately upon his misbehavior. These issues of negligence were submitted to the jury under instructions most favorable to appellant, and, giving the evidence the most liberal interpretation in favor of plaintiff's claim, it did no more than raise the issue of negligence. The plaintiff and his wife had paid their fare, and were entitled to the same degree of protection from injury or insult as any other passenger upon said train, and under the law it was the duty of defendant's employes in

charge of the train to use a high degree of care to protect them from injury of any kind, but it cannot be held as a matter of law that the brakeman was required to do more than he did to protect them. He could not have prevented the insult, and it does not appear that he could have sooner removed the offending party from the car, at least, not without incurring serious danger to himself or producing a disturbance more serious than that which had already occurred, and it cannot be said that his duty required him to act as contended by appellant, even if it be conceded for the sake of argument that a brakeman has under such circumstances the right to forcibly eject a passenger.

The second assignment is as follows: "The court erred in charging the jury in paragraph 3 of the general charge as follows: 'If you believe from the evidence that the plaintiff and his wife while passengers on defendant's train on or about the 22d day of February, 1907, were insulted and abused and threatened by a white passenger on said train, and in the compartment set aside for the accommodation of negro passengers, and if you further believe that said white passenger was merely loitering in said compartment set aside for negro passengers, and that he was not there with the acquiescence, consent, or knowledge of the defendant, its servants or employes,' etc. This assignment is manifestly insufficient to require our consideration. The charge complained of, as copied in the assignment, is so incomplete that it is impossible to say what instruction was given the jury predicated on the hypothetical facts recited in the charge, and the statement under the assignment does not enlighten us on this subject, but only contains a reference to the page of the stenographer's report on which the testimony of the plaintiff is to be found and to the pages of the record containing the charge of the court.

The third assignment of error is subject to the identical objection above made to the second, and for the same reasons cannot be sustained.

There is no sufficient statement under the fourth assignment and therefore it cannot be sustained.

The fifth, sixth, and seventh assignments complain of the refusal of the court to give special charges requested by the plaintiff set out in said assignments. None of these assignments are followed by a sufficient statement; the only statement submitted being references to the pages of the record on which the court's charge and the testimony of several of plaintiff's witnesses are to be found. It has been so often held that such statement is not sufficient under rule 31 that it is unnecessary to cite authority. If, however, the lack of a sufficient statement should be waived, we do not think the court erred in refusing the special instructions set out in the assignments. In so far as said instruc-

tions contain correct statements of law applicable to the facts in evidence, they are covered by the charge given by the court.

We are inclined to the opinion that the evidence failed to raise the issue of negligence on the part of appellee in the matters complained of in the petition, but, be this as it may, the case made by the pleadings was submitted to the jury under instructions favorable to appellant on the whole, and no sufficient ground for reversal is presented in the brief.

It follows that the judgment of the court below should be affirmed; and it has been so ordered.

**Affirmed.**

#### GORDON et al. v. RHODES & DANIEL.

(Court of Civil Appeals of Texas. June 11, 1908. On Rehearing, March 25, 1909.)

##### 1. FRAUD (§ 59\*)—MISREPRESENTATIONS OF VENDOR—MEASURE OF DAMAGES.

The measure of damages of a purchaser induced by the fraud of the vendor to purchase is the difference between the value of the land and the sum paid for it.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 62; Dec. Dig. § 59.\*]

##### 2. FRAUD (§ 27\*)—MISREPRESENTATIONS AS TO QUANTITY OF LAND SOLD IN GROSS.

A purchaser induced by fraud to purchase land in gross cannot, in an action for deceit, recover for a mere deficiency in the quantity of the land.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. § 27.\*]

##### 3. FRAUD (§ 60\*)—MISREPRESENTATIONS—ELEMENTS OF DAMAGES.

A purchaser induced by fraud to purchase land cannot recover for the loss sustained in consequence of the sale of his own land for less than its value to raise money to pay for the land purchased.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 65; Dec. Dig. § 60.\*]

##### 4. FRAUD (§ 47\*)—PLEADING.

A petition, in an action against real estate brokers for deceit inducing the purchase of land, which alleges that the brokers representing the vendor agreed to furnish to the purchaser an abstract, that by false representations they induced the purchaser to believe that an abstract had been furnished when it had not, that they falsely represented that they acted with the purchaser in negotiating for a joint purchase and falsely represented that the land was not subject to overflow and was worth \$20,000 and was a bargain at \$12,500, the sum agreed to be paid, when it was worth only \$7,000, states a cause of action for the value of the abstract and for the difference between the value of the land and the sum paid for it.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 42; Dec. Dig. § 47.\*]

##### 5. FRAUD (§ 37\*)—ACTION FOR DECEIT—VENUE.

Under Sayles' Ann. Civ. St. 1897, art. 1194, subd. 7, providing that a suit for fraud may be instituted in the county in which the fraud was committed or where defendant has his domicile, an action against real estate brokers for deceit inducing the purchase of real estate may be brought in the county where the false representations were made and the con-

tract for the purchase executed and consummated, though the brokers are domiciled in another county.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 33; Dec. Dig. § 37.\*]

##### 6. FRAUD (§ 60\*)—FRAUD OF VENDOR'S AGENT—LIABILITY—DAMAGES.

A broker employed by the owner to procure a purchaser of real estate was entitled to retain for his services the sum in excess of \$10,000 realized from a sale. The broker fraudulently induced a purchaser to purchase the land for \$12,500 and fraudulently induced the purchaser to sell his own land to the broker, who agreed to pay \$2,527 to the owner to apply on the price of the land purchased from the owner. *Held*, that the purchaser, electing to rescind the contract on the ground of fraud, could not recover the \$2,500 as an element of damages in an action of deceit against the broker.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 65; Dec. Dig. § 60.\*]

##### 7. LIMITATION OF ACTIONS (§ 37\*)—ACTION FOR DECEIT.

A purchaser was induced by fraudulent representations of the broker of the vendor to purchase land for \$12,500, \$5,000 of which was paid in cash and the balance in notes. The purchaser paid to the vendor \$2,500 in cash, and it was understood that \$2,527 should be paid by the broker to the owner on the purchaser's account. Payment was not made, and the purchaser did not discover the facts until four years and ten months had elapsed. *Held*, that the right of the purchaser to recover from the broker as for deceit was barred by the four-year statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 182; Dec. Dig. § 37.\*]

##### 8. LIMITATION OF ACTIONS (§ 100\*)—FRAUD—DISCOVERY OF FRAUD.

A purchaser sued the broker of the vendor for fraud inducing the purchase. The suit was commenced four years and ten months after the date of the alleged deceit. The fraud relied on consisted of misrepresentations as to the value of the land and as to the fact that the land was not subject to overflow. The purchaser showed that at the time the land was inspected it was dry with nothing to indicate that it overflowed and without indicating that the statements as to value were untrue. *Held*, that the purchaser's action was barred in four years by the four-year statute of limitations; the failure to discover the fraud not being excused.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 484-487, 490; Dec. Dig. § 100.\*]

Appeal from District Court, Red River County; Ben H. Denton, Judge.

Action by J. D. Gordon and others against J. J. Rhodes and another. From a judgment of dismissal, plaintiffs appeal. Reversed.

See 116 S. W. 40.

Lennox & Lennox, for appellants. McGrawdy & McMahon, for appellees.

WILLSON, C. J. The suit was commenced November 14, 1906, in the district court of Red River county, by appellants, J. D. Gordon, M. H. Gordon, and Z. V. Gordon, against appellees, J. J. Rhodes and M. E. Daniel. Exceptions to the petition on the ground that it appeared therefrom (1) that

the defendant should have been sued in Fannin and not in Red River county upon the causes of action, if any, thereby asserted, which did not appear from the face thereof to be barred by limitation, and (2) that the causes of action asserted were barred by the two-year statute of limitations, were sustained; and the plaintiffs declining to amend, the suit was dismissed. The appeal is from the judgment of dismissal.

The suit grew out of transactions had in January, 1902, between appellants and appellees and Hocker & Cheatham, resulting in the sale by appellants to appellees of 152.5 acres of land in Red River county, and the purchase by appellants of Hocker & Cheatham of 1,808 acres in Red River and Bowie counties. These transactions, and the circumstances accompanying them, as alleged, are set out at such length in the petition as to forbid the stating of them here with the same fullness. In this opinion only such of the allegations as we think a knowledge of is necessary to an understanding of the conclusions reached by us will be stated. Two causes of action were asserted by the allegations in the petition: One for damages for deceit charged to have been practiced by appellees on appellants, whereby they were induced to sell the 152.5 acres and to purchase the 1,808 acres of land; and the other, in effect, for a balance of the purchase money claimed to be due to them by appellees on the 152.5 acres. They will be discussed in the order in which we have mentioned them.

1. The damages claimed on account of the alleged deceit were: (1) As the difference between the value of the 1,808 acres and the sum appellants were induced to pay for same, \$4,005; (2) as the value of an abstract of the title to the 1,808 acres, which was to have been but was not furnished to appellants, \$40; (3) as the difference between the value of the 152.5 acres and the sum appellants were induced to sell same for, \$1,525; and (4) as the difference between the value of certain land in South Carolina, which appellants alleged they were compelled to sell, and the sum they sold same for, \$1,209.

From the allegations—which for the purposes of their appeal must be treated as true—in the petition, it appears: That Hocker & Cheatham, owning the 1,808 acres, and being anxious to sell same for \$10,000, arranged with appellees to represent them in effecting a sale of same, agreeing, if they effected a sale, that they might retain for their services in doing so any sum in excess of \$10,000 realized therefrom; that this agreement between appellees and Hocker & Cheatham, and the fact that the latter were willing to sell the land for \$10,000, it was understood between them, was to be kept secret from prospective buyers, for whom, either alone or jointly with themselves, it was understood between appellees and Hocker & Cheatham the former should pretend

to act in purchasing the land; that taking advantage of confidential relations, fully set out in the petition, existing between appellee Daniel, who carried on the negotiations, and appellants, appellees, by concealing the fact that they represented Hocker & Cheatham in the sale of the 1,808 acres, by pretending to act with and for appellants in negotiating for a joint purchase of same on their own and appellants' account, and by falsely representing that the land was not subject to overflow from Red river, except during extraordinary rises, when it was subject to overflow therefrom during ordinary rises, and by falsely representing that the land was worth \$20,000 and was a bargain at \$12,500, when it was worth only \$7,000, induced appellants, jointly with themselves, to enter into a contract with Hocker & Cheatham to purchase the land at the price of \$12,500, and by the same means, shortly thereafter, to wit, on January 21, 1902, induced appellants to assume appellees' part of said contract and to become the sole purchasers of said 1,808 acres. We think the allegations referred to stated a cause of action in favor of appellants against appellees for deceit, and entitled them, if that cause of action was not barred by operation of the statute of limitations, to recover in a proper forum the damages thereby proximately caused to them.

While in other jurisdictions the measure of the vendee's damages, where he has been induced by the fraud of the vendor to buy when otherwise he would not have bought, is the difference in the value between that which actually and that which was represented by the vendor to exist (4 Suth. Dam. § 1171), in this state the measure of the vendee's damages in such a case, it seems, is the difference between the value of the property and the sum paid by him for it. *George v. Hesse* (Tex.) 93 S. W. 107, 8 L. R. A. (N. S.) 804. The effect of the rule controlling here, we think, would be to deny to appellants a recovery on account merely of the deficiency in the quantity of the land, it having been purchased in gross and not by the acre, even if they were not deprived of a right to claim a recovery on account of the false representations alleged to have been made in this respect by reason of the fact that, as shown by the petition, they elected to consummate the purchase after they had learned that the quantity was less than it had been represented to be. It also would deny to them a recovery on account of their being compelled, as they allege they were, to sell the 152.5 acres and the South Carolina lands for less than same were worth, in order to raise means to pay for the 1,808 acres, even if it did not appear that those items of damages claimed were for consequences too remote to furnish a basis for a recovery. But we think the allegations, as against the exceptions urged to them, were sufficient to show a cause of action for the value of the



abstract. If, as alleged, appellees, representing the owners in the sale of the land, as they were, undertook to furnish an abstract, and if, representing appellants, as they pretended to be, they induced appellants by a false representation of the facts to believe that the abstract had been furnished as agreed upon, when it had not been and never thereafter was furnished, we think they should be held liable for its value.

Having determined that the allegations in the petition were sufficient to show that appellants had a cause of action against appellees for the value of the abstract and for the difference between the value of the 1,808 acres and the sum paid by them therefor, the next question is: Did it appear from the allegations in their petition that their cause of action was barred by operation of the statute of limitations? We cannot agree with appellees that the two-year statute of limitations was applicable to the case, but, instead, think the four-year statute was applicable. *Bass v. James*, 83 Tex. 110, 18 S. W. 336, supports appellees' contention in this respect, and the ruling there made, it seems, was approved as correct in *Machine Co. v. Hancock*, 4 Tex. Civ. App. 302, 23 S. W. 385; but as pointed out in *Blount v. Bleker*, 13 Tex. Civ. App. 227, 35 S. W. 864, the ruling in *Smith v. Fly*, 24 Tex. 350, 76 Am. Dec. 109, was followed in *Bass v. James*, evidently without reference to the change which in the meantime had been made in the law. *Sayles' Ann. Civ. St.* 1897, art. 3358; *Vodrie v. Tynan* (Tex. Civ. App.) 57 S. W. 681. In cases like this one the rule is that the cause of action will become and be barred if suit thereon is not brought within four years from the date it accrued, or, if the existence of the grounds for it, as the result of the fraud of the other party, was unknown to the injured party, then within four years from the time he discovered the existence thereof, or by the exercise of reasonable diligence might have discovered same. *Cooper v. Lee*, 75 Tex. 121, 12 S. W. 483. It appearing from allegations in the petition that appellants' purchase of the land was consummated January 21, 1902, and that this suit was not instituted until after 4 years and 10½ months from that date had elapsed, it must be held that appellants' cause of action for the damages in question was barred, unless a sufficient reason is shown by other allegations in the petition why the statute did not begin to operate against them when the cause of action accrued. Part of the allegations relied upon to show such a reason were as follows: "The plaintiffs further allege: That, still keeping up and actively carrying out their conspiracy of fraud and deceit, the defendants, after the close of the aforesaid transaction, entered into an agreement with and secured from the said Hocker & Cheatham a promise never to disclose the real facts in connection therewith, unless directly asked by the plaintiffs; this promise

being made as a concession to the said Daniel after the said vendors had refused to permit him to insert in said deed a \$5,000 cash recitation. That they thereby intended to continuously keep the facts concealed and hid from them and to prevent them, if possible, from being known, so that they could still retain their influence and control over them, and at the same time enjoy unmolested what they had thus obtained by their fraudulent means. That thereafter the same confidential relations between the plaintiffs and said Daniel continued as before. That they still occupied his premises and worked his lands. That at all times he acted as their legal and business adviser. That he took charge of their papers and acted for them in paying off and taking up the notes against said land as they fell due, and always advised that they be left with him for safe-keeping, which was done, and during all this time he still retained their utmost confidence as to his honesty and good judgment. That they did not know, and had no reason to suspect, that they had been deceived and imposed upon by the defendants. That the said Hocker & Cheatham faithfully kept their promise and never informed them, or any one else, until just before the institution of this suit, that they knew of no fact, and there was nothing in their possession to cause a suspicion in the mind of an ordinarily prudent person that the facts were other than as represented, unless it was the deed itself. That after its execution it was taken and filed for record by the said Daniel, or at his instance, and the plaintiffs, still not suspecting anything, deposited said deed, together with abstract, among their papers at the Planters' National Bank of Honey Grove, without ever reading or noticing anything to arouse suspicion, and that since that time they so remained in said bank, without any occasion for plaintiffs to examine or read them, until on or about October 19, 1906. \* \* \* That at the time said land was inspected and surveyed it was very dry, and there was nothing in and about said survey to indicate that it overflowed other than as represented by defendants, or that their statements as to value were untrue. That soon after the execution of said deed in 1902, the plaintiffs made permanent and valuable improvements upon said premises, by the way of fencing, to the amount of \$1,000, and that during the time said improvements were made it was still dry, and there were no visible means then, and so continued as long as plaintiffs were on the ground, to create a suspicion in their mind that they had been deceived as to the character of the overflow, and that the falsity of said representation could not be detected without the necessary weather conditions and the overflow of Red river. That an overflow of Red river did not come until in 1906. That such weather conditions as would develop and show the extreme

wet character of the land and the causes of the overflow did not come until during the spring and summer of 1906."

The facts alleged in the part of the petition quoted, we think, brought appellants within the rule which excuses a failure to institute a suit within the time after the cause of action accrues fixed by the statute, and we do not think it should be said from these allegations, or any others in the petition, that it appears as a matter of law that appellants in the exercise of reasonable diligence ought sooner than they did to have discovered the fraud which had been practiced upon them. *Cooper v. Lee*, 1 Tex. Civ. App. 9, 21 S. W. 1001. It presented a question, we think, for a jury, under proper instructions from the court, to determine. The petition on its face showed that both the defendants resided in Fannin county; but it was averred that the false representations alleged to have been made to induce, and which did induce, appellants to purchase the land, and, as well, the contract covering its purchase, were made in Red River county, and that the purchase was finally consummated there as the result of such representations. These allegations, we think, were sufficient to entitle appellants to maintain the suit in Red River county, in so far as it was for a fraud practiced upon them. *Sayles' Ann. Civ. St.* 1897, art. 1194, subd. 7; *Howe Grain & Mer. Co. v. Galt*, 32 Tex. Civ. App. 193, 73 S. W. 828; *Oil Co. v. Scott*, 28 Tex. Civ. App. 213, 67 S. W. 451.

2. As before stated, a recovery also was sought of a balance of \$2,527.33 alleged by appellants to be due to them on the purchase price of the 152.5 acres in Fannin county sold by them to appellees. The allegations in the petition necessary to be stated, in addition to those already stated, to a proper understanding of the ruling made, are: That appellants on January 8, 1902, as a part of the scheme devised by appellees to cheat and defraud them in the sale to them of the 1,808 acres, were fraudulently induced to sell and convey to appellees the 152.5 acres for the sum of \$6,862.50; that appellees were to pay the purchase price agreed upon by assuming and paying a debt of \$4,335.17 against the 152.5 acres, and by paying to Hocker & Cheatham on their (appellants') account, and as a part of the purchase price of the 1,808 acres, the sum of \$2,527.33 in cash; that they did not, as they undertook to do, pay said sum or any other sum to Hocker & Cheatham on appellants' account; and that said balance of \$2,527.33 of the purchase price of said 152.5 acres remained wholly unpaid. That these allegations and the force of appellants' contention may be better understood, it is proper to state that from the whole petition it appears: That Hocker & Cheatham were to pay to appellees for their services, in the event they effected a sale of the land, any sum in excess of \$10,000 realized from such

sale; that the sale as made by appellees to appellants was for \$12,500—a sum \$2,500 in excess of \$10,000—and that instead of paying to Hocker & Cheatham on appellants' account as a part of the purchase money of the 1,808 acres, as they had agreed with appellants to do, the \$2,527.33, appellees retained same as the sum due to them for their services by Hocker & Cheatham. Had appellees, as they had agreed to do, paid to Hocker & Cheatham the \$2,527.33 as a part of the purchase price of the land due to them from appellants, and had Hocker & Cheatham then handed back to appellees \$2,500 thereof as the sum due to them as the excess over \$10,000 for which the sale had been effected, and which therefore they were entitled to demand and receive of Hocker & Cheatham, appellants would have had no better and no other cause of action against appellees for same than they had for a recovery of any other part of the \$12,500 constituting the purchase price of the land. Appellants' contract was to pay \$12,500 for the land. That a portion of this sum to be paid by appellees, instead of being paid by them to Hocker & Cheatham, was retained in accordance with an understanding between appellees and Hocker & Cheatham, was not a matter which concerned appellants. Their obligation to Hocker & Cheatham for the \$2,500 had been satisfied by appellees in a way satisfactory to the former, and appellants had no right to complain of the way it was satisfied. They seek to recover the \$2,500 of appellees on the theory that they were to pay \$10,000 for the land, instead of \$12,500, but such a theory is not tenable. Their contract was to pay \$12,500. If, as the result of a fraud practiced upon them by appellees in their individual capacity or as the agents of Hocker & Cheatham, whereby they were induced to pay more for the land than it was worth, appellees alone, or jointly with Hocker & Cheatham, thereby became liable to them for the difference, the liability was for damages for the deceit and not for a debt. That the \$2,500, instead of being handed by appellees to Hocker & Cheatham, was retained by them with the latter's consent, we think did not affect the question. It was money which by the terms of appellants' contract belonged to Hocker & Cheatham, and appellants' only right with reference to it, they not having elected to rescind the contract, was to have it applied to the extinguishment of that much of their obligation to Hocker & Cheatham. It was so applied, and it became of no further importance, except so far as it entered into and formed a part of the purchase price paid by appellees for the land, to be taken into account in measuring the amount of their damages for the fraud alleged to have been practiced upon them.

As to the \$27.33 remaining of the \$2,527.33 which appellees undertook to pay, but did not pay, to Hocker & Cheatham on appel-

lants' account, we think same was recoverable by appellants as a debt due to them by appellees. But we also are of the opinion that the two-year statute of limitations was applicable to the cause of action therefor; and, further, we believe that the allegations in the petition do not show a sufficient reason why the suit was not brought until after the expiration of more than four years and ten months from the time the cause of action accrued. The petition alleges that appellants were to pay Hocker & Cheatham, as the purchase money of the 1,808 acres, \$5,000 in cash, and were to execute and deliver, and did execute and deliver, to them their promissory notes for sums aggregating \$7,500. The \$2,527.33 to have been paid by appellees to Hocker & Cheatham on appellants' account, it was understood, as alleged, was to constitute a part of the cash payment of \$5,000. Appellants alleged that they paid to Hocker & Cheatham in cash \$2,500, so, if appellees had paid to Hocker & Cheatham the \$2,527.33, the latter would have received as a cash payment on the land \$5,027.33, instead of \$5,000, and appellants would have been entitled to demand of them the excess of \$27.33, or a credit for same on their notes. If the allegations should be regarded as showing a sufficient reason why such a demand was not made at the time the sale was consummated, we think they are not sufficient to excuse appellants for failing to ascertain the truth about the matter during the period of more than two years and ten months in excess of the statutory bar, which elapsed between the time their cause of action accrued and the time their suit was instituted. They ought not, because of any facts alleged in their petition, to be heard to say that during said two years and ten months they were ignorant of the amount of the balance claimed against them as the purchase price of the land by the holders of their notes. If they knew the amount of the balance so claimed, they must have known whether they had been given credit in the transaction for the \$27.33 or not.

Being of the opinion, for reasons stated, that the court erred in sustaining the exceptions to the petition and dismissing the suit, the judgment of the trial court is reversed, and the cause is remanded for a trial on its merits.

#### On Rehearing.

With reference to the contention made by appellees that the causes of action alleged in appellants' petition appeared to be barred by the statute of limitations of two years, this court, in disposing of the appeal, held that, in so far as the recovery sought was for damages for the deceit alleged to have been practiced upon appellant, the statute of limitations of four years (Sayles' Ann. Civ. St. 1897, art. 3358) applied. Because the conclusion reached by us was in conflict with that reached by the courts in *Bass v. James*,

83 Tex. 110, 18 S. W. 336, and *Machine Co. v. Hancock*, 4 Tex. Civ. App. 302, 23 S. W. 385, pending the motion for a rehearing the question was certified to the Supreme Court. That court held that damage recoverable in such an action was a debt within the meaning of subdivision 4 of article 3354, Sayles' Ann. Civ. St. 1897, and therefore that the statute of limitations of two years should be applied in determining whether the action for the damages claimed was barred or not. *Gordon v. Rhodes & Daniel* (Tex.) 116 S. W. 40. On the assumption that appellants' action for the deceit, if the existence of the grounds for it, as the result of the fraud of the other party was unknown to him, might be maintained if commenced within four years from the time he discovered the existence thereof, or by reasonable diligence might have discovered the existence of same, this court further held that it should not be said as a matter of law that the facts alleged in the petition were not sufficient, if proven, to excuse appellant from discovering the alleged fraud sooner than he averred he did discover it. On more mature consideration of this feature of the case, we have reached the conclusion that the allegations were not sufficient to excuse appellant from failing sooner than he did to discover the truth as to the matters about which he alleged he had been deceived by appellees, and that in holding to the contrary in disposing of the appeal we erred. The suit was commenced about four years and ten months after the date of the alleged deceit—or two years and ten months after the bar of the statute held by the Supreme Court to have been applicable had become complete—in the absence of facts sufficient to postpone its operation. We think it should be said as a matter of law that the allegations of the petition were not sufficient to excuse appellant from failing within that time to have ascertained that the value of the land had been misrepresented to him. The exercise by appellant of proper diligence during that time ought to, and doubtless would, have enabled him to know that the land was worth less than it had been represented to him to be worth. The fact that weather conditions enabling him to know that the land was subject to overflow did not exist until 1905 did not furnish a sufficient excuse for his remaining so long in ignorance of its value. There is nothing in the allegations in the petition negating what doubtless was true, that, had appellants prosecuted any kind of inquiry for the purpose, they would have ascertained the value of the land, if not the truth as to its being subject to overflow. A failure during so long a time to ascertain a fact so easily ascertainable indicates an absence of such diligence on their part as would entitle them during all that time to have the operation of the statute postponed.

The motion for a rehearing is granted.

The order of this court heretofore made, reversing the judgment of the lower court, will be set aside, and the judgment of the lower court will be affirmed.

**JAMES v. FT. WORTH TELEGRAM CO.**  
(Court of Civil Appeals of Texas. March 18, 1909.)

**1. LIBEL AND SLANDER (§ 16\*)—WORDS ACTIONABLE—WORDS IMPUTING CRIME—STATUTORY LIBEL.**

Under Gen. Laws 1909, p. 30, defining a libel as a defamation expressed in printing or writing, or by signs, pictures, etc., tending to injure the reputation of one who is alive, and thereby expose him to public hatred, imputing to a person that he has killed a human being, under circumstances authorizing his arrest and detention by officers of the law, is libelous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 1-6; Dec. Dig. § 16.\*]

**2. LIBEL AND SLANDER (§ 21\*)—PERSON DEFAMED.**

Where a newspaper published an account of a homicide, and included as a part of the publication a picture of a person other than the one accused of the killing, referring to it as that of the person who did the killing by placing his name under it, the publication imputed the act to the person whose picture was published.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 103; Dec. Dig. § 21.\*]

**3. LIBEL AND SLANDER (§ 123\*)—ACTIONS—PEREMPTORY INSTRUCTIONS.**

In a libel action, where the evidence was undisputed that a publication, libelous per se as to plaintiff, was made by defendant, a verdict for plaintiff should have been directed.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 356; Dec. Dig. § 123.\*]

**4. LIBEL AND SLANDER (§ 114\*)—ACTIONS—DAMAGES.**

The law presuming injury from the publication of matter libelous per se, the libeled person is entitled to at least nominal damages from the publisher.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 352; Dec. Dig. § 114.\*]

**5. LIBEL AND SLANDER (§ 100\*)—LIBEL BY NEWSPAPER—DEFENSES—NOTICE OFFERING TO CORRECT MISTAKES—PLEADING AND PROOF.**

In a libel action against a newspaper, it was error to admit evidence of a notice, in the issue containing the libelous matter, that any erroneous reflection upon a person appearing in the newspaper would be gladly corrected upon receiving notice thereof, where not pleaded; such evidence, if competent at all, being admissible only on an issue as to exemplary damages when specially pleaded in mitigation of such damages, under McIlwaine's Ann. St. art. 3282b, allowing, as evidence for such purpose when specially pleaded, any public apology, correction, or retraction made and published.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 250; Dec. Dig. § 100.\*]

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

Libel action by Jesse James against the Ft. Worth Telegram Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded for a new trial.

From the record it appears that on August 23, 1907, one De Shayzos was killed at Arlington by one Daniel Herring. In connection with, and as a part of, its report of the homicide appellee published, in its issue for August 26, 1907, of the "Ft. Worth Telegram" newspaper, a picture of appellant, identifying the picture so published as that of said Daniel Herring by printing his name thereunder. Over the picture, in large type extending across the width of two columns of the newspaper, was printed the following: "'Self-Defense,' Says Wife of Man Held for Murder." In the next column, to the right of and even with the picture, was printed in large type headlines to the report as follows: "Kills Man With An Ax; Surrenders—Love Letters Figure in Strange Tragedy at Arlington—D. Herring in Jail—Confesses He Put Dr. B. C. De Shayzos to Death—Takes Wife Away—Man Held for Crime Brought to Ft. Worth from Dallas This Afternoon." Following the headlines was a detailed account of matters connected, or supposed by the reporter to be connected, with the homicide. On the ground that the publication was libelous appellant, then a minor about 20 years of age, by next friend brought an action for damages. On the trial the court instructed the jury as follows: "In this case I submit to you the following special issues: (1) You will find from the evidence, and state in your verdict, whether or not the defendant, by the publication of plaintiff's photograph in connection with the article set out in plaintiff's petition, intended to impute to the plaintiff the murder or killing of B. C. De Shayzos. (2) You will find from the testimony and state in your verdict, whether or not said publication, as a matter of fact, imputed to the plaintiff the murder or killing of the said De Shayzos. (3) If you answer either of the foregoing questions in the affirmative, then you will return a verdict for the plaintiff for such a sum of money as damages as you believe from the evidence plaintiff has sustained, and which you deem just and proper on account of said publication. If you answer both of said questions in the negative, then you will return a verdict for the defendant." The verdict of the jury was: "We, the jury, find for the defendant. We, the jury, find in the negative in questions Nos. 1 and 2." From a judgment in appellee's favor in accordance with the verdict, the appeal is prosecuted.

Buck, Cummings, Doyle & Bouldin, for appellant. Capps, Cantey, Hanger & Short, for appellee.

WILLSON, C. J. (after stating the facts as above). Appellant insists that the publication was libelous per se. We agree it was. Our statute defines a libel as a "def-

amation expressed in printing or writing, or by signs and pictures, or drawings, tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity or virtue or reputation of any one, or to publish the natural defects of any one, and thereby expose such person to public hatred, ridicule or financial injury." Gen. Laws 1909, p. 30; Walker v. San Antonio Light Pub. Co., 30 Tex. Civ. App. 165, 70 S. W. 557. There can be no doubt that imputing to a person that he has killed a human being under circumstances authorizing his arrest and detention by officers of the law tends to injure his reputation and to expose him to public hatred. Under definitions at common law not materially different from the one given by the statute, such a publication has always been held to be libelous. Newell on Slander and Libel, p. 129; 18 Am. & Eng. Enc. Law (2d Ed.) p. 892; Belo v. Fuller, 84 Tex. 450, 19 S. W. 617, 31 Am. St. Rep. 75. On the face of the publication here in question it necessarily must be said to be libelous as to appellant, if it should be held to have had reference to him. It is plain, we think, it should be construed as imputing the homicide to the man whose picture, forming a part of the publication, was identified by references to it as that of the man who did the killing. The evidence was uncontradicted that the picture was a reproduction of a photograph of appellant, and not a picture of the man guilty of the homicide. Therefore it is clear, we think, that the publication should be held to have imputed the killing to appellant.

In Farley v. Evening Chronicle Pub. Co., 113 Mo. App. 216, 87 S. W. 570, the plaintiff's picture had been published as part of a libelous charge against another man bearing the same name. The court said: "It is said in numerous cases that the plaintiff must prove the libel or slander was uttered of him. Baldwin v. Hildreth, 14 Gray (Mass.) 221. We think this fact was proved in the present case in the sense the rule means, namely, that the article referred to the plaintiff. It was not necessary to show he would have been referred to had the editor understood all the facts. The proposition is maintained generally that, though the publication of a libel was due to mistake, the publisher is answerable, and we see no reason why libeling a person on account of mistakenly identifying him with some one else should be an exception." In that case the publication of the plaintiff's picture as that of the man referred to in the libelous article was due to a mistake. In this case the publication of plaintiff's picture as the picture of the man guilty of the homicide was not due to a mistake. The reporter who prepared the account of the homicide and

secured the photograph to be reproduced as a part thereof knew it was a picture of appellant, and not of the person guilty of the homicide.

In Wandt v. Hearst's Chicago American, 129 Wis. 419, 109 N. W. 70, 6 L. R. A. (N. S.) 919, 116 Am. St. Rep. 959, 9 Am. & Eng. Ann. Cas. 864, following the headline "Suicide Girl Laid to Rest," in the publication, was the name "Evelyn Daly, Suicide," and following the name was a picture of the plaintiff, Wandt. The court said: "The insertion of the picture under the headline of the article is, of course, in effect a statement that it is a picture of the person referred to in the article. Hence the article and picture together constitute a libel as matter of law, unless the fact that the article states that the suicide's name was Evelyn Daly can be held to be an antidote to the otherwise libelous effect. This contention is strongly made by the appellant, and is in fact the only contention worthy of very serious consideration. It seems quite true, as urged by the appellant, that persons who knew the plaintiff well, and knew her residence and family, would probably not be misled, but would at once conclude that the picture was inserted by mistake; but there may well be a considerable number of persons, who only know the plaintiff by sight, or have merely a slight acquaintance, who would recognize the picture at once, and would conclude that the article in fact did refer to the plaintiff, concluding (if they knew the plaintiff's name at all) that such name was merely another alias. The complaint alleges that the plaintiff has been greatly damaged by the publication. There is ample room for the inference that she may well have been damaged in the estimation of the classes of people last mentioned. The fact that she may not have been damaged in the estimation of friends who knew her well would only affect the extent of injury and mitigate the damages." In De Sando v. New York Herald Co., 88 App. Div. 492, 85 N. Y. Supp. 111, the publication described an Italian bandit as a murderer, etc., and in connection with the article published a reproduction of a photograph of the plaintiff, underneath it printing the name of the bandit, which was not plaintiff's name. In holding the publication to be libelous the court said: "Stripped of extraneous statements and considerations, \* \* \* the subject may be narrowed down to the question whether the person responsible for the publication of a photograph in connection with an article which is libelous, and which refers specifically to the photograph which accompanies it, can escape liability for the wrongful act by placing underneath the picture a name different from that of the person of whom the picture is a likeness, and by stating in the article some facts which, standing alone, would tend to negative the

inference that the article was published of and concerning the plaintiff. We think it would be a reflection upon the law if it were powerless to afford some remedy for such grievous wrong." And see *Clary v. Press Pub. Co.*, 58 App. Div. 362, 68 N. Y. Supp. 1028; *Morrison v. Smith*, 83 App. Div. 206, 82 N. Y. Supp. 166; *Id.*, 177 N. Y. 306, 69 N. E. 725; *Houston Printing Co. v. Moulden*, 15 Tex. Civ. App. 574, 41 S. W. 385; *Davis v. Marxhausen*, 86 Mich. 281, 49 N. W. 50.

The imputation in the publication being per se libelous as to appellant, and the evidence being undisputed that the publication was made by appellee, the court should have instructed the jury to find for appellant. 13 Enc. Plead. & Prac. p. 106; *Houston Printing Co. v. Moulden*, 15 Tex. Civ. App. 574, 41 S. W. 387. Instead, by his charge the court instructed the jury to determine as an issue of fact whether the publication of appellant's photograph in connection with the account of the homicide was libelous or not as to him. That the failure of the court to properly instruct the jury was prejudicial to appellant's rights is proven by the verdict of the jury. It was in appellee's favor, whereas, as a matter of law, it should have been in appellant's favor for at least nominal damages. "The presumption of the law," said the court in *Belo v. Fuller*, 19 S. W. 618, 31 Am. St. Rep. 75, "is that the unauthorized publication of actionable words charging an infamous crime injures the character and reputation of the party against whom the libel is directed. \* \* \* Injuries resulting to his character and feelings need not be proved in order to permit a recovery. Such injuries are presumed."

In the issue of appellee's newspaper containing the libelous matter referred to was the following "notice to the public": "Any erroneous reflection upon the character, standing or reputation of any person, firm or corporation, which may appear in the columns of the Telegram, will be gladly corrected upon due notice of same being given at the office, Eighth and Throckmorton Streets, Fort Worth, Texas." Over appellant's objection, on the ground that it had not been pleaded as a defense or otherwise, the court admitted the notice as evidence on behalf of appellee. In so doing the court erred. If the notice in any event would be admissible as evidence, it would only be so on an issue as to exemplary damages, and when specially pleaded in mitigation of such damages. *McIlwaine's Ann. St. art. 3282b*.

The assignments of error so presented in appellant's brief as to be entitled to consideration, and not disposed of by what we have said, are without merit, and are overruled.

The judgment is reversed, and the cause is remanded for a new trial.

# STUBBS et al. v. MARSHALL et al†

(Court of Civil Appeals of Texas. Feb. 17, 1909. Additional Findings of Fact, March 24, 1909.)

## 1. APPEAL AND ERROR (§ 1053\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, after the introduction of evidence over objection, the parties offering it in the presence of the jury, asked the court to exclude it and direct the jury not to consider the same, whereupon the court said "All right," and where, on motion for new trial, each juror testified that he understood the court to have withdrawn the evidence, and that he did not consider it, any error in the admission of the evidence was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4180; Dec. Dig. § 1053.\*]

## 2. TRIAL (§ 85\*)—RECEPTION OF EVIDENCE—OBJECTIONS—EVIDENCE ADMISSIBLE IN PART.

On a single objection to evidence, some of which is admissible and some not, there is no error in admitting it all.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 223; Dec. Dig. § 85.\*]

## 3. WILLS (§ 165\*)—EVIDENCE—DECLARATIONS OF TESTATOR—UNDUE INFLUENCE.

Where there is independent evidence showing the exercise of undue influence over testator, his declarations before, at the time of, and after the execution of the will, bearing on the question of whether he was unduly influenced, are admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 417; Dec. Dig. § 165.\*]

## 4. APPEAL AND ERROR (§ 742\*)—ASSIGNMENT OF ERROR—QUESTIONS RAISED.

A proposition under an assignment of error complaining that an instruction stated to the jury that testator's declarations were competent to establish the influence and effect of the supposed undue influence does not raise the question that the charge is on the weight of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

## 5. APPEAL AND ERROR (§ 766\*) — BRIEFS — AMENDMENT.

Under Supreme Court Rule 38 (67 S. W. xvi), providing that a brief may be amended by a citation of additional authorities to the points made, which must be filed and notice given to adverse counsel one day before the case is called, and that no other amendment shall be allowed unless it can be done without injustice or unreasonable inconvenience to the adverse party, an amendment of a brief, incorporating an entirely new proposition, pointing out an error not theretofore relied on, offered on the eve of submission of the case, will not be permitted over objection of the adverse party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3101; Dec. Dig. § 766.\*]

## 6. APPEAL AND ERROR (§ 1005\*) — REVIEW — VERDICT — APPROVAL BY TRIAL COURT.

A verdict which there is evidence to support and approved by the trial judge will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3948; Dec. Dig. § 1005.\*]

Appeal from District Court, Blanco County; Clarence Martin, Judge.

Action by Alie Marshall and others against N. T. Stubbs, executor of the will of W. A.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

Kemp, deceased, and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

N. T. Stubbs and Cochran & Penn, for appellants. L. Koeniger and Will G. Barber, for appellees.

RICE, J. This is an appeal from a judgment in favor of appellees in a suit brought by them to contest the will of W. A. Kemp, deceased, and to set aside a judgment of the county court of Blanco county probating the same, on the ground of undue influence alleged to have been exercised over the testator by his wife, Nan A. Kemp, the sole legatee and beneficiary thereunder. This is the second appeal in this case (*Marshall v. Stubbs*, 106 S. W. 435), but as the first appeal involved only the correctness of a judgment with reference to questions of practice, upon which no question arises here, it will not be necessary to further consider the same.

The first error assigned, which is raised by the fourth and fifth assignments, is that the court erred in permitting W. B. Harmon, the father of the minor plaintiffs, who as their next friend brought this suit, and Vernie Harmon, one of the minor plaintiffs, to testify over defendants' objection to certain statements by and transactions he and his daughter had with the testator prior to, about the time of, and subsequent to the execution of the will in controversy, asserting by their propositions thereunder that parties at interest, as provided by article 2302 of the Revised Statutes of 1895, are in cases like the present forbidden to testify over objection to statements by and transactions had with the deceased. Premitting a discussion as to whether or not the plaintiffs in this case would fall within the inhibition of the statute, we do not believe that their contention, as shown by the record, can be sustained, because it appears from the recitations of the bill and the explanations thereof made by the court that during the progress of the trial counsel for appellees in open court, and in the presence of the jury, after the introduction of the testimony complained of, expressed a doubt as to its admissibility, and asked the court to exclude it and direct the jury not to consider said evidence, whereupon the court assented, and said, "All right." And, upon this question again being presented on motion for new trial, each of the jurors were called before the court, and testified that they understood the court to have withdrawn said testimony, and that they did not consider the same in arriving at their verdict. Even if it was error to have admitted it in the first instance, we think the action of the court, as shown by the record, rendered the same harmless. *Church v. Waggoner*, 78 Tex. 202, 14 S. W. 581; *Railway Co. v. Stoy*, 44 Tex. Civ. App. 448, 99 S. W. 137. It likewise appears from the record that much of what was testified to in this connection was legitimate evidence, and did not infringe upon the

rule invoked; and it has been often held that where a single objection is made to testimony, some of which is admissible and some not, there is no error in admitting it all, because the court is not required to segregate the legitimate evidence from such as is inadmissible. *Railway v. Frazier* (Tex. Civ. App.) 87 S. W. 400; *Jameson v. Dooley*, 98 Tex. 206, 82 S. W. 780; *Railway v. Gormley*, 91 Tex. 893, 43 S. W. 877, 66 Am. St. Rep. 894; *Railway v. Powell*, 38 Tex. Civ. App. 157, 86 S. W. 23. For these reasons both of said assignments are overruled.

As the sixth, seventh, and eighth assignments of error challenge the correctness of the ruling of the trial court in admitting certain evidence given by Rose and wife relative to certain conversations and occurrences had between testator and his wife, as well as certain statements made by testator, tending to show that the will was procured by undue influence exercised by Mrs. Nan A. Kemp over the testator, they will be considered together. The record discloses that W. A. Kemp, the testator, had been married three times; that Mrs. Marshall, one of the plaintiffs, was a daughter of the first marriage, and that the minor plaintiffs were children of a deceased daughter, a sister of Mrs. Marshall; that prior to his marriage to Nan A. Kemp he had made a will devising his property to Mrs. Marshall and her sister, Mrs. Harmon, mother of the minor plaintiffs, but that a short time after his marriage with the said Mrs. Kemp another will had been made in which the property was equally divided between his said two daughters and Mrs. Kemp, and it is shown by the bill of exceptions taken to the ruling of the court complained of under these assignments that the said witness Rose was permitted, over appellants' objection, to testify that, after Mrs. Harmon's death, he heard testator and Nan A. Kemp, his wife, talking about making a will, and saying things ought to be changed from what they were; that he said that the will that he had made (meaning the former will) ought to be the right one; that he had heard this talk more than once; that testator said he thought the will ought to be let stand like it was (meaning the will in which his two daughters were given equal portions with Mrs. Kemp); "that, when his wife would threaten to go back to Tennessee if he did not change his will (meaning the former one), he sometimes would say he would not do it and sometimes would say he would. With reference to whether after the will in controversy was made he ever talked to me about it as to being satisfied or dissatisfied with it, he said it did not suit him. That a few days before he died he stated that he was going to die." Witness tried to get him not to talk about it, but he said he would be better satisfied if he knew his children would get something of what he had left. Mrs. Rose, likewise over objection, was allowed to

testify to matters of like import. Appellees insist by counter propositions that, in cases where there is independent and substantive evidence raising the issue of undue influence, then the declarations of the testator before, at the time of, and after the execution of the will are admissible to aid the jury in determining whether the will was really the spontaneous expression of the testator's free will, or whether its execution was brought about by the influence which other evidence showed was brought to bear, and that such declarations, especially after the execution of a will, are properly admissible as rebutting the inference which may arise from the failure of the testator to change the will. The authorities cited by counsel for appellees seem to sustain his contention in this respect. Where a will is charged to have been procured by undue influence, the law seems to be settled that where there is independent evidence showing, or tending to show, the exercise of undue influence over and upon the mind of the testator at the time the will is executed, then it becomes competent, for the purpose of showing whether he was probably influenced, or what in fact was the status of his mind at the time, to show his declarations and statements relative to it in order to illustrate the question as to whether he was in fact influenced thereby. In the present case there was testimony sufficient to raise the issue that undue influence had been exercised over the mind of the testator in order to procure the execution of the will in question, outside and independent of any declaration made by him. This being true, it seems to us that it was competent to show his declarations, both before and after the execution of the will, bearing upon the question as to whether or not he was moved to execute it by reason of such influence.

In *Campbell v. Barrera* (Tex. Civ. App.) 32 S. W. 724, the declarations of the testatrix were held admissible for the purposes named. The same doctrine is also held in *Johnson v. Brown*, 51 Tex. 80; *Kennedy v. Upshaw*, 66 Tex. 454, 1 S. W. 308; *Patterson v. Lamb*, 21 Tex. Civ. App. 512, 52 S. W. 99. The contrary doctrine was not held in *Wetz v. Schneider* (Tex. Civ. App.) 96 S. W. 59, as contended for by appellants, because in that case there was no independent evidence showing the actual exercise of the undue influence, as in the present. As illustrative of the correctness of the rule followed by the trial court in the admission of this evidence, we quote from appellees' brief citations from the following cases: "I have done something I ought not to have done. I have made a will and did not make it as I wanted to. I know I did wrong, but I could not help it." *Dennis v. Weekes*, 51 Ga. 24. "I don't know anything about it. They got around me and confuddled me. It is to be done over again." *Stephenson v. Stephenson*, 62 Iowa, 165, 17 N. W. 456. In *Beaubien v. Clotte*, 12 Mich. 459, where the testator willed all to his wife, on

issue of undue influence it was held competent to show declarations "shortly before his death in which deceased expressed regret at having married, and stated that he was not master at home; that he was afraid of his wife, and was compelled to submit to her demands, or otherwise there would be trouble in the house." In *Shaller v. Bumstead*, 99 Mass. 126, 127, declarations subsequent to the execution of the will, showing dissatisfaction therewith, were held competent to rebut any inference arising from the nonrevocation thereof. In *Powers v. Powers* (Ky.) 78 S. W. 153, where undue influence was alleged as inducing the wife to disinherit her sons, the statement was by testator that he had to do it "to keep down hell at home." In *Roberts v. Trawick*, 17 Ala. 55, 52 Am. Dec. 164, it was held competent to show that two or three weeks before the will was executed witness found the wife in presence of the husband, crying, and the latter remarked: "All I can hear from some people is 'A will, a will,' but the laws of Alabama make a better will than I or anybody else can make." In *Parsons v. Parsons*, 66 Iowa, 754, 21 N. W. 570, 24 N. W. 564, testator's declaration, "If it was to do over again, I would make an equal division of my property," was held admissible. And in *Rambler v. Tryon*, 7 Serg. & R. (Pa.) 94, 10 Am. Dec. 444, it was held admissible to show that testator had said: "His wife and father plagued him to go to Lebanon, that they wanted him to give her all, or he would have no rest; that he did not want to go to Lebanon." Believing that this evidence was admissible, these assignments are overruled.

Appellants' ninth and tenth assignments of error urge that the court erred in that portion of its charge as follows: "There has been submitted to you evidence of the conduct and declarations of W. A. Kemp, deceased, before and after the will in controversy herein was executed, and I charge that such evidence was submitted to you solely for the purpose of throwing light upon his mind at the time and after said will was executed, if it does throw such light. Such evidence is not admissible to prove the actual fact of undue influence being exercised upon W. A. Kemp, deceased, in making said will, but competent to establish the influence and effect of external acts, if any are shown, upon the mind of W. A. Kemp, deceased, in making said will"—because, in effect, they contend that the only issue in the case was undue influence alleged to have been exercised by defendant upon W. A. Kemp in making the will in controversy, and that the mental capacity of said Kemp to make the same was not in question. Therefore his declarations before and after the execution of the will should not have been submitted to the jury for any purpose.

None of the propositions under this assignment complain of said charge as being upon the weight of evidence, but the fourth prop-



osition in appellants' brief complains of the charge because it tells the jury that the declarations of the testator are competent to establish the influence and effect of the supposed undue influence. This proposition does not raise the question that the charge is upon the weight of evidence, nor is it elsewhere raised by an appropriate proposition. However, counsel for appellants on the 19th of January, the day before the case was set down for submission, filed in this court an amendment to their brief, in which this additional proposition is urged under these assignments, to wit: "Proposition 6: The action of the court in the charge complained of in this assignment of error, in telling the jury that evidence of the conduct and declarations of W. A. Kemp, deceased, before and after the will in controversy herein was executed, while not admissible to prove the actual fact of undue influence being exercised upon W. A. Kemp, deceased, in making said will, were competent to establish the influence and effect of external acts upon the mind of said Kemp in making the will, was a charge upon the weight of evidence and an unwarranted interference by the court with the province of the jury in considering such evidence"—citing in support of their contention the case of *Hart v. Hart* (Tex. Civ. App.) 110 S. W. 91. The consent of the court was not obtained to the filing of this amendment to their brief; and while it is true that it recites that on the 15th day of January, 1909, they made known to counsel for appellees that the additional authority, to wit, *Hart v. Hart*, supra, would be cited and relied upon by them, yet it is not claimed in said amended brief or otherwise that any notice was given to counsel for appellees that an additional proposition would be filed and relied upon by them. The fact that the supplemental brief was filed and contained this additional proposition was called to the attention of counsel for appellees for the first time during the discussion of the case on the day of submission, whereupon he made a motion that the same be stricken out, and not considered, (1) because the same was filed without any leave of the court so to do; (2) because said additional brief sets up and urges a new and independent proposition under their ninth and tenth assignments of error, and for the first time urges that the charge of the court complained of is upon the weight of the evidence; (3) not having attacked said charge upon the ground that the same was upon the weight of evidence, appellants waived that ground of criticism thereof, and cannot afterwards retract said waiver over objection of appellees; (4) that proposition 6 in supplemental brief should not be considered, because the point therein raised was not fairly presented in proposition 4 of the original brief, the same being so general and indefinite as to constitute no basis therefor.

It seems that in *Hart v. Hart*, supra, a similar instruction to the one under consid-

eration was held as being upon the weight of evidence, but in that case a direct attack was properly made in the first instance in the brief upon the charge that it was upon the weight of evidence. The charge as given was not in our judgment fundamental error, and no objection that it was a charge upon the weight of evidence was ever made until in the amended brief, as above shown, and this was done upon the submission of the case, and over the objection of counsel for appellees. Supreme Court Rule 38 (67 S. W. xvi), with reference to the amendment of briefs, which also applies to this court, provides: "Such brief may be amended by a citation of additional authorities to the respective points or propositions made in it, which must be filed in the Supreme Court and notice of it given to the counsel for the opposite party, if in attendance, one day before the case is called. No other amendment to the brief shall be allowed by the court unless it is or can be done without injustice or unreasonable inconvenience being thereby imposed on the other party." We are inclined to believe that, under the rule cited and the circumstances shown in connection therewith, the amendment in question should not be allowed. It is true that the amendment suggests that counsel for appellees had notice of the fact that the authority cited in the brief would be relied upon, but had notice of no other amendment being desired; so that the amendment, incorporating into brief for appellants an entirely new and distinct proposition, pointing out an error not theretofore noticed nor relied upon, on the eve of submission, as was done in this case, ought not to be permitted over appellees' objection, because to do so would, in our judgment, work injustice and occasion unreasonable inconvenience to the opposite party, and it is inhibited by the rule quoted; and, as the error complained of is not fundamental, we think that these assignments should be overruled. We overrule the eleventh assignment of error because in our opinion the objection is hypercritical and without merit.

The remaining assignments urge the insufficiency of the evidence to support the verdict. While it is conflicting, still there is ample evidence in the record to support the verdict of the jury; and, in view of the fact that the trial judge has seen fit to sanction it, he having a better opportunity to pass upon this question than we, we are not disposed to disturb it.

Finding no error in the record that would justify a reversal of the judgment in this case, the same is affirmed.

#### On Motion for Additional Findings of Fact.

Since the original opinion was handed down, appellants have presented a motion requesting that we amend same by filing additional findings of fact in connection with our ruling on the questions involved in their ninth and tenth assignments of error so far as re-

lates to the filing of their amended brief herein, and in justice to them we have concluded to file the following additional findings, to wit:

(1) That, while the consent of the court was not obtained to the filing of the amendment to their brief by appellants, still it is true, as admitted by counsel for appellees in open court, that on the 15th of January, 1909, they notified him that the additional authority of *Hart v. Hart*, 110 S. W. 91, would be cited and relied upon by them in said amended brief.

(2) And that, while appellants at the hearing claimed the right to file their amended brief as a matter of right, they, in answer to appellees' motion to strike out their said amended brief, asked formal leave of the court to file the same, and this request, together with the motion to strike out, was submitted in connection with the submission of the main case, the court remarking at the time that they would reserve the right to pass upon all the questions so raised in a consideration of the main case.

(3) In connection with the question as to the filing of said amended brief, it is also proper to state that this case was first set down for submission on the 20th day of January, 1909, and that appellees did not file their briefs in said cause until that day.

With these additional findings, our former ruling upon this subject is adhered to.

#### WIMPLE et al. v. PATTERSON.

(Court of Civil Appeals of Texas. Jan. 28, 1909.  
On Rehearing, March 25, 1909.)

#### 1. PRINCIPAL AND AGENT (§ 156\*) — FALSE REPRESENTATIONS OF AGENT—LIABILITY OF PRINCIPAL.

A principal is liable for material and false representations of his agent if he authorized the agent to make them, or if they were made by the agent in the course of his employment, and whether the principal or the agent knew the representations to be false, or believed them to be true, for damages actually suffered, where the representations were intended to and did induce one to purchase property he would not otherwise have purchased.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 583-587; Dec. Dig. § 156.\*]

#### 2. PRINCIPAL AND AGENT (§ 156\*)—FRAUDULENT REPRESENTATIONS.

Where one is induced by fraudulent representations of a principal or his agent to purchase property he would not otherwise have purchased of the principal, the liability of the principal need not be rested on the tort, but may be referred to the contract; such representations operating as against the seller as a warranty.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 583-587; Dec. Dig. § 156.\*]

#### 3. PRINCIPAL AND AGENT (§ 184\*) — FALSE REPRESENTATIONS — LIABILITY OF AGENT.

An agent, inducing the sale of his principal's property by false representations, is not liable on the contract, but is liable in tort.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 701; Dec. Dig. § 184.\*]

#### 4. PRINCIPAL AND AGENT (§ 156\*) — FALSE REPRESENTATIONS — LIABILITY OF AGENT.

Where an agent, so acting within the scope of his employment as to bind his principal, honestly believes representations made by him to induce a purchaser to contract with his principal to be true, he is not liable either on the contract or as for a tort.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 587; Dec. Dig. § 156.\*]

#### 5. FRAUD (§ 65\*)—FRAUDULENT REPRESENTATIONS.

In an action by the purchaser of a machine for damages for fraudulent representations by the seller's agents, an instruction that if plaintiff, on inspecting the machine, could reasonably understand its condition, etc., defendants were not liable, was erroneous, since defendants were responsible only in so far as plaintiff's inability to understand the condition of the machine was due to their acts or omissions in disregard of their duty to him.

[Ed. Note.—For other cases, see *Fraud*, Dec. Dig. § 65.\*]

#### 6. FRAUD (§ 59\*)—FRAUDULENT REPRESENTATIONS—DAMAGES.

Where plaintiff bought an incumbered gin, giving in payment certain land, also incumbered, and his note, which he afterwards paid, his measure of damages, in an action against the seller of the gin and the latter's agents for false representations regarding the condition of the gin, was the difference between the market value of the gin incumbered as it was, and the land incumbered as it was, plus the amount of the note.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 60-64; Dec. Dig. § 59.\*]

#### 7. FRAUD (§ 59\*)—DAMAGES.

In an action by the buyer of a gin for fraudulent representations of the seller, as to its condition, plaintiff was not entitled to damages for expenses incurred and services performed by him in endeavoring to operate the gin after ascertaining that its condition in material respects had been misrepresented.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 60-64; Dec. Dig. § 59.\*]

#### 8. PRINCIPAL AND AGENT (§ 190\*)—LIABILITY OF AGENT—FALSE REPRESENTATIONS.

In an action by the buyer of a machine against the seller and his agents for fraudulent misrepresentations regarding the machine, it was error to refuse to permit one of defendant's agents to testify that he believed the representations to be true, when he made them; the intent with which they were made being material in determining the liability of the agents.

[Ed. Note.—For other cases, see *Principal and Agent*, Dec. Dig. § 190.\*]

#### On Rehearing.

#### 9. APPEAL AND ERROR (§ 1173\*)—DECISION—REVERSAL AS TO COPARTIES.

Where, in an action against several joint tort-feasors, there was no pleading by one of defendants claiming contribution as against his codefendants, and he asserted no right on appeal to relief against the judgment, it would be affirmed as to him, though reversed as to the other defendants.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1173.\*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by D. B. Patterson against C. S. Wimple and others. Judgment for plaintiff, and certain of defendants appeal. Reversed

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as to appellants, but affirmed as to the non-appelling defendant.

R. S. Phillipp and D. W. O'Dell, for appellants. Walker & Baker, for appellee.

**WILLSON, C. J.** The action was for damages. The petition alleged: That appellant Kirkham was the owner of certain gin property; that one Donahoe and appellants Wimple and Ewing, as partners, were real estate agents; and that they, as such partners, authorized by appellant Kirkham to do so, and acting for and with him, by false representations as to the condition, etc., of the property made to appellee, induced him to purchase same. The appeal is by Wimple, Ewing, and Kirkham from a judgment in favor of appellee against them and said Donahoe for the sum of \$700, and against the appellant Kirkham for the further sum of \$231.80.

The court instructed the jury to find for appellee if they believed from the evidence that any two or more of the appellants acting together, with a design to induce appellee to purchase the property, made the representations as to its condition complained of, that such representations so made were false, and that, relying upon the truthfulness thereof, appellee was induced to make the purchase and thereby was damaged, although they might further "believe from the evidence that said representations, if any, were made in good faith, and the party making them believed that they were true." It appears from the record that the representations in question were not made by Kirkham in person, but by the real estate brokers, as his agents, for the purpose of selling the property. Generally speaking, it may be said that for material and false representations made by his agent, as fully as for such representations made by himself in person, the principal is responsible, if he authorized the agent to make them, or if they were made by the agent in the course of his employment as such. When so made by the agent, such representations are to be treated as the representations of the principal, and whether the principal, if he made such representations, or his agent, if he made them, knew them to be false, or made them innocently, believing them to be true, is of no importance in determining the liability of the former for damages actually suffered, where the representations were intended to induce, and did induce, a buyer to purchase property he otherwise would not have purchased of the principal. In such a case, if the representations were fraudulently made, the liability of the principal need not be rested upon the tort, but may be referred to the contract, for, whether made innocently or deceitfully, such representations as against the seller operate as a warranty. *Loper v. Robinson*, 54 Tex. 510; *Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 374; 30 Am. & Eng. Ency. Law (2d Ed.) p.

136; 14 Am. & Eng. Ency. Law (2d Ed.) pp. 87, 156. They do not so operate as against the agent, when he avowedly acts, not for himself, but for one known by the purchaser to be his principal. The contract in such a case is not the contract of the agent. He does not, merely because he may have negotiated it, become liable as a party to it. He is not in the position of having warranted the truth of the representations made by him to induce, and which do induce to his hurt, the purchaser to contract, not with him, but with his principal. If, under the circumstances stated, the agent becomes liable to the purchaser for damages suffered by him, it is by force of other principles of law than those which measure and fix the rights of parties to a contract. His liability, under such circumstances, must be measured by the law of torts. For his fraudulent acts he is responsible to the buyer. He is not liable on the contract negotiated by him for his principal, but he is liable for his own fraud and deceit practiced on the purchaser to induce him to enter into the contract. If the fraud or deceit charged consists of false representations as to material facts made to the purchaser, to show a liability on the part of the agent it must be made to appear that he made such representations knowing them to be false, or, as stated by a writer in 20 Cyc. 24, that he made them "as a positive assertion calculated to convey the impression that he had actual knowledge of their truth, when in fact he was conscious that he had no such knowledge." It follows, from the principles stated, that when the agent, so acting within the scope of his employment as to bind his principal, honestly believes representations made by him to induce the purchaser to contract with his principal to be true, he is not liable either on the contract or as for a tort. It also follows that the portion quoted of the charge complained of, in so far as it authorized a recovery against appellants Wimple and Ewing, notwithstanding they may have made the representations set out in appellee's petition in good faith, believing them to be true, and as well other portions of said charge, in so far as the distinction we have pointed out was ignored, were erroneous.

The court further instructed the jury as follows: "If you believe from the evidence that the plaintiff inspected and examined the gin and machinery before he traded for it, and that when he did inspect and examine it he had at that time such knowledge of such property, together with what he there saw and knew as to its then condition, as that he could reasonably well understand its then condition, and he afterwards traded for the same upon his own knowledge and information so received, then in law he would be bound by said trade, and, if you so find, your verdict should be for the defendants; but, on the other hand, if you find from a preponderance of the evidence that the plain-

tiff, at the time he made an inspection of the gin property, did not have such knowledge of such property in its then condition and situation, and that he did not buy it on his own knowledge thus acquired by said inspection, then you will find against the defendant and in favor of the plaintiff on this issue." We think the instruction was erroneous. If appellee inspected the property and purchased it relying entirely upon his knowledge of it so acquired, the verdict should have been for appellants, unless, by some trick or artifice practiced upon him by appellants, he did not by such inspection ascertain material facts in regard to the property which otherwise he would have ascertained, or unless appellants concealed from him such facts under circumstances which made it their duty to disclose same. The fact that he could not "reasonably well understand" the condition of the property at the time he purchased it would not alone and of itself render appellants liable to him. Only so far as his inability to "reasonably well understand" the condition of the property may have been due to their acts or omissions in disregard of their duty to him could they be held responsible.

As the measure of his damages, in the event the jury found in favor of appellee, they were instructed to find such reasonable amount as they believed from the evidence "were incurred and expended by him in attempting to operate said gin," and also "the reasonable value of his services during said time; but he would not be entitled to recover any sum of money for the time expended by him or for expenses incurred in running or attempting to run said gin, incurred after he knew, or by the use of reasonable diligence could have known, that said gin could not be made to gin cotton. And if you find for the plaintiff, you will also find for him such sum of money as will show the difference, if any, between the reasonable market value of the gin property at the time of said trade and the value of his equity, if any, at said time in his said two places." Appellee owned a lot with a debt of \$775 against it, and a tract of land with a debt of \$1,220 against it. Appellant Kirkham owned the gin property with a debt of \$220 against it. The contention was that the representations complained of were made to induce appellee to exchange his two parcels of land for the gin property, assuming the payment of the debt against it, and executing his note to Kirkham for \$350; the latter assuming the payment of the indebtedness against the parcels of land he received in exchange for appellee's note and the gin property. It appeared from the testimony that one Phelps owned the \$220 note against the gin property, and acquired the ownership of the \$350 note executed by appellee as a part of the consideration for the exchange. It further appeared that appellee had conveyed the gin property to Phelps in payment of the two notes. The measure of the direct damages

suffered by appellee was the difference between the value of what he parted with and the value of what he received in the transaction. *George v. Hesse*, 100 Tex. 44, 93 S. W. 107, 8 L. R. A. (N. S.) 804, 123 Am. St. Rep. 772; *Sigafus v. Porter*, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113. What he parted with was the value of the two parcels of land less the incumbrances thereon and the \$350 note paid by him. What he received was the gin property less the \$220 incumbrance thereon. In this attitude of the case, we think appellants have no cause to complain of the charge in so far as it instructed the jury, if their verdict should be for appellee, to measure his direct damages by the difference between the market value of the gin property and the value of his equity in the two parcels of land. The charge in the respect referred to was more favorable to appellants than it should have been. The measure should have been the difference between the market value of the gin incumbered as it was, and the market value of the two parcels of land incumbered as they were, plus the sum of \$350 represented by appellee's note which he had paid; but in so far as the charge instructed the jury as to the measure for the consequential damages, if any, suffered by appellee, we think it was erroneous. The general rule is that, when a person is injured as a result of relying upon the false and fraudulent representations of another, he is entitled to recover only such consequential damages as can be said to have been reasonably contemplated at the time as likely to result to him from the wrong. *Wintz v. Morrison*, 17 Tex. 372, 67 Am. Dec. 658. We do not think appellee should be permitted to recover an account of expenses incurred and services performed by him in endeavoring to operate the gin after he had ascertained that its condition in material respects had been misrepresented to him. He might then have exercised his right to rescind the contract, and so have avoided such a loss. Electing to affirm it, after such election he should not, we think, be held to be entitled to charge against appellants such loss. We therefore think appellants' assignment of error complaining of this feature of the court's charge, and their eighth assignment of error, complaining of the refusal of the court to give the special charge requested, instructing the jury not to find for appellee anything on account of expenses and services performed by him in attempting to operate the gin after he had ascertained that its condition in material respects had been misrepresented to him, should be sustained.

On the ground that it was immaterial whether he believed them to be true or not, the court refused to permit appellant Ewing to testify that he believed to be true, at the time he made them, representations complained of made by him to appellee. In so ruling we think the court erred. *Boddy v. Henry*, 113 Iowa, 462, 83 N. W. 771, 53 L. R. A.

769. And we think the court's remarks in the presence of the jury giving as a reason for excluding the testimony that it was immaterial, and illustrating as set out in the bill of exceptions why it was immaterial, were improper. In determining the liability of the brokers, the intent with which the representations were made was material.

On the case as made by the record, we think the assignments of error remaining and not in effect disposed of by what we have said are without merit.

The judgment of the trial court is reversed, and the cause is remanded for a new trial.

#### On Rehearing.

Donahoe, one of the defendants in the court below, did not appeal from the judgment rendered against him and was not made a party to the appeal prosecuted by the other parties defendant against whom the judgment was rendered. In disposing of the appeal, we were inclined to the opinion that we should neither reverse nor affirm the judgment in so far as it was against Donahoe. *Sullivan v. Michael*, 39 Tex. Civ. App. 564, 87 S. W. 1061. In the motion for a rehearing, we are asked to affirm the judgment against him and, after further consideration, have reached the conclusion that we have power to do so, and that there is nothing in the record which suggests that it might be unjust to Donahoe to do so. In *Tynberg v. Cohen*, 76 Tex. 409, 13 S. W. 317, the action was against several defendants for damages for an alleged tort. The judgment was in favor of the plaintiffs against all the defendants except one named Wenar. It was in his favor. An appeal was prosecuted by the defendants against whom the judgment was rendered, but Wenar was not made a party to the appeal bond. The judgment was reversed. The new trial following the reversal resulted in a judgment against all the defendants. Wenar urged a motion in arrest of the judgment against him on the last trial, on the ground that he was discharged by the first judgment, a reversal of which, he insisted, did not vacate it as to him. In disposing of the contention made, on the second appeal of the case the Supreme Court said: "Notice of appeal from the former judgment was given, and of that Wenar was bound to take notice. An appeal bond was filed by the other defendants which may have been defective, because not made payable to him as well as the plaintiffs; but, if he desired to take advantage of this, he should have done so in proper time and manner. Notice of appeal given, and bond filed, clothed this court with jurisdiction over the entire judgment, and its reversal annulled it in toto. It stood after

reversal as though it had never been rendered." In *Railway Co. v. Enos*, 92 Tex. 580, 50 S. W. 928, a judgment, joint in form, was rendered against two defendants sued as tort-feasors. The Court of Civil Appeals reversed the judgment as to one of the defendants and affirmed it as to the other. On error to the Supreme Court, the point was made that the Court of Civil Appeals reversing as to one should have reversed as to the other defendant also. The Supreme Court overruled the contention, quoting as follows from *Hamilton v. Prescott*, 73 Tex. 563, 11 S. W. 548: "We think the conclusion to be deduced from these apparently conflicting cases is that this court, when it finds error in the proceedings of the lower court as to any party to the judgment and not as to another, and that a proper decision of the case as to one is not dependent upon the judgment as to the other, will reverse in part and affirm in part; but, where the rights of one party are dependent in any manner upon those of another, it will treat the judgment as an entirety, and, where a reversal is required as to one, it will reverse the judgment as a whole. \* \* \* That a judgment against two or more parties which is appealed from by one may be reversed as to the one and affirmed as to the others, or may be reversed as a whole, according to the manifest justice of the case, we think the cases cited sufficiently show." And added: "Under the rule thus stated, we think it is within the discretion of the Court of Civil Appeals in a proper case to affirm in part and reverse in part. *Miller v. Sullivan*, 89 Tex. 480, 35 S. W. 362; *Boone v. Hulsey*, 71 Tex. 176, 9 S. W. 531; *Giddings v. Baker*, 80 Tex. 308, 16 S. W. 33; *Schuster v. Bauman Jewelry Co.*, 79 Tex. 179, 15 S. W. 259, 23 Am. St. Rep. 327. Upon an examination of the whole record, we do not think plaintiff in error has shown an abuse of that discretion. The Court of Civil Appeals have simply severed the causes of action by affirming as to one and reversing as to the other of two joint tort-feasors who might have been sued separately. If, under the facts, plaintiff in error be entitled to contribution, as contended, against its former codefendant, it made no such claim in its pleadings, and the action of the Court of Civil Appeals will not preclude it from suing therefor."

In the case before us there was no pleading on the part of Donahoe claiming contribution as against his codefendants, and he is not asserting here any right to relief as against the judgment.

The motion for a rehearing will be overruled, but the judgment of this court will be so reformed as to affirm the judgment of the lower court as to Donahoe.

## LANG v. LIGHT et al.

(Court of Civil Appeals of Texas. March 17, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 444\*)—  
ACTIONS AGAINST—PERSONAL LIABILITY—  
PLEADING.

A pleading based on breach of L.'s covenant against incumbrances, alleging that P. qualified as executrix of L., and that property of L.'s estate came into her hands and still remains there which is subject in her hands to payment of the incumbrance, and not alleging that she was a devisee, states a cause against her merely as executrix, and not individually.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1817; Dec. Dig. § 444.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 437\*)—  
ACTIONS AGAINST—LIMITATIONS.

There is no limit of time on the right of creditor to bring suit against an independent executrix on a valid and existing debt of testator, except that the suit must be before she has fully administered and disposed of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 437.\*]

Error from District Court, Bexar County; J. L. Camp, Judge.

Action by D. W. Light and another against T. B. Jones, who caused Mrs. P. M. Lang to be made a party. Judgment was rendered against her, and she brings error. Reversed and rendered.

A. J. Clendenen, for plaintiff in error.  
Don A. Bliss, for defendants in error.

JAMES, C. J. D. W. and G. E. Light sued T. B. Jones to recover \$853.63 for breach of warranty of title growing out of back taxes on certain lands. Jones, by a special plea, caused Mrs. Lang to be made a party, asking judgment against her personally, or as independent executrix of the will of her husband, J. J. Lang, or in both capacities, by reason of substantially the following allegations: That J. J. Lang had warranted the title to a certain one of the tracts of land described in the petition to Jones, and covenanted that the tract was free from incumbrances. That Jones did not become aware of the fact that the tract was incumbered until a few weeks before bringing this action, when he learned that it was subject to a lien for the state and county taxes for the years 1885 to 1889, inclusive, and that suit had been brought by the state to enforce same and to foreclose said lien, the said incumbrance amounting, with interest, costs, and penalties, to \$659.32. The plea proceeds, and concludes as follows: "This defendant further shows that after the execution and delivery of said deed to this defendant, and prior to the 14th day of April, 1892, the said J. J. Lang departed this life testate, and his will was duly probated in the county court of Wise county, Tex., and the said Mrs. P. M. Lang, the surviving wife of the

said J. J. Lang, was duly appointed by said county court as the executrix of said will, and she duly qualified as such by making the oath and giving the bond required by law. This defendant further shows that a large amount of property of the value of, to wit, \$50,000, belonging to the estate of the said J. J. Lang, has come into the hands of the said Mrs. P. M. Lang, and that a large amount of said property of the value of, to wit, \$25,000, is still in the hands of the said Mrs. P. M. Lang, which said property is subject in her hands to the payment of said incumbrance. Wherefore this defendant prays that the said Mrs. P. M. Lang be duly cited herein both in her individual capacity and in her capacity as executrix of said will, and that, on final hearing, if the plaintiff herein should recover of this defendant the amount of said taxes on the said tract or any part of said taxes alleged to have been paid by him, together with any interest, penalties, and costs of said suit, then that this defendant have judgment over against the said Mrs. P. M. Lang in her individual capacity or in her capacity as such executrix as may be proper or in both capacities for any amount of such taxes, interest, penalties, and costs as to said tract that plaintiff may recover of this defendant. This defendant further prays for general relief, including his costs." The cause was tried by the court, and judgment was rendered for plaintiffs against Jones for \$763.75 and interest, and in favor of Jones against Mrs. Lang individually for \$404.75 and interest. The appeal is by Mrs. Lang.

The first assignment of error and proposition thereunder is that the pleading of Jones is insufficient to support the judgment, in that it alleges the receipt by a devisee of property of the testator sufficient to pay the debt sued for, but does not specifically describe any property received.

The second assignment is directed to the same pleading and is substantially the same, but states the proposition thus: "A personal judgment cannot be rendered in favor of a creditor of a deceased person against the heirs or devisees of the estate upon pleading and proof that property of the estate sufficient to pay all debts was received by such heir or devisee." It does not appear to be questioned that the plea was sufficient in its terms to have supported a judgment against Mrs. Lang in her capacity as executrix, and it could not well be otherwise contended. The judgment was against her personally. Does the plea state a case against her personally? The question involves a fundamental matter. We think it does not. There is not in the whole plea any fact stated showing her to have incurred a personal liability for the debts of the estate. It is only in the prayer that the subject of her personal respon-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sibility is mentioned, and the prayer, of course, has no basis except in the allegations in connection with which it is made. The plea alleges that she qualified as the executrix of Lang's will, that property of Lang's estate of the value of \$50,000 had come into her hands, of which there is still in her hands property of the value of \$25,000, which is subject in her hands to the payment of said incumbrance. There is no allegation that she was devisee, and no relief was contemplated upon that theory. These allegations go no further than to state a case against her as executrix. There is no case attempted to be stated upon the theory that the property was community; nor upon the theory that Mrs. Lang was devisee of the property; nor upon the theory that she, as executrix, had wrongfully converted or disposed of the property, for there were no such allegations. The case stated by the plea was, purely and simply, one seeking to charge her as executrix, and this was its entire scope. Regardless of what the evidence may have been, the pleading was not sufficient to support the personal judgment.

The third assignment is: "The court was in error in trying the case upon the assumption that the defendant Mrs. P. M. Lang would be liable to a judgment over against her in favor of T. B. Jones for such judgment as might be rendered against him in favor of the plaintiffs in the event that it should be shown by the evidence that she had received as the devisee of J. J. Lang, deceased, money and property of the value in excess of the sum paid out by her upon the debts of the decedent; whereas, in law the said T. B. Jones would have possessed only the right to enforce a lien against such property as might still remain in her hands which she had received as a devisee or legatee of said decedent." The theory of her liability as the devisee of Lang did not exist in the pleading, and it is therefore not necessary to deal with the case from that standpoint.

The fourth assignment is submitted as a proposition. It reads: "The court was without power or jurisdiction to require this defendant to render an account of the money, and property received by her from the estate of J. J. Lang, deceased, either as independent executrix or as devisee named in the will after the lapse of 16 years, and to allow or disallow such payments and credits as to the court might seem proper. The court possessed only the power upon proper pleading and proof that this defendant had in her hands at the date of trial property received as an heir, devisee, or legatee of the will of the deceased to foreclose a lien upon such property for the amount of the debt established against the deceased, and erred in the judgment rendered for the reasons stated." We know of no limit of time

upon the right of a creditor to bring suit against an independent executrix upon a valid and existing debt of the deceased, except that such a suit would not lie against her after she had fully administered and disposed of the estate. The evidence shows that she qualified as independent executrix in 1892. The will shows that she was sole devisee. She being the sole devisee, naturally there was no distribution, and the undisposed of property remained in her hands without any termination of her relation as executrix. Appellant states, as a fact in the case, that "at the date of the trial she had disposed of all of the property which came into her hands either as executrix or devisee, except 1,288 acres of land in Crockett county and 520 acres in Schleicher county, valued at about \$1 per acre." No question is raised concerning the validity of the debt or the amount adjudged.

Under these circumstances, the judgment of the district court should have been for Jones against Mrs. Lang in her capacity of independent executrix. The judgment of the district court will be reversed as between Jones and appellants, and such judgment rendered here as should have been rendered in the district court, appellant to recover the costs of the appeal.

#### ZENO et al. v. ADOUE†

(Court of Civil Appeals of Texas. March 17, 1909. Rehearing Denied March 31, 1909.)

#### 1. VENDOR AND PURCHASER (§ 276\*)—VENDOR'S LIEN—FORECLOSURE—DEFENSES—WAIVER.

Where the maker of notes secured by a vendor's lien conveyed the land to a third person under an agreement that the latter would pay the notes and reconvey the land to the maker on repayment, the third person on refusing to pay the notes had no substantial interest in the property, and was a mere trustee for the maker, and he could not, in a suit to foreclose the vendor's lien, urge the defenses of limitation and homestead rights waived by the maker.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 773; Dec. Dig. § 276.\*]

#### 2. LIMITATION OF ACTIONS (§ 175\*)—DEFENSES—WAIVER.

A maker of a note secured by vendor's lien may in a suit to foreclose the lien waive the defense of limitation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 662; Dec. Dig. § 175.\*]

#### 3. HOMESTEAD (§ 169\*)—WAIVER OF RIGHT.

A maker of a note secured by a lien may in a suit to foreclose the lien waive his homestead rights.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 335; Dec. Dig. § 169.\*]

#### 4. TRUSTS (§ 377\*)—COSTS.

A defendant who, though a mere trustee for his codefendants confessing judgment, unsuccessfully controverted plaintiff's right to recover, was liable for costs.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 618; Dec. Dig. § 377.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

Appeal from District Court, Robertson County; J. C. Scott, Judge.

Action by Lucie A. Adoue against Bat Zeno and others. From a judgment for plaintiff, defendant W. W. Holland, Jr., appeals. Affirmed.

W. W. Holland, Jr., in pro. per. Bailey, Woods & Morehead, for appellee.

KEY, J. Appellee brought this suit against Bat Zeno and his wife, Mandy Zeno, and W. W. Holland, Jr., seeking to recover upon four promissory notes and to foreclose a vendor's lien upon a tract of land. Bat Zeno was the maker of the notes, and no judgment was sought against the other defendants, except for a foreclosure of the lien and for costs. W. W. Holland, Jr., for himself and as attorney for his codefendants, filed an answer interposing certain defenses. Thereafter Bat Zeno and Mandy Zeno filed another answer signed by themselves individually, in which they repudiated the former answer filed in their behalf, and declared that they had not authorized Holland to file it for them. They also admitted in their answer last filed the material averments in the plaintiff's petition. The case was submitted to the trial court without a jury, and judgment rendered for the plaintiff against Bat Zeno for the debt, and against all of the defendants foreclosing the lien upon the land, and the defendant Holland only has appealed.

The trial judge filed findings of fact; those material to Holland's branch of the case being as follows:

"(7) I find that on the 30th day of October, 1907, Bat Zeno and Mandy Zeno executed and delivered to defendant W. W. Holland, Jr., an instrument of writing, duly acknowledged, purporting to be an absolute deed in fee to said land with general warranty for the recited consideration of \$1,000; that at the time of the execution of said instrument said Holland had full knowledge of the fact that the renewed notes sued upon had been theretofore executed by Bat Zeno and delivered to plaintiff's agent, and had full knowledge of the amount and nature of plaintiff's claim now sued upon, and that she was asserting a vendor's lien against said land.

"(8) I find that the real consideration for said purported deed from the Zenos to Holland was an agreement and understanding on the part of said Holland to pay off and satisfy the claim of plaintiff, evidenced by the renewal notes sued upon; that said Holland never paid said \$1,000 nor any part thereof as a consideration for said land; and that said Holland agreed with said Zenos before and at the time of the execution of said conveyance to reconvey said land to

said Bat Zeno upon the payment to him by the Zenos of the amount agreed to be paid by him in satisfaction of plaintiff's claim, with interest and a reasonable fee for his service.

"(9) I find that said Holland failed and refused to pay said renewed notes or any part thereof.

"(10) I find that Bat Zeno and Mandy Zeno are illiterate negroes, being unable to read and write and unfamiliar with business methods; that they signed by their mark an instrument, purporting to be an agreement between them and W. W. Holland, Jr., dated October 30, 1907; that they did not understand that said agreement authorized said Holland to plead for them the statute of limitation in an effort to defeat a recovery by plaintiff in this suit, and that they did not so authorize him; that they understood said agreement to mean, and expected, said W. W. Holland, Jr., to pay off and discharge the renewed notes sued upon, and hold the land under their said conveyance to him as security for such advancement.

"(11) I find that the answer of Bat Zeno and Mandy Zeno, signed by their marks, repudiating the plea of limitation filed for them by said W. W. Holland, Jr., was fully understood by them, and was their voluntary act and correctly stated their wishes in the matter."

These findings fully support the judgment of foreclosure against Holland. They show that his title to the land was held in trust for the Zenos, and upon an agreement by him to pay the notes sued on himself, while it may be that if they had not filed their last answer, and had permitted Holland to control their case, the Zenos might have urged the plea of limitation and homestead rights set up in their original answer, as to which, however, we make no ruling. But they had the right to take the case out of Holland's hands and to waive the defenses referred to, which they have done, and Holland, having no substantial interest in the property, and being merely a trustee for the Zenos, cannot urge those defenses. *Hawley v. Whitaker* (Tex. Civ. App.) 33 S. W. 688.

The third and last assignment complains because the court rendered judgment against Holland for costs; the contention being that, as he was merely a trustee for his codefendants, he should not have been held liable for the costs. The record indicates that Holland, notwithstanding the virtual confession of judgment by his codefendants, persisted in controverting the plaintiff's right to recover even a judgment of foreclosure as against him, and for that reason we think the court properly held him liable for costs.

No error has been shown, and the judgment is affirmed.



## BARR et al. v. SIMPSON.†

(Court of Civil Appeals of Texas. Jan. 9, 1909.  
On Rehearing, March 27, 1909.)

**1. QUIETING TITLE (§ 8\*)—PREVENTION OF CLOUD ON TITLE—PROPERTY OF WIFE—EXECUTION SALE FOR DEBTS OF HUSBAND.**

Where a deed to a married woman purchasing land with her separate funds did not on its face set forth the fact that the land was to be her separate property, the law would presume, in the absence of extraneous proof, that it was community property subject to the husband's debts, and an execution sale of the land based on a judgment against the husband would create a cloud on the title to the land, and hence an injunction would lie at the suit of the wife's grantee to prevent such sale.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 34, 35; Dec. Dig. § 8.\*]

**2. HUSBAND AND WIFE (§ 257\*)—COMMUNITY PROPERTY.**

The increase of cattle given to a married woman is community property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 904; Dec. Dig. § 257.\*]

**3. HUSBAND AND WIFE (§ 255\*)—COMMUNITY PROPERTY.**

A married woman purchased land and used her separate funds to pay a part of the price. The note for the balance and the deed of trust securing it were signed by her and her husband. There was nothing to show that the creditor agreed to look alone to her for the payment of the loan, or that it should be paid out of her separate estate. *Held* that, so far as the land was paid for out of her separate funds, it was her separate property, but, in so far as it was paid for in funds borrowed by her on the note of herself and husband and secured by the deed of trust, it was community property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 900, 901; Dec. Dig. § 255.\*]

**4. HUSBAND AND WIFE (§ 259\*)—COMMUNITY PROPERTY.**

Money earned by a married woman by teaching school is community property in the absence of an agreement between herself and husband that it shall be her separate estate.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 911; Dec. Dig. § 259.\*]

On Rehearing.

**5. HUSBAND AND WIFE (§ 267\*) — PROPERTY SUBJECT TO — PROPERTY CONVEYED BEFORE EXECUTION.**

Land conveyed to a married woman by deed which did not disclose the fact that it was to be her separate property was conveyed to a purchaser for a valuable consideration by her and her husband joining in the deed. At the time the deed was filed for record, a third person had a judgment against the husband, but no abstract of it was filed. There was nothing to show that the deed from the married woman and her husband to the purchaser was fraudulently made to defraud creditors of the husband. *Held*, that the land was not subject to levy under execution issued under the judgment against the husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 267.\*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by O. H. Simpson against W. W. Barr and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. M. Moore, for appellants. P. B. Ward and Spence & Baker, for appellee.

BOOKHOUT, J. O. H. Simpson, as plaintiff, sued W. W. Barr, as constable of Johnson county, Tex., and also J. A. Templeton, Emmett Patton, composing the firm of Templeton & Patton, and T. M. Stribling, as defendants, and sought an injunction against them to restrain a threatened sale under execution of the plaintiff's lands situated in Johnson county, Tex., comprising two separate tracts, one of 108½ acres and the other of 50 acres. Plaintiff alleged that he purchased said land on March 9, 1906, from Sarah U. Simpson, who was joined pro forma in the conveyance by her husband, R. H. Simpson; that he paid \$400 cash and assumed the payment of a lien debt upon the land in the sum of \$500, owing to a mortgage company of Dallas, Tex., and that, in further consideration of the conveyance of the land, he executed his own note in the sum of \$1,727 to the order of the said Sarah U. Simpson; that the 108½-acre tract was the separate property of the said Sarah U. Simpson, as was also the 50-acre tract at the time of the conveyance to him; and, further, that the 50-acre tract was a part of the homestead at that time of the said Sarah U. Simpson and R. H. Simpson. Plaintiff alleged that on December 7, 1900, defendants Templeton and Patton recovered a judgment against the said R. H. Simpson and another for \$173.60 in justice court, precinct No. 1, Johnson county, Tex.; that defendant Stribling has an interest in the said judgment; that on August 7, 1907, said defendants caused to be issued and placed in the hands of defendant Barr, as constable, an execution on said judgment; and that under their direction the said constable levied upon the plaintiff's lands as the property of the said R. H. Simpson, and that the constable had advertised the sale thereof for the September, 1907, sale day. He averred that the lands were not the property of the defendants in execution, nor of either of them, and denied that the said lands were the property of either of the said defendants in execution at the time of the levy thereon. He averred that Sarah U. Simpson, wife of R. H. Simpson, had purchased the said lands in controversy as her separate property, paying for same out of her separate funds, but specially averred that, while this was the fact, still the deeds to Mrs. Simpson did not limit the property to her separate individual use and benefit, but, on the contrary, the deeds while made to her would be construed as conveying the land to her as the community property of herself and her husband, R. H. Simpson; that such was the presumption arising from the form of the conveyance. Plaintiff charged that the defendants were proceeding with their levy

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and threatened sale of the property upon the said assumption drawn from the face of said deeds that the said lands were the community property of Sarah U. and R. H. Simpson, the latter being one of defendants in their execution, and plaintiff averred that it would require evidence dehors the record to show the facts, and that the property was, as a matter of truth, paid for with the separate money of Mrs. Simpson, and thus that the threatened sale of the lands as the property of R. H. Simpson, if made, would cast a cloud upon plaintiff's title to said lands, against which he was entitled to relief in a court of equity. Plaintiff averred that the defendants would deny, also, that the 50-acre tract was a part of the homestead of Sarah U. and R. H. Simpson at the time plaintiff purchased same, and that they would further deny that the lands involved in this suit were the separate property of said Sarah U. Simpson. He further averred that he purchased said lands for the purpose of reselling same as soon as he could find a suitable purchaser at a price satisfactory to him; that the Colonial & United States Mortgage Company held a lien debt against the 108½-acre tract, the payment of which plaintiff had assumed; that said debt would soon mature, and plaintiff would be unable to pay off such debt unless he is enabled to make his sale of the land, or, if he could not sell the land, he would be compelled to negotiate a renewal of the lien indebtedness, which he is advised he cannot do if the lands were sold under the threatened execution by the defendants. Plaintiff further averred that he was then negotiating a sale of the 108½-acre tract to a purchaser named Burks, who was ready and able to buy the land, at a price satisfactory to plaintiff, provided the title is not incumbered by the threatened sale under execution, but that if such sale were made and a hostile title thereby acquired and put of record to said lands, as defendants were about to do, plaintiff would be unable to make the sale to the said Burks, with whom he averred he had a written contract for the purchase of the land duly executed, conditioned, however, upon plaintiff being able to convey a good and marketable title to his land, which plaintiff averred he could do only in the event that the threatened execution sale was not made; that, if plaintiff's lands were sold under the said execution and levy by defendants, such sale would cast a cloud upon plaintiff's good and perfect title, and would prevent him from making the pending sale, and also that the execution sale, if made, would result in the mortgage company refusing to renew the loan or lien indebtedness upon the 108½-acre tract; and, further, that if the lands were sold, and if the defendant constable should execute a deed to the purchaser, it would require extrinsic evidence to remove the cloud from the title to the land, and would result in

irreparable injury to plaintiff. He therefore prays for injunction restraining all the defendants from proceeding with their threatened execution sale of his lands. A writ of injunction issued as prayed for. The defendants answered by general demurrer, general denial, and with two other special pleas not necessary to be here stated. Upon the issues raised by these pleadings a trial was had before the court without a jury, and on January 27, 1908, final judgment was rendered, making perpetual the injunction theretofore issued.

Defendants perfected an appeal. The allegations of the petition were sufficient when tested by a general demurrer. These allegations, if true, show that the plaintiff's title to the land is derived through a married woman, and that the land was purchased and paid for by her out of her separate funds, and that the conveyance to her was made during her coverture, and did not on its face show that the property was her separate estate. If the land was in fact purchased by Mrs. Simpson with her separate means and was to become her separate property, and the deed on its face did not set forth that the land was to be her separate property, the law presumes it to be community property and subject to the husband's debts, and a sale by virtue of the levy of an execution against the husband would cast a cloud upon the title, which cloud could only be shown by evidence dehors the recitations in the deed. In such a case injunction will lie to prevent a cloud on her title. *Roe v. Dailey*, 1 Posey, Unrep. Cas. p. 247; *Huggins v. White*, 7 Tex. Civ. App. 563, 27 S. W. 1068; *Gober v. Smith* (Tex. Civ. App.) 36 S. W. 911; *Van Ratcliff v. Call*, 72 Tex. 491, 10 S. W. 578; *Day v. State*, 68 Tex. 526, 536, 4 S. W. 865; *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994; *Ormsby v. Ottman*, 85 Fed. 492, 29 C. C. A. 295; *Pixley v. Huggins*, 15 Cal. 128.

The 108½-acre tract was purchased by Mrs. Simpson from one Blackstock in October, 1902, and during her coverture. She paid \$400 cash, which she says was the proceeds received from the sale of cattle given her by her sons. The evidence is not clear whether this sum was derived from the sale of the cattle originally given her, or whether it also embraces the moneys received from their sale and the sale of their increase. Their increase would be community property, and not her separate property. In view of the trial court's finding that this \$400 was the separate property of Mrs. Simpson, we would not feel justified in setting aside that holding. As the case must go back for another trial, we thought best to call attention to evidence in this respect. It is conceded that the balance of the consideration of this 108½ acres was the assumption by Mrs. Simpson of three outstanding notes against the property amounting to \$342.50. These notes were taken up and a new loan on the land negotiated for \$417.62. This loan

was in favor of the mortgage company. It was secured by a deed of trust on the land. Both the note and deed of trust securing it were signed by Mrs. Simpson and her husband. There was no evidence that the mortgage company agreed to look alone to Mrs. Simpson for payment of this loan, or that it should be paid out of her separate estate. This loan was on the property when appellee purchased the same, and he assumed it as a part of the consideration to be paid by him for the land. It is clear that, so far as this tract was paid for out of the separate funds of Mrs. Simpson, it became her separate estate. But, in so far as it was paid for in funds borrowed by her on the note of herself and husband and secured by a deed of trust executed by herself and husband upon the property, it was community property. *Epperson v. Jones*, 85 Tex. 425; *Shuster v. Bauman*, 79 Tex. 179, 15 S. W. 259, 23 Am. St. Rep. 327; *Ullmann v. Jasper*, 70 Tex. 447, 7 S. W. 763; *Sinsheimer v. Kahn*, 6 Tex. Civ. App. 143, 24 S. W. 533. If it was community property, it was subject to appellant's lien.

As to the 50-acre tract, the evidence shows that it was purchased by Mrs. Simpson in 1891 during her coverture. Four hundred dollars of the purchase money was paid in cash, and she gave her note for the balance. The \$400 consisted of money given her by her father and money earned by her teaching school. The money earned by her after her marriage teaching school was community property, and, in the absence of testimony of an agreement between her husband and herself that it was to become her separate estate, the land would also, to the extent of the moneys so paid, be community property. In the absence of evidence that the note for \$140 given for the deferred payment was paid out of her separate funds, that part of the land in proportion to the amount of said note also became community property.

For the errors pointed out, the judgment is reversed and cause remanded.

#### On Rehearing.

The appellee in his motion for rehearing contends that, having held that appellee was entitled to the writ of injunction prayed for by him, we erred in reversing and remanding the cause. A reconsideration of the pleadings convinces us that this contention must be sustained. The evidence is undisputed that appellee purchased the lands for a valuable consideration by him paid and received a deed of conveyance therefor, which was filed for record in March, 1906. At the time appellants held a judgment against R. H. Simpson, one of the appellee's grantors, but no abstract of said judgment was ever filed in the office of the county clerk of Johnson county, and no lien existed on said land by reason of said judgment. The execution sought to be enjoined by appellee was not

levied upon the land until the month of August, 1907, more than a year after appellee's purchase of the lands.

There were no pleadings filed by defendants in the court below, appellants here, that the deed from Sarah U. Simpson and her husband, R. H. Simpson, was simulated and fraudulent, or that it was made to hinder, delay, and defraud the creditors of R. H. Simpson. No issue was presented as to the validity of the deed to appellee. Under these facts, and in view of the pleadings, it follows that we erred in reversing and remanding the case.

Appellee's motion for rehearing is granted, and the judgment of the trial court is affirmed.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. WILLIAMS et al†

(Court of Civil Appeals of Texas. March 6, 1909. Rehearing Denied March 27, 1909.)

##### 1. MASTER AND SERVANT (§ 286\*)—DEATH OF SERVANT — NEGLIGENCE — QUESTION FOR JURY.

Where the evidence showed that decedent, while in the discharge of his duties as a locomotive engineer, was struck and killed by a mail crane erected by defendant on its right of way near its railroad track, that such crane might have been placed at a greater distance from the track without interfering with its proper use, and that decedent did not unnecessarily expose himself to danger in the performance of his duties, it was a question for the jury whether defendant was negligent in placing the crane where it was.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1022; Dec. Dig. § 286.\*]

##### 2. TRIAL (§ 139\*)—TAKING QUESTION FROM JURY.

The trial court is not justified in taking from the jury a question of fact, unless the evidence is such that there is no issue to be determined.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 338; Dec. Dig. § 139.\*]

##### 3. MASTER AND SERVANT (§ 286\*)—DEATH OF SERVANT — NEGLIGENCE — QUESTION FOR JURY.

In an action for the death of an engineer by contact with a mail crane, where the evidence shows that because of the defective and rotten condition of the ties at and near the crane the locomotive would roll or sway on its springs so as to extend the cab over the track 12 inches nearer the crane in passing than it would if standing perpendicular, the questions whether the condition of the track constituted negligence, and, if so, whether such negligence was the cause of the accident, were for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1021; Dec. Dig. § 286.\*]

##### 4. NEGLIGENCE (§ 61\*)—PROXIMATE CAUSE—CONCURRING NEGLIGENCE.

Where an accident occurs from two causes, each due to negligence of different persons, each person whose acts contributed to the accident are liable for the injury resulting, and the negligence of one is no excuse for the negligence of the other.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 75; Dec. Dig. § 61.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Application for writ of error pending in Supreme Court.

**5. MASTER AND SERVANT (§ 96\*)—DEATH OF SERVANT—DEFENSES—CONCURRING NEGLIGENCE OF THIRD PERSON.**

Where defendant was negligent in maintaining a mail crane too near the track, and in allowing the track near the crane to remain in a defective condition, it is no defense to an action for the death of an engineer by striking the crane that the postmaster was also negligent in placing the crane in position at an improper time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 158; Dec. Dig. § 96.\*]

**6. DEATH (§ 89\*)—DAMAGES—ELEMENTS OF LOSS.**

In an action for wrongful death, instructions are proper which limit recovery to the present value of the pecuniary aid plaintiffs have a reasonable expectation that decedent would have contributed to them had he lived, and excluding any allowance for grief and affection.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 118; Dec. Dig. § 89.\*]

**7. DEATH (§ 88\*)—DAMAGES—LOSS OF SOCIETY.**

Loss of society is not a proper element of damages for wrongful death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 118; Dec. Dig. § 88.\*]

**8. DEATH (§ 86\*)—DAMAGES—"PECUNIARY AID."**

"Pecuniary aid" for which recovery may be had for wrongful death means not only money, but everything that can be of value, and in the case of minor children includes the reasonable pecuniary value of the nurture, care, and education, if any, they would have received from decedent during their minority, had he lived.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 119; Dec. Dig. § 86.\*]

**9. TRIAL (§ 256\*)—INSTRUCTIONS—OMISSIONS.**

Where an instruction is correct as a proposition of law and applicable to the case, failure to assert any limitation is not error, in the absence of a special request for such limitation.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 628; Dec. Dig. § 256.\*]

**10. MASTER AND SERVANT (§ 295\*)—DEATH OF SERVANT—ACTION—INSTRUCTIONS—ASSUMPTION OF RISK.**

In an action for the death of an engineer by contact with a mail crane, an instruction as to the assumption of risk by decedent is properly refused, where it does not take into consideration the question as to whether decedent, as a person of ordinary care, would have continued in the service with knowledge of the dangerous position of the crane and the defective condition of the track at that place which the evidence disclosed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1175; Dec. Dig. § 295.\*]

**11. TRIAL (§ 253\*)—REFUSING INSTRUCTIONS.**

An instruction is properly refused where it is misleading in ignoring a material fact involved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 613; Dec. Dig. § 253.\*]

**12. TRIAL (§ 260\*)—REFUSING INSTRUCTIONS.**

It is proper to refuse an instruction, the substance of which is covered by the general instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.\*]

**13. MASTER AND SERVANT (§ 270\*)—INJURIES TO SERVANT—EVIDENCE—REMOVEDNESS.**

In an action for death of a servant, evidence as to the condition of a railroad track at a certain place in December is admissible as to its condition the previous May at the time of the accident, where there is further evidence that its condition was practically the same at both dates.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 917; Dec. Dig. § 270.\*]

**14. APPEAL AND ERROR (§ 1051\*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

The error, if any, in admitting the testimony of a witness, is harmless, where other witnesses were allowed to give similar testimony without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4161; Dec. Dig. § 1051.\*]

**15. MASTER AND SERVANT (§ 270\*)—INJURIES TO SERVANT—EVIDENCE—OBSERVATION BY WITNESS.**

In an action for the death of an engineer, on the question of whether defendant railroad company was negligent in placing a mail crane so near its track as to strike intestate, it is proper to allow a witness to testify as to what he observed when the engine passed the crane.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 920; Dec. Dig. § 270.\*]

**16. DEATH (§ 99\*)—DAMAGES—EXCESSIVENESS OF RECOVERY.**

In an action for the death of a locomotive engineer, who was 31 years of age, earning from \$165 to \$175 per month, and who left a wife and three children, a verdict for \$25,000 held not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 130; Dec. Dig. § 99.\*]

Appeal from District Court, Hunt County; B. L. Jones, Judge.

Action by Ellen Williams and others against the Missouri, Kansas & Texas Railway Company of Texas for the death of plaintiffs' decedent. From a judgment for plaintiffs, defendant appeals. Affirmed.

Peniel is a post office in Hunt county, Tex., at which there is a store and a few houses adjacent to appellant's track. Appellant's passenger trains do not stop at Peniel, and the mail is received and delivered from the cars by means of a mail crane. On May 22, 1907, M. A. Roberts, postmaster at Peniel, assuming that appellant's mail train was on time, placed the mail sack upon the crane and left it in position to be taken off in the usual way. However, the mail train was behind time, and before it reached Peniel a freight train passed upon which R. L. Williams was engineer, and as his head was protruding from the window it was struck by the crane, and his death immediately resulted. Appellees, wife and children of said Williams, instituted this suit to recover of the railroad company damages in the sum of \$50,000 alleged to have resulted to them from his death. The issues of negligence submitted in the charge were: First, construction and maintenance of the mail crane too close to the track, and second, permitting the track to become defective so as to cause the engine to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lean toward the crane. A trial before a jury resulted in a verdict and judgment in favor of appellees for \$25,000, apportioned as follows: \$10,000 to Mrs. Ellen Williams, \$4,000 to Annie Williams, \$5,000 to Mildred Lee Williams, and \$6,000 to Robert Lee Williams. Appellant's motion for new trial having been overruled, an appeal was duly perfected to this court.

Coke, Miller & Coke and Head, Dillard, Smith & Head, for appellant. Wolfe, Hare & Maxey, for appellees.

BOOKHOUT, J. (after stating the facts as above). Error is assigned to the fifth paragraph of the court's charge, which is as follows: "If you believe from the evidence that the mail crane by which Robert Lee Williams was struck and killed was so near the defendant's railway track as that same was dangerous to the deceased, Robert Lee Williams, while he was engaged in operating the engine upon which he was at the time he was killed; and if you further believe from the evidence that a person of ordinary care would have continued in the service of the defendant in the capacity of locomotive engineer with such knowledge of the location of said mail crane and the danger of operating an engine over defendant's track by where same was located, as you may believe said Robert Lee Williams had; and if you further believe from the evidence that in erecting and maintaining said mail crane the distance it was from the track at the time said Williams was killed, defendant was guilty of negligence; and if you further believe that such negligence, if any, was the proximate cause of the death of said Robert Lee Williams—you will find for plaintiffs and assess their damages under instructions hereinafter given, unless you find for the defendant under other instructions given you."

It is insisted that the evidence was not sufficient to authorize the submission to the jury of the issue as to whether or not appellant was guilty of negligence in erecting and maintaining the mail crane the distance it was from the track at the time Williams was killed. The mail crane is an upright post or column on the top of which there is a piece of timber or beam hung on to this upright post by a hinge or pivot. Further down on this upright is another beam not so long and attached to the post by a hinge or pivot. On the ends of these beams there are iron pivots, on which the rings in the bottom of the mail sack are hung. The contrivance on the car which catches the mail sack is called the "catcher," and consists of an iron arm in the shape of a V attached by hinges or loops to an iron bar on the side of the car, and when this catcher is in position to catch the mail sack it extends out about 82 inches from the side of the car. When it is desired to deliver mail to a train, the arm or beam of the crane is pulled down, and

these arms are extended at right angles towards the track, and the mail sack hung on the pivots in the ends of these arms. The weight of the mail sacks retains the arms in this position until the sack is taken off by the passing train, when the arm automatically straightens up. The evidence showed that it was 51½ inches from the wooden beam when extended to the west rail of the track upon which the train was moving. The track was 4 feet 8½ inches wide. The cab of the engine was 10 feet wide. Taking the width of the track, 4 feet 8½ inches from the width of the cab, 10 feet, we have 63½ inches left. Half this amount, 31¾ inches, gives us the distance the cab extended over the track. Taking this distance, 31¾ inches, from the distance the wooden beam was from the track, viz., 51½ inches, we have 19¾ inches. On the ends of the wooden beams were iron clips on which the mail sack was hung, and these were six inches long, which, taken from 19¾ inches, leaves 13¾ inches. It was shown that the natural swing of the engine on its springs when the track was in good repair was four inches, which, when taken from 13¾ inches, leaves 9¾ inches as the clearance when the track was in good repair and nothing but the usual expected. It was admitted that the mail car extended over the track the same distance as the cab of the engine, and the undisputed evidence showed that the mail hook or catcher bar extended out from the car 32 inches, and that it would take up the mail "just so the catcher bar extends beyond the mail sack." Applying the above figures, it is seen that it was not necessary for the crane to have been placed so near the track. The evidence showed that these cranes are not set the same distance from the track. It appears from the evidence that the deceased while in the discharge of a duty required of him by his employment, and while in his proper place, was struck and killed by a mail crane erected by appellant on its right of way near its track, and there being no evidence showing that at the time deceased was unnecessarily exposing himself to danger or doing any act which was not required in the proper discharge of his duties, and there being evidence that said mail crane might have been erected at a greater distance from the track without interfering with its proper use, it was for the jury to say whether, in placing the same where it was, appellant was guilty of negligence. *Railway v. Stephenson*, 22 Tex. Civ. App. 220, 54 S. W. 1086; *Whipple v. New York, N. H. & H. R. Co.*, 19 R. I. 587, 85 Atl. 305, 61 Am. St. Rep. 796. The rule is that the trial court is never justified in taking from the jury a question of fact, except in case the evidence is such that there is no issue made for the jury to determine. *Choate v. Railway Co.*, 90 Tex. 88, 36 S. W. 247, 37 S. W. 319; *Railway Co. v. Kime*, 94 Tex. 649, 54 S. W. 240; *Joske v. Irvine*, 91 Tex. 582,

44 S. W. 1059. The trial court did not err in charging the jury as set forth in the paragraph of the charge above quoted.

The sixth paragraph of the charge is assailed as error, which paragraph is as follows: "Again, even if you do not believe from the evidence that the mail crane where it stood was dangerous to deceased, Williams, while operating the engine, and you do not believe that defendant was guilty of negligence in erecting and maintaining said mail crane where it stood, yet if you believe from the evidence that the defendant's track and roadbed at, along, and about where said mail crane stood was defective and out of repair, and that by reason of such defective condition, if any, of said track and roadbed, the same was dangerous for use by the said Robert Lee Williams in the discharge of his duties in operating an engine by where said mail crane stood, and if you further believe from the evidence that in permitting said track and roadbed to be defective and out of repair the defendant was guilty of 'negligence,' as this term has been hereinbefore defined to you, and if you further believe from the evidence that such negligence, if any, was the direct and proximate cause of the death of said Robert Lee Williams, then you will find for plaintiffs and assess their damages under instructions hereinafter given, unless you find for the defendant under other instructions given you." The proposition presented is that the evidence in this case was not sufficient to authorize the submission to the jury of the issue as to whether the alleged defect in the track did in fact cause the death of Williams. To find that it did it will be necessary to base a presumption upon a presumption, which is not permissible. This contention is not sustained.

The witness Kern testified: "I made an examination of the ties to see their condition, also the rails, and found, at a point about a foot and a half north of a line directly east from the base of the mail crane to the track, one tie that was very rotten on the west end. It was rotten right under where the rail crosses it and had a piece broken out of it about  $2\frac{1}{2}$  inches or 3 inches square and about 18 inches long from the rail clear out to the end of the tie. At  $7\frac{1}{2}$  feet north of the mail crane there was another tie that was very rotten right immediately under the rail, but not broken. At 12 feet north there was another very rotten tie with a similar piece broken out like the first one described. As to the condition of the spikes along about the location of the mail crane on the inside of the west rail for a distance of about 20 feet, there wasn't a single spike that clamped the rails down, by which I mean that the heads were not driven down close against the iron. On the outside of that rail only part of them were driven down. The spikes to the rotten ties projected up from an inch and a half to two inches above that iron piece. The rails had

cut down into the ties some, from a quarter to a half inch." The engine which Williams was operating at the time of his injury was No. 536, and weighed 140 tons. There was expert testimony that the condition of the track as testified to by the witness Kern would cause an engine weighing 140 tons to roll or sway on its springs so that at the crane the cab of the engine would have extended out 12 inches closer to the crane than it would if standing perpendicular. This testimony was uncontradicted. This being true, the cab was brought so as to almost or quite come in collision with the extended arm of the mail crane. This evidence raised an issue for the jury to say whether the condition of the track constituted negligence, and, if so, whether such negligence was the cause of the injury to deceased.

Complaint is made in the third assignment of the court's refusal to give appellant's special charge instructing a verdict for defendant. It is contended that the undisputed evidence in this case showed that Williams' death was caused by the act of the postmaster, Roberts, in leaving the mail on the arm of the crane extended toward the track while a freight train was passing, and, there being no attempt either in the pleading or the evidence to hold appellant liable for such act the jury should have been instructed to return a verdict in its favor. There was no issue in the pleadings of any negligence on the part of the postmaster. The evidence shows that at Peniel there is no station, no passenger depot, and that passenger trains do not stop there, and, in the absence of these and of testimony to the contrary, it may be inferred that there is no telegraph station, whereby the postmaster might be notified in the event the mail train was late. The north-bound train which carries the mail was due there at 1:30 p. m. The postmaster put out the mail on the crane at 1:15 p. m. The north-bound train was late. In our opinion it cannot be said that the act of Roberts in putting out the mail 15 minutes before the mail train was due, not knowing that the train was behind time, was negligence; but, if it was, then the injury to Williams resulted from such negligence concurring with the negligence of appellant in erecting the mail crane too close to the track. If an accident occurs from two causes, both due to negligence of different persons, but together the efficient cause, then all the persons whose acts contribute to the accident are liable for an injury resulting, and the negligence of one furnishes no excuse for the negligence of the other. *Markham v. Nav. Co.*, 73 Tex. 247, 11 S. W. 131; *Railway Co. v. McWhirter*, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 755. The freight train upon which Williams was engineer was going south. Williams had just turned on the injector, an apparatus which throws water from the tender into the boiler. A part of this apparatus is on the outside of the en-

gine, and there is an overflow so that a man can look at it from the outside and see if it is working all right. Williams had turned on the injector and had his head out of the window watching to see if it was working properly. While in this position his head was struck by the mail crane, and he was instantly killed. The court did not err in refusing to instruct a verdict for defendant.

Error is assigned to the ninth and tenth paragraphs of the charge of the court, which read as follows: "(9) If, under the foregoing instructions, you find for the plaintiffs, then you will apportion the amount so found among them in such sums as you may determine each is entitled to receive; and you are instructed that the measure of damages, if you find for plaintiffs, is such sum as you find and believe from the evidence to be the present worth or value of the pecuniary aid, if any, that you believe from the evidence plaintiffs had a reasonable expectation that the said Robert Lee Williams, deceased, would have contributed to them had he lived. (10) By 'pecuniary aid' is meant not only money, but everything that can be valued in money, and, in the case of the minor children, includes the reasonable pecuniary value of the nurture, care, and education, if any, you believe from the evidence they would have received from the said Robert Lee Williams, deceased, during their minority had he lived. If you find for plaintiffs, you will not allow them anything for any grief or sorrow on account of the death of the said Robert Lee Williams or for the loss of his society, affection, or companionship." The contention is that the measure of damages in a death case is not the pecuniary aid plaintiffs reasonably expect to receive, but it is such a sum as will compensate for the pecuniary benefits which the jury, under the evidence, find it reasonably probable that plaintiffs would have received.

At the time of his injury, Williams was an engineer operating a freight engine for appellant. He had been in this position one month. Prior to this he had for about six years been a fireman. He was 31 years old at the time of his death. He left a wife and three children, Annie, Mildred Lee, and Robert Lee; the last having been born after his death. As fireman he earned about \$70 per month. The earnings of an engineer are about from \$165 to \$175 per month. The charges complained of are substantially the same as that approved by the Supreme Court in *Railway Co. v. McVey*, 87 S. W. 329, and by the Court of Civil Appeals for the First District in *Railway Co. v. Rutland*, 101 S. W. 533, in which case a writ of error was refused. The charges announce correct propositions of law. They limit the recovery of appellees to the present worth or value of the pecuniary aid that the jury might believe from the evidence plaintiffs had a reasonable expectation that the deceased would have contributed to them had he lived, and

expressly excluded any allowance for grief, sorrow, loss of society, affection, and companionship.

Again, the contention is made that a charge upon the measure of the damages in a death case is too broad, which instructs a jury that the pecuniary aid which the plaintiffs are entitled to recover included everything that can be valued in money except grief or sorrow and loss of society, affection, and companionship. The allegations in appellees' petition were sufficiently broad to cover all pecuniary loss to them, and the court's charge being a sound general proposition of law, if appellant desired any limitations thereon, it was its duty to ask the necessary instruction, and, having failed to do so, cannot now complain. *Railway Co. v. McDuffey* (Tex. Civ. App.) 109 S. W. 1104.

The sixth assignment of error is the refusal to give appellant's special charge reading as follows: "In this case you are instructed that if you believe from the evidence that the deceased knew that there were mail cranes situated along by and near defendant's track the distance that this one was from the track, and knew or by the exercise of ordinary care could have known, the position of this crane, and if you further believe from the evidence that the defendant was not guilty of negligence in respect to the condition of the track, but that the deceased was injured by reason of looking out of the cab of his engine when passing this crane, he assumed the risk of such act at such time and you will return a verdict in favor of defendant." This charge was properly refused. It is not correct in that it wholly ignores the question as to whether deceased, as a person of ordinary care, would have continued in the service with a knowledge of the defective dangerous contrivance which the evidence showed was erected by appellant. *Laws* 1905, p. 386, c. 163; *Railway Co. v. Foth* (Tex. Civ. App.) 100 S. W. 171; *Railway Co. v. Barwick* (Tex. Civ. App.) 110 S. W. 953; *Railway Co. v. Bailey* (Tex. Civ. App.) 115 S. W. 601.

These remarks apply also to the seventh assignment of error, which complains of the refusal to give appellant's special charge No. 4, and said assignment is overruled.

Error is assigned to the court's refusal to give appellant's special charge reading as follows: "In this case you are instructed that if you believe from the evidence that there were some defective ties in the track near and north of the crane, yet if you further believe from the evidence that the track was level and had no low places in it, and was reasonably safe for the passage of trains like the one deceased was on, you cannot find for plaintiffs on the issue of the defective tracks." E. Royse, an experienced engineer, testified: "By 'level track,' I mean a track that is level, in first-class shape and solid. I don't mean a track like that. Where there

is a rotten tie it is bound to go down when I get 140-ton engine on it." This charge was properly refused because misleading, in that the evidence showed that, while the track might have been level, it was in such condition as to be dangerous for the operations of engines such as deceased was on at the time of his death.

Again, the court in its main charge instructed the jury as follows: "Or if you believe from the evidence that defendant's track and roadbed at, along, and about where said mail crane stood, was in such condition and in such state of repair as an ordinarily prudent person would have had and kept same under the same or similar circumstances, or if you find and believe from the evidence that said track and roadbed were not in such condition and repair as an ordinarily prudent person would have had and kept same under the same or similar circumstances, but you do not believe from the evidence that the defective condition of said track and roadbed, if you find same were defective, was the proximate cause of the death of the said Robert Lee Williams, you will find for the defendant as to this issue." The main charge sufficiently embodied the proposition embraced in the requested charge.

Error is assigned to the refusal of appellant's requested charge reading as follows: "In this case you are instructed that although you may believe from the evidence that the track was defective by reason of having some rotten ties in the same and by reason that some of the spikes being pulled up and standing up from the rails, yet you cannot find for the plaintiffs on the issue of the defective track, unless you further believe that a person of ordinary care would have considered a track in that condition unsafe for the passage of trains like that of deceased, and unless you further believe that said track had been in that condition for such a length of time that a person of ordinary care would have known it and remedied the defects, and unless you further believe that the condition of said track was the proximate cause of the injuries received by deceased." The proposition presented is that the employer is not liable to the employe for an injury caused by a defect in the premises unless the defect be such that a man of ordinary prudence would have, before the injury, regarded as sufficient to probably cause injury to the employe from the causes and in the manner the one in question was inflicted. This charge, in so far as it submitted to the jury the question as to whether the track was in such condition as an ordinarily prudent person would have had and kept it, and as to whether the condition of the track was the proximate cause of the accident, was sufficiently embraced in the court's charge. H. N. Newman, appellant's road master, having charge of this portion of its track, testified that during May, 1907, he was over and inspected this particular

piece of track two or three times a week, sometimes on a hand car, and sometimes on the train, and sometimes on his gasoline motor car. G. S. Sherrell testified for defendant that he was section foreman, having charge of the particular piece of track where this accident happened, and that it was his duty to repair the track and keep it in proper condition, and that he was over the track most every day. This evidence was sufficient to show that appellant knew of the bad condition of this track, or in the exercise of ordinary care should have known thereof. The testimony of appellees shows a condition which was open and easily discoverable on ordinary inspection, and it could not be heard to say that it did not know thereof, or had not had an opportunity to know, or that in the exercise of ordinary care it should not have known. Its liability was the same whether it knew of its condition, or whether in the exercise of ordinary care it should have known thereof.

It is contended that the court erred in permitting the witness J. E. Kern to testify on direct examination, in behalf of plaintiffs, as follows: That on December 12, 1907, he examined the ties in defendant's track at and near the mail crane and at a point about  $1\frac{1}{2}$  feet north of the base of the mail crane, and found one tie that was very rotten at the west end, rotten right under where the rail crosses it, and having a piece broken out of it 2 or 3 inches square and 18 inches long; also, at a point  $7\frac{1}{2}$  feet north of the crane found another tie very rotten right under the rail, that at a point 12 feet north there was another very rotten tie with a piece broken out of it like the first one, that along about the location of the mail crane on the inside of the west rail for a distance of about 20 feet there was not a single spike that clamped the rails down, that was driven down close against the iron, and that on the outside of the rail only a part of them were driven down, that the spikes in the rotten ties projected up from  $1\frac{1}{2}$  to 2 inches above the iron pieces, and that the rails had cut down into the ties at some places from  $\frac{1}{4}$  of an inch to  $1\frac{1}{2}$  inches. The proposition presented is that evidence that three ties in a railroad track were defective, and spikes not tightly driven down in December, is too remote, irrelevant, and immaterial to prove the condition of the track in the preceding May; many trains having each day passed over the track during the interval.

The court, in approving the bill of exception preserving the ruling, qualified the same as follows: H. M. Jackson testified that in May, October, and December, 1907, he was familiar with the track where Williams was killed. He further testified: "In May of last year, and for some time before that, I had been in the habit of passing back and forth at that place quite frequently and continued



to do so afterwards. I still walk along there frequently and notice no change in the track. It is in about the same condition it was in May of last year (1907). In October and December of last year, so far as I can see, it was in the same condition that it was in May." The witness M. A. Roberts testified: "In passing back and forth over the track from the post office up to the mail crane prior and up to the time Williams was killed, I observed to some extent the condition of the track and roadbed, their general condition. I know Mr. Kern, and was with him on the 10th of December when he made some measurements there and when he made some observation of the ties when we were there. As far as I observed and could tell, I couldn't see any change to amount to anything in the condition of the track, roadbed, ties, etc., at the time Mr. Williams was killed as compared to the condition at the time we made these measurements. There was very little difference in the condition of the track, etc., the 10th of December than it was at the time of the accident." There being evidence that the track was in the same condition in December that it was at the time of the happening of the accident, there was no error in admitting the testimony complained of in this assignment. Again, the objection to this evidence seems to go to its weight, rather than its admissibility. *Railway Co. v. Beam* (Tex. Civ. App.) 50 S. W. 411; *Railway Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151.

Error is assigned to the admission of the evidence of M. A. Roberts on direct examination: That he was present with J. E. Kern at the time the said Kern made an examination of the track and mail crane at Peniel on December 12, 1907; that he had been constantly about that place and was acquainted with defendant's track in the neighborhood of the crane, and had been for several years prior to the time the examination was made; and that as far as he observed and could tell he couldn't see any change to amount to anything in the condition of the track, roadbed, and ties at the time Mr. Williams was killed as compared with the condition of the same at the time the measurements and observations by Mr. Kern and himself were made. It is contended that appellees' case depending, as it did, upon three particular ties in the track being in the same condition in May that they were found to be in the following December, in order to produce the motion in the engine which it is claimed caused the injury, testimony of a witness as to the general similarity of conditions on the two dates without reference to these particular ties was irrelevant and immaterial. These objections go to the weight of the evidence rather than its admissibility. Again, similar evidence having been admitted without objection from the

witnesses Jackson and Nix, the admission of the testimony complained of, if error, was harmless.

Again, it is contended that the court erred in permitting the witness Roberts to testify that on December 10, 1907, he noticed an engine when it went over the track, and that it rocked some along there, that he got down in front of the engine to see if it ran level, and he could tell that it wobbled a little, but that he never noticed the track. If there was any error, and we see none, in admitting this evidence, it was harmless. The undisputed evidence showed that, with the track in good condition, the engine would sway something like 4 inches. The evidence also showed that, if the track was in the condition shown by appellees' testimony, there would have been a sway of at least 12 inches. It was competent to show this fact, whether the track was good or bad as bearing on the negligence of appellant in placing the mail crane at the distance it had from the track. If it was competent for an engineer to state his opinion as to the number of inches an engine would rock or sway when the track was in ordinary or reasonably good repair, then it was also competent for a witness who had observed an engine passing this point to testify as to what he observed in this regard.

Various assignments of error complain in different form of the verdict and judgment as excessive and without sufficient evidence to support the same. These assignments are not sustained. Robert Lee Williams at the time of his death was 81 years old with a life expectancy of 33.72 years. He was a strong, sober, healthy man; was industrious, of good business habits and devoted to his family. He left a wife 28 years old and three children, aged, respectively, 10, 3, and 1, years. He was occupying a position paying on the average from \$165 to \$175 per month. He did not drink, did not use tobacco, and was saving in his personal expenses. The evidence was sufficient to support the verdict and judgment. *Railway Co. v. Davenport* (Tex. Civ. App.) 110 S. W. 150; *Railway v. Mitchell* (Tex. Civ. App.) 107 S. W. 374; *Railway Co. v. Kelly*, 34 Tex. Civ. App. 21, 80 S. W. 1073; *Railway Co. v. Bailey* (Tex. Civ. App.) 115 S. W. 601.

Finding no reversible error in the record, the judgment is affirmed.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. RIVERHEAD FARM.†

(Court of Civil Appeals of Texas. Feb. 11, 1909. Rehearing Denied March 25, 1909.)

1. RAILROADS (§ 114\*)—INJURIES FROM CONSTRUCTION—ACTIONS—BASIS OF JUDGMENT.  
In an action against a railroad company for damage to crops resulting from failure to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

maintain proper drainage, the court found that the surface water flowed across the land before the road was constructed, leaving it drained within 2 to 12 hours after each rainfall, and that no drains were constructed before the road was built, and thereafter the roadbed formed a dam so as to impound the water of the land and injure plaintiff's onion crop, the drains and sluices constructed by the company being inadequate to drain the land, and judgment was given for plaintiff. *Held*, that the findings showed that the judgment was based upon defendant's duty to construct culverts, as required by McIlwaine's Dig. St. art. 4436, and not upon the breach by the company of any contract to construct drains.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 371; Dec. Dig. § 114.\*]

## 2. RAILROADS (§ 114\*)—INJURIES FROM CONSTRUCTION—PLEADING—GROUND OF ACTION—STATUTORY LIABILITY.

A petition alleged that plaintiff was the owner of irrigable land, and that defendant agreed, as a part of the consideration for the conveyance of a strip thereof to it for a roadbed, to maintain all drainage and irrigation ditches, but that, in constructing its road, defendant wrongfully and tortiously failed to construct sluices and culverts for the necessary drainage. *Held*, that the cause of action was not based on breach of contract but on defendant's duty, under McIlwaine's Dig. St. art. 4436, to construct necessary sluices and culverts.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 368; Dec. Dig. § 114.\*]

## 3. RAILROADS (§ 72\*)—CONVEYANCE OF RIGHT OF WAY—DRAINAGE—WAIVER OF STATUTORY DUTY.

Recitals, in a conveyance of land to a railroad company for its roadbed, that the company, in consideration of the conveyance, agreed to maintain in good condition all drainage ditches, etc., so long as they were deemed necessary by the grantor, did not constitute a waiver by the grantor of the company's duty to construct necessary culverts or sluices, as required by McIlwaine's Dig. St. art. 4436, but merely added the further duty of maintaining the then existing ditches.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 173; Dec. Dig. § 72.\*]

## 4. RAILROADS (§ 72\*)—CONVEYANCE OF RIGHT OF WAY—RELEASE OF DAMAGES—CONSIDERATION.

A consideration was necessary to sustain a contract by a landowner, upon conveying a tract for a railroad right of way, releasing his right to recover damages from the railroad for its failure to discharge its statutory duty to construct necessary ditches for drainage of the adjacent land.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 168, 176; Dec. Dig. § 72.\*]

## 5. DAMAGES (§ 112\*)—MEASURE—INJURIES TO CROPS.

In an action for the destruction and injury of an onion crop, plaintiff's measure of damages was the market value of the part of the crop destroyed when it was destroyed, at the nearest market, and the difference between the market value at that place of the part merely injured, immediately before it was injured, and its market value there immediately thereafter.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281, 282; Dec. Dig. § 112.\*]

## 6. DAMAGES (§ 174\*)—EVIDENCE—ADMISSIBILITY—INJURY TO CROPS.

In determining the market value of a crop immediately before and after it was injured or destroyed, evidence was admissible to show the

probable yield under proper cultivation, the expense of cultivation, and the value of the crop when matured and marketable, as well as the cost of preparation and transportation to market.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 464; Dec. Dig. § 174.\*]

## 7. DAMAGES (§ 222\*)—ASSESSMENT—FINDINGS—MEASURE OF DAMAGES.

In an action for the destruction of, and injury to, an onion crop, evidence of the probable yield under proper cultivation, the expense of cultivation, the value of such yield when matured and marketable, and the cost of preparation and transportation to market, being admissible in determining the market value of the crop, that the court set out such evidence in its findings, and indicated that he was controlled by it, did not show that he resorted to an improper measure of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 565; Dec. Dig. § 222.\*]

Appeal from District Court, Hays County; L. M. Moore, Judge.

Action by the Riverhead Farm against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

The appeal is from a judgment in favor of appellee against appellant for the sum of \$13,763.53.

Appellee, plaintiff below, alleged: That it was the owner of a tract of land near San Marcos; that by means of ditches, etc., said land had been prepared for irrigation and was in a very high state of cultivation; that it had conveyed to appellant, for use as a right of way for its railroad in making a connection with another railroad, a narrow strip across said land; and that, as a part of the consideration for such conveyance, appellant had agreed "to maintain in good condition all drainage and irrigation ditches then existing on said land, so long as the same may be necessary for the proper use of the lands of plaintiff laying upon either side of said connecting tract, for irrigation purposes." Appellee further alleged that appellant, in constructing its railroad across said tract of land, wrongfully and tortiously failed to first construct sluices and culverts required for the necessary drainage thereof by the natural lay of the land, and never afterwards constructed such necessary sluices and culverts, but, on the contrary, "wrongfully and tortiously neglected to do so," and that, as it was constructed on said right of way, appellant's roadbed intercepted the natural flow of surface waters across said land, operating in effect as a dam, "catching, holding, and impounding the surface waters as they reached it, and causing them to flood large portions of said land," on which it was alleged appellee had growing a crop of onions. And appellee further alleged that, as a result of such waters being so impounded, about 15 acres of the land on which the onions were growing were so flooded and kept submerged with water as to almost

wholly destroy its said crop of onions thereon, to its damage in the sum of \$25,000.

The trial was before the court without a jury. From the evidence heard by him, the court found as facts: That because of the natural lay of the Holland and adjacent tracts, including an area of over 300 acres, surface water originating on such area before appellant's railroad was constructed across said Holland tract, flowed across the part of same on which appellee's onion crop was growing, leaving the land effectually drained within from 2 to 12 hours after each rainfall, according to the quality of rain falling in each instance. That before constructing its railroad across said land, appellant did not first construct such culverts and sluices as the natural lay of the land required for its necessary drainage after the construction of said railroad. That such necessary sluices and culverts were not thereafterwards, and before appellee suffered the damages sought to be received, constructed by appellant, though it did construct a culvert and sluices which were wholly inadequate for such necessary drainage. That as said railroad was so constructed and maintained across said land, its bed operated as a dam, intercepting the natural flow of surface waters, and catching, holding, and impounding the same on the land. That about April 25, 1907, appellee had growing on the land across which appellant's said railroad had been constructed a crop of onions, then almost matured and in a "most favorable and promising condition." That on or about said day in April there was a heavy fall of rain on said drainage area. That the flow of surface water on said area across said 15 acres, according to the natural lay of the land, was intercepted by appellant's said roadbed where it crossed said 15 acres, and was held and impounded on the upper side of said roadbed, thereby submerging, and keeping submerged for a period of from 24 to 72 hours, the portion of said 15 acres, to wit, about 11 acres, lying on said upper side of said railroad. That while said surface water was so impounded, it slowly, but continuously, passed from said upper side to the lower side of said roadbed, and so kept the remainder (about 4 acres) of said 15 acres of land, lying on the lower side of said roadbed, continually flooded and saturated with said water. That on or about May 8, 1907, and on or about June 7, 1907, other rains fell upon said area, when said land was again in like manner flooded and submerged. That on each occasion referred to when surface water was impounded upon said land, the same would, but for the presence of said roadbed, because of the natural lay of the land, have passed over and away from said 15 acres without injury to the crop growing thereupon. That because said water was so impounded, flooding and submerging the crop growing thereupon at and for the length of time stated, the

greater part of said crop was destroyed, and the market value of the part not destroyed was greatly depreciated. That the failure of appellant to provide such necessary culverts and sluices for its roadbed was the proximate cause of said injuries to said crop. That, had said onion crop not been so injured, it would have yielded at its maturity an average of 44,000 pounds per acre for the entire 15 acres, or an aggregate of 660,000 pounds of onions, which, at 50 pounds to the crate, would be 13,200 crates. That the market value of same at San Marcos at their maturity would have been \$1.75 per crate, or, for the whole number of crates, \$23,100. That the cultivation of said onions had been completed when the first of said rains fell. That the actual cost and expense of gathering and preparing the onions for market f. o. b. cars at the loading station would have been an average of 30 cents per crate, or, in the aggregate, \$3,960, which, deducted from the \$23,100, representing what would have been the market value of the crop but for its destruction and injury, left \$19,140 as its net market value. That the part of the crop damaged but not destroyed was gathered and marketed by appellee at an expense of \$1,537.50, and brought the sum of \$6,913.71, or, less such expenses, the net sum of \$5,376.47. On the facts so found by the court, he concluded as a matter of law that appellee was entitled to recover the sum of \$23,100, as representing what would have been the total value of the crop, less \$3,960, representing what would have been the cost of gathering and marketing the entire crop, and less the further sum of \$5,376.47, the net proceeds of the part of the crop gathered and marketed, or the sum of \$13,763.53, for which amount the judgment was rendered.

Fiset & McClendon, for appellant. O. T. Brown, for appellee.

WILLSON, C. J. (after stating the facts as above). In its petition appellee alleged that it had conveyed to appellant a right of way for its railroad over and across the 15 acres of land, and that, as a part of the consideration for such conveyance, appellant had agreed "to maintain in good condition all drainage and irrigation ditches then existing on said land, so long as the same may be necessary for the proper use of the lands \* \* \* for irrigation purposes." On the trial appellee offered no evidence in support of said allegation in its petition, but appellant offered, and the court admitted as evidence, the instrument evidencing the conveyance to it of said right of way, containing an undertaking on its part substantially as alleged in said petition. Appellant now insists that the findings of the trial court show the judgment to have based upon its failure to comply with the statute requiring it, before constructing its roadbed, to first construct "necessary culverts or sluices, as the natural lay of the land requires, for the necessary drainage thereof"

(McIlwaine's Dig. Tex. St. art. 4436), and that, having such a basis, instead of its failure to comply with its contract evidenced by the conveyance to it of the right of way, the judgment is erroneous. We think it is obvious that the basis for the judgment was the court's finding that appellant had failed to discharge the duty the statute imposed upon it, and not a breach of its contract; but we do not think it follows that the judgment therefore is erroneous. The cause of action set up in appellee's petition was not appellant's breach of a contract, but its failure to comply with the requirements of the statute, resulting in injury to appellee. Appellant's answer to the petition was a general denial. If, without pleading it, it was entitled to rely upon a contract as relieving it from liability to appellee for a failure to comply with the statute, it nevertheless, on that account, has here no right to complain, because it appears that it did not prove such a contract. There was nothing in the recitals in the conveyance to it from appellee showing that the latter had waived, released, or in any manner parted with its right to complain of a failure on appellant's part, when constructing its roadbed, to discharge its duty under the law to construct as a part of such roadbed such culverts or sluices as the natural lay of appellee's land rendered necessary for the drainage thereof. The recital in the conveyance, relied upon by appellant to support its contention, evidenced an undertaking on its part, in consideration of the conveyance made to it of the right of way, "to maintain in good condition all drainage and irrigation ditches, pipe lines, canals, and crossings now existing, so long as the same may be deemed necessary by the party of the first part (appellee), and from time to time provide and thereafter maintain such additional drainage and irrigation ditches, pipe lines, canals, and crossings as may be necessary for the proper use of the lands of the party of the first part, lying upon either side of said connecting tract, for irrigation purposes." Evidently it was not the intention of the parties that the undertaking specified on appellant's part was to so operate as to relieve it of the consequences to appellee of a failure to perform its statutory duty. Instead, we think, it should be held to have been intended to add to that duty the further duty to maintain in good condition ditches, pipe lines, etc., then existing for the purpose of irrigating the land, and to provide and afterwards maintain such additional ditches, pipe lines, etc., as might become necessary for that purpose. For discharging its statutory duty, appellant had no right to exact a reward. For releasing its right to recover damages it might become entitled to as the result of the failure of appellant to discharge that duty, appellee was entitled to exact a reward. In fact, it could not be held to have released its rights to such damages in the absence of proof that there was a consideration to it for such a release. Yet, if the undertaking

on appellant's part be construed as a release by appellee of its right to such damages, it would appear not only that it received no consideration for same, but, on the contrary, that it had purchased the privilege to do so by a conveyance of the right of way to appellant. It is clear, we think, that the court did not err in refusing to treat the suit as one for damages for a breach by appellant of its undertaking in the contract. The first, second, third, fourth, fifth, and sixth assignments of error therefore are overruled.

Appellant further insists that in determining the amount of appellee's damages the court resorted to another measure than the one authorized by the law to be used in this case, and that therefore the judgment is erroneous. We think it is true, as appellant contends it is, that the true measure of appellee's damages was the market value at San Marcos of the portion of the crop destroyed at the time it was destroyed, and the difference between the market value at San Marcos of the portion thereof merely injured immediately before it was injured, and its market value at said place immediately after it was injured. *Railway Co. v. Mayfield* (Tex. Civ. App.) 107 S. W. 940. But we are not prepared to say that the trial court did not resort to this measure in determining the amount of damages found by him in appellee's favor. On the contrary, we think, we should assume that he was controlled in determining the damages by the proper measure therefor. In determining the market value of the crop immediately before and immediately after it was injured or destroyed, the court was authorized to consider evidence showing the "probable yield under proper cultivation, the value of such yield when matured and ready for sale, and also the expense of such cultivation, as well as the cost of preparation and transportation to market." *Railway Co. v. Pape*, 73 Tex. 501, 11 S. W. 526; *Railway Co. v. Jackson* (Tex. Civ. App.) 103 S. W. 710; *Milling Co. v. Langford*, 32 Tex. Civ. App. 401, 74 S. W. 928. Having a right to consider such testimony in determining the market value of the part destroyed at the time it was destroyed and the difference in the market value of the part injured immediately before and immediately after it was injured, we do not think that the fact that the court in his findings set out such testimony, and indicated that he was controlled by it, shows that he resorted to an improper measure in determining the damages. The ultimate finding made by him—that is, that appellee had been damaged in the sum of \$13,763.53—we think must be assumed to have been based on the measure authorized by law. The seventh, eighth, and eleventh assignments of error are overruled.

By its tenth and eleventh assignments of error, appellant attacks the judgment on the ground that it is excessive. While the judgment is a large one, we cannot say that it was not supported by the evidence. In fact the

evidence, it seems, properly may be said to have been sufficient to have supported a judgment for even a greater sum.

The judgment is affirmed.

HOUSTON & T. C. RY. CO. et al. v. ROGERS.  
(Court of Civil Appeals of Texas. Feb. 24, 1909. On Rehearing, March 18, 1909.)

**1. APPEAL AND ERROR (§ 598\*)—RECORD—STATEMENT OF FACTS.**

On appeal from the county court to the Court of Civil Appeals, the original statement of facts is not to be sent to the upper court, but must be copied into and made a part of the transcript, as required by Acts 30th Leg. 1907, p. 509, c. 24.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2639; Dec. Dig. § 598.\*]

**2. APPEAL AND ERROR (§ 644\*)—RECORD—WAIVER OF IRREGULARITIES—INCORPORATING ORIGINAL STATEMENT OF FACTS.**

Where appellee failed to object, before the day of submission of the case to the Court of Civil Appeals, that the original statement of facts in the county court had been transmitted on appeal, instead of being copied into the transcript, he waived the defect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2795-2798; Dec. Dig. § 644.\*]

**3. DAMAGES (§ 142\*)—PLEADING—GENERAL AND SPECIAL ALLEGATIONS.**

Where a petition contains a general allegation of damages, and also specially avers the particular items of damages claimed, the special allegations will control, and be considered the damages for which plaintiff seeks reimbursement.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 413; Dec. Dig. § 142.\*]

**4. APPEAL AND ERROR (§ 1140\*)—DISPOSITION OF CAUSE—AFFIRMANCE—REMISSION OF PART OF RECOVERY.**

Ordinarily, where an improper element of damage has been allowed, if the amount claimed can be segregated from the verdict or finding, the judgment will not be remanded, but may be modified by remittitur, and then affirmed; but where the court, in awarding excessive damages, did not award judgment jointly against two defendants for the total amount found due, but awarded separate recoveries in the distinct sums that each was found liable for, and there is nothing in the evidence by which the correct amount that each defendant would be liable for can be ascertained, the cause must be remanded for another trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4464; Dec. Dig. § 1140.\*]

Appeal from Llano County Court; A. H. Willbern, Judge.

Action by W. J. Rogers against the Houston & Texas Central Railway Company and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded on rehearing.

Baker, Botts, Parker & Garwood, Fliset & McClendon, S. R. Fisher, J. H. Tallichet, and S. W. Fisher, for appellants. McLean & Spears, for appellee.

LEVY, J. By his petition appellee sought to recover damages for negligent delay in the handling of a shipment of calves originating at Llano, Tex., on July 8, 1906, and terminating at Ft. Worth in the afternoon of the following day; the shipment being over the respective lines of the two appellants. The case was tried before the court without a jury.

The law does not provide that the original statement of facts be sent to this court on appeal of a case from the county court. The statement of facts on an appeal from a judgment of the county court should be copied into and made a part of the transcript, as required by the act of 1907 (Acts 30th Leg. p. 509, c. 24). *Railway v. Nelson* (Tex. Civ. App.) 108 S. W. 182. We are therefore in this appeal to be controlled by the findings of fact made by the trial court, which properly appear in the record, because there is no statement of facts in the record as provided by law.

The court finds that "the defendants did not transport and deliver said cattle within a reasonable time and with ordinary care, but negligently delayed the same in transportation, and carelessly and negligently handled said stock while being transported by them, respectively, the direct and proximate result of which was to cause said stock to excessively shrink in weight, to become stale in appearance, and to have them encounter a drop in the market, all to such an extent that said cattle, at the time and in the condition they were delivered at destination, were of less value than they would have been, had they been transported and delivered within a reasonable time and with ordinary care, to the extent of \$394." In the absence of a statement of facts, we are not prepared to hold that the finding was erroneous, or without evidence to support the same, or that the amount allowed was excessive.

The bills of exception are of such a nature that the same cannot properly be determined, in reference to the precise case as tried, without a statement of the facts.

The case is ordered affirmed.

**On Rehearing.**

The motion for rehearing was granted, and we have considered the statement of facts in the case, on the ground that the appellee had waived copying into the record by failure to object to same before the day of the submission of the case to this court.

We have concluded that the assignments of error complaining of the amount of the verdict as being excessive under the pleadings and evidence should be sustained. Having specially alleged the items of damages claimed to make up the aggregate sued for, the appellee is bound by such particular allegations. Where the petition contains a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

general allegation of damages, and at the same time specially avers the particular items of damages claimed, the special allegations will control, and be considered the damages for which the plaintiff seeks reimbursement.

Under the proof, limited by the allegations, the total amount appellee could have recovered was, with interest, \$354.22, which is \$68.13 less than the amount of the damages awarded by the court. Ordinarily, where an improper element of damage has been allowed, if the amount claimed can be segregated from the verdict or finding, the judgment will not be remanded, but may be modified by remittitur and then affirmed. But in this case the court below has not awarded judgment jointly against the two appellants for the total amount found due, but has awarded to the plaintiff a recovery separately against the defendants in the distinct amounts that each was so found liable for. There is nothing in the evidence by which we can arrive at the correct amount that each appellant would be liable for, and hence we cannot correct an excessive amount by awarding to each a portion thereof if remitted. We cannot say that one appellant should be credited with the whole of the excess, or what portion of the excess each should be allowed. To do so would be simply an arbitrary act. Neither, in the absence of an express agreement on the part of the appellee, could we say that the total amount of the excess should be allowed each appellant in remittitur. In this attitude the case will have to be remanded for another trial.

The case is ordered reversed and remanded.

### S. W. SLAYDEN & CO. v. PALMO.

(Court of Civil Appeals of Texas. Jan. 13, 1909. Rehearing Denied March 17, 1909.)

#### 1. VENDOR AND PURCHASER (§ 18\*)—NATURE OF CONTRACT—OPTIONS.

A contract between a firm and a third party, whereby the latter agreed to deed certain land to one partner or to whom he should direct, in consideration of a certain sum in vendor's lien notes or of the note of such partner, was not on its face a mere option to be submitted to the latter in person and accepted by him before it was binding, nor did it require him to personally direct to whom the farm should be conveyed, but he could act by an agent.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.\*]

#### 2. VENDOR AND PURCHASER (§ 45\*)—REQUISITES OF CONTRACT—QUESTIONS FOR JURY.

Whether a contract for the conveyance of land was signed on the understanding that it was to be submitted to the grantee, and not be binding unless approved by him, *held* properly submitted to the jury.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 77; Dec. Dig. § 45.\*]

#### 3. PARTNERSHIP (§ 128\*)—CONTRACTS—SCOPE OF FIRM BUSINESS.

A firm engaged in discounting paper and loaning money was liable as surety on a mortgage on a farm owned by a firm debtor. One of the partners in the name of the firm contracted with the debtor that he should deed the farm to another partner or to such party as he might direct, in consideration of a certain sum in vendor's lien notes or the note of such other partner, the purchaser to assume the mortgage and the debtor to be released from firm. Certain personal property of the debtor not covered by the mortgage was included in the sale, and the contract further required other land to be conveyed to the debtor. *Held*, that as the firm did not acquire any property, but incurred a liability, the contract was not within the apparent scope of its business, and did not bind the other partners in the absence of ratification.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 193; Dec. Dig. § 128.\*]

#### 4. EVIDENCE (§ 208\*)—ADMISSIONS—JUDICIAL ADMISSIONS—PLEADINGS.

On the issue as to whether one T., who executed a contract in the name of a firm, was a partner, it was error to admit as an admission a petition in another action against the firm charging that T. was a partner, and the answer, which, while embracing a general denial, failed to deny the partnership under oath, since in that action the answer may have been an admission of the partnership, because of the existence of a statute or law requiring that, when a plaintiff charges that defendants are partners, the latter must, to present an issue thereon, deny the charge under oath; such statute having no application except in the case in which the answer is filed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 714; Dec. Dig. § 208.\*]

#### 5. VENDOR AND PURCHASER (§ 330\*)—BREACH OF CONTRACT—DAMAGES.

Where plaintiff contracted to convey a farm and certain personal property to defendants for a named sum, the value of the personal property, if not delivered by plaintiff, should have been deducted from the consideration named in an action for breach of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 953; Dec. Dig. § 330.\*]

#### 6. VENDOR AND PURCHASER (§ 331\*)—BREACH OF CONTRACT—ACTIONS—VERDICT.

In construing a verdict the pleadings and charge may be looked to, but the court may not look to the testimony in order to ascertain facts on which to base a judgment, and hence in an action for breach of a contract for the purchase of land a verdict merely finding for plaintiff for the land at \$5 per acre, but not stating the total value of the land or the number of acres, was insufficient.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 957; Dec. Dig. § 331.\*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by M. Paimo against S. W. Slayden & Co. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Clark & Clark, D. C. Bolinger, W. B. Carrington, and Eugene Williams, for appellants. Richard I. Munroe and J. R. Downs, for appellee.

KEY, J. This case has been on appeal once before, and will be found reported in 90 S.

W. 908, and 92 S. W. 796. M. Palmo instituted the suit against S. W. and T. B. Slayden and Ozias Bailey, seeking to recover for the breach of a written contract. T. B. Slayden died, leaving S. W. Slayden and Ozias Bailey as the only defendants. The contract sued on reads as follows: "S. W. Slayden & Co., composed of S. W. Slayden, O. Bailey, and T. B. Slayden, Waco, Texas, Nov. 23d, 1897. This contract shows that M. Palmo agrees to deed the Brazos Plantation farm to S. W. Slayden, or to whom S. W. Slayden may direct, in consideration of \$6,000 in vendor lien notes to be approved by M. Palmo or the note of S. W. Slayden for said amount, the purchaser of said Brazos Plantation farm assuming the mortgage on said farm, on which is a balance due of about \$9,000. With the farm is included all stock except one pair of mares, and all farm implements, wagons and vehicles, except one buggy and cotton seed sufficient to plant the farm next year, and all corn and hay, household and kitchen furniture is also excepted, as well as the cotton now on the farm. In addition to the \$9,000 in notes the said Palmo is to be released from payment his account with S. W. Slayden & Co. [Signed] M. Palmo. S. W. Slayden & Co., per T. B. Slayden. It is also understood that Palmo is to have the fifty acres of land in Rockport, once owned by him." The plaintiff charged in his petition that the three original defendants were partners at the time the contract was made; that he had performed his part of the contract by executing a deed at the instance of the defendants to one John Baade, conveying to him the plaintiff's equity in the tract of land described in the contract as the "Brazos Plantation farm." It was also alleged that the defendants had breached the contract by refusing to deliver to the plaintiff \$6,000 worth of vendor's lien notes or the note of S. W. Slayden for that amount, and had failed to convey or cause to be conveyed to him the 50 acres of land in Rockport, referred to in the contract, and alleged to be of the value of \$2,000. The petition also contained averments whereby it was sought to recover from the defendants on account of an alleged conversion of 25 bales of cotton, but the court sustained a special exception to that branch of the plaintiff's case, and that ruling is not complained of in this court. The answer of the defendants embraced a general demurrer, a special exception, a general denial, and a voluminous special plea, the particulars of which need not be here stated further than to say that it included a specific denial of the plaintiff's charge that T. B. Slayden was a member of the firm of S. W. Slayden & Co. That plea was duly verified as required by statute. The plaintiff filed a supplemental petition, and, among other matters, alleged that if T. B. Slayden was not, in fact, a member of the firm of S. W. Slayden & Co., the latter had held him out as

such in such manner as to authorize the plaintiff to deal with him as a member of the firm. The last trial was before the court and a jury, and resulted in a verdict, which reads as follows: "We, the jury, find for plaintiff the sum of \$6,000 and the Rockport land at \$3 per acre, with 6 per cent. interest per annum from Nov. 23, 1897, on both ams. up to present date. [Signed] J. Ivey McClain, Foreman." After receiving the verdict, the court rendered judgment for the plaintiff against the firm of S. W. Slayden & Co. and against S. W. Slayden and O. Bailey individually for the sum of \$9,833.33, and the defendants have appealed the case to this court, and presented it upon 41 assignments of error in a brief containing 214 printed pages.

The case has been given careful consideration, and the conclusion reached that the judgment must be reversed. It is not necessary, nor shall we attempt, to consider in detail the various assignments of error, and it is sufficient to say that, with one exception hereafter noted, the errors pointed out are sufficiently presented in appellants' brief.

In 1894 the plaintiff, Palmo, owned and was running what was known as the "Hotel Palmo" in the city of Waco, and 50 acres of land in Rockport, Tex. He had borrowed money from and was indebted to the State Central Bank, of which S. W. Slayden was president and W. H. Lastinger cashier. This indebtedness ran up to about \$19,000. S. W. Slayden had formerly owned a plantation on the Brazos river, which he sold to one Sam Johnson. Johnson mortgaged the farm to the State Central Bank to secure an indebtedness of \$23,500, and thereafter conveyed the farm back to S. W. Slayden, with the debt and mortgage referred to standing against it. That debt and mortgage was transferred by the bank to another bank. In September, 1894, S. W. Slayden and Palmo made a trade whereby the Brazos plantation or farm referred to was exchanged for the Palmo Hotel; Palmo assuming the payment of the \$23,500 mortgage on the farm, and Slayden assuming the payment of the \$19,000 owing by Palmo to the bank. Palmo took possession of the farm, and operated it for two or three years. He also sold a portion of it, and applied the proceeds on the mortgage. The State Central Bank was a private corporation, and its capital stock was owned by S. W. Slayden 96 shares, O. Bailey 12 shares, W. H. Lastinger 1 share, and J. L. Slayden 1 share. On March 11, 1895, that corporation ceased to do business, and conveyed all of its assets to S. W. Slayden in consideration of his assuming the payment of its debts. At about the same time the firm of S. W. Slayden & Co. was organized, and consisted of S. W. Slayden and O. Bailey. However, there was testimony tending to show that T. B. Slayden had been held out and represented to be a member of the firm in such manner as to bind the firm by acts of his within the scope

of the partnership business. The undisputed testimony shows that the partnership of S. W. Slayden & Co. was formed for the purpose, and was engaged in the business, of discounting paper and loaning money. Such loans and discounts were generally made upon real estate security. The firm was not engaged in the business of buying and selling, and did not in fact buy or sell, real estate. There was also evidence sufficient to show that the firm of S. W. Slayden & Co. was bound as guarantor or surety for the debt against the Brazos farm. It was also shown that at the time the contract sued on was made Palmo was indebted to S. W. Slayden & Co. in about the sum of \$800. There was proof showing that, prior to making the contract here involved, Palmo set up a claim for shortage in the Brazos farm, and that he had attempted to secure from S. W. Slayden compensation for the alleged shortage. There was proof showing that, in the former transactions between Palmo and S. W. Slayden, the former had conveyed to the latter 50 acres of land in or adjacent to Rockport, Tex., which was the only land that Palmo had ever owned at that place; and there was proof supporting the finding of the jury that the land referred to was worth \$5 an acre. Many other facts were proved, some of which may be referred to hereafter.

Before discussing the points upon which the case will be reversed, it is deemed proper to notice some of the contentions on behalf of appellants that are not considered tenable. The contract of June 18, 1898, pleaded and relied on by appellants as a relinquishment of all liability to appellee up to that date, was conditional upon Palmo's making sale of the farm to H. H. Rowland. Palmo did not consummate the sale. The farm was afterwards sold to Rowland, not by Palmo, but by the trustee foreclosing the mortgage lien, and selling the farm to S. W. Slayden, who then sold to Rowland. Therefore, unless it can be shown that the sale referred to was made at the instance of Palmo for the purpose of carrying out his contract with Rowland, or that subsequent thereto he ratified and adopted the act of the trustee and S. W. Slayden in making the sale to Rowland, we do not think the contract of June 18, 1898, is available as a defense to the cause of action asserted in this case. And if the sale was made at Palmo's instance, or if he ratified or adopted it, then the contract referred to became operative and constituted a good defense, regardless of the reasons urged by Palmo against its validity.

In view of the ruling just made, the questions presented in reference to the Presidio county land and Palmo's testimony concerning the same become immaterial.

We also overrule appellants' contention that the contract sued on shows upon its face that it was a mere proposition or option

to be submitted to S. W. Slayden in person and by him accepted before it could become binding. It does not so read, and we are not at liberty to so construe it; nor does it require, as contended on behalf of appellants, that S. W. Slayden should personally direct to whom the farm should be conveyed. It requires the farm to be conveyed "to S. W. Slayden or to whom S. W. Slayden may direct," but we think that he could act by agent in designating a grantee. We do not hold, however, that ratification could be done by an agent, unless he had specific authority to ratify. The defendants pleaded that the contract was signed upon an understanding that it was to be submitted to S. W. Slayden, and not be binding unless approved by him, and the court properly submitted that question to the jury.

As to the points made in appellants' brief as to whether T. B. Slayden was a partner, or so held out as to bind the firm, as said before, there was testimony authorizing a finding that he was so held out. But such finding did not authorize a verdict against the defendants for reasons which will now be stated. It must be borne in mind that T. B. Slayden is no longer a party to the suit, and the question of his liability or the liability of his estate is not under consideration. At the trial now under review, the defendants were S. W. Slayden and O. Bailey, and the question of their liability, jointly or severally, was the matter to be determined. The most favorable construction that can be placed upon the contract sued on in behalf of Palmo and as against S. W. Slayden & Co. is that it obligates the latter to see to it that Palmo sold his farm, either to S. W. Slayden or some other designated vendee, and received in payment therefor S. W. Slayden's note or vendor-lien notes to be approved by Palmo of the value of \$6,000, that the 50 acres of land in Rockport, formerly owned by him, should be conveyed back to him, and that he should be released from the payment of his account owing to S. W. Slayden & Co. The contract was not signed by S. W. Slayden or O. Bailey individually, but by S. W. Slayden & Co., per T. B. Slayden. It shows on its face that it was made with the firm, and not with any individual member of the firm except T. B. Slayden, who is no longer a party to the suit. Was such a contract within the scope of the partnership business? Or, stating the question more accurately, was that portion of the contract which obligated the firm to see to it that the Rockport land was conveyed to plaintiff, and that he receive \$6,000 worth of vendor's lien notes or the note of S. W. Slayden for that sum, within the apparent scope of the partnership business? We think that question must be answered in the negative. The firm of S. W. Slayden & Co. was organized for the purpose, and was engaged in the business of discounting paper and loaning money; and it



was not within the apparent scope of the authority vested by law in any member of that firm to bind the partnership by a contract for the purchase or sale of real estate, unless some special reason existed which would take the case out of the general rule. *Faires v. Ross* (Tex.) 18 S. W. 418; *Beatty v. Bulger*, 28 Tex. Civ. App. 117, 66 S. W. 893. In the latter case it is said: "That a partnership is not liable upon an individual undertaking of one of the members, not shown to be in furtherance of the purposes of the partnership or undertaken for its benefit, is an elementary proposition too plain to require the citation of authorities." The contract in question had no connection with any business of the partnership of S. W. Slayden & Co. except that part which stipulates that Palmo is to be released from the payment of his account with S. W. Slayden & Co. While it was held in *Lee v. Hamilton*, 12 Tex. 418, that a partner has no implied authority to accept anything other than money in payment of a debt owing to the firm, still, if it be conceded that T. B. Slayden had authority to accept real estate or other property in payment of Palmo's indebtedness to the firm, it cannot be successfully contended that he had authority to bind the firm by an obligation to see that a particular tract of land was conveyed to Palmo, and that he should receive \$6,000 in promissory notes."

But it is contended on behalf of appellee that, as the proof warranted a finding that T. B. Slayden was held out and treated as a partner, he, as such partner, had the power to bind the partnership, because there was proof to the effect that the partnership was obligated for the payment of the mortgage against the Brazos farm. In other words, that under such circumstances any member of the firm could enter into a contract on behalf of the firm for the purchase of the farm in question, and obligate the firm as the contract under consideration attempts to do. We cannot sanction that contention. While it may be conceded that each partner has implied authority to take all steps necessary for the protection of the firm, we do not believe that this case comes within such rule. The holder of the mortgage was not a party to the contract, and therefore S. W. Slayden & Co. were not released from their obligation as surety for the debt against the farm. The only result would have been to transfer Palmo's equity of redemption to S. W. Slayden or such person as he might direct. It is not a contract by the terms of which the firm was to acquire any property, or be released from any obligation; while, on the other hand, if binding upon the firm, it obligated it for more than \$6,000. Hence it is apparent that the contract was not necessary for, and could not result in, the protection of the firm of S. W. Slayden & Co. Furthermore, it included in the sale by Palmo certain personal property that was not covered by the

mortgage against the farm, and the consideration to be paid to Palmo was, in part, for such personal property. The court charged the jury as follows: "(10) A partnership conducting a banking or loan business would have the right to protect themselves against any note upon which the partnership was responsible as indorser or by reason of having assumed to pay the same in any manner deemed best by any member of the partnership, provided that no new or additional obligation be created against the partnership. So if you believe that S. W. Slayden & Co. was obligated for the balance due on the Johnson note, either by indorsement or by assuming to pay the same, a member of the partnership could accept the land against which a lien was held to secure said debt to protect the partnership against the indorsement or the obligation to pay by defendants, and in payment and settlement of the indebtedness due by plaintiff to said defendant company, and such a transaction would be within the general scope of the partnership business." The first part of this charge may have stated the law correctly, but the latter part tended to contradict the former, and was, to say the least, misleading. In concluding this branch of the case our ruling is that the contract was not within the apparent scope of the partnership business, and S. W. Slayden and O. Bailey are not bound thereby, unless it shall be made to appear that they have ratified or adopted the same.

The trial court permitted the plaintiff to introduce in evidence a petition filed by the National Bank of Commerce against S. W. Slayden & Co., in one of the federal courts of this state and the answer filed by S. W. Slayden & Co. to that petition. The petition charged that S. W. Slayden & Co. was a partnership consisting of S. W. Slayden, O. Bailey, and T. B. Slayden; and, while the answer of the defendants embraced a general denial, the partnership was not denied under oath. The evidence referred to was offered and admitted upon the theory that it tended to show an admission by S. W. Slayden and O. Bailey and T. B. Slayden was a member of the firm of S. W. Slayden & Co. That testimony was objected to by the defendants, and we think the objection should have been sustained. For the purposes of that case, the answer filed in that court may have been equivalent to an admission of the partnership, but, if so, it was merely on account of the existence of a statute or some other rule of law which requires that, when a plaintiff charges that the defendants are partners, the latter must, in order to present an issue in that regard, deny such charge under oath. Such a statute or rule of law has no application except as a rule of procedure in the case in which the answer is filed. Leaving out of consideration the rule referred to, as should have been done when the evidence was offered, then the documents

referred to merely showed that somebody charged that T. B. Slayden was a member of the firm of S. W. Slayden & Co., and the latter denied the charge. Such evidence constituted no admission, and did not tend to prove any fact material to this case. Hence we sustain the thirty-fourth and thirty-fifth assignments of error.

We also hold that error was committed, as pointed out in the thirty-sixth assignment, in permitting Palmo to testify that in 1894, when he exchanged the hotel for the plantation, there were about 100 bales of cotton on the plantation, the proceeds of which were appropriated by Slayden. That testimony was immaterial and calculated to prejudice appellants.

The thirty-seventh assignment complains of the action of the court in permitting the plaintiff to introduce in evidence a petition filed by one Ellison in the county court against the plaintiff Palmo and S. W. Slayden. We fail to see the materiality of that testimony, and think the objection urged against it should have been sustained. The same may be said in reference to the testimony complained of in the thirty-eighth assignment, wherein the plaintiff was permitted to testify that he had made negotiations through J. E. Horne, a real estate agent, to exchange the Brazos plantation for Bandera county land, and that the loan incumbering the plantation had prevented him from making the trade. That testimony was immaterial, and may have been harmful to appellants.

The thirty-ninth assignment complains of the charge of the court in reference to the measure of damages, wherein the jury were instructed that, if they found for the plaintiff, to allow him the sum of \$6,000 and the value of the 50 acres of Rockport land, with 6 per cent. interest per annum from November 23, 1897. We do not agree with appellants in their contention as to the measure of damages; but there was testimony tending to show that some of the personal property to go with the farm was not delivered by Palmo, and, if such was the case, the value of such personal property should have been deducted from the \$6,000.

There is one other matter, though not assigned as error, to which we deem it proper to direct the attention of the trial court. The verdict does not specifically find the total amount of the value of the Rockport land, nor does it furnish the data by which such total amount can be ascertained. It merely finds for the plaintiff for the Rockport land at \$5 per acre. It has been repeatedly held that when a defendant has interposed a general denial, and there is a jury trial, the verdict must find all the facts necessary to support a judgment; and that while, in construing a verdict, the pleadings

and charge of the court may be looked to, the court cannot look to the testimony, no matter how clear and uncontradicted it may be, in order to ascertain facts upon which to base a judgment. *Dodd v. Gaines*, 82 Tex. 429, 18 S. W. 618, and cases there cited. We think the verdict should have stated the total value of the land, or given the number of acres, as well as the value per acre. Of course, the verdict could have been general and covered both items in one sum, but that course was not pursued.

On account of the errors hereinbefore pointed out, the judgment is reversed and the cause remanded.

Reversed and remanded.

# MISSOURI, K. & T. RY. CO. OF TEXAS v. LIGHT et al.

(Court of Civil Appeals of Texas. March 18, 1909.)

## 1. TRIAL (§ 191\*)—CARRIAGE OF LIVE STOCK—ACTION FOR INJURY—EVIDENCE—INSTRUCTIONS.

Where, in an action for injuries to a shipment of horses and mules, the shipper testified that all of the animals were injured, resulting in a loss of \$40 per head, and the undisputed evidence showed that some of the animals were sold at the point of destination at prices in excess of what the shipper testified would be the market value had they arrived in proper condition, an instruction that if, because of the carrier's negligence, the animals were injured, plaintiff was entitled to recover, was erroneous as assuming that the animals, if injured, suffered in their market value.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431; Dec. Dig. § 191.\*]

## 2. CARRIERS (§ 229\*) — CARRIAGE OF LIVE STOCK—INJURIES—MEASURE OF DAMAGES.

A carrier of live stock negligently injuring the same is liable only for such difference between the market value of the stock in the condition in which they arrived at the point of destination and that in which they should have arrived as was caused by its negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 930, 963, 964; Dec. Dig. § 229.\*]

## 3. NEW TRIAL (§ 52\*)—MISCONDUCT OF JURY—QUOTIENT VERDICT.

Where each juror, without discussing the evidence, after the jury had retired, wrote the amount of damages he thought plaintiff was entitled to recover, and these sums were added, and then divided by 12, and the quotient was returned as their verdict, the court would not set aside the verdict as a quotient verdict, in the absence of evidence that the method of finding the verdict was in compliance with a previously formed agreement.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 104; Dec. Dig. § 52.\*]

## 4. CARRIERS (§ 229\*) — INJURIES TO LIVE STOCK—EXCESSIVE DAMAGES.

In an action against a carrier for injuries to a shipment of 26 horses and mules, the shipper testified that the stock, arriving in proper condition, would have been worth \$150 per head, and that they were worth only \$90 per head in the condition in which they did arrive. A short time after arrival, 8 of them were sold in excess of the estimated market value. There was nothing to show that such animals were

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

injured less than the others, or that the market value was greater at that time. The average of those subsequently sold was also above the value of those fixed by the shipper. Four of the unsold animals were held at \$275 per pair. The value of 3 animals was unaccounted for. There was nothing to show that the market value of the stock changed, or that any expense was incurred to get them in a better marketable condition. Held, that a verdict for \$533 was excessive.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 229.\*]

Appeal from District Court, Denton County; Clem B. Potter, Judge.

Action by D. W. Light and others against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Garnett & Eldridge, for appellant. Walker & Mays, Herbert R. Wilson, and Orus O. Ross, for appellees.

HODGES, J. The appellees owned 28 head of horses and mules in Denton county, which, in December, 1903, were shipped over the appellant's line of road to San Antonio, and thence over the International & Great Northern to Cotulla. The stock were loaded into a car at Pilot Point on Wednesday, and reached their destination on the following Monday night. This suit is to recover damages for delay, rough handling, and failure to properly water and feed the stock while in transit over the appellant's line. Upon the trial before a jury, the plaintiffs in the case recovered a judgment for \$533.

The testimony shows that the distance from Pilot Point to Cotulla is about 400 miles, that the shipment over the appellant's line was to San Antonio, and thence over the International & Great Northern Railroad; the latter distance being about 100 miles. There was testimony on the part of the appellees tending to show delays, rough handling, and injuries to the stock, but upon these issues the evidence was conflicting. There was also a conflict in the evidence as to the condition in which the stock arrived at Cotulla. On the part of the appellees the testimony was that they were gaunt, drawn, skinned, and bruised, and some of them were lame; while witnesses for the appellant say that the stock were not injured in any way, that they were not bruised or skinned, and were in as good condition as could be expected after having been transported that distance. It is claimed that the stock were shipped for the purpose of being sold at the point of destination, and most of them had been sold prior to the time of the trial. Upon the issue of injury to the market value of the stock, D. W. Light, one of the appellees, was the only witness who testified in the court below. His testimony upon that issue is as follows: "If these stock had reached Cotulla in the condition and at the time they should have reached there,

their market value would have been about \$130 per head. The market value of said stock at the time and in the condition they did arrive there was \$90 per head. The difference per head in the condition and at the time they should have reached Cotulla, and the condition and time when they did reach Cotulla, was \$40 per head." There was other testimony, offered by appellant, to the effect that the market value of the entire lot upon their arrival at Cotulla was much above \$90 per head. The evidence also shows: That before the stock arrived, and while at Granger in transit, four of the mules were sold by the man in charge for \$625; that the next day after their arrival four others were sold for \$550; that within a short time four other mules and two horses were sold for an aggregate of \$815; that some time thereafter—just how long is not stated—two other mules were sold for \$265, and still later five mules were sold at an average of from \$250 to \$275 per span. There were six mules and three horses on hand at the time the witness whose deposition was taken testified. We are not advised as to when this was. Several of the mules remaining unsold were being held for \$275 per pair; an offer of \$265 per pair having been refused. As to the condition of the remainder of the stock, the testimony does not disclose anything further than as given by the witness D. W. Light, above referred to.

The first error assigned complains of the following portion of the court's charge: "If you believe from the evidence that during the transportation of said horses and mules, and while they were in charge of the defendant, the defendant was guilty of negligence in the manner of handling or switching the car in which said horses and mules were, and if on account thereof said horses and mules were skinned, bruised, or injured, then you will find for the plaintiffs on this item of their claim." The objection to this is that it assumes as a conclusive fact that if the animals were "skinned, bruised, or injured," they necessarily suffered in their market value, and therefore the charge is on the weight of the evidence. In view of the peculiar facts of this case, we think the charge is subject to the objection urged. There was testimony on the part of the appellees that all of the stock were more or less skinned, bruised, and injured, without specifying in detail any of the injuries, except as to three of the animals. D. W. Light, one of the plaintiffs in the case, testified that the damages from those injuries amounted to \$40 per head. The undisputed evidence further shows that some of the stock were sold within a very short time after their arrival, at prices in excess of what Light testified would be their market value had they arrived in proper condition. This, it seems, would afford conclusive evidence that some of the stock, at least, were not "skinned, bruised, or injured" suf-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ficiently to affect their market value. We think the court should have left it to the jury to determine whether or not the injuries were sufficient to affect the market value of the stock.

It is also claimed that the court erred in giving the following charge on the measure of damages: "If you find for the plaintiffs, you will assess their damages at such sum as in your judgment from the evidence is the difference between the market value of said horses and mules in the condition in which they arrived at Cotulla, and the market value of said horses and mules in the condition in which they should have arrived in Cotulla." The specific objection to this portion of the charge is that "it makes the appellant absolutely liable for the difference between the market value of the stock in the condition in which they arrived at Cotulla, and that in which they should have arrived"; whereas, the appellant can only be held liable for such difference as may have been caused by its negligence. We think the proposition stated by the appellant correctly gives the rule in such cases, and if, by a fair construction of the language used in the charge, it fails to conform to that requirement, it should not have been given. The court uses the language, "in the condition in which they should have arrived," without any qualification. This apparently implies that there was a dereliction of duty somewhere which caused an injury. Had the court supplied the ellipsis by adding, "but for the negligence of the appellant," still another objection, equally as grave, would have arisen. The charge might then be said to have been upon the weight of the evidence. Yet, clearly, we think such was the only inference to be drawn from the language used. If we construe the language as having reference to a condition of the stock brought about by any and all of the circumstances attending that shipment which resulted in their delay or injury, then the charge seeks to make the appellant responsible for more than the law will justify. The charge should have been so framed as to submit the measure of damages in a manner authorizing a recovery for such injuries as resulted from the negligence of the appellant or of its servants.

Appellant further complains that the verdict is excessive and is not supported by the evidence. There is also an assignment charging misconduct on the part of the jury in the manner in which they arrived at their verdict. Upon this latter question the court heard testimony which showed that the jury reached their verdict in the following manner: After they had retired for the purpose of deliberation, and without having discussed the evidence, in pursuance of a suggestion, each juror wrote upon a slip of paper the amount of damages he thought the plaintiffs were entitled to recover. These were added together, and the sum divided by 12, resulting in 533 as the quotient. They

accordingly returned \$533 as their verdict in the case. The testimony further showed that the various sums written by the jurors ranged from \$300 to \$988. There is some doubt, from the evidence adduced, as to whether this method of finding the verdict was in compliance with a previously formed agreement, or that the result was afterwards agreed to by all the members of the jury, and we are unable to say that the verdict was arrived at in such a way as to justify the court in setting it aside on that account alone; but, be that as it may, these facts are suggestive of such an absence of that deliberation which should characterize the conduct of jurors, when passing upon the property rights of litigants, as to subject to close scrutiny the evidence upon which their finding is made to rest. Under the testimony we think the jury might justifiably have concluded that the stock in question were injured by long confinement and the manner in which they were handled while in transit, and if it was also found that some of the injuries inflicted were caused by the negligence of the appellant's employés, it cannot be said that such finding would be without evidence to support it; but it is difficult to understand how a satisfactory conclusion could be reached as to how much damages should be awarded.

There were twenty-six horses and mules in the car when they arrived at Cotulla; two mules having been sold on the way by the man in charge. One of the appellees testified that some of the stock were skinned, bruised, and injured when they arrived, while others say that all of them were in that condition. How much of this condition was due to the negligence of the appellant's servants, and how much resulted incidentally and necessarily from being transported that distance in a railway car, is purely a matter of conjecture under the evidence. Two of the witnesses for plaintiffs below testified to specific injuries to three of the animals, but did not undertake to say what was the amount of damages resulting from those particular injuries. D. W. Light, one of the appellees, says that the stock would have been worth in that market \$130 per head had they arrived in proper condition, that they were worth only \$90 per head in the condition in which they did arrive, and thus places \$40 per head as a general average of the damages sustained. There was nothing to enable the jury to assess the damages to any one or more of the animals at a greater or less amount than the average named by Light. The correctness of his estimate is so strongly challenged by his subsequent admissions, and those of his co-plaintiffs, that its probative value as a basis for a verdict may be seriously questioned. It is admitted that, a very short time after the stock arrived at Cotulla, eight head of them were sold for \$1,100, or \$7.50 per head more than Light estimated their mar-

ket value would have been had they arrived in good condition, and \$47.50 more than he stated their market value actually was upon their arrival. There is nothing in the evidence to show that the animals sold were injured less than the others, or that their market value was greater at that time. The average of those sold thereafter was also above the value fixed by Light. It was also admitted that four of the mules which were unsold at the time the deposition of the witness was taken were held at \$275 per pair. This would leave only five head whose value were unaccounted for, thus showing by the evidence that twenty-one of the animals had been erroneously estimated by Light to have been damaged to the extent of \$40 per head. Could the jury say that these five were each damaged to the extent of over \$100, as they must in order to sustain their finding? We think not. It is true some of these animals were priced some time after their arrival at their destination, and appellees contend that these values should not be taken as a basis of measuring their damages. We think that is true, and are not undertaking to use it for that purpose; but we refer to it simply to show how unreliable and inadequate was the testimony upon which the jury had to rely in estimating the damages in the case. There was nothing to show that the market value of the stock had changed during the time intervening between their arrival and when the animals were subsequently sold, or that any expense was incurred to get them in a better marketable condition. The evidence merely shows that they were turned into a large pasture and were kept there until sold.

We think that the verdict is excessive, and for that reason, among the others discussed, the judgment is reversed, and the cause remanded.

#### MONTGOMERY, Tax Collector, v. PEACH RIVER LUMBER CO.

(Court of Civil Appeals of Texas. Feb. 24, 1909. Rehearing Denied March 18, 1909.)

#### 1. PROPERTY (§ 5\*) — PERSONAL PROPERTY — STANDING TIMBER.

Standing timber, when sold by the owner of the land with the right to enter and remove it, ceases to be a part of the realty, and becomes personal property.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 8; Dec. Dig. § 5.\*]

#### 2. TAXATION (§ 247\*) — EXEMPTION — PUBLIC PURPOSES — COUNTY SCHOOL LANDS — TIMBER.

Const. art. 11, § 9, exempts from taxation all property of counties, etc., held only for public purposes. Article 7, § 6, provides that all lands granted to the several counties for educational purposes are the property of such counties, and shall be held by them in trust for the public schools. Acts 1905, p. 72, c. 52, provides that timber held by persons, purchas-

ed from the state under the various laws for that purpose, shall be taxed. *Held*, that timber on county school lands was exempt from taxation under section 9, so long as it was owned by the county, but, when sold, was not exempt from taxes levied after the sale, though not severed from the land; Act 1905 applying to county lands as well as state lands.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 247.\*]

#### 3. TAXATION (§ 611\*)—COLLECTION OF TAXES — ACTION TO ENJOIN—PLEADING.

In a suit to enjoin the collection of taxes on timber standing on county school lands, on the ground that it was exempt from taxation, allegations of the petition that the county transferred the timber standing on the land to M., with the right to enter and remove it, and that plaintiff, by proper conveyances, etc., became the owner of M.'s rights, under his contract with the county, showed that title to the timber was conveyed to M., and that plaintiff acquired his title.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 611.\*]

#### 4. TAXATION (§ 611\*)—COLLECTION OF TAXES — SUIT TO ENJOIN — FINDINGS — CONSTRUCTION.

A finding, in a suit to enjoin the collection of taxes, merely that plaintiff had acquired from the county, by mesne conveyances, the right to cut and remove timber on county school lands did not show that title to the timber, while standing on the land, was in plaintiff.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 611.\*]

#### 5. TAXATION (§ 611\*)—COLLECTION—SUIT TO ENJOIN—PLEADING—SUFFICIENCY OF PETITION.

In a suit to enjoin the collection of taxes on timber standing on county school lands, the petition alleged the conveyance of the timber to plaintiff's remote grantor, with right to enter and remove it, and that its sale by the county was a proper exercise of its right to use the land for school purposes, and that the timber standing on the land was not subject to taxation, because it was then a part of the realty, and had never been severed. *Held*, that the petition showed that plaintiff's theory was that the timber could not be taxed separately so long as it was not severed, irrespective of whether the county owned it, and hence was bad on general demurrer, as showing on its face that plaintiff was not entitled to the relief sought.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 611.\*]

#### 6. APPEAL AND ERROR (§ 837\*)—REVIEW—MATTERS CONSIDERED.

Allegations of the petition, under which plaintiff would not be entitled to recover, cannot be considered to supplement the findings of fact, for the purpose of working a reversal of a judgment for plaintiff, warranted by the findings considered by themselves.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 837.\*]

#### 7. APPEAL AND ERROR (§ 719\*)—ASSIGNMENTS OF ERROR — NECESSITY — INSUFFICIENCY OF PETITION.

The insufficiency of the petition on its face is fundamental error apparent of record, and requires a reversal, though there is no assignment of error on that ground.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 719.\*]

Appeal from District Court, Montgomery County; L. B. Hightower, Judge.

Suit by the Peach River Lumber Company against B. E. Montgomery, Tax Collector. From a decree for plaintiff, defendant appeals. Reversed and remanded.

W. M. Williams, for appellant. Stewarts, Llewellyn & Kayser, and Geo. T. Burgess, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against appellant, B. E. Montgomery, tax collector of Montgomery county, to enjoin the collection of taxes levied and assessed for the years 1905 and 1906, by the proper authorities of said county, upon the standing timber upon three leagues of land in said county, granted by the state to Walker county for school purposes. The petition alleges facts showing the sale of the timber by Walker county to R. McDonald in February, 1902, and then alleges: "That by proper conveyances the said Peach River Lumber Company, on the 9th day of July, 1902, became the owner of said timber, and subrogated to the rights therein of the said R. McDonald, by virtue of his contract with Walker county. That said timber standing and growing upon the said land, during the years 1905 and 1906, was not subject to taxes, state and county, for the reason that same was part of the realty, never severed therefrom, and, further, that the right to cut and remove from said land said timber thereon was a proper exercise by Walker county of its right to use said property for school purposes, and therefore said timber was not taxable by Montgomery county and the state of Texas. That B. E. Montgomery, tax collector, as aforesaid, is attempting to collect from complainant, the sum of \$596.54, the amount of taxes assessed against said timber for the years 1905 and 1906, and that said B. E. Montgomery, tax collector, as aforesaid, is threatening and preparing to levy upon certain mules and oxen of complainant, to the value of \$1,000, to satisfy said taxes, interest, and costs, and that the tax so assessed against said timber is void, and that the threatened and attempted levy upon complainant's property is void, and prays for writ of injunction to issue to restrain the levy upon and sale of complainant's property." A temporary restraining order was granted in vacation. The defendant answered at the next term of the court by general demurrer and general denial, and upon final trial, on January 23, 1908, a perpetual injunction was granted in accordance with the prayer of plaintiff's petition.

The following is the agreed statement of facts upon which the cause was tried in the court below: "(1) That the Walker county three-league grant was granted by the state of Texas to Walker county as school land for public school purposes, said grant being located in Montgomery county, Tex., and covered with pine timber. (2) That plaintiff has acquired from Walker county, by mesne conveyances, for a consideration fully paid,

the right to cut and remove the timber from said land until December 31, 1909; and plaintiff has a contract right thereafter to cut and remove the timber until the year 1916, by the payment of a further sum in money. (3) That Montgomery county, by its assessor, has regularly assessed for taxes the timber remaining on said land, being assessed as the property of plaintiff, the tax for 1905 and 1906 amounting to \$596.54, and defendant is preparing to levy on and seize and sell certain mules and oxen belonging to plaintiff, to satisfy said tax. Said mules and oxen being of the value of \$1,000, said levy, seizure, and sale would be an irreparable injury, for which plaintiff has no adequate remedy at law." The trial court, at request of appellant, filed conclusions of fact and law, the conclusions of fact so filed being an exact copy of the agreed statement above set out.

If, as alleged in the petition, appellee is the owner of the timber, the fact that it is growing upon lands of Walker county which are not subject to taxation would not exempt the timber from taxation. It is well settled that growing timber, when the title thereto has been transferred by the owner of the land upon which it stands, and the right given the transferee to enter and remove the same, becomes the personal property of the owner, and can no longer be regarded as a part of the realty. *Boykin v. Rosenfield & Co.*, 69 Tex. 118, 9 S. W. 318. Such being the rule of decision in this state, it would seem to necessarily follow that the purchaser of timber growing upon lands exempt from taxation could not claim such exemption for the timber so purchased, but to relieve the question of all doubt the Legislature, by an act passed in 1905, expressly declared that timber held by persons or corporations, and growing upon lands of the state, shall be subject to assessment for taxation as other property. The general principles of law involved are well settled, but their proper application to the facts disclosed by the record, or, to speak more accurately, the determination of the question of what facts we should consider established by the record, is one of difficulty. Section 9, art. 11, of the Constitution of this state exempts from taxation the property of counties, cities, and towns owned and held only for public purposes, and section 6, art. 7, of the same instrument declares: "All lands heretofore or hereafter granted to the several counties of this state for educational purposes are of right the property of said counties respectively to which they are granted, and title thereto is vested in said counties, \* \* \* said lands and the proceeds thereof when sold, shall be held by the counties alone as a trust for the benefit of public schools therein."

Under these provisions of the Constitution it is clear that, if the timber upon the school lands of Walker county was the property of said county on the 1st day of Janu-

any next preceding the date upon which the taxes sought to be enjoined were levied, such timber was not subject to taxation, and the injunction was properly granted. If, on the other hand, it was at said time the property of appellee, it was subject to taxation as other personal property owned by it, and the injunction should have been refused. The decision of the case depends entirely upon the determination of whether appellee acquired title to the timber under the contract made with Walker county by R. McDonald in February, 1902. The petition contains the following allegations: "That heretofore, to wit, on or about the 21st day of February, 1902, said Walker county duly and legally transferred to one R. McDonald the timber then standing and growing on said land, together with the right to enter upon said land and remove the same up to and including the year 1909, with the further right, by the payment of an additional sum per acre, to enter and remove said timber up to the 12th day of February, 1916, said county receiving the sum of \$5,000 in cash, and two vendor's lien notes, one for the sum of \$7,500, due in 6 months after said date, and the other for \$12,500, due 12 months after date, and retaining the vendor's lien to secure the payment thereof, all of which notes have been fully paid, and said lien thereon discharged, prior to January 1, 1905. That by proper conveyances, and for valuable consideration, the said complainant herein did, on the 9th day of July, 1902, become the owner of, and subrogated to, all the rights of the said R. McDonald which he acquired under and by virtue of said contract with said Walker county, as aforesaid." We think the facts stated in these allegations clearly show that the title to the timber was conveyed to McDonald, and that as a purchaser under him appellee has acquired such title. Neither the statement of facts nor the conclusions of fact filed by the trial judge contain a copy of this contract, and the findings of the judge, which are, as before said, a literal copy of the agreed statement of facts, only show that the plaintiff "has acquired from Walker county, through mesne conveyances, for a consideration fully paid, the right to cut and remove the timber from said land until December 31, 1909." If this finding is taken as a full and accurate statement of the terms of the contract, it fails to show title in appellee to the timber while it remains upon the land, and, while so remaining, such timber would not be subject to taxation.

We have reached the conclusion, however, that we should not base our judgment upon this finding of fact, and disregard the allegations of the petition before set out. After the allegations above quoted, the petition proceeds as follows: "That said timber so standing and growing upon said land upon the date hereinafter mentioned was not subject to taxation against this complainant un-

der said facts above alleged, for the same was then and there a part of the realty, never severed therefrom; and, further, that complainant's right to enter said premises and cut and remove said timber therefrom, so acquired, as aforesaid, from said Walker county, was a proper exercise by said Walker county of its right to use said property for school purposes, and therefore said timber so standing and growing on said land on said dates was not taxable by said Montgomery county and said state of Texas." It is, we think, apparent from these allegations that the theory upon which the suit was brought was that, so long as the timber remained upon the land, it was a part of the realty, and, irrespective of the question of ownership, it could not be assessed for taxes separate and apart from the land, and, the land being exempt from taxation, such exemption was extended to the timber thereon, and no sale of the timber could defeat this exemption so long as it remained upon the land. This also seems to be the theory upon which the trial court based its judgment.

It is settled by the decisions of this state that the owner of land may sell or mortgage the timber growing thereon, and when such sale is made, the timber becomes the personal property of the vendee. *Boykin v. Rosenfield*, 69 Tex. 118, 9 S. W. 318. If the timber in question was the property of appellee, the fact that it was growing upon school lands of Walker county, which are exempt from taxation under the Constitution, would not defeat the right of Montgomery county to tax said timber. The cases of *Daugherty v. Thompson*, 71 Tex. 193, 9 S. W. 99, and *Davis v. Burnett*, 77 Tex. 3, 13 S. W. 613, cited by appellee, do not sustain the contention that, because the timber is growing upon exempt land, it is therefore exempt notwithstanding it may have been sold by the owner of the land in whose favor the exemption is given. The cases cited only go to the extent of holding that the lessee of school lands cannot be required to pay taxes upon his leasehold, because to make such leasehold taxable would decrease the rental value of the land, and to that extent lessen the revenues which might be derived therefrom for public school purposes. The Legislature of this state, as before stated, has expressly provided by an act of the twenty-ninth Legislature (page 72, c. 52) that timber purchased from the state, and growing upon the public lands of the state, shall be taxed as other property. While this act does not apply to lands owned by the counties, the question of whether the Constitution prohibits such taxation is exactly the same whether the land on which the timber is growing is state or county lands, and the act shows as well the legislative construction of the Constitution as the policy which it deems wise to pursue. If the case could be decided upon the allegations of the petition as supple-

mental to the findings of fact filed by the trial judge, the judgment of the lower court should be reversed, and judgment here rendered in favor of appellant. While the allegations of the petition are not directly contradictory to the fact findings of the trial court, they change the legal effect of said findings, and we are not authorized, in this state of the record, to render judgment for defendant upon the facts alleged in the petition. The petition, we think, shows upon its face that appellee was not entitled to the relief sought by him, and was therefore subject to general demurrer. There is no assignment attacking the judgment upon this ground, but the error is fundamental and apparent of record, and requires a reversal of the judgment. *Rankert v. Clow*, 16 Tex. 9; *Seise v. Malsch*, 54 Tex. 357; *Brewing Co. v. Templeman*, 90 Tex. 277, 38 S. W. 27; *Harris v. Petty*, 66 Tex. 514, 1 S. W. 525; *Willson v. Johnson*, 94 Tex. 272, 60 S. W. 242. These authorities sustain the proposition that a judgment based upon pleadings which affirmatively show that the case made by the party in whose favor the judgment is rendered is not founded in justice and in law should be reversed for fundamental error, notwithstanding the appellant in such case has failed to present an assignment pointing out the error.

For reasons indicated, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

# ST. LOUIS, I. M. & S. RY. CO. v. GRIMSLY.

(Supreme Court of Arkansas. March 29, 1909.)

## 1. CARRIERS (§ 343\*)—CONTRIBUTORY NEGLIGENCE—NECESSITY OF PLEADING.

A carrier, to avail itself of contributory negligence of one sustaining injuries while waiting at a depot to see passengers off, must plead such negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1398; Dec. Dig. § 343.\*]

## 2. CARRIERS (§ 347\*)—INJURIES TO PERSON ACCOMPANYING PASSENGERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries sustained by falling through a defective seat in defendant's depot while waiting to see passengers off, whether plaintiff was guilty of contributory negligence held for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1402; Dec. Dig. § 347.\*]

## 3. TRIAL (§ 260\*)—REFUSING INSTRUCTIONS ALREADY GIVEN—CONTRIBUTORY NEGLIGENCE.

Where, in an action for injuries by falling through a defective seat while waiting to see passengers off, the court instructed that plaintiff must have used ordinary care, and another instruction charged on contributory negligence, a requested instruction that it was plaintiff's duty, before sitting, to look at the seat, and if

he did not do so, or the defect was obvious, he was negligent, was properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 657; Dec. Dig. § 260; \* *Carriers*, Cent. Dig. § 1407.]

## 4. CARRIERS (§ 286\*)—INJURIES TO PASSENGERS—CONDITION OF WAITING ROOM—CARRIER'S DUTY.

It is a railroad company's duty to exercise ordinary care to keep its waiting room in a safe condition, so that it was inaccurate to instruct that a carrier must keep its waiting room in a reasonably safe condition.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1142; Dec. Dig. § 286.\*]

## 5. CARRIERS (§ 321\*)—INJURIES TO PERSON ACCOMPANYING PASSENGERS—INSTRUCTIONS.

In an action against a carrier for injuries sustained by a person accompanying a passenger by falling through a defective seat in defendant's waiting room, instructions held to sufficiently present the question of defendant's negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1329; Dec. Dig. § 321.\*]

## 6. CARRIERS (§ 304\*)—LIABILITY TO PERSONS ACCOMPANYING PASSENGERS.

A carrier is bound to exercise ordinary care to keep its waiting room in a reasonably safe condition for the benefit of those going there to meet and assist incoming, or to aid outgoing, passengers for their convenience, comfort, and safety; such persons being implied licensees.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1104, 1110-1114, 1152; Dec. Dig. § 304.\*]

## 7. TRIAL (§ 68\*)—REOPENING CASE—DISCRETION OF COURT.

In an action for personal injuries, the court did not abuse its discretion in permitting plaintiff to be recalled, after defendant's case was closed, to testify as to how much his time was worth.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 158-163; Dec. Dig. § 68.\*]

## 8. CONTINUANCE (§ 22\*)—ABSENCE OF EVIDENCE—DISCRETION OF COURT.

It was within the trial court's discretion to deny a continuance in a personal injury action to permit defendant to rebut evidence by plaintiff as to the value of his time.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. § 58; Dec. Dig. § 22.\*]

## 9. DAMAGES (§ 216\*)—PERSONAL INJURIES—INSTRUCTIONS.

In an action for personal injuries, an instruction that in assessing plaintiff's damages the jury should consider his earning capacity, his physical condition both before and after the injury, and the nature and character of the injuries, and whether they were permanent or temporary, and allow such sum as will fairly and reasonably compensate him including reasonable compensation for past or future physical pain and suffering, was not erroneous.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 348; Dec. Dig. § 216.\*]

## 10. DAMAGES (§ 131\*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

Plaintiff fell through a seat in a railroad depot, and his back was hurt so as to confine him in bed for five days, and he was unable to put on his shoes unaided for three weeks, during which time he suffered much pain, and was put to other expense for hiring necessary farm

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



labor. *Held*, that a verdict for \$450 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 357; Dec. Dig. § 131.\*]

Appeal from Circuit Court, Miller County; Jacob M. Carter, Judge.

Action by R. Grimsley against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The appellee sued appellant to recover damages for injuries received by him in falling through a seat in the passenger depot of appellant in the city of Texarkana, Ark. The seat had a defective bottom. Appellee alleged that he accompanied his daughter-in-law and her children to said depot for the purpose of aiding them to embark on said appellant's passenger train as passengers, that when they arrived at the depot he purchased a ticket for them and took a seat beside his daughter-in-law to wait for the train, and, on account of the defective chair, fell through it and was injured. Appellee alleged that appellant knew, or should have known, of the defective condition of the seat, and that by reason of the negligence of appellant in failing to provide and maintain said seat in a reasonably safe condition he had been damaged in the sum of \$1,500. He alleged how he was damaged. The appellant answered denying all the material allegations, but did not set up contributory negligence as a defense. The evidence on behalf of appellee tended to prove that on the 27th day of July, 1907, he went with his daughter-in-law and her two small children to appellant's depot, in the city of Texarkana, for the purpose of purchasing her ticket and aiding her and the children in getting on the train. He says: "After purchasing her ticket, I handed her the ticket, and then monkeyed with the children a little, and then turned around and sat down on the seat right beside her. I fell through the seat, and it had my feet right up in my face. The seat was thin bottom and perforated. It was fastened with tacks, but was not fastened at all where I sat down. The front side was not tacked. I examined it and could put my hand on it and mash it in, and when I took my hand off it would come back up again." The appellee then tells that he was hurt in his back, that he was in bed five days, and that for three weeks he could not put on his shoes unaided. He suffered much pain. Another witness testified that he saw the chair in which appellant was injured about one week before, that he started to sit down in the chair, and noticed that the tacks were out of it. The chair was in plain sight in the middle of the room. The appellee was a farmer, and had done most of his work on the farm to the time of his injury. He had a crop of corn

and cotton planted. He had to hire help to have his crop gathered.

The court, at request of appellee, gave the following instructions:

"You are instructed that it was the duty of the defendant to keep the seats in the waiting room in reasonably safe condition for the use of passengers who came to the depot for the purpose of taking the train, or for those who came as escorts with them to assist them in taking the train. If you find that the plaintiff came to the depot with his daughter-in-law and her children for the purpose of aiding them in taking the train as passengers, and when in said depot he was injured in his person by reason of acts complained of in his complaint, then you will inquire whether said seat was in a reasonably safe condition when plaintiff sat down upon it. If you find that it was not in a reasonably safe condition when he sat down upon it, then you will inquire whether such condition was an act of negligence on the part of the defendant, and was such an act of negligence as that some injury might have been foreseen or reasonably anticipated as the probable result of such an act of negligence. If you find the foregoing facts in the affirmative, then your verdict should be for the plaintiff."

"(3) If you find for the plaintiff, then in assessing his damages you should take into consideration his earning capacity before and after the injury was received as may be shown by the proof, his physical condition before and after the injury, and the nature and character of the injury he received—whether it be permanent or temporary in its nature—and find for him such sum as will fairly and reasonably compensate him therefor. And you are further instructed to include therein fair and reasonable compensation for any physical pain and suffering he may have undergone, or may undergo in the future, as a result thereof, if any."

The court gave, among others, the following at the request of appellant.

"The burden of the proof is on the plaintiff to show by a preponderance, or a greater weight, of evidence that plaintiff fell through the chair as alleged in the complaint, that the chair was defective, and that its defective condition was known to defendant, or that defendant by ordinary care should have known of its condition."

"(10) Although the jury may believe that the seat in question was defective, yet if such defect was plain and plainly to be seen, and plaintiff discovered this defect, or failed to use ordinary care in that direction, he cannot recover."

And refused the following:

"(7) The jury are instructed that it was the duty of the plaintiff, before attempting to sit down on the seat or chair upon which

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he attempted to sit, to have looked at the same, and if he failed to do so, and if the defect in the chair or seat was such as was plainly obvious and could have been seen or detected by simply looking at it, then he is guilty of contributory negligence and cannot recover in this case."

The verdict was in favor of appellee in the sum of \$450. Judgment was entered against appellant for that amount, and this appeal was taken.

E. B. Kinsworthy and Lewis R. Laton, for appellant. Joe E. Cook, for appellee.

WOOD, J. (after stating the facts as above). Appellant contends that appellee's own evidence shows that he was guilty of contributory negligence, and that the court should have so told the jury as matter of law, and should have granted appellant's request for peremptory instruction because of appellee's contributory negligence. The court's ruling was correct. Appellant did not set up contributory negligence in its answer, and hence it was not an issue in the case. *Railway Co. v. Philpot*, 72 Ark. 23, 77 S. W. 801. But, even if it had been pleaded, it was at most only a question for the jury under the evidence, and the court told the jury, in the first instruction given at appellee's request, to which no objection is urged here, that "ordinary care was required of appellee." The court also in appellant's request 10 presented the question of appellee's contributory negligence to the jury. For the above reasons there was no error in the refusal of the court to grant appellant's prayer numbered 7.

The appellant complains that appellee's prayer No. 2 given by the court makes appellant an insurer of its premises against all injuries. The request in the first and second paragraphs was inaccurately worded in telling the jury that it was the duty of appellant to keep its waiting room in a "reasonably safe" condition, and that it was their duty to inquire whether the seat was in a "reasonably safe condition," for it was the duty of appellant only to exercise ordinary care to keep its waiting room in safe condition; but the third and fourth paragraphs show plainly that the court intended to and did tell the jury that the point of inquiry was as to whether the waiting room was in an unsafe condition on account of the negligence of appellant, and that unless such condition existed through the negligence of appellant, there would be no liability. While the instruction was not aptly worded and cannot be approved as a precedent, it did not, as a whole, announce an erroneous principle. The specific objection made to it was that it did not define "negligence," or incorporate the proposition of reasonable care; but the court in other instruc-

tions had told the jury that appellee could not recover unless he proved that appellant knew, or by the exercise of ordinary care should have known, of the defective condition of the seat. The instructions, taken as a whole, correctly submitted the question of whether or not appellant was negligent in the manner charged in the complaint.

There was no error in refusing appellant's prayers to the effect that, unless appellee was intending to become a passenger at the time of the injury, he could not recover. The duty of carriers of passengers to exercise ordinary care to keep their waiting rooms in reasonably safe condition is for the benefit, also, of those who go there for the purpose of meeting and assisting the incoming, or of aiding the outgoing, passengers in such friendly offices as may be reasonably necessary for their convenience, comfort, and safety. Such persons are upon the premises upon the implied invitation of the railroad company. *Railway Co. v. Lawton*, 55 Ark. 432, 18 S. W. 543; *Railway Co. v. Tomlinson*, 69 Ark. 489, 64 S. W. 347; *Montgomery & Eufala Ry. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72.

There was no error in permitting appellee to be recalled after the evidence was closed by appellant for the purpose of showing how much his time was worth, nor in refusing to continue the case at that juncture to permit appellant to rebut the evidence. The matter was in the discretion of the court, and no abuse of discretion is shown.

There was no prejudicial error in the giving of instruction No. 3 on the measure of damages.

We could not reverse the judgment as excessive under the evidence, even if there were no other element of damage than the physical injury and the consequent pain and suffering. The evidence sustained the verdict. The judgment is correct.

Affirm.

#### HENDERSON et al. v. DEARING et al.

(Supreme Court of Arkansas. March 22, 1909.)

##### 1. STATUTES (§ 141\*)—AMENDMENT—EFFECT.

In amending an amended part of an act, it is proper to re-enact and publish at length the amended part as amended, and when this is done all the amendments of the first amending act become amendments of the original act; the effect of an amendment being to so change the original act as to make it read as it would have read, and to give it the same effect it would have had if originally enacted as amended.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 48, 209; Dec. Dig. § 141.\*]

##### 2. STATUTES (§ 141\*)—AMENDMENTS.

Act March 11, 1891 (Acts 1891, p. 66), creating a fencing district, having been properly amended by Act March 13, 1893 (Acts 1893, p. 91), in the manner provided by the Constitution, by re-enacting and publishing so much as was amended, subsequent amendments of the latter

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

act in a similar manner by Act May 8, 1899 (Acts 1899, p. 302), and Act April 13, 1907 (Acts 1907, p. 407), became amendments of the original act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 209; Dec. Dig. § 141.\*]

3. STATUTES (§ 66\*)—FENCING DISTRICTS—CREATION BY SPECIAL ACT—CHANGE OF BOUNDARIES.

The Legislature may create a fencing district by a special act, and may thereafter change the boundaries of such district.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 66.\*]

4. FENCES (§ 4\*)—FENCING DISTRICTS—CHANGE OF BOUNDARIES—BENEFITS TO LANDOWNERS—PRESUMPTIONS.

The presumption arising from an act creating a fencing district is that the owners of property in the district as changed by a subsequent act will be benefited.

[Ed. Note.—For other cases, see Fences, Dec. Dig. § 4.\*]

5. FENCES (§ 16\*)—FENCING DISTRICTS—APPORTIONMENT OF FENCING—DUTY OF ASSESSORS—FAILURE TO ACT—EXCUSES.

That Act April 13, 1907 (Acts 1907, p. 407), amending prior acts by adding new territory to a fencing district, failed to provide for the expenses of a survey of the lines of the new territory, did not excuse the assessors from apportioning the fencing as required by such prior acts; it not appearing that any effort had been made to make the apportionment without such expense, or that the boundaries could not be sufficiently ascertained for all practical purposes from the owners of the lands.

[Ed. Note.—For other cases, see Fences, Dec. Dig. § 16.\*]

Appeal from Circuit Court, Independence County; Frederick D. Fulkerson, Judge.

Mandamus by A. A. Henderson and others against T. H. Dearing and others. From a judgment denying their petition, plaintiffs appeal. Reversed and remanded.

S. A. Moore and McCaleb & Reeder, for appellants. Ernest Neill and Rose, Hemingway, Cautrell & Laughborough, for appellees.

BATTLE, J. Section 1 of an act entitled "An act to authorize the enclosing of certain lands on White river in Independence county and for other purposes," approved March 11, 1891, authorized the owner of lands within certain boundaries to inclose the same with one continuous fence (Acts 1891, p. 66).

Sections 2, 3, 7, and 9 of the same act are as follows:

"Sec. 2. That it shall be the duty of the respective owners of said lands to erect or cause to be erected, so much of said fence as would be in proportion to the value of the lands owned by each person within said enclosure, said value to be determined from the assessment of said lands by the county assessor.

"Sec. 3. That for the purpose of ascertaining what amount of fencing each of such landowners will be required to do, and for the purpose of keeping up said fence, they

shall elect on the first Saturday in January of each alternate year, three of their number a board of assessors, who shall first take an oath to faithfully perform their duties without prejudice or favor and apportion to said landowners the amount of fencing that would fall to his or her share as provided in section two of this act; provided, that for the year 1891, J. J. Walldrip, F. M. Martin and Albert Arnold shall constitute said board of assessors and hold their offices until the first Saturday in January, 1892, or until their successors are elected and qualified."

"Sec. 7. That should any owner of land within said territory fail or refuse to do the amount of fencing provided for in section three (3) of this act, then any other person interested in said enclosure may proceed to do said fencing, and when done have the same valued by appraisers, and if said person who failed or refused to do said fencing shall refuse or fail on demand to pay for said fencing, then said person or persons who shall have done said fencing shall recover against recusant before any court of competent jurisdiction judgment for the amount of the award of the appraisers, together with 50 per centum penalty for refusing to pay said award, and all costs of suit, and said judgment shall become and operate as a lien on the lands lying within said enclosure so fenced, and may be enforced as mechanics' liens are now enforced by law."

"Sec. 9. The entire fence provided for in this act when completed shall be examined and approved by the board of assessors, and if any part thereof is not a lawful or a sufficient fence, said board shall have power to condemn the same and to require the person whose duty it was to construct the same originally to reconstruct that part of said fence properly and to make the same a sufficient and lawful fence."

Section 1 of an act entitled "An act to amend an act entitled 'An act to authorize the enclosing of certain lands on White river, in Independence county, and for other purposes,' approved March 11, 1891," approved March 13, 1893, amends section 1 of the act of March 11, 1891 (Acts 1893, p. 91), changing the boundaries of the fencing district by adding other lands, and authorizing the owners of the lands within the boundaries to inclose the same with one continuous fence.

Section 1 of an act entitled "An act to amend an act to authorize the inclosing of certain lands on White river, in Independence county, and for other purposes, approved March 13, 1893," approved May 8, 1899, amended section 1 of the last-mentioned act in the same manner (Acts 1899, p. 302).

Section 1 of an act entitled "An act to amend an act entitled 'An act to authorize the enclosing of certain lands on White river,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in Independence county, and for other purposes,' approved March 13, 1893, and amended May 8, 1899," approved April 13, 1907, amended section 1 of the last-mentioned act so as to read as follows: "That the owners of lands lying on and near White river, in Independence county, Arkansas, and within the following described boundaries and limits, to wit [here follows description of lands], be and they are hereby authorized to enclose said land with one continuous fence; provided, that the Black river and the White river boundaries of said lands shall be in lieu of any fence, except at the option of the owners of said lands fronting on said river," etc. (Acts 1907, p. 407).

On the 11th of October, 1907, A. A. Henderson, and 11 others, filed in the Independence circuit court a petition for a writ of mandamus against T. H. Dearing, W. J. Waldrip, and E. R. Moore, as the board of assessors of the aforementioned fencing district, requiring them to ascertain the amount of fencing required by the foregoing acts to be built by each landowner in the district, and to do such other and further acts and things as is required of them as such board of assessors by said acts.

The defendants answered as follows:

"Defendants further say: That the act of March 11, 1891, creating the fencing district in Big Bottom township, contained certain provisions for the construction of a fence around the lands embraced in such district and creating a board of assessors, and that the defendants herein held their office as such board of assessors under and by virtue of the provisions of such act; but that the Legislature of 1893, by its act approved March 13, 1893, simply amended certain sections of the former act of 1891, without re-enacting the entire statute, and which amended sections in no wise related to the duty of the board of assessors as to constructing any fence or performing any of the duties sought to be imposed upon these defendants by plaintiffs, and that the said act of 1893 contains no provisions under which a fence could be built.

"That the said act of May 8, 1899, expressly amended section 1 of the said act of 1893, by enlarging the territory embraced in said fencing district, but was not amendatory to the act of March 11, 1891, and in no wise related or referred to it; nor did said act of 1899 make any provision for constructing any fence, or impose upon the board of assessors any of the duties sought to be imposed upon the defendants by plaintiffs.

"That the act of 1907 aforesaid expressly amended the act of March 13, 1893, as amended by the act of May 8, 1899, by enlarging said fencing (or purporting to do so), but did not re-enact or amend any part of the act of March 11, 1891, nor did it make any provisions whatever for the construction of any fence, or the performing of any of the duties by the board of assessors of said

fencing district now sought to be imposed upon these defendants by plaintiffs. The defendants further allege that the act of 1907 makes no provisions for the necessary expense which these defendants will have to incur in order to lay out and apportion the amount of fencing to be done by the different landowners as prayed for by the plaintiffs. That before any apportionment could be made it will be necessary that the lines of said new territory be properly surveyed by a competent surveyor with the necessary assistance, all of which entail a considerable expenditure of money, for which no provision has been made by said act.

"That in order to properly perform the duties sought to be laid upon them, these defendants would have to devote a large portion of time during many months, for which no provision for compensation has been made in said act."

The court permitted the defendants to amend their answer by alleging "that there is now an existing fencing district in a part of the territory sought by plaintiffs to be embraced in one district, and that the act of the Legislature under which plaintiffs seek to obtain a writ of mandamus against defendants makes no provision for compensation to the owner of the lands in said district for the fence around said existing district, sought to be used in said proposed new district, and that said act fails to show there will be any benefits accruing to the landowners in said old district, to compensate them for the burdens imposed by said act."

Plaintiffs demurred to the answer, which was overruled, and their petition was denied. Plaintiffs appealed.

The acts of March 11, 1891, of March 13, 1893, and May 8, 1899, were amended in the manner provided by the Constitution; that is, by re-enacting and publishing at length so much as was amended. In amending an amended part of the act of March 11th, it was proper to re-enact and publish at length the amended part as amended, and in this way all the amendments of the act of March 13, 1893, became amendments of the act of March 11, 1891. The result of an amendment is to so change the original act as to make it read in the same manner it would have read, and to give it the same effect it would have had, if it had been originally enacted as amended. *Mondschein v. State*, 55 Ark. 389, 18 S. W. 383; *Hempstead County v. Harkness*, 73 Ark. 600, 84 S. W. 799.

The Legislature has the power to create a fencing district by a special act. *Spillers v. Smith*, 85 Ark. 228, 107 S. W. 985. It had the right to change the boundaries of the district formed by the act of March 11th by the act of April 13, 1907, and did so. *Porter v. Waterman*, 77 Ark. 383, 91 S. W. 754; *Spillers v. Smith*, 85 Ark. 228, 107 S. W. 985. The fence of the district as first

formed became the property of the district of the new boundaries.

Appellees say that "it is apparent on reading the act of 1907 that it imposes no duties on the assessors." But the act of March 11, 1891, of which it is a part, does. It requires the assessors to take an oath to faithfully perform their duties without prejudice or favor and "to apportion to said landowners the amount of fencing that would fall to his or her share as provided in section two of this act." Their duties are defined by the act of March 11, 1891, as it has been from time to time amended.

Appellees say that the district as formed by the act of March 11, 1891, was already protected by a fence, and those owning lands in that district could not be benefited by the change of boundaries. "No one," say they, "can suggest any benefit which the owners of land protected by the old fence would derive from taking it down and removing it further away, so as to include other lands." The presumption arising from the act creating the district is that all the owners of property in the district as changed by the act of April 13, 1907, will be benefited. *Coffman v. St. Francis Drainage District*, 83 Ark. 54, 103 S. W. 179.

The object of the formation of fencing districts is to enable owners of the land included therein to fence the same at a reduced expense and to protect themselves against the encroachments of cattle and other live stock running at large. The greater the division of the expense, the less the part of each one. Fences decay. Repairs are necessary, and expenses continually accrue. The increase of property in the district makes the burden thereof lighter. In this way the extension of the district is beneficial.

Appellees say that before any apportionment of the fencing to be done under the act of April 13, 1907, "can be made, it will be necessary that the lines of said new territory be properly surveyed by a competent surveyor with the necessary assistance, all of which will entail a considerable expenditure of money, for which no provision has been made by said act." But it does not appear that any effort has been made to make the apportionment without such an expense, or that the boundaries of the district cannot be sufficiently ascertained for all practicable purposes from the owners of the lands on the boundaries.

No sufficient excuse is given in the answer of appellees for the failure to apportion the fencing of the district according to its new boundaries. They have assumed this duty and should make an earnest effort to discharge it.

Judgment is reversed, and cause remanded, with directions to the court to sustain the demurrer to the answer.

# WESTERN UNION TELEGRAPH CO. v. RHINE.

(Supreme Court of Arkansas. March 29, 1909.)

## 1. TELEGRAPHS AND TELEPHONES (§ 66\*) — MESSAGES—FAILURE TO DELIVER—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a verdict for plaintiff in a suit against a telegraph company for failure to deliver a death message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 66.\*]

## 2. TELEGRAPHS AND TELEPHONES (§ 71\*) — DEATH MESSAGES—FAILURE TO DELIVER—DAMAGES—EXCESSIVE RECOVERY.

\$750 recovery against a telegraph company for failure to deliver a message to plaintiff advising her of her son's death was excessive by \$350, where, if it would have been practicable for her to view the remains at all, she would have been little consoled, since decomposition had set in immediately, and where she could have done no more than follow his body to its burial place.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 74; Dec. Dig. § 71.\*]

Appeal from Circuit Court, Arkansas County; Eugene Lankford, Judge.

Action by Eliza Rhine against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed, on condition of remittitur; otherwise, reversed and remanded for new trial.

Geo. H. Fearons, Thomas, Lee & Smith, and Rose, Hemingway, Cantrell & Lughborough for appellant. Pettit & Pettit, for appellee.

HART, J. This suit is based upon the failure to deliver the following telegram, dispatched from Almyra, Ark., to Carmi, Ill.: "Almyra, Ark., Sept. 23, 1906. Mrs. Theodore Rhine, Carmi, Illinois. Jake died suddenly this afternoon. Wire the boys answer will you come. Meet you at Stuttgart, shipment impossible. F. C. Rhine." The jury returned a verdict for appellee for \$750. The telegraph company has appealed.

It is insisted by its counsel that there is not sufficient evidence to sustain the verdict. The appellant's office at Almyra was not a night office, but the sender of the message found the agent and induced him to dispatch the message for him about 9:30 p. m. on Sunday, September 23, 1906. Carmi, Ill., had office hours on Sunday from 8 to 10 a. m. and from 4 to 6 o'clock p. m. On other days, its office hours were from 8 a. m. to 12 m., from 1 to 6 o'clock p. m., and from 7 to 8 o'clock p. m. Appellee was the mother of the Jake Rhine referred to in the telegram. She was at home on the night of the 23d and the day of the 24th of September, 1906. The message was never delivered. No arrangements were made for the funeral until Tuesday morning. The sons of appellee were delaying it in order to hear from their mother and to fix it at a time when

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

she could be present. Not having received an answer from their message on Tuesday morning, the 25th inst., they decided to have the funeral that day between the hours of noon and 1 o'clock p. m. They said they would have delayed the burial later, had they heard from their mother. The mother testified that, had she received the message, she would have answered it, and would have started at once to Almyra. Had the message been delivered within a reasonable time after the company's office hours at Carmi on Monday morning, the testimony shows that appellee could have reached Almyra Tuesday afternoon, and that the funeral would have been delayed until her arrival. The court instructed the jury that the company's Sunday office hours at Carmi were reasonable. It is admitted by counsel for appellant that the court properly instructed the jury on the points of law involved, and we are of the opinion that there was sufficient evidence to warrant the jury in finding for appellee.

Next, counsel for appellant insist that the verdict was excessive. We agree with that contention. The body at once became badly decomposed, and offensive odors came from it. It could have afforded the mother but little consolation or satisfaction to have viewed her son's remains in such condition, if, indeed, it was practicable for her to view them at all. The funeral would necessarily have had to take place as soon as she arrived on Tuesday afternoon. All she could have done would have been to have followed his body to its burial place. We think the damages should not have been placed at a greater sum than \$400.

If appellee will, within 15 days, remit the amount recovered by her down to that sum, the judgment will stand affirmed; otherwise, it will be reversed, and the cause remanded for a new trial.

#### HOGG et al. v. THURMAN et al.

(Supreme Court of Arkansas. March 29, 1909.)

#### 1. BILLS AND NOTES (§ 107\*)—SPECIAL RECITALS—STATUTES—SUBJECTS OF "PATENT"—BOOKS.

Under Rev. St. U. S. § 4886 (U. S. Comp. St. 1901, p. 3382), providing that any person who has invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, etc., may obtain a patent therefor, books and the right to sell books are not patents or patent rights, and a note given for books and for the right to sell the same need not comply with Kirby's Dig. §§ 513, 514, requiring the note given for a patent or patent right to be in certain form, with certain statements to be shown on the face thereof.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 107.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5228-5230; vol. 8, p. 7748.]

#### 2. BILLS AND NOTES (§ 363\*)—BONA FIDE HOLDER—EQUITABLE DEFENSES.

A bona fide holder takes negotiable paper free from all equitable defenses not appearing on the face of the paper and for which the statute does not declare the paper invalid.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 944; Dec. Dig. § 365.\*]

#### 3. BILLS AND NOTES (§ 337\*)—"BONA FIDE HOLDER"—WHO IS.

To be a bona fide holder of negotiable paper, one must take it bona fide, for a valuable consideration, in the usual course of business, before maturity, and without notice of any existing defense, and a purchaser who may be charged with notice of a defense is not a bona fide holder, provided such notice existed at the time of the transfer or before payment therefor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 818, 856-863; Dec. Dig. § 337.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 823, 824.]

#### 4. BILLS AND NOTES (§ 353\*)—BONA FIDE HOLDER—CONSIDERATION.

Before one can claim to be an innocent purchaser of a negotiable paper for value and without notice, the consideration paid must be more than merely nominal, but any substantial consideration is sufficient.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 898-903½, 906, 907; Dec. Dig. § 353.\*]

#### 5. BILLS AND NOTES (§ 497\*)—BONA FIDE HOLDER—INADEQUACY OF CONSIDERATION.

A maker of a note who proves fraud or illegality in the inception thereof and a total want of consideration therefor may show the grossly inadequate price paid by the transferee thereof as a circumstance creating a presumption that the transferee knew the facts that would impeach the validity of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1675-1687; Dec. Dig. § 497.\*]

#### 6. BILLS AND NOTES (§ 537\*)—BONA FIDE HOLDER—CONSIDERATION.

Where the price paid for a note by the transferee thereof was so utterly trifling as to bear on its face the impress of fraud, or to leave open a reasonable conjecture that the transferee knew the facts that would invalidate the note, and the note was obtained by the payee by fraud or a total want of consideration, the jury must determine whether the transferee obtained it in good faith and without notice.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 537.\*]

#### 7. BILLS AND NOTES (§ 509\*)—ACTION BY TRANSFERREE—EVIDENCE—ADMISSIBILITY.

The maker of a note when sued thereon by a transferee may, in support of the defense that the note was obtained by the payee through fraud without consideration, show by the examination of the transferee as a witness that only a nominal sum was paid for the note.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 509.\*]

#### 8. BILLS AND NOTES (§ 509\*)—ACTION BY TRANSFERREE—EVIDENCE—ADMISSIBILITY.

The maker of a note, when sued by a transferee who paid a grossly inadequate consideration therefor, may show that the note was obtained by the payee by fraud and without consideration.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 509.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**9. APPEAL AND ERROR (§ 1180\*)—DISMISSAL.**

Where the cause must be reversed and remanded for a new trial on the original cause of action, the ancillary proceeding of attachment must also be remanded with instructions to sustain the attachment if judgment is obtained by plaintiff on the new trial, otherwise the attachment must be dissolved.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1180.\*]

Appeal from Circuit Court, Union County; Geo. W. Hays, Judge.

Action by W. J. Thurman and another against H. M. Hogg and another. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

Marsh & Flenniken, Thornton & Thornton, and Warren, Hamiter & Smith, for appellants.

**FRAUENTHAL, J.** The appellees, who were the plaintiffs below, instituted this suit against the defendants upon two promissory notes. They alleged that they had purchased said notes in the ordinary course of business before maturity and for a valuable consideration, and were bona fide holders thereof. The notes were dated April 8, 1907, and were due, respectively, six and eight months after date, and each was for the sum of \$150. The defendants denied that the plaintiffs were the owners of the notes, or that same were transferred to them before maturity. They alleged that the notes were executed for the right to sell certain patented articles and were not executed on a printed form in manner prescribed by the statute; that the consideration for which the notes had been executed had entirely failed; that the original payee had executed to defendants a bill of sale for the right to sell such patented articles, and agreed to deliver to defendants 100 copies of said articles, and they alleged that the said original payee of said notes failed to deliver any of said articles; and that there was an entire failure of the consideration of said notes. At the time of the institution of the suit, the plaintiffs sued out a writ of attachment against defendants upon the ground that defendants were about to sell, convey, and otherwise dispose of their property with the fraudulent intent to cheat, hinder, and delay their creditors. And the defendants in proper manner denied these allegations for attachment. Upon a trial of the cause the court instructed the jury peremptorily to return a verdict in favor of the plaintiffs for the amount of the notes. The attachment branch of the case was submitted to the court sitting as a jury, and the attachment was sustained. Thereupon judgment was rendered in favor of plaintiffs for the amount of said notes, and sustaining the attachment; and from this judgment the defendants now prosecute this appeal.

On April 8, 1907, the defendants executed to one M. F. Brown the two notes sued on,

and these notes were negotiable instruments. On June 7, 1907, and before the maturity of the notes, the payee transferred the notes to plaintiffs without recourse; and plaintiffs testified that they were transferred to them for a valuable consideration, but named no amount. Upon the trial of the case below the defendants offered to prove the consideration for which the notes were executed, and, by testimony duly presented, offered to prove that the sole consideration of the execution of said notes was a certain written contract given by M. F. Brown, the payee of the notes, granting to defendants the right to sell certain books or articles in White county, Ark., and also that said Brown was to deliver them 120 books, which were to be used in effecting the sale of such books in the territory covered by the right, and the books were also to be sold by them; that these books had never been delivered, and that they had not been able to proceed with the work in the territory on that account; that no books had ever been shipped to them; and that defendants had not received any consideration for the execution of the notes. In substance, the defendants offered to prove by evidence that there was no consideration for the notes, and that the original payee had fraudulently obtained from them the execution of the notes. The court refused to permit the introduction of any evidence tending to prove the above-alleged facts.

In the trial of the cause one of the plaintiffs was a witness on his own behalf, and testified that the plaintiffs bought the notes in June, 1907, but in his direct examination he was not asked, and did not state, what consideration was paid by them for the notes. Upon his cross-examination he was asked the following: "Q. You got this note at a reduced price? A. Yes, sir. Q. What did you give for it? (To which plaintiffs objected, which objection was by the court sustained. To which ruling of the court the defendants at the time saved their exceptions.) Q. Didn't you buy these notes for a mere nominal sum? (To which the plaintiffs objected, which objection was by the court sustained. To which ruling of the court the defendants saved their exceptions.) Q. Isn't it a fact that this man had tried all over the neighborhood to sell these same notes, and had failed? A. I don't know whether he did or not. I heard it. That was only hearsay. Q. How far do you live from these defendants? A. About a mile. Q. Have you ever notified them that you held these notes? A. Not before they became due." The lower court refused to permit the introduction of the above testimony, presumably on the ground that the plaintiffs were bona fide and innocent purchasers and holders of the negotiable promissory notes, and on that account the defendants could not make a defense of want or failure of consideration, and could not as-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

against plaintiffs present any fraud or equities which they might set up as against the original payee, and could not inquire into the amount of the price paid by plaintiffs for the notes.

The defendants contend that the original payee of the note was a vendor of a patented article or a patent right, and that the notes were not executed in conformity with section 513, Kirby's Dig., and on that account plaintiffs could not be considered innocent holders of the notes, even though they had given value therefor before maturity. But the testimony offered by the defendants would not show that the consideration of the notes was a patented article or a patent right. The consideration of the notes which they attempted to prove was a contract for the right to sell books in a certain territory and 120 books. Now, the subject-matter which is patentable consists of any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, or any new, original, and ornamental design of any article of manufacture. The art that is patentable is a process or act performed upon the subject-matter to be transformed and reduced to a different state or thing. Rev. St. U. S. 1878, § 4886 (U. S. Comp. St. 1901, p. 3382); 30 Cyc. 820. And so books and the right to sell books are not patents or patented rights within the provisions of sections 513, 514, Kirby's Dig., which require the note given therefor to be in certain form with certain statements to be shown on the face thereof.

The question involved in this case, then, is whether the court committed error in refusing to permit the introduction of the above testimony tending to show that the plaintiffs had obtained the notes for a mere nominal consideration, and that the original payee had secured the execution of the notes by fraud, and without consideration. It is contended by appellees that said testimony is inadmissible for the reason that they are bona fide holders of the notes, which are negotiable instruments. A bona fide holder takes negotiable paper free from all equitable defenses; that is, all those defenses that do not appear on the face of the paper, and by which the paper is not declared invalid by statute. But, before one can become a bona fide holder of a negotiable instrument, he must take it (1) bona fide; (2) for a valuable consideration; (3) in the usual course of business; (4) before maturity; and (5) without notice of any existing defense and of dishonor thereof. If the purchaser can be charged with notice of the defense or defect of title, he is not a bona fide holder of the instrument. Such notice, of course, must exist at the time the paper is transferred to him or before he paid for it. Tiedeman on Commercial Paper, §§ 279-299; 1 Daniel on Negotiable Instruments, §§ 769a-789; Old National Bank of Ft. Wayne v.

Marcy, 79 Ark. 149, 95 S. W. 145; Jones v. Jackson (Ark.) 110 S. W. 215. This notice of a defense to the note or of its infirmity affects the good faith of the purchaser, and deprives him of the vantage ground and security of an innocent purchaser. Thompson v. Love, 61 Ark. 81, 32 S. W. 65. Ordinarily the amount of the price that is paid by the purchaser for the paper does not concern the maker; but it may have a bearing on the question of actual or constructive notice of the infirmity of the paper. In order that one may claim to be a bona fide holder of a negotiable instrument, it must appear that he has paid a valuable consideration for its transfer to him. Any substantial consideration is sufficient. But, before he can claim to be an innocent purchaser for value and without notice, the consideration must be more than simply a nominal consideration for its transfer. "The inadequacy of the price for the transfer of the paper may be so gross as to justify the conclusion that the purchaser is charged with notice of a fraudulent or defective title on the part of the vendor." Tiedeman on Commercial Paper, § 291. And in the same connection the above author says: "It is certain that a purely nominal consideration would not make the purchaser a holder for value." In the case of De Witt v. Perkins, 22 Wis. 474, the plaintiff purchased a note for \$300, paying only \$5 therefor, and at the time considered the maker solvent; and in that case it was held that this mere nominal price charged him with notice of defect in the note. Lay v. Wissman, 36 Iowa, 306; 1 Daniel on Negotiable Instruments (5th Ed.) §§ 777, 777a. So that the principle is well established that, if the maker proves there was fraud or illegality in the inception of the instrument and a total want of consideration therefor, then the maker would be entitled to show the grossly inadequate price paid by the purchaser for the note, as a circumstance which would create a presumption that he knew the facts that would impeach its validity. Commissioners v. Clark, 94 U. S. 278, 285, 24 L. Ed. 59; Collins v. Gilbert, 94 U. S. 753, 761, 24 L. Ed. 170; Henry v. Sneed, 99 Mo. 401.

The difficult question to determine is: When is the price paid for the negotiable instrument so grossly inadequate as to charge the purchaser with notice? In 1 Daniel on Negotiable Instruments (5th Ed.) § 779, it is said: "In general terms it may be said that the consideration should be so utterly trifling as to bear upon its face the impress of fraud to leave open no reasonable conjecture, but that the purchaser must have known from the very nature of the facts that they could not have originated from any but a corrupt source. \* \* \* If the amount paid for the paper were not so insignificant as per se to charge the transferee with notice, it might still be so inadequate as to be a preg-



nant fact to be given due consideration in connection with others in determining whether he should be so chargeable or not." Where there has been a substantial price paid by the purchaser for a negotiable instrument, and he is in other regards a bona fide holder thereof, then the matters relating to the original consideration and transaction between the maker and original payee cannot be inquired into, unless such instrument is declared invalid by statute. But where such price paid for the instrument or note was grossly inadequate as above defined, and the instrument or note was obtained by the original payee by fraud or a total want of consideration, then it becomes a question to be determined by the jury as to whether the alleged purchaser of the note obtained it in good faith and without notice. 1 Daniel on Negotiable Instruments (5th Ed.) §§ 818, 819. In this case the defendants contended and offered to prove that the notes herein sued on were obtained through the fraudulent promises and representations of the original payee and without consideration. The defendants further endeavored to show by asking the plaintiff himself that only a nominal sum was paid by plaintiffs for the notes. This testimony was competent. We are therefore of the opinion that the lower court erred in refusing to permit the defendants to prove the amount of the consideration paid by the plaintiffs for the notes; and, if that amount was grossly inadequate, the court erred in refusing to permit the defendants to prove that the notes were obtained by the original payee by fraud and without consideration.

We have examined the evidence relative to the issue raised by the suing out of the attachment, and we are of the opinion that there is sufficient evidence to justify the finding of the court in sustaining said attachment. *Sherrill v. Beach*, 37 Ark. 560; *Hanks v. Andrews*, 53 Ark. 327, 13 S. W. 1102; 4 Cyc. 419. But, inasmuch as this cause must be reversed and remanded for a new trial upon the original cause of action involving the indebtedness, the ancillary proceeding of the attachment must also be remanded with it, with instructions to sustain the attachment in the event a judgment is obtained by plaintiffs upon the new trial for said indebtedness, otherwise the attachment will be dissolved.

The judgment is reversed, and the cause remanded for a new trial.

#### BOLES et al. v. KELLEY et al.

(Supreme Court of Arkansas. March 22, 1909.)

#### 1. MUNICIPAL CORPORATIONS (§ 407\*)—STREET IMPROVEMENTS—STATUTES—VALIDITY—"PROPERTY HOLDERS OWNING PROPERTY."

Under Const. art. 19, § 27, providing that the General Assembly shall not be prohibited

from authorizing assessments for local improvements, based on the consent of a majority in value of the "property holders owning property" adjoining the locality to be affected, the Legislature may amend Kirby's Dig. § 5685, requiring a city to take steps for the making of a street improvement when any 10 "resident" owners of real property petition therefor, by striking out the quoted word "resident"; the words "property holders owning property" meaning property owners owning property irrespective of their residence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1008; Dec. Dig. § 407.\*]

#### 2. PLEADING (§ 367\*)—MOTIONS—MAKING MORE DEFINITE—COMPLAINT.

The allegations in a complaint, in a suit to enjoin the enforcement of assessments for a local improvement, that the petition for the improvement was void because the same was not signed by the majority in value of the property holders owning property adjoining the locality to be affected, and because the same was fraudulently signed by owners of property in other paving districts previously established, the real estate in such districts being estimated in making up a majority, etc., were indefinite, authorizing a motion to make the same more definite by requiring plaintiffs to state whether the two grounds were the same, though plaintiffs asserted that the two grounds were not intended to be the same.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1174; Dec. Dig. § 367.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 538\*)—STREET IMPROVEMENTS—ASSESSMENTS—SUIT TO RESTRAIN ENFORCEMENT—COMPLAINT.

The allegation in the complaint, in a suit to enjoin the enforcement of assessments for a local improvement, that the petition therefor was void because many signers were procured by fraud and misrepresentations was insufficient for failing to show that the signers procured by misrepresentation reduced the number of the remainder to less than a majority in value of the property holders.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1204, 1253; Dec. Dig. § 538.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 538\*)—STREET IMPROVEMENTS—ASSESSMENTS—SUIT TO RESTRAIN ENFORCEMENT—COMPLAINT.

The allegation in the complaint, in a suit to restrain the collection of assessments for a street improvement, that the city was laid off into one paving district, to be known as "Paving District No. 5," for the purpose of paving the streets in the city shows no defect warranting an injunction against a paving assessment, in that paving districts 1-4 were not included, since it necessarily included paving districts 1, 2, 3, and 4 for the purpose of assessment and taxation according to benefits received, in accordance with the statute.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1204, 1253; Dec. Dig. § 538.\*]

#### 5. MUNICIPAL CORPORATIONS (§ 307\*)—PAVING DISTRICTS—BOARD OF IMPROVEMENT—APPOINTMENT.

The appointment of a board of improvement for a district by the council of a city is not invalid because the board was appointed by the same ballot on which a board of improvement for a sewer district was appointed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 819; Dec. Dig. § 307.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**6. MUNICIPAL CORPORATIONS (§ 314\*)—STREET IMPROVEMENTS—AUTHORITY OF BOARD OF IMPROVEMENT.**

Under the statute providing that the board of improvement shall form plans for the improvement within their district as prayed in the petition, etc., the board must determine how and to what extent streets shall be improved, pursuant to a petition of property owners specifying the improvement desired.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 827; Dec. Dig. § 314.\*]

**7. MUNICIPAL CORPORATIONS (§ 538\*)—ASSESSMENTS FOR STREET IMPROVEMENTS—SUITS TO RESTRAIN ENFORCEMENT—STATUTES.**

Kirby's Dig. §§ 5679, 5685, authorizing one whose real estate has been assessed for a street improvement to appeal to the city council within 10 days, and barring persons failing to begin proceedings to correct assessments within 30 days after the publication of the ordinance levying the assessments, bar a suit commenced in January of one year to restrain the collection of assessments levied under an ordinance passed in January the year before.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1202; Dec. Dig. § 538.\*]

**8. MUNICIPAL CORPORATIONS (§ 538\*) — ASSESSMENTS FOR STREET IMPROVEMENTS—SUITS TO RESTRAIN ENFORCEMENT—PARTIES.**

Owners of property assessed for a street improvement, who sue to enjoin the collection of the assessment on the ground of the invalidity of the contract for the improvement, must make the contractor a party.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1203; Dec. Dig. § 538.\*]

**9. MUNICIPAL CORPORATIONS (§ 538\*)—ASSESSMENTS FOR STREET IMPROVEMENTS—SUITS TO RESTRAIN IMPROVEMENT—COMPLAINT—RELIEF IN EQUITY.**

Under Kirby's Dig. §§ 5740-5742, requiring annual settlements by boards of improvement, and adjustments by the city council, and authorizing a court of chancery to re-examine the same for error or mistake at the suit of any taxpayer, etc., a complaint in a suit by taxpayers which charges a board with waste and misappropriation, but which fails to state the facts, and which does not show why equity should interfere, nor why the statutory remedy of adjustment by the council is inadequate, states no cause of action for relief in equity.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1198; Dec. Dig. § 538.\*]

Appeal from Sebastian Chancery Court; J. V. Bourland, Chancellor.

Suit by J. Keith Boles and others against Harry E. Kelley and others, to restrain defendants from collecting paying taxes from plaintiffs and others, to enjoin them from misappropriating moneys belonging to plaintiffs and others, to enjoin them from mutilating the streets of the city of Ft. Smith by cutting the roadways thereof, and to recover moneys paid by plaintiffs and others under mistake and duress, and illegally collected and held by defendants. Defendants were sued in their individual capacity, as well as their so-called official capacity, and were so summoned and so entered their ap-

pearance. From a decree dismissing the complaint, plaintiffs appeal. Affirmed.

T. S. Osborne, for appellants. F. A. Youmans, for appellees.

**BATTLE, J.** Is the complaint of appellants sufficient? This question is raised by demurrer and motion to make specific and certain, and is the only question in the case.

Appellants, in paragraph 1 of their complaint attack the amendment of section 5665 of Kirby's Digest by the Legislature of 1905 (Laws 1905, p. 300). Section 5665 reads as follows: "When any ten resident owners of real property in any such city or incorporated town, or of any portion thereof, shall petition the city or town council to take steps toward the making of any such local improvement, it shall be the duty of the council to at once lay off the whole city or town, if the whole of the desired improvement be general and local in its nature to said city or town, or the portion thereof mentioned in the petition, if it be limited to a part of said city or town only, into one or more improvement districts, designating the boundaries of such district so that it may be easily distinguished," etc. The Legislature, at its session of 1905, amended this statute by striking out the word "resident" before the word "owners." Appellants insist that this amendment rendered the statute void. We are unable to understand how it could have that effect. There is nothing in the Constitution prohibiting such legislation. But on the contrary, it expressly provides: "Nothing in this Constitution shall be so construed as to prohibit the General Assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected; but such assessments shall be ad valorem and uniform." Article 19, § 27. The words "property holders owning property" mean property owners owning property. The object of the section is to authorize the formation of districts for the construction of improvements, based upon and paid for by local assessments upon the property in the locality to be affected, and of course had reference only to the property owners owning the property in the district, irrespectively of their residence.

In the second paragraph of the complaint they alleged that the petition purporting to be signed by a majority in value of the real property owners in the district was illegal and void:

"(2) Because the same was not signed by a majority in value of the property holders owning property adjoining the locality to be affected.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"(3) Because the same was fraudulently signed by owners of real property in paving districts Nos. 1, 2, 3, and 4, heretofore established in said city, the real estate in said districts being estimated in making up a majority in value of the real estate included in said alleged district No. 5, and it is not assessed and taxed in the latter district, and should have been excluded, and, if excluded, a majority in value did not sign said petition.

"(4) Because many signers were procured by fraud and misrepresentation, in that they were told 'that they would not have to pay till they got the pavement.'"

The defendants moved the court to require plaintiffs to make this paragraph "more definite and certain, in that they be required to state whether the ground of allegation in subdivision 2 is the same ground of the allegation in subdivision 3 of said paragraph."

The two subdivisions of the paragraph being made to show a cause of action, the latter could have been reasonably construed to explain the former, and to show wherein the petition was not signed by a majority of property owners in value; and, for the purpose of making the paragraph more definite and certain, the motion should have been sustained, notwithstanding the plaintiffs asserted in court that the two subdivisions were not intended to be the same. Such assertion was no amendment, and no compliance with the order of the court sustaining the motion.

The fourth subdivision of paragraph 2 was of no effect. It was not shown that the signers procured by misrepresentation, if they had a right to rely thereon, were sufficiently numerous to reduce the number of the remainder of the signers to less than a majority.

The third paragraph of the complaint alleges that the actual laying out of paving district No. 5 was illegal and void:

"(2) Because the same was not laid out so as to conform to the requirements as shown in the petition marked 'Exhibit A.'

"(3) Because it did not include for purposes of assessment and taxation the real property embraced in paving districts Nos. 1, 2, 3, and 4, in said city, and in said paving district No. 5.

"(4) Because the same includes a large area of territory not lying within the corporate limits of Ft. Smith, and not lying within the constitutional boundaries of the state of Arkansas, and the real property therein is not subject to assessment and taxation in said paving district No. 5, to wit, that portion of land lying and being situate between the western boundary line of the state of Arkansas and the Arkansas and Poteau rivers and Mill creek.

"(5) Because the same embraces a large area of territory which is alleged to have

been added to the city of Ft. Smith in the year 1905, which in fact was not added to said city for the want of proper description, to wit, in that the description fails to run a connecting line from the southwest corner of said city to a point where Mill creek crosses the state line, being a distance of about a mile."

The defendants demurred to this paragraph because it does not state facts sufficient to constitute a cause of action.

This paragraph is very vague and uncertain. Referring to other portions of the complaint to ascertain what is meant, we find that Exhibit A, made a part of this complaint, was a petition asking that the whole of the city of Ft. Smith as then bounded be laid off into one improvement district for the paving of the streets in said city, and, for the purpose of raising funds with which to make the improvements, to assess the real property within the district according to the benefits to be derived therefrom.

We find in the complaint that the city was laid off into one paving district, to be known as "Paving District No. 5," for the purpose of paving the streets in the city. This necessarily included paving districts Nos. 1, 2, 3, and 4, for the purpose of assessment and taxation according to benefits received, as the statute provides. Paving district No. 5 as formed did not include any territory not within the corporate limits of the city of Ft. Smith. The allegations in paragraph 3 were conclusions as to law, and not a statement of facts as shown by the complaint.

Paragraph 4 of complaint is as follows:

"That the alleged board of improvement has no legal existence: "

"(1) Because the same was appointed without any authority of law.

"(2) Because the same was illegally appointed, in that it was appointed by the same ballot of the city council on which a board of improvement for alleged sewer district No. 2 was appointed.

"That the plans for paving said streets as reported to the council by said alleged board are illegal and void:

"(1) Because the same were reported without authority of law.

"(2) Because the same do not conform to the requirements as shown in petition marked 'Exhibit A' and 'Exhibit B,' in that said plans do not provide for paving all the streets in said alleged district, and do not provide for paving all the roadway of said streets as the streets existed when said petitions were signed, said streets at that time having a sidewalk of 8 feet on each side, and a roadway in the center of about 34 feet."

Defendants demurred.

It is not shown that the board of improvements were illegally appointed. We do not see any reason why they could not have been

appointed by the same ballot another board was selected.

We infer that the objection to the plans for paving the district is that the pavement did not embrace the whole of the streets instead of a part. This is not a valid reason. The statute provides that "immediately after their qualification the board shall form plans for the improvement within their district, as prayed in the petition"; and, as soon as the plans have been formed, and costs thereof ascertained, it shall report the same to the city or town council. The petitions of property owners specify the improvement desired. In this case it was the pavement of the streets, but not how and to what extent they shall be paved. That was the duty of the board to determine.

Paragraph 5 of complaint is as follows:

"That the assessment of real property in said alleged district was illegal and void:

"(1) Because the same was made without authority of law.

"(2) Because the same was made according to the area of the soil only, excluding valuable buildings and improvements on the soil, which were also real estate.

"(3) Because all the real estate in said so-called district No. 5 is not assessed and taxed.

"(4) Because said assessment is not ad valorem and uniform.

"(5) Because successive collections will be necessary to complete the improvements in said alleged district, and many valuable and expensive buildings and improvements have been erected on property in said alleged district within the last year, and the assessments on said property so improved have not been readjusted so as to include said additional improvements.

"That Ordinance No. 741 of the ordinances of the city of Ft. Smith, passed January 7, 1907, entitled 'An Ordinance Levying Assessments on Real Property in Paving District No. 5, of Fort Smith, Arkansas,' is illegal and void:

"(1) Because the same was passed without any authority of law.

"(2) Because the same levied an assessment according to the area of the soil only, excluding buildings thereon which were also real estate.

"(3) Because the assessment was not levied on all the real estate in said alleged district.

"(4) Because said assessment and levy was not ad valorem and uniform."

Defendants moved that plaintiffs be required to make this paragraph more definite and certain, in that they be required to set out:

"First. When said assessment was filed in the office of the city clerk of the city of Ft. Smith.

"Second. When the ordinance was passed by the city council of the city of Ft. Smith levying said assessment."

This motion was based on sections 5679 and 5685 of Kirby's Digest. The first section allows any one, whose real estate is embraced in an assessment made by a board of assessors of an improvement district of a city or town, and filed in the office of the city clerk, 10 days from the notice of the filing given by the city clerk in which to appeal from such assessment to the city council. The second provides that, within 30 days after the passage of the ordinance based upon this assessment by the city council, "the recorder or city clerk shall publish a copy of it in some newspaper published in the city for one time; and all persons who shall fail to begin legal proceedings within 30 days after such publication for the purpose of correcting or invalidating such assessment shall be forever barred and precluded." The object of the motion was to require the plaintiffs to show that they had a right to attack the assessment and ordinance based thereon by complying with the foregoing sections; for if they had failed to do so, they were forever barred from attacking the assessment and ordinance. Board of Improvement District v. Offenhauser, 84 Ark. 257, 268, 105 S. W. 235; Crane v. Siloam Springs, 67 Ark. 30, 43, 55 S. W. 955; Ahern v. Board of Improvement District, 69 Ark. 63, 76, 61 S. W. 575; Driver v. Moore, 81 Ark. 80, 86, 98 S. W. 734. Then again the assessment of real property alluded to is too vague and uncertain in failing to identify the assessment referred to, and should have been made more specific and certain. The ordinance referred to is described as passed on the 7th of January, 1907, and this suit was commenced on the 14th of January, 1908. Plaintiffs are evidently barred from attacking it by this suit.

In paragraph 6 of their complaint plaintiffs allege that the contract to pave the streets of Ft. Smith was made with a firm of contractors known as "Burke Bros.," and that it is illegal and void, and failed to make them parties to this suit. The defendants demurred to this paragraph because of such failure, and because it failed to state facts sufficient to constitute a cause of action.

The contractors should have been made parties as to so much of the complaint, and the paragraph was fatally defective in the failure to make them parties. The other subdivisions of this paragraph, which do not affect the contract, are shown, by what we have already said as to other paragraphs, to fail to furnish grounds of action.

Paragraph 7 of the complaint is a repetition, to some extent, of what has been said in other paragraphs, and consists of general allegations without stating the facts upon which they are based. It charges the board of improvement with waste and misappropriation of the funds of the district, and makes no specific allegation. It does not allege that

the board has failed to file annually with the clerk of the city of Ft. Smith settlements showing all collections and moneys received and paid out, with proper vouchers for all such payments, as required by the statute, or that, if filed, the city council failed to examine them, and to disallow any and all unjust charges and credits, and fails to show why a court of equity shall interfere and hold the board to account for moneys in their hands, or that the remedy provided by statute is not full and adequate. Kirby's Dig. §§ 5740-5742. The defendants demurred to this paragraph.

The court sustained the motions and demurrers of the defendants, and, plaintiffs failing to plead further, dismissed their complaint. For reasons before stated, we think the court committed no prejudicial error in so doing.

Decree affirmed.

#### JONES et al. v. HARRIS et al.

(Supreme Court of Arkansas. March 8, 1909.)

##### 1. SUBROGATION (§ 21\*)—NECESSITY FOR PAYMENT OF DEBT.

One who is liable to pay the debt of another cannot, as against the principal creditor, assert his right of subrogation until he pays the debt in full, and he cannot delay injuriously the right of the principal creditor to pursue remedies open to him to collect his debt, nor ask a postponement in order that assets or securities may be marshaled.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 47, 48; Dec. Dig. § 21.\*]

##### 2. CORPORATIONS (§ 340\*)—FAILURE TO FILE ANNUAL STATEMENTS—STATUTORY LIABILITY—ENFORCEMENT.

The liability of officers of a corporation for the debts thereof imposed by Kirby's Dig. § 859, for the failure of the officers to file the annual statement required by section 848, is a primary liability, and the defaulting officers are absolutely liable for the debts of the corporation incurred during the period of the default, and they cannot postpone the enforcement of the liability, and no equities can arise in their favor as against creditors of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1474; Dec. Dig. § 340.\*]

##### 3. INJUNCTION (§ 26\*)—RESTRAINING MULTIPLICITY OF SUITS—GROUNDS.

A defendant in numerous actions at law to enforce a primary liability created by statute who asserts no defense to the actions cannot sue in equity to enjoin the actions to prevent a multiplicity of suits.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 31; Dec. Dig. § 26.\*]

Appeals from Pulaski Chancery Court; John E. Martineau, Chancellor.

Petitions by Marvin H. Harris, receiver of the Capital City Savings Bank, and by M. W. Gibbs, against Scipio A. Jones and others, to restrain defendants from prosecuting separate actions at law against M. W. Gibbs. From a decree granting the relief

prayed for on specified conditions, defendants appeal and M. W. Gibbs cross-appeals. Reversed.

Scipio A. Jones, J. T. Castle, E. W. Kimball, and Carmichael, Brooks & Powers, for appellants. Ratcliffe, Fletcher & Ratcliffe, for appellees.

MCCULLOCH, C. J. The assets of the Capital City Savings Bank, a domestic corporation engaged in the banking business, were by the Pulaski chancery court placed in the hands of a receiver at the instance of a creditor in a suit brought against the corporation, wherein it is alleged to be insolvent. M. W. Gibbs, one of the appellees, was president of the corporation, and both he and the secretary failed to make and file the annual certificate showing the condition of the affairs of the corporation as required by the statute (Kirby's Dig. § 848), and many of the unpaid creditors of the bank instituted separate actions at law against Gibbs to recover the amount of their respective claims, basing their right to recover on the following statute: "If the president or secretary of any such corporation shall neglect or refuse to comply with the provisions of sec. 848 and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute, for all debts of such corporation contracted during the period of any such neglect or refusal." Kirby's Dig. § 859. While these actions were pending the receiver filed in the chancery court his petition asking that the plaintiffs in those actions, their agents, and attorneys be restrained from prosecuting the actions until their respective claims should be duly probated in the chancery suit wherein the receivership is involved, and until the winding up of the assets of the bank be concluded in the chancery court. Subsequently appellee Gibbs filed a similar petition in the chancery court, praying that all creditors of the bank (including those who had sued him at law) be required to present their respective claims to that court against the bank and against him, the petitioner; that they be enjoined from prosecuting the actions at law against him, and be required to first resort to the assets of the bank as administered by the chancery court before proceeding against him for the payment of their claims; and that he be subrogated to the rights of the creditors against the assets of the bank. He alleged in his petition that there are about 800 creditors of the bank, many of whom had already instituted actions at law, and that a separate action against him by each creditor would be oppressive and burdensome, and would absorb much of his property in costs and expenses. On the hearing of the petitions the court overruled a demurrer inter-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

posed by the creditors to the petitions, and rendered a final decree in accordance with the prayer thereof, requiring all creditors to file in that court for adjustment and adjudication their claims against the bank and against Gibbs as president thereof, and restraining said creditors, their agents, and attorneys from prosecuting actions at law against Gibbs without obtaining permission of that court. The court also enjoined Gibbs from selling any of his property without first obtaining the permission of the court. The creditors appealed.

It will be noted in the first place that the petition of appellee Gibbs sets forth no defense to the actions at law instituted against him by creditors of the bank on account of his failure to file the annual statement. His petition sub silentio concedes his liability for the debts of the bank contracted during the period of his neglect to file the statement. His only asserted claim to equitable relief is based on the allegation that he has no means of accurately determining in what amount the bank is liable to said several creditors, or for what part thereof he is liable; that separate actions instituted by a large number of creditors would subject him to great expense and costs; and that he is entitled to subrogation to the rights of the creditors against the assets of the bank. He does not allege that there are any such serious complications in the accounts of the creditors as would render it impracticable in an action at law for a court or jury to determine the amount of his liability. No reason is given why access could not be had to the books and accounts of the bank in the hands of the receiver for the purpose of determining in a trial at law the amount of his liability to creditors. It is unnecessary for us to determine now whether or not appellee Gibbs will be entitled to subrogation to the rights of creditors against the assets of the bank, for the reason that his right of subrogation, if it should ultimately be found to exist, is not complete and enforceable until he pays the debts. It is well established that one who is liable to pay the debt of another cannot assert his right of subrogation until he pays the debt in full, at least so far as the rights of a principal creditor are concerned. In order to put himself in position to ask for subrogation, he must pay the debt. Even payment of a part of the debt does not establish his right to subrogation. *McConnell, Adm'r, v. Beattie*, 34 Ark. 113; *Bank of Fayetteville v. Lorwein*, 76 Ark. 245, 88 S. W. 919; *Sheldon on Subrogation*, §§ 3, 127; *Harris on Subrogation*, § 29; *Carter v. Neal*, 24 Ga. 346, 71 Am. Dec. 136; *Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204; *Stuckman v. Roose*, 147 Ind. 402, 46 N. E. 680; *Lumberman's Ins. Co. v. Sprague*, 59 Minn. 208, 60 N. W. 1101; *Bank v. Potius*, 10 Watts (Pa.) 148; *Kyner v. Kyner*, 6 Watts (Pa.) 221; *Muller v. Flavin*, 13 S. D. 595, 83

N. W. 687; *Featherstone v. Emerson*, 14 Utah, 12, 45 Pac. 713; *Sickels v. Herold*, 15 Misc. Rep. 116, 36 N. Y. Supp. 488. The reason of this rule is that the person ultimately entitled to subrogation cannot be permitted to interfere with or delay injuriously the right of a principal creditor to pursue every remedy open to him for the collection of his debt. The same reason forbids the person asserting the right of subrogation from asking a postponement in order that the assets or securities may be marshaled. 6 Pomeroy, *Equity Jurisprudence*, § 866.

Mr. Pomeroy in the section above cited says: "Relief will not be given if it will delay or inconvenience the paramount incumbrancer in the collection of his debt, or prejudice him in any manner; for it would be unreasonable that he should suffer because some one else has taken imperfect security. Thus relief has been denied where the fund to be resorted to has been dubious, or one which might involve the creditor in litigation; and a mere personal remedy has been held insufficient to warrant interference." The rule thus announced is strengthened by a consideration of our statute as interpreted by this court declaring the character of the liability fixed thereby. We have held that it creates a primary and not a secondary liability, and that the defaulting officers of the corporation become, by reason thereof, absolutely liable for the debts of the corporation incurred during the period of the default. This being true, they have no right to postpone the enforcement of the statute against them, and no equities can arise in their favor as against creditors of the corporation. *Neb. Nat. Bank v. Walsh*, 68 Ark. 433, 59 S. W. 952, 82 Am. St. Rep. 301; *Ark. Stables v. Samstag*, 78 Ark. 517, 94 S. W. 699.

Appellees also invoke the principle announced by some authorities that a court of equity will enjoin the prosecution of numerous actions arising out of the same transaction in order to prevent a multiplicity of suits. Two cases of this sort have been brought to our attention. *Southern Steel Co. v. Hopkins* (Ala.) 47 South. 274; *Whitlock v. Y. & M. V. Ry. Co.*, 91 Miss. 779, 45 South. 861. The Mississippi case was one to enjoin the prosecution of numerous suits instituted separately against a railroad company to recover damages alleged to have been caused by a railroad accident, and the Alabama case was one to enjoin 110 separate suits against a coal company for damages caused by the alleged negligent killing of persons in a mine explosion. In both of those cases the defendants in the actions at law asserted in their respective bills in equity valid defenses, and claimed the right to make defense without being subjected to the costs and expenses of a multiplicity of suits. In the present case, however, appellee Gibbs asserts no defense whatever to the actions

at law. Without pausing to consider whether, under the state of facts set forth in the cases just cited, we would uphold the right to enjoin suits at law, we have no hesitancy in saying that in a case like the present one, where no defense at all is asserted, the principle cannot be invoked to call into action the jurisdiction of a court of equity.

The chancery court erred in its decree, and the same is reversed and the cause remanded, with directions to dissolve the injunction, and to dismiss the two petitions. Appellee Gibbs has cross-appealed from that part of the decree restraining him from disposing of his property. It necessarily follows that that part of the decree must also fall, and it, too, is reversed.

**PLUNKETT et al. v. STATE NAT. BANK.**  
(Supreme Court of Arkansas. March 29, 1909.)

**1. PLEADING (§ 212\*)—DEMURRER—ABANDONMENT.**

A plaintiff abandons his demurrer to the answer by failing to call for a ruling of the court thereon, and by asking for a judgment on the merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 521, 524; Dec. Dig. § 212.\*]

**2. JUDGMENT (§ 107\*)—DEMURRER TO ANSWER.**

Where defendant answered and plaintiff demurred thereto, the court should not, in the absence of defendant and without passing on the demurrer, render judgment against defendant, but he should be given an opportunity to amend his answer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 198-200; Dec. Dig. § 107.\*]

**3. JUDGMENT (§ 145\*)—DEFAULT JUDGMENT—SETTING ASIDE—GROUNDS.**

Where a judgment was rendered against a defendant in his absence after he had filed an answer tendering no valid defense, a motion to set aside the judgment setting up no defense other than that stated in the answer was properly refused.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 293, 295; Dec. Dig. § 145.\*]

**4. PLEDGES (§ 55\*)—ENFORCEMENT.**

A payee of a note given for the accommodation of a third person to whom the consideration passed and secured by notes deposited by the third person as collateral may sue the maker at law without enforcing the collateral, or he may pursue both remedies at the same time, though there can be but one satisfaction of the note.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 140; Dec. Dig. § 55.\*]

**5. SUBROGATION (§ 21\*)—NECESSITY FOR PAYMENT OF DEBT.**

The maker of a note given to the payee for the accommodation of a third person who deposited with the payee notes as collateral is not entitled to be subrogated to the rights of the payee and the third person as to the collateral without first paying the note.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 47, 48; Dec. Dig. § 21.\*]

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by the State National Bank against R. D. Plunkett and others. From a judgment refusing to set aside a judgment for plaintiff, defendants appeal. Affirmed.

Carmichael Brooks & Powers, for appellants. B. S. & J. V. Johnson, for appellee.

**McCULLOCH, C. J.** The plaintiff (appellee) instituted this action against defendants Plunkett and others to recover the amount of two negotiable promissory notes, each for \$830, executed by the latter to the plaintiff. The defendants filed their answer, stating, in substance, that the consideration for said notes passed to the People's Fire Insurance Company, that they executed the notes for the accommodation of said company, and not for their own benefit, and that these facts were known to the plaintiff; that the notes were executed as renewals of certain notes which were signed by said insurance company, and that at that time the company deposited with plaintiff as collateral security certain notes which plaintiff still holds, and which, if collected, would satisfy the debt of plaintiff; that the said insurance company is now in the hands of a receiver appointed by the chancery court of Pulaski county. They prayed that the cause be transferred to the chancery court where the receivership case is pending, and that they be subrogated to the rights of the plaintiff and said insurance company as to the collateral notes held by plaintiff. The plaintiff filed a demurrer to this answer, but on a later day of the term, without passing on the demurrer, and in the absence of the defendants and their attorneys, the court rendered judgment in favor of plaintiff for the full amount of the notes with interest. On a later day of the term the defendants appeared and filed a motion to set aside said judgment. The court overruled this motion, and the defendants have appealed to this court.

The plaintiff abandoned its demurrer by failing to call for a ruling of the court thereon, and in asking for a judgment on the merits of the case. The court should not have rendered judgment absolute against the defendants in their absence, as they should have been given an opportunity to amend their answer if they desired to do so. However, in the motion to set aside the judgment defendants set up no defense other than that stated in their answer; and the question recurs on the sufficiency of their answer. If the answer presented a valid defense, they were entitled to be heard on it, and judgment should not have been rendered in their absence. On the other hand, if their answer was insufficient to tender a valid defense, and as no additional matter was set up in their motion by way of defense, there was no error either in rendering judgment in the first instance or in refusing to set it aside if no

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

valid defense was tendered. We are of the opinion that the answer stated no defense to the action, and that the demurrer thereto should have been sustained.

Plaintiff had the right to prosecute its action against defendants without being compelled to pursue its remedies for the enforcement of the other notes held as collateral security. It had the right to pursue both remedies at the same time, though there could be but one satisfaction of the demand. *West v. Carolina Life Ins. Co.*, 31 Ark. 476; *Barnes v. Bradley*, 56 Ark. 105, 19 S. W. 319; *Neely v. Black*, 80 Ark. 212, 96 S. W. 984. Defendants could not demand the right of subrogation without having first paid the whole of plaintiff's debt, and could not force the latter into a court of equity for the purpose of enforcing the collection of the collateral notes. *Jones v. Harris*, 117 S. W. 1077; 1 *Brandt on Suretyship and Guaranty*, § 338.

As no valid defense was stated to the plaintiff's cause of action on the notes, the circuit court was right in rendering judgment thereon.

Affirmed.

#### AYER & LORD TIE CO. v. YOUNG.

(Supreme Court of Arkansas. March 29, 1909.)

##### 1. PRINCIPAL AND AGENT (§ 21\*)—EVIDENCE OF AGENCY—TESTIMONY OF AGENT.

While agency cannot be proved against the principal by declarations or admissions of the agent, it can by his testimony as to facts within his knowledge.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 39; Dec. Dig. § 21.\*]

##### 2. PRINCIPAL AND AGENT (§ 123\*)—EVIDENCE OF AGENCY—SUFFICIENCY.

Testimony of witness that he was sent by his principal to start a sawmill and have it logged, and that a skidway was necessary for this purpose, is sufficient evidence of his authority to contract for a skidway.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 123.\*]

##### 3. TRIAL (§ 252\*)—ABSTRACT INSTRUCTIONS.

An instruction authorizing a verdict if it be found there was a ratification of a contract is erroneous as abstract; there being no evidence of ratification.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

##### 4. PRINCIPAL AND AGENT (§ 171\*)—RATIFICATION OF AGENT'S ACT.

A skidway having been constructed for a mill, and it being necessary to use it in logging the mill, the use of it by the principal is not a ratification of the agent's act in contracting for it.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 644-655; Dec. Dig. § 171.\*]

##### 5. APPEAL AND ERROR (§ 1064\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Where it cannot be determined whether the verdict was based on original authority of the agent or ratification of his act, and there was

no evidence of ratification, error in giving an instruction authorizing it if ratification be found was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.\*]

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Action by Herbert Young against the Ayer & Lord Tie Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

This action was brought by Herbert Young against the Ayer & Lord Tie Company for an amount alleged to be due him by defendant for building a skidway at a lumber mill. In October or November, 1906, one U. S. Pitney, who had charge of the defendant company's business in the state of Arkansas, made an agreement with the plaintiff to build a skidway at a sawmill on White river, and agreed to pay him therefor \$15. The defendant had a contract with the owners of the mill to furnish them saw logs, and the skidway was to be used in delivering the logs. The plaintiff started the erection of the skidway, but soon afterwards stopped work on account of the high water. The plaintiff testified that he did nothing more toward the erection of the skidway until the following summer, when one Harbin, an employé of the defendant, came down to look after the work, and to see about cutting the timber and logs; that Harbin said the mill-owners objected to the kind of skids that were being put in, and made a new contract with him to build a different kind of skidway; that he then erected it according to the terms of the new contract; and that there is a balance due him of \$85. C. M. Harbin testified that he was sent by the company to get some one to log the mill, and to put it in condition to receive the logs for sawing; that a skidway was necessary for this purpose; that he instructed Herbert Young to fix the skidway; and that, if there was any additional work outside of what Pitney had told him to do, he would see that he got his money. Pitney testified that Harbin was sent to the mill by him to start it up, but that he had no authority to make an additional or new contract with Young. The suit was originally brought in the justice of the peace court. On appeal in the circuit court there was a verdict for the plaintiff for \$50. The defendant has duly prosecuted an appeal to this court.

Thomas & Lee, for appellant. Manning & Emerson, for appellee.

HART, J. (after stating the facts as above). It is earnestly insisted by counsel for appellant that there is no evidence in the record tending to show that Harbin was ever an agent of the Ayer & Lord Tie Company, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.



that the acts, admissions, or declarations of Harbin are not competent to prove his agency. While it is true that in an action against the principal the declarations or admissions of the agent are not competent to prove the agency, the rule has no application here. No attempt was made to prove Harbin's authority by his declarations or admissions. Harbin was a witness in the case, and his testimony was of matters of which he stated he had knowledge. If he knew the facts concerning the extent of his authority, his testimony was as competent on that point as that of any other witness having knowledge of the same facts. The point was expressly so ruled in the case of *Beekman Lumber Co. v. Kittrell*, 80 Ark. 228, 96 S. W. 988. The testimony of Harbin to the effect that he was sent down there to start the mill up and have it logged, in connection with his further testimony that the skidway was necessary for this purpose, was sufficient testimony from which the jury might infer that he had the authority to make the contract sued on.

Counsel for appellant also assigns as error the action of the court in giving the following instructions:

"No. 3. Although you believe from the evidence that Pitney agreed to pay plaintiff \$15 for building a skidway, still if you find from the evidence that a new and different contract was made by the plaintiff and Harbin, who was in the employ of the defendant, whereby a different sum was to be paid for different work, the defendant would be liable, if you find that the work was done by the plaintiff for defendant under the last contract, and defendant ratified same by receiving the benefit of the labor.

"No. 4. If it was agreed by the plaintiff and the defendant company or its agent, Mr. Pitney, that he was to build a certain skidway, made in a certain manner for \$15, then he could not recover more than \$15 for building it, although it might work a hardship on him; but if you find that after they started to build it, an agent of the company, or one acting as the agent of the company, wanted a change or additions, made to it, and promised to pay him for these additions, and he did make changes and additions different from the first contract, and did the work, and the company received the benefits of it, then he would be entitled to whatever additional changes in the work was worth."

We think these instructions should not have been given. There was no testimony upon which to base a finding that there was a ratification of any contract made by Harbin. Counsel for appellee insist that the using of the skids after they were built was a ratification. The company's conduct in this respect was not inconsistent with any other hypothesis than that of approval of Harbin's acts. The skidway was there, and

was necessary to be used in logging the mill. We do not think the mere use of the skids by appellant would amount to a ratification of Harbin's acts. The instructions then were purely abstract. It has been repeatedly held by this court that instructions are given by the court for the purpose of aiding the jury in arriving at a proper determination of the issues presented to them. Instructions which are not applicable to any state of facts are abstract and are misleading when they are foreign to the issues. It cannot be determined here whether the jury found for the appellee because they believed Harbin made the new contract and had authority to make it, or because they believed the appellant ratified his unauthorized contract. Hence the instructions were prejudicial. "It is prejudicial error to give an instruction based on a hypothesis unsupported by the evidence where such instruction is calculated to confuse the jury, and divert their minds from the real issue in the case." *St. Louis, I. M. & Sou. R. Co. v. Woodward*, 70 Ark. 441, 69 S. W. 55; *St. L., I. M. & Sou. R. Co. v. Denty*, 63 Ark. 177, 37 S. W. 719; *St. L., I. M. & Sou. R. Co. v. Puckett, Adm'r (Ark.)* 114 S. W. 224.

For the error in giving instructions Nos. 3 and 4, the judgment is reversed, and the cause remanded for a new trial.

#### AYER & LORD TIE CO. v. MARTIN.

(Supreme Court of Arkansas. March 29, 1909.)

##### 1. LOGS AND LOGGING (§ 8\*)—CONTRACTS—DUTY AS TO PILING.

Plaintiff contracted to cut and haul logs and unload them on skidways to be furnished by defendant. After he had filled one skidway, the logs not being removed therefrom, or another furnished, he unloaded the other logs on the ground, though it was more difficult and expensive. *Held* that, it being contemplated that plaintiff was to continue with his work without stopping, he was not liable for the expense of repiling the logs on skidways.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 16, 17; Dec. Dig. § 8.\*]

##### 2. LOGS AND LOGGING (§ 8\*)—AMOUNT CUT AND HAULED—EVIDENCE.

Evidence in an action for cutting and piling logs *held* sufficient to show enough logs were cut and piled to authorize the verdict.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 16, 17; Dec. Dig. § 8.\*]

##### 3. APPEAL AND ERROR (§ 1002\*)—QUESTIONS OF FACT—CONFLICTING EVIDENCE.

There being substantial evidence to authorize the verdict, it will not be disturbed, though there is conflicting evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3935; Dec. Dig. § 1002.\*]

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Action by J. J. Martin against the Ayer & Lord Tie Company. Judgment for plaintiff, and defendant appeals. *Affirmed*.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Thomas & Lee, for appellant. Manning & Emerson, for appellee.

FRAUENTHAL, J. The appellant, who was the defendant in the lower court, was engaged in the railway tie business, and in August, 1907, entered into a verbal contract with the plaintiff, by which it employed the plaintiff to cut its timber into 16-foot logs, and haul same to a certain mill, and there unload them on a skidway, which defendant agreed to prepare and furnish for the reception of the logs, and plaintiff was to saw the logs so placed on the skidway into logs of 8-foot lengths, and for all this work defendant was to pay plaintiff \$5 per 1,000 feet. In preparation for and in pursuance of the performance of the contract, plaintiff opened a camp and employed timber cutters and had three teamsters and teams in the camp. The defendant, in pursuance of its part of the contract, had a skidway built at the mill where the logs were to be delivered. The plaintiff proceeded to cut and haul the logs, and placed same on the skidway until the skidway was entirely filled with logs. These logs so placed on the skidway amounted to about 35,000 feet, and were sawed by plaintiff into logs of 8-foot lengths. The defendant did not remove these logs from the skidway, and did not build additional skidways; and, the plaintiff continuing to haul logs and the defendant failing to furnish further skidway facilities for the reception of the same, the plaintiff began piling the logs on the ground. During the time he was piling the logs on the ground he spoke to the agent of defendant about it, and called his attention to the fact of there not being room on the skidway for the logs, and that he could not afford to pay for placing them on the skidway after unloading them on the ground, and he was told by defendant's agent to go on with the hauling, and that defendant would do what was right about putting the logs on the skids. The plaintiff continued to cut and haul logs of the length of 16 feet to the amount of 68,000 feet, and unloaded them on the ground. These, with the 35,000 feet which had been unloaded on the skids and sawed into lengths of 8 feet, made a total of 103,000 feet which plaintiff claims that he cut and hauled, and for which he was entitled to pay at the rate of \$5 per 1,000 feet. He was paid by defendant at two several times during the progress of the work the total sum of \$330, and the plaintiff claimed that this left a balance of \$185 due to him for which he instituted suit. The jury returned a verdict in favor of plaintiff for \$157.90, and, from the judgment entered thereon, defendant prosecutes this appeal.

There were no objections interposed at the trial, and none are now pressed on this appeal to the giving of any of the instructions. The only question involved on this appeal,

therefore, is whether there is sufficient evidence to support the verdict. It is contended by the defendant that the plaintiff is not entitled to recover because he stopped cutting and hauling logs, and thus violated the contract. But according to the testimony of plaintiff, corroborated by other witnesses, there was no definite time for the contract to run, and no definite amount of logs that were to be cut and hauled. According to this testimony, the defendant was simply to pay to plaintiff \$5 per 1,000 feet for the logs that he would cut and haul and saw; and either party had the right to terminate the contract at his election, and to cease working thereunder, so that the plaintiff did not violate any term of the contract when he stopped work thereunder, and therefore was not in any default.

It is next contended by defendant that the plaintiff should be charged with the cost of placing on the skidway and sawing the logs which he had unloaded on the ground, which cost amounted to \$113.09. By the undisputed terms of the contract, the defendant was to furnish skidways upon which the plaintiff should unload the logs. It did build a skidway, but it only accommodated a small amount of the logs. The plaintiff made his preparations, and at considerable expense of camp and teams maintained the necessary preparations for the cutting and hauling of the logs. According to the testimony on the part of the plaintiff, it was less difficult and expensive to unload the logs upon the skidway than upon the ground. The plaintiff had filled the skidway with logs and sawed those logs in compliance with the terms of the contract. The defendant failed to take these logs out of the skidway, and failed to furnish additional skidways. Under the terms of the contract, the defendant was to furnish the skidways for the reception of the logs. Now, that did not mean, and the contract did not provide, that the defendant should furnish the skidway facilities at its election from time to time. The plaintiff had made preparations to continue right along with the work without stopping, and it appears that this was contemplated by the parties and done with the knowledge of defendant; and it would have been expensive to plaintiff after thus beginning the work to stop the hauling and still maintain a camp and teams in idleness. So that, under this view of the evidence, the defendant was in default when it failed to furnish sufficient skidway facilities for the logs hauled by the plaintiff. So that the failure by plaintiff to unload the logs on the skidway was brought about by the conduct of defendant in failing to furnish the skidways, which by the contract it was bound to do. The rights of plaintiff could not be affected by this default on the part of defendant. *Brodie v. Watkins*, 31 Ark. 319; *Cassady & Dunn v.*

Clarke, 7 Ark. 124; Ward v. Kadel, 38 Ark. 174; Missouri Pac. Ry. Co. v. Yarnell, 65 Ark. 320, 46 S. W. 943; 9 Cyc. 646. Therefore the plaintiff under this view of the evidence was not chargeable with the expense of placing the logs from the ground on the skidway.

It is contended by defendant that the evidence does not sustain the amount of the verdict. The defendant introduced two witnesses who testified as to the measurement of the logs. But both of these parties measured only a part of the logs, and estimated a part from the number of ties that had been cut. And the estimates of these two witnesses did not agree—one estimating the amount of the logs to be 87,928 feet and the other estimating the amount to be 89,469 feet. The plaintiff testified that, when the logs were scaled, the separate amounts of each log were set down in a book and that he had same made out on a list thereof, which he presented, and this showed the amount of the logs to be 103,000 feet. But, in addition to this, the defendant had employed one Carson to saw the logs which plaintiff had piled on the ground,

and he testified on the part of the defendant that there were 66,000 feet of these logs. The plaintiff testified that he had placed on skidway 35,000 feet of logs, which would make a total of 101,000 feet. Under this conflicting testimony, we cannot say that the finding of the jury is contrary to the evidence. There was evidence showing that the reasonable cost for sawing the logs into lengths of 8 feet was 50 cents per 1,000; so that the cost of sawing the logs which plaintiff hauled and did not saw could not amount to exceeding \$34, if plaintiff is chargeable therewith, after the defendant's default and the additional expense or cost of the inconvenience incurred by the plaintiff in unloading the logs on the ground.

There was conflicting evidence in this case, but there is substantial evidence to sustain the verdict of the jury. Under such circumstances it should not be disturbed. *McClintock v. Frohlich*, 75 Ark. 111, 86 S. W. 1001; *C., R. I. & Pac. R. Co. v. Stanford*, 84 Ark. 407, 106 S. W. 205; *Shaufelberger v. Mattix*, 85 Ark. 193, 107 S. W. 380.

The judgment is affirmed.

**SEAMAN v. CAP-AU-GRIS LEVEE DIST.**  
(Supreme Court of Missouri, Division No. 1.  
March 31, 1909.)

**1. DRAINS (§ 17\*)—DRAINAGE DISTRICT—EMPLOYMENT OF COMMISSIONER AS ENGINEER—INVALIDITY OF CONTRACT.**

Inasmuch as the duties of the commissioners of a drainage district organized under Rev. St. 1899, §§ 8318-8345 (Ann. St. 1906, pp. 3935-3947), are enjoined by such article on all three and not on two of them only, which section 8325 provides shall constitute a quorum, and it is intended that the scheme of drainage and the plan of its construction shall have the indorsement of all the members, and it is their duty to see that work is done according to the plans and specifications filed with the county court, and accept the work on completion, and section 8336 expressly provides that they shall not during their term be interested, directly or indirectly, in any contract for the construction of any ditch, drain, or levee, or in the wages or supplies to men or teams employed, for two members to employ the third as engineer under the authority conferred by sections 8328 and 8335, as to surveys, profiles, plans and specifications, etc., would not only defeat the general intent of the law as to the exercise of the discretion of "three competent persons" required to be appointed commissioners, but would violate the absolute prohibition of such employment in section 8336.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 17.\*]

**2. DRAINS (§ 17\*)—EMPLOYMENT OF COMMISSIONER AS ENGINEER—INVALIDITY OF CONTRACT—RIGHT TO COMPENSATION.**

That a drainage district received the benefit of services of one of the commissioners employed by the others as engineer in violation of the absolute prohibition of Rev. St. 1899, § 8336 (Ann. St. 1906, p. 3944), would not prevent the district from repudiating the contract and declining to pay him therefor or estop it to plead its invalidity in defense to an action by him for compensation.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 17.\*]

Appeal from Circuit Court, Lincoln County.

Action by W. J. Seaman against the Cap-Au-Gris Levee District. From a judgment for plaintiff, defendant appealed to the St. Louis Court of Appeals, which transfers the cause to the Supreme Court. Reversed.

This suit was brought in the circuit court of Lincoln county, by the plaintiff against the defendant on 16 orders or warrants issued by it, payable to him or order, in payment of services performed by him as commissioner and engineer in the construction of certain levees and ditches in said drainage district.

The petition contained 16 counts, each of which alleges the incorporation of the defendant, substantially, as in the first count; that on the 6th day of July, A. D. 1896, by order of its board of commissioners, and by its legally constituted officers, to wit, William Brimm, president of its board of commissioners, and W. J. Seaman, secretary, defendant made, executed, and delivered to this plaintiff its negotiable, written obligation directing its treasurer to pay him the

sum of \$100, which said written obligation or order is herewith filed, and marked "Exhibit A" and which written order or obligation obligated itself to pay to the order of this plaintiff, W. J. Seaman, \$100, in words and figures as follows, to wit: "No. 97. Office of the Board of Commissioners of the Cap-Au-Gris Drainage and Levee District. \$100.00. To the Treasurer of the Board of Commissioners of the Cap-Au-Gris Drainage and Levee District, Lincoln County, Missouri: Pay to the order of W. J. Seaman, the sum of one hundred dollars for engineering out of any funds in your hands. This warrant bears interest at the rate of six per cent. per annum from date. Given at Winfield, Mo., this 6th day of July, 1896. By order of the board. [Signed] W. Brimm, President. Attest: W. J. Seaman, Secretary." It alleges presentment of order in due time to the treasurer for payment and divers times since, failure and refusal to pay, and demands judgment for the amount with 6 per cent. interest from date of the order. The other counts are in the same form, with the following variations only, occurring in the copy of the orders:

Second count, Exhibit B, No. 98, \$100.

Third count, Exhibit C, No. 99, \$100.

Fourth count, Exhibit D, No. 100, \$100.

Fifth count, Exhibit E, No. 101, \$100.

Sixth count, Exhibit F, No. 102, \$100.

Seventh count, Exhibit G, No. 103, \$100.

Eighth count, Exhibit H, No. 104, \$100.

Ninth count, Exhibit I, No. 105, \$84, for "expenses."

Tenth count, Exhibit J, No. 106, \$55 for "commission fee."

Eleventh count, Exhibit K, No. 140, \$12.90, to the "order of Dodge, Cochran & Co. for levee work," dated September 3, 1896, alleging also assignment of the order to plaintiff.

Twelfth count, Exhibit L, No. 208, \$100, "for 20 days' engineering," dated September 5, 1896.

Thirteenth count, Exhibit L, No. 209, \$100, "for 20 days' engineering," dated September 5, 1896.

Fourteenth count, Exhibit M, No. 210, \$31, for 5 days' engineering and 3 days' commission fees, September 5, 1896.

Fifteenth count, Exhibit N, No. 211, \$7.80, for expenses, September 5, 1896.

Sixteenth count, Exhibit O, No. 238, \$115.07, "for engineering, commission fees, and expenses," February 20, 1897.

In the answer defendant alleged that it was incorporated under the drainage act approved April 1, 1893 (Laws 1893, p. 188); that W. J. Seaman, named in each of the counts of the petition as secretary of the board of commissioners, and the plaintiff was one and the same person; that engineering set up as the consideration of the order mentioned in the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 12th,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

13th, 14th, and 16th counts of the petition was done, if done at all, while plaintiff was one of defendant's board of commissioners, under a pretended contract with said board whereby he was to receive \$5 per day; that such contract was illegal, against public policy, unauthorized by law, and in violation of sections 19 and 26 of said act of 1893, and that said orders were without consideration and void. It is further pleaded that said contract was for an amount exceeding \$500, and was not let to bidders as required by law. The execution of the order described in count No. 16 was also denied under the oath of the president of the board. Counts Nos. 9, 10, 11, and 15 were not controverted in the answer.

The facts are not disputed, and are as follows:

The defendant drainage district was organized in Lincoln county, Mo., under the laws of 1893, and embraces about 3,300 acres of land on the bottoms of the Mississippi river, in said county; it being the same drainage district involved in the case of *State ex rel. v. Wilson* (not yet officially reported) 115 S. W. 549. The county court in appointing commissioners for this levee district, as was its duty under the statute, appointed plaintiff, William J. Seaman, as one of the commissioners, and at the same time appointed William Brimm and W. A. J. Sitton as commissioners with him. At a regular meeting of these commissioners, as shown by the evidence, in the judgment of the commissioners it became necessary to appoint a civil engineer to take charge of the construction of the levees and ditches in the district. The plaintiff, as shown by the transcript, not voting himself, was by the other two commissioners elected to the position of engineer. This was done at a regular meeting of the commissioners, and a proper record made thereof. The plaintiff, Mr. Seaman, accepted the position, and took charge of this part of the work in the laying off, construction, building, measuring, and completing the levees in said district, working at the same, as shown by the evidence, some 250 or 300 days. The levee was completed, accepted by the commissioners and by the county court. The assessments for the construction of the levee were made payable by installments, a large part of these installments maturing after the completion of the levee. From time to time as this work was done this plaintiff, as well as all other persons working in any department of the levee construction, would present their accounts to the commissioners, and, for want of cash on hand to pay, the commissioners issued scrip, or these warrants or orders sued on in this case, in payment for the work. Seaman, the commissioner, and this plaintiff, in the course of his work as commissioner and as engineer, received in payment therefor the scrip, orders, or warrants that were sued on in this case and offered

in evidence. When the levee was completed it was found that it would require another assessment of some \$10,000 to pay the outstanding indebtedness made necessary in the construction of the levee, of which plaintiff's warrants were a part. The commissioners so made their report to the county court, showing the indebtedness of the levee district above the funds on hand arising from the first assessment to pay the same to be about \$10,000. The indebtedness by the commissioners was itemized, and included these warrants or orders of plaintiff sued on. The county court on this report of the commissioners ordered an assessment payable in five installments, the first installment payable in July following the assessment, and the others following annually. An appeal was taken to the circuit court, and the circuit court affirmed the judgment of the county court, and the assessments were made. For the lack of funds these warrants have never been paid, hence this suit.

The evidence shows that the work was necessary, that the work was done for a fair price and in a satisfactory manner, and that Seaman in his employment was employed by the other two members of the commission. The evidence further shows that from time to time in the reports made by this commission, and by the commissioners following them, that this indebtedness of plaintiff was recognized and the warrants issued therefor were recognized as a proper indebtedness of the district, and that the orders and judgments both of the county court and the circuit court so held. It was admitted that W. A. J. Sitton, William J. Seaman, and William Brimm were commissioners of the defendant district from the 13th day of February, 1894, until their successors were appointed and qualified, as shown by the evidence, in 1897. Mr. Brimm was president, and Seaman was secretary.

William J. Seaman testified that he was the plaintiff, and was secretary of the board of commissioners of the levee district during the year 1896 and until February, 1897. Identified the warrants or orders sued on in this case and the signatures thereto. Testified that these warrants were issued by the board to him, except the one issued to Cochran & Co., which was properly assigned. He performed services as engineer for the district. Was employed by Brimm and Sitton. Plaintiff then offered the record in the levee company to show the issuing of the warrants sued on, to which counsel for defendant objected, for the reason that, with the exception of vouchers 105 and 106, the vouchers are for services as engineer. This district was organized under the act of 1893, and Seaman had no right to accept employment under the statute. "The Court: There is no charge that there was anything wrong with the manner in which the work was done? Mr. Dudley: No, we don't know anything about that. The Court: There is no

controversy whether it was properly done? Mr. Dudley: We don't charge that it was improperly done, but done contrary to the statute and public policy." Plaintiff introduced a record of the levee district showing that Trescott, Killam, and Magruder had their first meeting and organized the 20th day of February, 1897, and that on the same day and date the former commissioners, Seaman, Brimm, and Sitton, met with their successors, disorganized, and turned the record over to their successors. Plaintiff then introduced page 29 of the record of the levee district, showing resolution appointing W. J. Seaman as engineer, and fixing his salary at \$5 per day.

Plaintiff then resumed examination of witness Seaman, who testified that he did the work for which these vouchers were issued, that it was reasonable, and that he reported to the commissioners, and they received and accepted his work, and by order of the board the warrants sued on were issued. On cross-examination Mr. Seaman testified that all of the work done for which suit is brought was done while he was one of the commissioners, and that he was secretary of the board at that time. "Mr. Norton: What did you say about separation of the work of engineer and commissioner? A. It was itemized. The work for commissioner is itemized as commissioner, and the work as engineer is separate from that and issued as engineer. When I performed services as engineer I did not receive compensation as commissioner, and when I worked as commissioner I did not receive compensation as engineer."

Examination by the Court: "Q. You only received one compensation? A. Yes, sir. Q. Was this work done under the direction of the board? A. Yes, sir; by their order. Q. Were they posted as to the detail of the work? A. Whenever it was necessary to consult them they were called in and we had a meeting. The commissioners acted on my report and accepted it."

Recross-examination: "Q. What was the character of the work you rendered as engineer? A. Laying out, measuring, and leveling; measuring the work done, and accepting it when it was done. Seeing it was done according to contract; inspecting the work done, and reporting to the board. By the Court: Q. The work was done by contract? A. The contract was let to Dodge, Cochran & Co.; they built the work, and I looked after the engineering and seeing that they did their work according to specifications. Mr. Killam and Duey had part of the work, which was two different companies."

Plaintiff then introduced the final report filed March 1, 1897, of Commissioners Brimm, Seaman, and Sitton, for the purpose of showing that they reported to the court, as issued by them and unpaid, all warrants sued on here, besides many others. Plaintiff also introduced a report of commissioners

filed in the county court July 15, 1896, showing the issuance and outstanding of a part of the warrants sued on in this case, to wit, the warrants described in the first 10 counts. Plaintiff then introduced a report of Commissioners Trescott, Killam, and Magruder, filed October 15, 1897, wherein they ask for an additional assessment, and in showing the indebtedness of the district included all of the warrants sued on in this case.

William Brimm testified that he was one of the commissioners in 1896 and 1897, and as such commissioner voted for the employment of W. J. Seaman as engineer and fixed his salary at \$5 per day. "We accepted his services and approved them, and issued the warrants sued on for services."

Cross-examination: "The mechanical work was let by contract. There was no letting the contract for engineer to the highest bidder. There were about 3,300 acres in the district. The levee was something like six miles. Ditch on one side nearly two miles long. It was laying out this ditch and inspecting the work as it progressed that this engineering was principally done. By the Court: Who drew the plans and specifications? A. Mr. Seaman, and upon these plans and specifications the work was let, and he continued to superintend like an architect, seeing that it was done according to plans and specifications."

W. A. J. Sitton testified: "I was one of the commissioners. Voted for the employment of Seaman as engineer. I suggested Mr. Seaman to Mr. Brimm because I thought he was the best man for that business that we had in the county. We had to have an engineer and surveyor, and a good one, and I suggested Mr. Seaman to Mr. Brimm, and we agreed on him and employed him, and fixed his salary at \$5 per day. While he was acting as engineer he did not charge as commissioner, and when acting as commissioner he did not charge as engineer. In the meeting of the commissioners when he was employed as engineer, Mr. Seaman took no part; he did not say anything."

Examination by the Court: "Q. Did he take any part in fixing the compensation? A. No, sir. Q. Was his work satisfactory? A. It was in good shape. Q. Are you satisfied his services were worth the sum you agreed to pay him? A. I think they were easily worth it. Q. Did you think this work was necessary? A. Yes, sir. We couldn't do anything of that kind without it. It would be impossible to get ditches there like that without it. Q. He was the best man, you thought? A. He was the best man in the county, in my opinion."

Plaintiff then introduced certified copy of the record of the county court in November, 1897, showing an additional levy to pay warrants sued on in this case and others, and also the record of the circuit court made the 9th day of April, 1898, showing that on appeal from the county court the

circuit court adjudicated this matter and made the additional levy, and that this levy was founded on the report of the commissioners showing the indebtedness sued on here, and other indebtedness in the construction of the levee. The warrants or orders sued on were introduced and read in evidence. County Court Record J, p. 467, of Lincoln county, was introduced, showing the approval of the final report of Commissioners Seaman, Sitton, and Brimm. It was admitted that the defendant was incorporated under the act of 1893.

At the close of testimony, the defendant asked, and the court refused to give, the following instructions, to which action of the court defendant duly excepted, to wit:

"(1) The court declares the law to be that the employment of the plaintiff by defendant's commissioners for the performance of the work mentioned in the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 12th, 13th, and 16th counts of the petition at the price and sum of \$5 per day, and the issuance of the warrants or orders mentioned in said several counts in payment therefor, were ultra vires, illegal, and void, and as to said counts the findings will be for defendant.

"(2) The court declares as a matter of law that the witnesses Seaman and Brimm had no authority to issue the warrant or order mentioned as described in the sixteenth count of the petition, their terms as commissioners having expired prior to the issuance of said warrant, and as to said count the findings will be for the defendant. The court declares as a matter of law that there can be no recovery on the fourteenth count, except for three days' services as commissioner, the sum of \$6, and interest on said sum at 6 per cent. per annum from the 5th day of September, 1897, to this date."

The trial resulted in a judgment for plaintiff for the sum of \$1,946.81; and after filing proper motions for new trial, etc., an appeal was duly taken by defendant to the St. Louis Court of Appeals. The latter court transferred the cause to this court, because the defendant was a public political subdivision of the state, as held by this court in the case of *Morrison v. Morley*, 146 Mo. 543, 48 S. W. 629, which fact gives this court exclusive jurisdiction of the case on appeal.

Norton, Avery & Young, for appellant. W. A. Dudley, for respondent.

WOODSON, J. (after stating the facts as above). It is conceded in this case that the appellant is a drainage district of Lincoln county, incorporated under the drainage act of 1893 (Laws 1893, p. 188), now article 5 of chapter 122 of the Revised Statutes of 1899 (Ann. St. 1906, pp. 3935-3947), and that under section 8322 thereof the county court of said county, on February 13, 1894, appointed the respondent, W. J. Seaman, William Brimm, and W. A. J. Sitton commissioners to lay

out and construct the levees and ditches provided for in said district. On March 27, 1904, the board of commissioners elected said Seaman secretary of the board, and also appointed him engineer, and agreed to pay him \$5 a day for his services as such engineer. All of the work for which the warrants in suit were given was performed by respondent while he was a member of said board; and those sued on in the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 12th, and 13th counts were for services performed by him as engineer, and those sued on in the 14th and 16th counts were given, respectively, for services performed by him in his capacity as commissioner and as engineer, the former for five days as engineer and three days as commissioner, and the latter does not state what number of days he was allowed for as engineer or as commissioner. All the remaining warrants were given for services performed by respondent as commissioner and for expenses, the validity of none of which is challenged.

Section 8343, Rev. St. 1899, fixes the salary of each commissioner at \$2 per day and expenses, but as respondent's salary as commissioner nor his expenses are challenged by this suit, it will be unnecessary to further discuss this branch of the case.

Section 8328, Rev. St. 1899, provides as follows: "Surveys, maps, etc., to be made, when. If the commissioners report that the whole cost of such proposed work will be less than the benefits resulting therefrom, they shall proceed to have the proper surveys, profiles, plans and specifications made therefor, and shall report to the court their conclusions thereon, with a copy of such surveys, profiles, plans and specifications, and their recommendations as to the best and cheapest method of doing the proposed work."

And section 8335, Rev. St. 1899, authorizes and empowers the commissioners to do any and all acts which may be necessary in and about surveying, laying out, constructing, repairing, altering, enlarging, cleaning, protecting, and maintaining any such drain, ditch, levee, etc., authorized to be done under said article.

We suppose the commissioners by the two latter sections were fully authorized and empowered to employ an engineer whenever his services were necessary in the prosecution of the work upon the drainage system; at any rate, counsel for appellant does not deny the power of the commissioners to employ an engineer when his services are necessary, but he does challenge their authority of employing one of their own number as such engineer, because, he says, section 8336, Rev. St. 1899, expressly prohibits them from doing so.

Said section 8336 reads as follows: "Contracts, when and how let. In all cases where the work to be done at any one time under the direction of the commissioners shall, in their opinion, cost to exceed \$500, the

same shall be let to the lowest responsible bidder, and the said commissioners shall advertise for sealed bids by notice published in some newspaper issued in the county in which the petition is filed, and if there be no newspaper issued or published in said county, then in some newspaper published in an adjoining county; which said notice shall particularly set out the time and place, when and where, the said sealed bids will be opened, the kind of work to be let, and the terms of the payment. Said commissioners may continue the letting from time to time, if in their judgment the same shall be necessary, and may reserve the right to reject any bid and all bids. And said commissioners shall not, during their term of office, be interested, directly or indirectly, in any contract for the construction of any ditch, drain or levee in such drainage district, nor in the wages or supplies to men or teams employed on any such work in said district."

Passing over, without discussing, that clause of the section which requires all contracts for work to be performed which shall cost more than \$500 be let to the lowest and best responsible bidder, etc., to that clause thereof which provides that "said commissioners shall not during their term of office be interested, directly or indirectly, in any contract for the construction of any ditch, drain or levee in such drainage district, or in the wages or supplies to men or teams employed on any such work in said district," by reading said article 5 of chapter 122 one will be impressed with the idea that it was the intention of the Legislature to have these drainage districts, which are public corporations, placed under the supervision and control of a board of commissioners composed of three suitable members who are authorized and directed by statute to have surveys and profiles, maps, and plats made of the proposed work to be done, and to do all other things necessary to construct, maintain, and keep in repair the levee system in each and every drainage district. Those duties are enjoined upon all three of the members of the commission, and not upon two of them only.

While it is true section 8325 provides a majority of the commissioners shall constitute a quorum, and that a concurrence of a majority of their number upon any proposition shall be considered as the act of the district, yet the whole article contemplates that all the members shall serve when present, and that a concurrence of a majority of them upon any proposition shall be considered the action of the board or commission. If, otherwise, it was the intention that only two were to act when all were present, then there could be no action of the board whatever where those two failed to concur upon any proposition. Not only does this general idea run through the entire article, but it permeates and is given expression in each and every section thereof.

Sections 8328 and 8335, the ones which empower the commission to employ an engineer, in express terms provide that the commissioners—not one or two of them, but the commissioners—shall have the surveys made as commissioners and not as engineers, and they shall do all things necessary to carry into effect the intention and object of the act, namely, the construction and maintenance of the drainage system. Those duties are numerous and important, requiring the exercise of wise discretion and sound judgment on the part of "three competent persons," whom the law requires the county court to appoint as commissioners.

By reading sections 8328 and 8330 it will be seen that the surveys, profiles, plats, and specifications required to be made by the engineer constitute the whole foundation and fabric upon which the levee system is to be constructed. From those the area of the district, the number and size of the levees and drains are to be determined, as well as what lands will be benefited or damaged by the proposed improvements, and also the cost of the work and the assessments of the taxes to be made upon the lands out of which the improvements are to be paid.

Clearly, it could not have been the intention or purpose of the Legislature to have one of the commissioners to act as an engineer of the board, make the surveys, profiles, plats, and specifications, and then have the other two approve or disapprove the same, and report those facts to the county court, as required by section 8330. The other two commissioners might not always agree, and doubtless did often disagree, as to just what the survey in many of its details, if not in its general plan and scope, should be and should show, and in all such cases there could be no report made by the commissioners to the county court as contemplated and required to be done by said section 8330; but if, upon the other hand, the commissioners, all three of them, as provided by the act, should act together, then probably most, if not all, portions of the surveys, profiles, maps, and specifications could be agreed upon by a majority of the commission, if not by all of them, and thereby enable them to report to the county court as required by law. But independent of the foregoing observations, the clear intent of the act is that the scheme of drainage and the plan of its construction should have the indorsement of all the members of the commission, and the act makes it their duty to see that the work is done according to the plans and specifications on file with the county court, and the work after its completion should have their approval and be accepted by them. That could not be done where one of their number abdicates his seat as commissioner and assumes the role of engineer for the commission; nor could he act in both capacities, for the reason that the law would not tolerate or permit the engineer to make the



surveys and construct the drainage system in pursuance thereof, and then take his seat upon the commission with the other members thereof and vote for its approval and acceptance. It would be farcical to authorize an engineer to have the work done under his orders and supervision and then permit him to vote for its approval and acceptance.

In discussing a similar question, the Supreme Court of Georgia in the case of *Macon v. Huff*, 60 Ga., loc. cit. 224, used this language:

"The first question, and the great question argued before us with great research and ability by the able counsel on both sides, is this: Could Huff, whilst mayor of Macon, and ex officio president of council, make the contracts which are set out in the record, and legally bind the city thereby?

"The fundamental principle which will be found to underlie all adjudications made in this state on similar questions, and which, we think, has not been upset by any well-considered case anywhere, is that no officer or agent, public or private, whose duty it is to supervise a contract in behalf of his employers or principal, can himself undertake to do that thing which his office or agency makes it his duty to supervise for others, and to see to it for them that it is well and faithfully done. The reason is too plain and palpable for serious dispute. The man becomes a judge in his own case. He agrees to perform work himself, and yet is to judge whether or not it is well done. So tender is our law of bias on the part of the noblest and purest in behalf of self-interest, that no judge is permitted to sit in a cause in which he has any interest. If a relative by blood or marriage within a certain degree is interested, he cannot sit and determine the case. The same principle applies to jurors, and to all courts, federal, state, or municipal. Ever since the Yazoo fraud, this has been the policy of this state. In 1801 an act was passed 'that no judge or justice of any court, no ordinary, justice of the peace, nor presiding officer of any inferior court or commission, can sit in any cause or proceeding in which he is peculiarly interested, or related to either party within the fourth degree of consanguinity or affinity, nor in which he has been of counsel.' See Code 1873, § 205; Cobb's Dig. p. 480. Therefore, in the mayor's court of the city of Macon, Mr. Huff could not sit in a cause between himself and the humblest citizen of the city, involving the slightest breach of propriety or the smallest amount of money. Yet the effect of these contracts is to make him every day the judge in his own case. He has contracted for money to do certain work for the city, and, as mayor of the city and its chief executive officer, it is his official duty to see that this work is well done. He contracts to cut and haul wood to the poor, to fence and keep in repair the fencing

of a very large piece of ground, involving heavy and continuous expense, to levee the river or drain the lagoons and keep the park dry as far as practicable, to gravel the walks and keep them in order—in fine, to keep the whole part in perfect order—for the term of five years. His administrative and executive duties as mayor require him to overlook and judge of the extent and manner in which, as contractor, he discharges these obligations. Can he do it disinterestedly? Possibly he may; but the law regarding our fallen nature as all weak, and profiting by the prayer which the Son of God prescribed for all men, forbids that such temptation be laid in the path of any man, however exalted his office or pure his character. How would it look for Governor Colquitt, while in office, to lease for himself the penitentiary convicts, or the state road, or Macon and Brunswick road, when it is his official duty to see to it that the lessees carry out faithfully their contracts with the state? It will be observed that these contracts with Mr. Huff are executory and continuous; that the contract is not executed in its totality on his part, but he obligates himself to do things day by day for the entire term of his contract.

"It matters not how fair the contract may be, public policy will not uphold it. This principle is iterated and reiterated everywhere in the books. \* \* \* It would seem, therefore, to be unnecessary to fortify our own judicial exposition of our own statutes by the authority of courts foreign, or quasi foreign, to us upon cases and questions similar to those declared and ruled by our own courts.

"If need be for other reference, however, we could refer on the same general line to *Michoud v. Girod*, 4 How. 533, 11 L. Ed. 1076; *Marsh v. Whitmore*, 21 Wall. 182, 22 L. Ed. 482; *Kerr on Fraud and Mistake*, 160; *Wood on Master and Servant*, 213, 215; 1 *White and Tudor, Lead. Cases in Equity*, 72, 115; *Davoue v. Fanning*, 2 Johns. Ch. 252, 3 Am. Rep. 105; *Zinn's Leading Cases on Trusts*, 76, being a great case before the House of Lords, where the Chancellor, Lord Cranworth, delivered his opinion for reversal, and Ex-Chancellor Lord Brougham concurred, both opinions being in point on this question, it being held that a director of a railroad company could not contract with the company; *Pickett v. School Dist. No. 1, Town of Wlota*, 25 Wis. 551, 3 Am. Rep. 105, where it was held that a school commissioner could not contract with the other commissioners to build the schoolhouse. See, also, *Garrison v. City of Chicago, Law and Equity Reports*, pamph., August 1877, p. 166; 1 *Perry on Trusts*, 59, 194, 206, 207, 209, 210; *Smith v. City of Albany*, 61 N. Y. 444. Indeed, the books abound in the general principle, sometimes and under some circumstances annulling absolutely the contract, at others and under other circumstances on terms; but we

rest the case confidently upon the great fundamental principle that the mayor is paid to superintend all this work done for the city; that he is her administrative and executive officer to see that the work is well done; that it is wholly unreasonable and against all public policy, therefore, that he be permitted to make a contract to do what his official duty makes him superintend and oversee and holds him responsible for. Code of Macon, § 83. In respect to contracts about the purchase of lots for homes or things of that sort, this case, it will be seen, is put on a different basis; and of course is wholly unlike the contract for the mayor's salary.

"(2) But it is urged that the contract has been ratified, and that, even if originally illegal, it is now good. Ratified how? By whose authority? The mayor has been the head of the city government ever since the contract was made, and if it could not be made with him whilst he was the head of the government and part of the council, having the right to give the casting vote, it is difficult to see how and by what competent authority it has been ratified. If a clean mayor and council, of which Mr. Huff was not a member, should do any act or omit to do any act by which, either by their conduct or acquiescence, this contract was ratified, we are of the opinion that it could be ratified; because, as such council and mayor could originally make a legal contract with Mr. Huff, he not being the head thereof, there is no reason why it should not ratify an old one. It would be just the same in effect as if they had made a new one when they ratified the old. But as the supposed ratification could have been made, and the acts which it is argued amount to it were done by the same council which originally did the illegal thing, and by another council down with the same complaint, Mr. Huff still being similarly related to both, no act or omission to act on their part can so operate as to make this contract legal by ratification. It is true that Mr. Huff has been elected mayor since the making of these contracts, and since they were probably generally known, but certainly unless the question was by competent authority derived from an act of the Legislature or the charter, submitted to vote, the only lawful mode in which the corporation can act, either to make or ratify a contract, is through the mayor and council, and it would be folly to hold that a contract, illegal because made by one who was mayor when it was made with the council of which he was head, could be ratified by a council of which he was still the head. We hold, therefore, that no act or conduct on the part of the city through its authorized agents has in law operated to ratify and legalize this originally illegal contract.

"(3) But, nevertheless, it is a universal principle of equity that whosoever enters her courts as a suitor must cleanse himself at the threshold, and that she will adminis-

ter relief to no complainant who falls or refuses to do equity himself. Before, therefore, this complainant can have any relief in equity, it must do equity itself. Certainly it must do so where the chancellor is satisfied that there is no actual or intentional fraud on the part of the defendant, and that public policy alone demands that the law be enforced and the contract be rescinded or annulled. This seems to have been the idea of Lord Brougham in *Aberdeen Railway Co. v. Blaikie Bros.*, *Zinn's Lead Cases on Trusts*, 76, where the case of *York Building Company v. MacKenzie* is cited, and where even ornamental improvements were required to be paid for, though the sale was annulled. That case is a very strong authority to invalidate these contracts at bar as illegal; but it seems, also, from the opinion of Lord Brougham before the House of Lords, where the case was determined, to be an authority for paying Mr. Huff back what he has expended, with interest thereon, in the absence of fraud on his part. That case, too, disposes of all that has been urged about the custom of former members of council to buy and deal with the city of Macon, of whom a long list, running back many years, is given in the record; but no case, so far as we see, of the mayor taking a contract to do work which his official duty required him to supervise. Certainly, however, it is right and equitable that Mr. Huff should be paid by the city that which he has spent, and of which the city will reap the benefit. It would be grossly unjust to hold otherwise, and, when this case is tried, this equitable principle will be applied to it."

But independent of these general observations, let us return to said section 8336. It, in express terms, provides that no commissioner shall during his term of office be interested, directly or indirectly, in any contract for the construction of any ditch, drain, or levee in such district, or in any wages of or supplies to men or teams employed on any such work. If it be conceded, and we suppose it is conceded, as it is not denied, that the commissioners had the power and authority under said sections 8328 and 8335 to employ an engineer and to agree to pay him \$5 a day for his services as such, then that contract of employment is in direct violation of that clause of section 8336 which says no commissioner shall be interested in any contract for the construction of any drainage system in such district, for the obvious reason that the work of the engineer in the construction of said improvements is the most important part thereof, and doubtless is the highest priced labor employed upon the work; and in this particular instance his salary was fixed at \$5 a day, three-fifths more than that fixed by law for the commissioners. If we take the opposite view of those sections, and hold that the commissioners had no authority to employ an engineer, and that therefore there was no contract between

respondent and the commission regarding services as engineer upon said improvements, then he could not recover upon the contract of employment, for the reason that there would be no valid contract in force obligating the district to pay him for his services. So, in either event, he could not recover upon the contract made by him with the other two commissioners. These views are supported by the case of *King's Lake Drainage & Levee District v. Jameson*, 176 Mo. 557, 75 S. W. 679.

If we correctly understand the contention of counsel for respondent, they do not seriously controvert the contention of appellant, which is to the effect that the contract by which respondent was employed as engineer for the district is void because it violates said section 8336; but they seek to escape the provisions of that statute by insisting that, since the district has received the benefit of his services, it should not now be permitted to repudiate said contract and decline to pay him for said services, and that in equity and in good conscience it should be estopped from pleading its invalidity. In support of that contention, counsel for respondent cite and rely upon the following cases, among others: *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670; *Macon v. Huff*, supra; *Argenti v. San Francisco*, 16 Cal. 256.

In the case of *Niles v. Muzzy*, supra, the facts were these: Muzzy was mayor of the city of Niles, and was employed as an attorney to appear for and defend the city in a suit brought against it by one Young. After defending the suit, the city declined to pay Muzzy his fee for the legal services rendered by him in the case, upon the ground that the contract of employment was void for the reason that it violated sound public policy. The Supreme Court of Michigan in that case held that there was nothing in Muzzy's relations to the city to preclude his recovering the value of his fees. In discussing that question, the court used this language: "Having rendered these valuable professional services, it is now objected that he ought not to be paid for them because he was mayor and councilman. There is no question open in regard to their worth to the city, or as to the necessity there was for them. Every such consideration is closed by the finding. Neither his duty as mayor, or as councilman, or as both, included any such service. He was no more required in consequence of his official position to employ his time and talents as a counselor at law in conducting a suit brought against the city than he was to pay the debts of the city out of his own private funds."

We have heretofore referred to and quoted from the case of *Macon v. Huff*, supra.

In the case of *Argenti v. San Francisco*, 16 Cal., loc. cit. 282, Chief Justice Field, afterwards one of the Justices of the Supreme Court of the United States, in discussing this question, used this language:

"If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it, or, if used by her, to render an equivalent to the true owner, from the like general obligation. In these cases she does not, in fact, make any promise on the subject; but the law, which always intends justice, implies one, and her liability thus arising is said to be a liability upon an implied contract; and it is no answer to a claim resting upon a contract of this nature to say that no ordinance has been passed on the subject, or that the liability of the city is void when it exceeds the limitation of \$50,000 prescribed by the charter. The obligation resting upon her is imposed by the general law, and is independent of any ordinance and the restraining clauses of the charter. It would be, indeed, a reproach to the law if the city could retain another's property because of the want of an ordinance, or withhold another's money because of her own excessive indebtedness."

It will be seen that in none of those cases, unless it is the California case, was there any statute prohibiting the parties thereto from making the contracts involved therein.

This question was also before this court in the case of *Sparks v. Jasper County*, 213 Mo. 218, 112 S. W. 265, and on pages 269 to 272 the court used this language:

"(4) The defendant sets up in its answer divers counterclaims and set-offs, aggregating about \$15,000, for money paid by the county to plaintiff for bridges constructed by him in years gone by, under various contracts, which defendant alleges were illegally let to plaintiff. It is not alleged that the bridges were not constructed according to the terms of the contract, or that they were not worth the sums of money paid therefor, nor is it alleged that the county refused to receive the bridges; while, upon the other hand, the evidence shows that the contracts for constructing these bridges had been fully performed on both sides long prior to the institution of this suit. The record also discloses the fact that the contracts for their construction were fair and reasonable, that the bridges were substantially built and were reasonably worth the money paid by the county for them, that they were accepted by the county, and that they have been retained and constantly used by the public ever since, with no offer to return them to the plaintiff. Under those circumstances, conceding for argument's sake the contracts were illegal in their inception, yet it would be unjust and inequitable to permit the county to retain the bridges and at the same time recover back the money paid therefor. That principle of equity should apply here

which requires persons who seek equity to do equity before their prayer will be heard. This is no novel question to the jurisprudence of this country. The law is that where there has been a complete performance of the contract on both sides, and it is fair and reasonable in fact, there can be no recovery of the consideration by the municipal corporation where it retains and enjoys the benefits of the contract, and where it cannot or will not restore the property acquired by the contract, even though the contract be one which the law denounces as illegal and which could not be enforced on that account. *Frick v. Town of Brinkley*, 61 Ark. 397, 33 S. W. 527; 20 Am. & Eng. Ency. Law (2d Ed.) p. 1190; *Riverside County v. Yawman & Erbe Mfg. Co.*, 3 Cal. App. 691, 86 Pac. 900; *Long v. Boone County*, 36 Iowa, 60; *Inhabitants of Schell City v. Rumsey Mfg. Co.*, 39 Mo. App. 264.

"In *Frick v. Town of Brinkley*, supra, a member of the city council (prohibited by law from making contracts with the city) sold the city a lot of tiling and received payment therefor. Subsequently an action was brought to recover the purchase price without returning the tiling. The court says: 'We think it (the town) cannot in good conscience be allowed to receive the value back, while at the same time it is enjoying the benefits of its purchase; at all events, when it does not even offer to restore that which it claims could not have been its property, and, consequently, is not now its own. This is not the assertion of any right which the appellant has, nor any obligation resting upon the appellee under the contract of purchase; but it is a rule of justice and right growing out of an implied contract and obligation of every one, whether a natural or artificial person, to restore to another that which belongs to him and that is in the possession of the former or in his power to restore, and when the power to restore does not exist, and when a restoration in the nature of things became impracticable, then to be precluded from recovering back the fair price paid. In such cases as this the sole duty of the courts seems to be to see that the public corporation suffers no material loss or injustice, but further than this they could but inflict burdens upon others more or less disastrous where no resulting good can follow—a thing courts of justice ought not to indulge in.'

"In *Riverside County v. Yawman & Erbe Mfg. Co.*, supra, the court say: 'It affirmatively appears from the complaint that the board of supervisors has purchased and paid for and retained the use of certain personal property, and the court is asked to compel restitution with penalty in favor of such purchasers. The Legislature never contemplated conferring such power upon a public corporation when it enacted section 8 of the county government act. The right there sought to be conferred was to recover money

paid without authority at law. To say that one who receives property under a contract with the owner, and retains and uses it, is not authorized by law to pay for it, would be to say that a public corporation may take and use property for public purposes without compensating the owner, provided they can once get possession of it under the guise of a contract; and to say that they may recover the purchase price actually paid, without tendering back that which they have received, would be to say that our Legislature intended to discourage common honesty as applied to public corporations, and that the courts were to be made the "handmaidens of iniquity."'

"In *Long v. Boone County*, 36 Iowa, 60, quoted with approval in *King v. Mahaska County*, 75 Iowa, 336, 39 N. W. 639, it was held: 'When the legally constituted agent of the county contracts for work in respect to which he has no power unless authorized by a special vote of the people, and executes a warrant for the amount thereof to the treasurer of the county, which is voluntarily paid by the latter officer, the county cannot recover back the amount so voluntarily paid.' While some of the expressions in the case of *King v. Mahaska County*, 75 Iowa, 329, 39 N. W. 636, seem at first blush to support defendant's contention, when critically considered it will be seen that it distinguishes that case from the case of *Long v. Boone County*, 36 Iowa, 60, by using the following language, on page 336 of 75 Iowa, and page 639 of 39 N. W.: 'When all the pleadings are considered, the defendant was not in the attitude of seeking to recover back money paid to the plaintiff on their illegal contracts.'

"The Supreme Court of the United States and courts of last resort of many of the states go much further in the adjustment of the rights of parties growing out of illegal contracts than this court has. In other words, they grant not only the relief this court grants, but they go much further, and relieve where this court will not do so, as will appear from the following cases: The Supreme Court of the United States, in the case of *Chapman v. County of Douglass*, 107 U. S. 357, 2 Sup. Ct. 70, 27 L. Ed. 378, in discussing this question, used this language: 'This doctrine was fully recognized by the Supreme Court of Nebraska as the law of that state in the case of *Clark v. Saline County*, 9 Neb. 518, 4 N. W. 246, in which it adopts from the decision of the Supreme Court of California the following language: "The city is not exempted from the common obligation to do justice which binds individuals. Such obligations rest upon all persons, whether natural or artificial. If the city obtain the money of another by mistake or without authority of law, it is her duty to refund it, from this general obligation. If she obtains other property which does not belong to her, it is her duty to restore it, or,

if used, to render an equivalent therefor from the like obligation. *Argenti v. San Francisco*, 16 Cal. 282. The legal liability springs from the moral duty to make restitution." The same rule is announced in the following cases: *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Marsh v. Fulton Co.*, 10 Wall., loc. cit. 684, 19 L. Ed. 1040; *Hitchcock v. Galveston*, 96 U. S., loc. cit. 351, 24 L. Ed. 659; *McBrien v. Grand Rapids*, 56 Mich. 95, 22 N. W. 206; 1 Beach on Pub. Corp. § 227. These cases are but samples of the overwhelming authorities which hold that, where a moral duty exists to make satisfaction, a legal liability springs therefrom; and as said by the Supreme Court of the United States in the case of *Hitchcock v. Galveston*, supra: "There may be a difference between the case of an engagement made by a corporation to do an act expressly prohibited by its charter or some other law, and a case of where legislative power to do the act has not been granted. Such a distinction is asserted in some decisions. But the present is not a case in which the issue of the bonds was prohibited by any statute. At most, the issue was unauthorized. At most, there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at farthest, only ultra vires, and, in such case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform. This was directly ruled in *State Board of Agriculture v. Citizens' Street Railway Co.*, 47 Ind. 407, 17 Am. Rep. 702. There it was held that: "Although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract." See, also, substantially to the same effect, *Allegheny City v. McClurkan*, 14 Pa. 81; and, more or less in point, *Maher v. Chicago*, 38 Ill. 286; *Onelda Bank v. Ontario Bank*, 21 N. Y. 490; *Argenti v. City of San Francisco*, 16 Cal. 256; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370. The same is true of the case at bar. Jasper county was not prohibited by statute from building bridges; but, upon the other hand, the statute expressly grants to the county that power. Conceding the contracts for building the bridges were illegal, yet the execution of those contracts was, at most, a defective exercise of the power granted, and, when the bridges were constructed in pursuance thereof and accepted by the county,

then she was, to say the least, morally bound, in the absence of fraud, to pay them, if not legally bound to do so, which she is not under the decisions of this court. *Wolcott v. Lawrence County*, 28 Mo. 272; *Anderson v. Ripley Co.*, 181 Mo. 46, 80 S. W. 263; *Woolfolk v. Randolph Co.*, 83 Mo. 501; *Crutchfield v. Warrensburg*, 30 Mo. App. 456.

"The conclusions reached in these cases are correct, and rest upon sound reason. They were suits based upon contracts not in writing, etc., which were prohibited by statute, and the court in those cases simply enforced the statute as it found it, and to have done otherwise would have given force and effect to contracts which were prohibited by statute from being made. *Roeder v. Robertson*, 202 Mo., loc. cit. 537, 100 S. W. 1086. But that is not the question involved in this case. Here the plaintiff is not asking this court to enforce these alleged illegal contracts. They were years ago fully performed on both sides, and the defendant is now here by way of counterclaim, in the nature of a cross-bill, seeking to recover back the money she paid for those bridges without an offer to return them to the plaintiff. This she cannot do without she first returns, or offers to return, them to him, and the reason therefor is this: If the contracts were void, then the title to the bridges never passed thereby from plaintiff to the defendant and became her property; but they remained his property the same as though the contracts had never been entered into. That being true, then when the county acquired the possession of the bridges under those void, yet colorable, contracts, she was morally bound to pay for them, as she did; and conceding, as before stated, without deciding it, that, after accepting the bridges and paying for them, she had the right to repudiate the contracts and sue for the recovery of the money paid by her for them, she would be morally bound, and from that springs the legal liability to return the bridges to plaintiff before she would be permitted to recover back the contract price so paid. This same principle underlies the case of *Roeder v. Robertson*, 202 Mo. 522, 536, 100 S. W. 1089, in which this language is used: "The act is prohibitive in its operation. It seeks to prevent foreign corporations from doing business in this state until they have complied with the provisions of the act by filing a copy of their charter or articles of incorporation with the Secretary of State, and by appointing an agent in this state to represent them. If such corporations, in violation of the act, do business in this state, all such transactions are, by the courts, declared null and void, and all contracts made by them with citizens of this state for the sale of goods, wares, and merchandise are nullities, and the title sought to be transferred thereby does not pass to and vest in the vendee, but remains in the vendor the same as if the pretended contract had not been executed.

\* \* \* For under the facts of this case a citizen of this state would not be permitted to recover the possession of the property sold to the respondent, nor its value, in case of its conversion, without first refunding or paying back to the respondents the consideration paid by them under the void contract, and received by A. W. Stevens & Son. He would be estopped from claiming the property until the purchase price has been returned.' *Simpson v. Stoddard Co.*, 173 Mo. 421, 73 S. W. 700."

To the same effect is the case of *Hitchcock v. Galveston*, 96 U. S. 341, loc. cit. 350, 351, 24 L. Ed. 659.

There are many other cases of like import, and all of them involved one or more of the following legal propositions regarding public corporations, to wit:

First. That where the corporation has the power to make the contract, but the law requires it to be made in a particular manner, such as where it is provided that the contract shall be awarded to the lowest and best bidder, then in such cases, where the contract was not awarded to the lowest and best bidder, or where it was not reduced to writing, but had been fully executed, in good faith, by the obligee in the contract, then the city will not be allowed to repudiate the contract and escape the liability upon that ground alone, but in such cases the courts will compel payment where the corporation retains the benefits received under the contract, and by virtue of its having been executed.

Second. That where the corporation is absolutely prohibited from making the contract, or from making it with certain designated persons, then in such case where, for instance, the contract increased the indebtedness of the corporation beyond the constitutional limit, or where it was made with one of those when the statute absolutely prohibited it from being made, then the corporation will not be estopped from repudiating the contract, or be required to pay the consideration expressed therein, even though the obligee has in good faith fully executed the contract upon his part. But in such cases it would seem the obligee would have the right to recover back from the corporation the subject-matter of the contract where it is capable of being returned, but not otherwise.

Third. That if the contract has been fully executed by both parties thereto, then the corporation will not be heard to say the contract was not let according to law, or that it had no power or authority to enter into the contract, and recover back the consideration paid by it without it first returns or offers to return the benefits it has received under the contract by virtue of its execution; and even where the corporation in such cases has placed itself beyond the power of making restitution, it will not be permitted to plead the illegality of the contract and recover back

the consideration paid. This, the third proposition, rests upon the maxims, "He who seeks equity must do equity," and "He who comes into equity must come with clean hands." *Sparks v. Jasper County*, supra.

"He that hath committed inequity shall not have equity." A court of equity is a court of conscience. It searches the consciences of the complainant and defendant, and will give the former no relief where he occupies a wrongful or unjust attitude toward the transaction for which he prays relief, and it also looks into the conscience of the defendant and compels him to do equity. To same effect is the case of *Union National Bank v. Lyons* (decided at this sitting of the court) 119 S. W. —.

If we apply the law enunciated in the cases before cited to the case at bar, then respondent is not entitled to a recovery upon the warrants issued to him in payment of his services rendered as engineer to the appellant district, for the reason that the commissioners, by said section 8336, were absolutely prohibited from employing respondent as engineer to do the engineering work of the district.

We are, therefore, of the opinion that the court should have given the instructions asked for by counsel for appellant, and that its refusal to do so was error.

The judgment is therefore reversed, and the cause remanded with directions to the circuit court to enter judgment for the appellant on the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 12th, and 13th counts of the petition, and for all sums sued for in the 14th and 16th counts, which were allowed respondent for services performed by him as engineer, and enter judgment in favor of respondent for the remaining sums sued for in said 14th and 16th counts; and also enter judgment in his favor on all of the remaining counts of the petition, with 6 per cent. interest thereon, from the respective dates when the warrants sued on were presented for payment down to the date of the rendition of the judgment hereby ordered to be entered. All concur.

BOOTH v. ST. LOUIS, I. M. & S. RY. CO.  
(Supreme Court of Missouri, Division No. 1.  
Feb. 25, 1909. Rehearing Denied  
March 31, 1909.)

1. APPEAL AND ERROR (§ 581\*)—ABSTRACT—  
CONTENTS—ORDER ALLOWING APPEAL.  
Rev. St. 1899, § 813 (Ann. St. 1906, p. 783), requiring plaintiff to file a transcript of the record, or, in lieu thereof, a certified copy of the record entry of the judgment, together with the order granting the appeal, and to thereafter file printed abstracts of the entire record, was designed to facilitate the business of appellate courts, by obviating the necessity of searching the transcript for essential points of the record, and its spirit and purpose must control, so that where the appeal was on a short transcript containing a certified copy of the judgment and of

\*For other cases see same topic and section NUMBER in Dec. & Ann. Dig. 1907 to date, & Reporter Indexes

the order granting the appeal, made during the term, that the abstract did not contain the order granting the appeal was not ground for dismissal, though the statute, in terms, applied to short as well as long transcripts.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 581.\*]

**2. APPEAL AND ERROR (§ 528\*)—RECORD—CONTENTS—MOTION FOR NEW TRIAL.**

A motion for a new trial is not a part of the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2387; Dec. Dig. § 528.\*]

**3. APPEAL AND ERROR (§ 706\*)—RECORD—BILL OF EXCEPTIONS—CONTENTS—MOTION FOR NEW TRIAL.**

Where the bill of exceptions recited that appellant filed his "motion for new trial in said cause as follows," referring to a page of the record where it was set out in full, the appeal would not be dismissed on the ground that the bill of exceptions did not contain the motion for new trial, even though the motion was not properly a part of the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 706.\*]

**4. MASTER AND SERVANT (§ 102\*)—MASTER'S DUTY—SAFE PLACE OF WORK.**

A master must furnish servants reasonably safe implements and a reasonably safe place to work, and is liable for injuries caused by his failure to do so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 173; Dec. Dig. § 102.\*]

**5. RAILROADS (§ 259\*)—OPERATION—LEASE—COMPANIES LIABLE FOR INJURIES.**

Public service corporations, such as railroads, cannot lease property without legislative consent, and an attempt to do so is a mere nullity, and a lessor railroad will be held liable for the torts of the lessee in operating the road, exactly as though the lease had not been made.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 802-815; Dec. Dig. § 259.\*]

**6. APPEAL AND ERROR (§ 907\*)—PRESUMPTIONS—FACTS NOT SHOWN BY RECORD.**

Where, in an action for injuries caused by being struck by a trolley wire strung over defendant's road which the railroad for which plaintiff was employed was using at the time, where plaintiff did not show by what authority his road was using defendant's road and objected to evidence by defendant to show that fact, it cannot be assumed that it was used illegally or under conditions that rendered defendant liable for the torts of the user.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 907.\*]

**7. RAILROADS (§ 259\*)—OPERATION—COMPANIES LIABLE—COMPANIES PERMITTING USE OF ROAD BY OTHERS.**

If an employé of another road was injured by his employer's negligence while using a part of defendant's road, defendant would not be liable for such injuries, where it did not appear by what authority the other company was using its track, or whether it was using it under an unauthorized lease from defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 813; Dec. Dig. § 259.\*]

**8. RAILROADS (§ 282\*)—OPERATION—USE BY OTHER COMPANIES—INJURIES—NEGLIGENCE—OBSTRUCTIONS.**

In an action for injuries by being struck by a trolley wire strung over defendant's railroad while plaintiff's road was using defendant's track, where the case was tried on the theory that the wire was suspended so low as to endanger plaintiff while passing under it on top of a car, it could not be said as a matter of law that defendant was negligent because the wire was not 22

feet high, at which height Rev. St. 1869, § 1179 (Ann. St. 1906, p. 995), requires street railways to construct its trolley wires above a railroad track which it crosses, even if that statute was applicable, as the wire might have been reasonably high, though less than 22 feet.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.\*]

**9. RAILROADS (§ 282\*)—OPERATION—USE OF ROAD BY OTHERS—NEGLIGENCE.**

That a trolley wire strung over defendant's railroad was only 19 feet 5 inches above the track did not, as a matter of law, require defendant to warn employes of another road, which it permitted to use its track, to look out for danger.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.\*]

**10. RAILROADS (§ 282\*)—OPERATION—CONTROL OF RIGHT OF WAY.**

A railroad has control of its right of way through country districts, and can prevent the erection of structures dangerous to the operation of its trains or remove such structures; but it does not have exclusive control of its right of way through a public street, being there only by permission, and its rights and those of a street railway whose track it crossed in a public street would be mutual, so that the railroad could not require the street railway to maintain its trolley wire at a certain height for the safe operation of the railroad, its only remedy being an appeal to the city authorities, and hence it could not be said as a matter of law that the railroad negligently permitted the trolley wire to be strung too low so as to make it liable for injuries thereby to an employé of another road using its track.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.\*]

**11. RAILROADS (§ 282\*)—INJURIES TO LICENSEE—PLEADING—ISSUES.**

In an action for injuries by being struck by a trolley wire strung over defendant's railroad track which plaintiff's employer was using at the time, where the petition only alleged that defendant permitted the street railroad to negligently string the wires, there was no issue as to whether defendant itself erected the wires.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.\*]

Lamm, P. J., and Woodson, J., dissenting in part.

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

Action by W. E. Booth against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Martin L. Clardy, D. C. Chastain, Edw. J. White, and Henry G. Herbel, for appellant. R. A. Mooneyham, Hugh Dabbs, and R. M. Sheppard (A. L. McCawley, Lee Shepherd, Herbert Crane, and Harry Phelps, of counsel), for respondent.

VALLIANT, J. This suit was begun against the St. Louis, Iron Mountain & Southern Railway Company and the Missouri Pacific Railway Company for damages for personal injuries which plaintiff in his petition alleges he suffered through the negligence of the two defendants. When the plaintiff's testimony was concluded, the court gave the jury an instruction to the effect that the plaintiff

could not recover against the Missouri Pacific Company, but refused to so instruct as to the Iron Mountain Company, therefore the plaintiff dismissed his suit as to the Missouri Pacific, and the trial went on against the Iron Mountain and resulted in a verdict for the plaintiff for \$10,000, from which the Iron Mountain Company appealed.

1. Respondent has filed a motion to dismiss the appeal, alleging as a ground therefor that the circuit court did not make an order granting the appeal. The cause comes here on a short transcript; that is, a duly certified copy of the judgment and of the order of the circuit court granting the appeal, which order was made during the term at which the judgment was rendered. How, then, could we say that there was no order allowing the appeal, while we have before us a duly certified copy of the order itself? But it is said the abstract does not show it. Suppose that is so; would it not be sacrificing justice to give section 813, Rev. St. 1899 (Ann. St. 1906, p. 783), and the rules of court made in obedience thereto, such an interpretation as would authorize a dismissal of the appeal under these circumstances? That statute was designed to aid in expediting the business of this and the other appellate courts, imposing on the appellant the duty of presenting in brief abstract form the essential points of the record, so that the court could seize the points without consuming time in going through the long transcript to find them for itself. We have often said, and we adhere to it, that the time of the appellate courts is too valuable to be consumed in labor that can be performed by the attorneys in the case, and that we will not search the transcript for what the abstract ought to show. It is true the letter of the statute applies as well to a short as it does to a long transcript, yet its reason and spirit must be looked to in its application. We have held in two recent cases that when the cause is here in the short form—that is, a certified copy of the judgment and of the order granting the appeal—we would not dismiss the appeal because the abstract did not show the order. *Pennowfsky v. Coerver*, 205 Mo. 136, 103 S. W. 542; *Coleman v. Roberts* (Mo.) 114 S. W. 39.

It is also alleged as a ground for the motion that the abstract does not show that the motion for a new trial was filed during the term at which the judgment was rendered. Respondent is mistaken in point of fact in that particular. The abstract of the record proper shows that the motion was filed within four days after the return of the verdict and during the same term at which the judgment was rendered, that the motion was overruled, and that thereafter the affidavit for appeal was filed and the appeal granted during the same term.

Respondent in his brief says that the motion for a new trial does not appear in the bill of exceptions. That is also a misunder-

standing of the abstract. The bill of exceptions purports to set out all the proceedings in pais, and, after setting out the evidence, the instructions, and the verdict, it proceeds: "Thereupon, on the same day, to wit, December 19, 1905, the defendant filed its motion for a new trial in said cause, as follows: (Printed on page 17 of this record.)" Turning to page 17 of the printed abstract, we find the motion in full. But the counsel say that on page 17 the motion appears to have been copied into the record proper, where it had no lawful place. It is true the motion had no lawful place in the record proper, and if it was not in fact set out or called for in the bill of exceptions it would avail the appellant nothing. But the abstract of the bill of exceptions signifies that the motion was copied therein, and the reference to another page where it is printed in full was only to save the useless trouble and expense of printing it a second time. The motion to dismiss is overruled.

We pass now to the merits of the case. There is no dispute about the principal facts. Plaintiff was in the employ of the Missouri Pacific Company as brakeman on a freight train of that company. The train was passing over a switch track belonging to the Iron Mountain Company in the city of Carthage. The tracks crossed a public street in that city, Main street, at right angles or nearly so. The track of a street railroad company, whose cars were propelled by electricity through the medium of a trolley wire, was laid in Main street and crossed this switch track of appellant. On the day of the accident the plaintiff was on the top of an unusually tall box car in a freight train belonging to and being operated by the Missouri Pacific Company, in the usual performance of his duty as brakeman, and while in that position he was struck on the neck by the trolley wire as the freight train passed under it, and he thereby received the injuries complained of. The height of the trolley wire above the track was 19 feet 4 inches, that of the car was 14 feet 8 inches. It was of the highest class of freight cars then in use on any railroad, and was about 2 or 2½ feet higher than the usual cars. This car did not belong to either the Missouri Pacific or the Iron Mountain, but to the St. Louis & San Francisco Railroad Company, and was being switched from the tracks of that company to those of the Missouri Pacific in the usual course of through traffic, the Iron Mountain switch track being used to make that connection. The plaintiff was 6 feet 2 inches tall, which, plus 14 feet 8 inches, the height of the car, made 20 feet 10 inches, which was 1 foot 6 inches higher than the trolley wire.

2. Postponing for the present the question of whether the wire was at a sufficient height to enable the defendant company to operate its trains under it with reasonable safety to its own employes, and of whether



the defendant was responsible for the lack of height of the wire, if there was a lack, we come to the question, what was the liability of the defendant to the employes of another railroad company using the track? In the manner in which the question is presented in the plaintiff's petition and brief, we may divide it into two questions, to wit: If the injury was caused by the negligence of the Missouri Pacific while using the track of the Iron Mountain, is the latter company liable? Second, if it was caused by a defect in the track rendered so by the impending wire, is the Iron Mountain Company liable? That those are questions of some difficulty were seemingly appreciated by the learned counsel for plaintiff, as shown by the careful and cautious wording of the petition. The petition, as we have already said, was leveled at both companies, and a distinct charge of negligence is made against each. The charge against the Missouri Pacific Company is that "its agents and servants in charge of and operating said train" so negligently ran the same under the wire without giving him any warning of its condition, and after they saw, or by the exercise of ordinary care could have seen, his peril, and would have seen that he was unaware of the danger, in time to have avoided the injury, but failed to do so. There the charge is that he was injured by the negligence of his own fellow servants, and that the danger from the wire was so apparent that if they had exercised ordinary care to protect him they would have seen it. Let us assume for the present that the Iron Mountain Company furnished the Missouri Pacific a defective track, that the danger arising therefrom was so apparent (for that is what the petition says) that if the servants of the Missouri Pacific had exercised ordinary care they would have seen it and could have avoided the injury, but failing to observe such care the plaintiff was injured through their negligence. According to that statement, if ordinary care had been exercised the track could have been used with safety, but the plaintiff was injured because of the lack of ordinary care. We have, then, the question above propounded, is the Iron Mountain Company liable for the negligence of the Missouri Pacific while using the Iron Mountain track?

(1) It is the duty of the master to furnish his servant reasonably safe implements and a reasonably safe place in which to work, and failing to do so, if the servant is injured thereby, the master is liable. That liability arises out of the relation of master and servant. But what is the relation between the servant of that master and a third person who furnishes him the implements or rents him the premises in which to carry on his business? Even if there should be a defect rendering the implement or the place unsafe, is the third person liable to the servant? Without pausing to answer

that question, we come to the one in this case: Suppose there was a defect in the premises furnished which rendered it unsafe, but not so dangerous but that it could be used with reasonable safety if ordinary care was exercised by the master to protect his servant, but the master failed to exercise ordinary care, and through his negligence his servant was injured, is the third person liable? We do not understand that counsel for the plaintiff rest the claim of the liability of the Iron Mountain Company for the negligence of the Missouri Pacific on the law of master and servant or principal and agent, but they limit their contention to the law that is supposed to apply to railroad companies in particular in like circumstances, and the proposition is reduced to this: Where one railroad company permits another to run trains over its road, it is liable for the negligence of that other in so doing. To some extent there is authority for that proposition, but within limits. In *Thompson on Negligence*, § 585, after discussing the question of the liability of a lessor for the negligence of a lessee, the author says: "But this principle has no application to the case of leases made by railway companies and other corporations having public duties to perform, without the consent of the Legislature. In such cases the law does not allow a corporation to cast off its public duties without the consent of the state and devolve them on another; and, if it attempts to do so, the law treats such attempt as a mere nullity, and holds it liable for the torts of its lessee in operating its road, exactly as though the lease had not been made, or as though the relation of principal and agent existed between the lessor and the lessee." In that statement of the law is comprised the whole doctrine, and the reason for it, that a railroad company is held to a different account for its conduct in such case from concerns engaged in ordinary business, where the law of principal and agent or master and servant applies. *Elliott on Railroads*, §§ 467 et seq., discusses the same subject with elaboration under the captions of authorized, unauthorized, and fraudulent leases of one railroad company to another, and of one company permitting another to make a joint use of its track, and the same principle as above quoted is recognized. That principle is this: It is not every use that a railroad company may permit another to make of its track that will render it liable for the act of the other company, but only an unauthorized use involving an abuse or a misuse of its franchise. A railroad company which holds a franchise from the state is under obligation to the state to use that franchise, and is liable for its misuse, even if the misuse is the act of another company by its leave, unless the same high authority which granted the franchise grants also the right to assign or lease it. In *Moorshead v. Railway*, 203 Mo. 121, 98 S. W.

261, 100 S. W. 611, this court held that a street railroad company which was authorized by an act of the General Assembly to lease its road to another corporation was not liable for the negligent acts of that corporation in operating the road. In that case there was no question of fraud, nor in the act of the General Assembly was there anything to indicate that it was intended to hold the lessor company liable for the acts of the lessee.

In the case at bar we have no lease to consider, and we really do not know by what authority the Missouri Pacific Company was using the track, for the plaintiff offered no proof on that point, and the defendant was not allowed to make proof. So far as the petition informs us, this was the only time the Missouri Pacific ever ran its train over this track, although the evidence showed that it had been doing so every day for at least 18 months before the accident. But the plaintiff did not undertake to show by what authority the Missouri Pacific was so using the track, and when the defendant offered to prove what the arrangement between the two companies was under which the track was so used the testimony was, on the plaintiff's objection, excluded, on the ground that it was immaterial, the court saying it made no difference what the arrangement was. Under that ruling the Iron Mountain would be liable for the act of the Missouri Pacific, even if the latter was a trespasser on its track.

Elliott on Railroads, vol. 2, § 477, says: "It is held by the Supreme Court of the United States that a railroad company which permits another to make a joint use of its track is liable to a person injured by the negligence of the company to which the permission is granted." The learned text-writer is not entirely in accord with that doctrine, but he says the weight of authority seems to be that way. In a note to the text the case cited as deciding that point is Railroad v. Barron, 72 U. S. 90, 18 L. Ed. 591. But the facts of that case presented a very different question from that which arises on the facts in this case. In that case the person injured was a passenger in a train that was owned and being operated by the defendant railroad company that owned the track, and the accident was caused by the train being run into and crushed by an express train belonging to another railroad company which was using the track by permission of the defendant company. The theory of that case is that the railroad company which owned the track was not taking proper care of its own passengers when it permitted another train not under its own management to intrude. That case is probably responsible for much that has been written on that subject, but when read in the light of its own facts it does not justify all that has been written; it does not, at

least, justify the conclusion that respondent in this case draws from it.

Bennett v. R. R., 102 U. S. 577, 26 L. Ed. 235, is also cited, but that does not bear on the question before us. The railroad company was held liable in that case, not on any rule of law applicable particularly to railroad companies, but on the general principle that any one who owns land and induces others to come upon it for a lawful purpose is liable to them in damages resulting from an unsafe condition of the premises, if he negligently suffered the dangerous condition to remain after he had notice of it and gave the public no warning. In that case the railroad company owned and maintained a wharf connecting its railroad depot with a steamboat landing, and a passageway was built by the railroad company to enable persons passing from the depot to the steamboat. There was a hatchway on the premises, though not in the walkway, that was designed for foot passengers. Plaintiff in the night attempted to go to the steamboat landing, but the light which he carried was blown out by the wind, and in the darkness he lost his way and fell into one of the hatch holds.

We do not discover in any of the other cases cited by the counsel for respondent anything in conflict with the principle we have above stated. Cases there are which hold that a railroad company is liable to its own employé or its own passenger for an injury resulting from a condition which it permitted another to make and over which it had control, rendering the running of trains on its road more dangerous. The law for such cases is found either in the law of master and servant or in the law of carrier and passenger. But in this case there has been no injury to a servant or a passenger of the defendant, the Iron Mountain Company.

When a railroad company is sued for an injury alleged to have been inflicted through the negligence of another company operating a train on its road, the burden of proof may be on the company that owns the road to show its lawful right to allow the other company to use its track, as in the Moorehead Case above referred to; but when in such case the plaintiff does not show by what authority the other company was using the road, and will not allow the defendant to show it, we have no right to assume that the use permitted was in violation of law or under conditions that rendered the owner of the track liable for the torts of the user.

If a flood following an extraordinary rain-storm should wash away a bridge or otherwise render a railroad temporarily unfit for travel and its trains should be delayed, if another railroad company, in view of the distress, should permit one of the delayed trains to pass over its tracks in furtherance of its

journey, and if a passenger on such train should be injured through the negligent management of the train by its own train crew, there would be neither law nor reason nor common justice in saying that the railroad company that owned the track was liable merely because it suffered the other company to pass its train over the track.

Under the facts of this case, we hold that, if the plaintiff was injured through the negligence of the Missouri Pacific Company, the Iron Mountain Company is not liable although the Missouri Pacific was at the time using the Iron Mountain track. If the Iron Mountain Company is held liable in this case, it must be because of its own negligence.

(2) This brings us to the consideration of the second question above propounded, to wit, if the injury was caused by a defect in the track, and that defect was caused by the impending wire is the Iron Mountain Company liable? The petition charges the defendant, the Iron Mountain Company, with negligence in three particulars, viz.: First, it says that it was its duty to have maintained the wire at a height of not less than 22 feet; second, that it was its duty to have warned the employes of the Missouri Pacific of the dangerous condition of the wire; third (and it is the main charge), that the defendant permitted the street car company to maintain the wire at the alleged unsafe elevation.

When the plaintiff alleged in his petition that the defendant should have maintained the wire at the height of 22 feet, he doubtless had in mind the statute, section 1179, Rev. St. 1899 (Ann. St. 1906, p. 995), which is in these words: "All street railway companies or corporations operating cars by electricity, or by overhead wires, shall construct and maintain its wires at a height of not less than twenty-two feet above the top of the rail of the railroad track crossed by such street railway company, and the wires of such street railway company shall be guarded, or provided with fenders or guard wires, so as to prevent the same from coming in contact with the cars, track or telegraph line along the track of such railroad company." But the plaintiff, doubtless understanding the section, as its language indicates, to be a law for the conduct of street railroads, did not ask that the cause be submitted to the jury on the theory that the defendant was guilty of negligence as for not conforming to the requirements of that section, but the instructions asked by the plaintiff and given were solely on the theory that the trolley wire "was suspended over said railroad so low as to endanger the plaintiff in passing under the same while standing in the usual and customary position on top of said train." Those words tendered an issue of fact which was not answered by the statute. As a matter of fact, the wire may have been reasonably high for the usual business of the defendant though less than 22 feet, and that is the the-

ory on which the plaintiff asked to go to the jury. The defendant was not negligent on the ground that the wire was not 22 feet high.

The next proposition announced in plaintiff's petition is that, because the wire was suspended only 19 feet 5 inches above the track, the duty devolved on the Iron Mountain Company to give the employes of the Missouri Pacific Company warning to look out for the danger. That proposition does not seem to be seriously urged, and we know of no theory of law on which it could be sustained.

Plaintiff's last charge of negligence is that the Iron Mountain Company permitted the street car company to maintain the wire at the alleged unsafe height. The petition nowhere charges that the Iron Mountain Company maintained the wire, or that the street railroad company derived its authority from the Iron Mountain Company to erect and maintain it, or that the Iron Mountain Company had any control over the street railroad company, but the whole charge is compassed, somewhat vaguely, in the assertion that the Iron Mountain Company permitted the street railroad company to do the thing complained of.

We do not find in any of the many cases cited by respondent in his brief one answering the vital question in this case. In his brief respondent assumes that appellant had control of the wire, because he says it was on appellant's right of way. If that were so, and if the wire was so low that it rendered the passage of trains under it unsafe for the men operating the trains with reasonable care, we would have a very different case to decide. A railroad company has control of its right of way through the country, and has the right to keep any one off who erects or attempts to erect a structure dangerous to the operation of its trains, and has the right to remove offensive structures. But this trolley wire was not on premises that the railroad company controlled; it was on a public street which was in the control of the city. The street car company was there presumably by the same authority that the railroad company was, and with as much right. If either was doing wrong to the injury of the other, an appeal to the city authorities or to the courts was the only means of redress. If a corporation using electric wires should stretch a wire across a railroad company's right of way in the country at an elevation that rendered it dangerous to persons on trains of the railroad company, the latter would have a right, after reasonable notice to the offending company, to cut down the poles and remove the wire, and so it would anywhere where the railroad company had full control of its right of way. But a railroad company lays its tracks in a public street only by permission, and its use of the street, even that part which its tracks actual-

ly cover, does not belong to the railroad company, and is not under its exclusive control. The portion of the street occupied by the defendant's railroad was, in a limited sense, its right of way, and so the portion occupied by the street railroad company was its right of way, and the point where their respective tracks actually crossed each other belonged as much to one as it did to the other, and it belonged to neither nor to both exclusively. If this trolley wire had crossed the defendant's right of way at a point where the defendant had control, it might with propriety be said that the defendant permitted the street car company to maintain it; but that was not the fact; it crossed defendant's track in a public street where the defendant could neither refuse to allow it to cross or permit it to do so.

There was some effort made to show that the defendant company erected the wire, but that effort went no farther than to show that the railroad company which formerly owned the track furnished the street railroad company the poles on which to elevate the wire at that point higher than it had been originally. The street railroad company erected the wire, and there was no suggestion that the poles were not tall enough to have allowed the wire to have been raised higher. Besides, that was not really a question in the case; the petition did not state that the defendant company had erected the wire, but the charge was that it had permitted the street railroad company to do the thing complained of.

We therefore hold that there was no evidence to sustain the charge that defendant permitted the wire to be maintained.

3. Perhaps it may be said that there was evidence tending to show that the wire at the height it was maintained was not reasonably safe. The wire was not 22 feet high, as the statute above mentioned requires, but this suit is not under that statute. If plaintiff had sued the street railroad company for the injury, there is authority for saying that it would have been liable under the statute. *Smedley v. St. L. & Sub. Ry. Co.*, 118 Mo. App. 103, 93 S. W. 295. A wire may be at a height which under the circumstances of the case is reasonably safe for trains passing under it although not 22 feet high. We are not now speaking of a case in a suit against a street railroad company founded on that statute, but we confine what we say to the case at bar. Plaintiff seems to have assumed that the height required by the statute was the standard, and because this wire was not up to that standard it was dangerous; but that cannot be assumed under the petition in this case. The charge in the petition is that it was maintained at an elevation too low to be reasonably safe when used with ordinary care. That is a question of fact. Plaintiff contented himself with showing that the height of the wire was 19 feet 5 inches, and that he was struck by it

on the neck as, the car on which he was standing passed under it. But the plaintiff's evidence also showed that the car in question was unusually tall, 2 to 2½ feet taller than the ordinary, and that he was an unusually tall man, 6 feet 2 inches in height. The conductor of the train standing on the same car near the plaintiff passed safely under the wire. Plaintiff's testimony also showed that for at least 18 months he had been passing under this wire on freight trains at least once a day and sometimes oftener, sometimes standing on box cars, more frequently on flat cars, and was never hurt. If the mere fact that the plaintiff got hurt while standing at his full height on an unusually tall car can be said to be evidence tending to show that the wire was not at a reasonably safe height for men passing under it, observing ordinary care, the fact that trains of this kind had been passing under it in safety for at least 18 months would seem to put the question at rest. But we do not say that if that had been the only question in the case the court erred in submitting it to the jury.

4. We think the evidence conclusively shows that it was the plaintiff's own negligence that caused the accident. He was as familiar as one could be with the premises. He knew that the wire was there; he passed under it on an average of at least once a day, sometimes several times in a day, for a period of at least 18 months. Sometimes he passed under the wire standing on the top of box cars, more frequently on flat cars, but often enough to have given him full knowledge of the situation. He was an experienced brakeman, and knew the class and character of freight cars. This was a car of unusual height, which fact was plain to view; he climbed on it from the ground to the top, and he could not have failed to have noticed its unusual height if he had paid any attention to it. But, unfortunately for him, for the moment he was unmindful of the situation. In charging negligence against the Missouri Pacific, he says in his petition, in effect, that the danger was so apparent that the servants of the Missouri Pacific in charge of that train were negligent in not observing it and warning him of the danger. If they could see, why could not he? He had as fair a view of the situation as any of his fellow servants.

We hold that there was no evidence tending to sustain the charge that the defendant, the Iron Mountain Company, permitted the street railroad company to maintain the wire, or that the Iron Mountain Company was responsible for the height at which the wire was maintained; and we also hold that the Iron Mountain Company is not liable under the pleadings and evidence in this case for the negligence of the Missouri Pacific Company, if there was such negligence; and we further hold that the plaintiff's own evidence shows that the accident resulted from his

own negligence in failing to notice the wire as he was passing under it.

After what is above said, it is unnecessary to discuss the instructions.

The judgment is reversed.

LAMM, P. J., concurs in paragraphs 1, 2, and 3, and in the result, but dissents from paragraph 4, which holds as a matter of law that plaintiff was guilty of negligence. WOODSON, J., concurs in paragraph 1, and in first subdivision of paragraph 2, and in the result in the second subdivision of paragraph 2, expresses no opinion as to paragraph 3, and concurs in the result, but dissents from paragraph 4. GRAVES, J., not sitting, having been of counsel.

### HANKS v. HANKS.

(Supreme Court of Missouri, Division No. 1.  
March 31, 1909.)

#### 1. COURTS (§ 231\*)—SUPREME COURT—JURISDICTION—CONSTITUTIONAL QUESTION—TIME OF RAISING.

In a divorce action, where the answer alleged as a defense an Iowa judgment granting defendant a divorce from plaintiff, and the reply alleged that the judgment was void as contravening state and federal constitutional provisions stated, the constitutional question was duly raised so as to give the Supreme Court jurisdiction, as it could not be raised earlier than the reply.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 653; Dec. Dig. § 231.\*]

#### 2. APPEAL AND ERROR (§ 511\*)—ABSTRACT—SUFFICIENCY—BILL OF EXCEPTIONS.

Where the abstract contained what purported to be a bill of exceptions, but did not show that the bill of exceptions was actually filed, or contained any record entry of the filing, the abstract was insufficient to permit consideration of the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2319; Dec. Dig. § 511.\*]

#### 3. APPEAL AND ERROR (§ 511\*)—ABSTRACT—RECITALS — RECITALS IN BILL OF EXCEPTIONS.

That a bill of exceptions was made a part of the record must be shown by the record entry, and cannot be shown by recitals in the bill itself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2319; Dec. Dig. § 511.\*]

#### 4. APPEAL AND ERROR (§§ 529, 534\*)—RECORD—MATTERS INCLUDED—JUDGMENT AND ORDER OF APPEAL.

Neither the judgment nor the order granting the appeal belong in the bill of exceptions, they being part of the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2389; Dec. Dig. §§ 529, 534.\*]

#### 5. APPEAL AND ERROR (§ 554\*)—RECORD—BILL OF EXCEPTIONS—EFFECT OF ABSENCE—DISMISSAL.

On appeal on a short transcript, where the certified copy of the judgment and order of appeal is on file and all the pleadings are properly abstracted, the appeal will not be dismissed because the abstract does not contain a sufficient

bill of exceptions, but judgment will be reversed or affirmed on the pleadings and judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2472; Dec. Dig. § 554.\*]

#### 6. PLEADING (§ 310\*)—EXHIBITS ANNEXED TO ANSWER—EFFECT.

Where the answer in a divorce action pleaded an Iowa judgment of divorce previously granted defendant, and averred that copies of such proceedings were attached as "Exhibit A" and made a part of the answer, the exhibit was not thereby made a part of the answer, and could not be considered as a part of it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 944; Dec. Dig. § 310.\*]

#### 7. APPEAL AND ERROR (§ 554\*)—RECORD—BILL OF EXCEPTIONS—EFFECT OF ABSENCE.

Where the record does not contain a sufficient bill of exceptions, the judgment will be affirmed if it is proper under the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2472; Dec. Dig. § 554.\*]

#### 8. APPEAL AND ERROR (§ 907\*)—REVIEW—PRESUMPTIONS—CONFORMITY OF JUDGMENT TO PLEADINGS.

Where, in a divorce action, the answer alleged a prior judgment of divorce granted defendant in Iowa, and averred that plaintiff herein was duly and legally served in that action, the allegations were sufficient to sustain the judgment pleaded, in the absence of a bill of exceptions showing the evidence, as it will be presumed that the evidence supported the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. § 907.\*]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by Thomas P. Hanks against Mary E. Hanks. From a judgment for defendant, plaintiff appeals. Affirmed.

H. S. Julian, for appellant. Ellis & Cook (Clyde Taylor, of counsel), for respondent.

GRAVES, J. The plaintiff sued the defendant in the circuit court of Jackson county for a divorce, on the alleged grounds: (1) That she had absented herself for the space of one whole year without reasonable cause; (2) that she had been guilty of adultery with a certain named individual, not necessary here to state; (3) and of certain indignities in the petition described.

Defendant filed an answer, denominated an "answer in abatement," in which she denies the scandalous and other charges of the petition, and then she pleads a judgment and decree of divorce entered and made by the district court of Polk county, Iowa, on May 3, 1905, whereby she was divorced from the plaintiff. This decree and all the files in the case duly certified according to the act of Congress is attached to the answer as "Exhibit A," and, in the language of the answer, "is hereby made a part of this plea in abatement."

The reply to this answer reads:

"The plaintiff, for reply to the averments of defendant's answer:

"(1) Denies each and every allegation therein contained, and asks for judgment on his petition.

"(2) Plaintiff further states that defendant was not a resident of the state of Iowa, and the courts of that state never had jurisdiction over either plaintiff or defendant, but that both were residents of Jackson county, Mo., and defendant was simply sent to Iowa for the purpose of trying to procure a bogus and spurious decree of divorce against this plaintiff.

"(3) Plaintiff further states that under section 2947, Rev. St. Mo. 1899 (Ann. St. 1906, p. 1699), a wife divorced from her husband for his fault or misconduct retains dower rights in all property of the husband, and, if this alleged judgment of the Iowa court is allowed to stand and bind plaintiff, it is equivalent to a judgment against his character, also a judgment against his property, and casts a cloud upon any real property he may have possessed at the time said judgment was rendered or hereafter may possess, without personal service, and without a day in court, which would be a violation of plaintiff's rights under sections 10 and 30, art. 2, of the Constitution of Missouri (Ann. St. 1906, pp. 132, 166), also of his rights under the fifth amendment, and section 1 of the fourteenth amendment to the Constitution of the United States.

"(4) Plaintiff further states that said alleged decree was procured by fraud, misrepresentation, and deceit practiced and wrought (by defendant here and plaintiff there) upon said Iowa court, in this: She had her pretended suit instituted by M. E. Hanks, Plaintiff, v. T. P. Hanks, Defendant, and got an order of publication for service in the same initials, when she well knew that her Christian name was Mary and his Thomas, and that they were known and called by such names; and plaintiff charges it to be a fact that said initials were used as aforesaid, instead of their Christian names, for the purpose of deceiving the court and its officers, and also for the purpose of misleading any one reading said notice, and making it extremely improbable that any one reading said notice would be able to detect who the real parties to said suit were. And plaintiff says that on account of said Mary E. Hanks not instituting said suit in the real names of the parties, that said court never got nor could get jurisdiction of either party, or of the cause, and that said alleged decree is spurious, bogus, and should be for naught held.

"(5) Plaintiff further says that said alleged Iowa decree can have no extraterritorial effect or force, and cannot bind this plaintiff, that he has never been subject to said court's jurisdiction, nor was he served with actual notice to appear and defend said suit, but that his domicile has been in Jackson county, Mo., where plaintiff and defendant were married and lived during the entire term of their married life."

In the record before us there are two preliminary matters to determine before we

reach the merits of this case: First, has this court jurisdiction? Secondly, have we before us such an abstract of record as, under our rule, permits us to examine into the merits of the cause? The latter inquiry is raised by counsel, the former we raise ourselves, for, if we have no jurisdiction, we shall so determine, but leave untouched all other matters.

1. As to our jurisdiction, it occurs to us that constitutional questions are properly and timely raised in the third paragraph of the reply. The effect of this pleading is to aver that the judgment of the Iowa court upon service by publication was void, because violative of the constitutional provisions, both state and federal, therein specifically named. Whether there is merit in the question raised is for us to determine, but, being timely raised, it is sufficient to give us jurisdiction. The invalidity of this Iowa decree could not have been raised earlier than in the reply, for it appears for the first time in the answer. As was well said by Lamm, J., in *Lohmeyer v. St. Louis Cordage Co.* (Mo.) 113 S. W., loc. cit. 1110: "But it must be taken as settled law that in so grave a matter as a constitutional question it should be lodged in the case at the earliest moment that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived. *Barber Asphalt Co. v. Ridge*, 169 Mo., loc. cit. 387, 68 S. W. 1043 et seq. If plaintiff grounds his right of action on a statute which defendant contends is unconstitutional, it should be put in the answer and kept alive. If the defendant grounds an affirmative defense on a statute that plaintiff contends has a like vice, it would seem he should plead its unconstitutionality in the reply, though that has been questioned. *Kirkwood v. Meramec Highlands Co.*, 160 Mo. 111, 60 S. W. 1072. If proper to put it in instructions, it should be lodged there and the ruling of the court invoked."

Whether the doctrine announced by Judge Lamm is in conflict with the case he cites—*Kirkwood v. Meramec Highlands Co.*, 160 Mo. 111, 60 S. W. 1072—may be debatable, but we hardly think there is serious conflict. First, in the *Kirkwood Case*, the pleader failed to point his finger to a single constitutional provision which was violated by the law pleaded. The language used was, "Is unconstitutional, null, and void, and is no law of the state of Missouri binding upon the plaintiff." Under this pleading no constitutional question was raised in the pleadings, for we have always held that the plea must point to the portion of the Constitution which is being invoked. The constitutional provision not being properly pleaded, and the instructions not presenting such question, Burgess, J., rightfully held that the question was not in the case. Some of the language might be interpreted to mean that such question could not be raised in a

reply, but we hardly think that it was so intended. Then, again, we can imagine a case wherein, although a constitutional question was properly pleaded, yet the further record in the case might show an abandonment of that issue, and such may have been the Kirkwood Case, although it does not clearly so appear from the opinion. But be this as it may, we are firmly of the opinion that a constitutional question not only may, but should, appear in the reply, when that is the first time and place for it to be lodged, and that such a question is sufficiently lodged in the pleadings in this case to give this court jurisdiction. We shall therefore proceed to determine the case here.

2. The purported abstract of record fails to show that any bill of exceptions was ever filed in the cause. Pages 1 to 14 thereof, inclusive, are taken up with the pleadings which we have hereinabove outlined. Then beginning on page 15, and ending on page 28, is printed what purports to be a bill of exceptions, and on the following, but unnumbered, page is an index. This is the whole document denominated an "abstract of the record." Nowhere is it stated that the bill of exceptions was actually filed, or any record entry of the filing thereof made. In this, the abstract is totally insufficient, under our rule, to permit us to examine into the exceptions contained in the bill of exceptions. To us this bill of exceptions must be as a sealed book. This court has been so explicit upon this point that even the way-faring need not be misled or go astray. Speaking of a similar situation in *Harding v. Bedoll*, 202 Mo., loc. cit. 634, 100 S. W. 641, we said: "Upon this point the abstract is wholly insufficient. A bill of exception is part of the record when signed by the trial judge and by him ordered filed, but there should be a record entry showing the filing thereof, and this record entry should be properly abstracted so as to show the facts. That the bill of exceptions has been made a part of the record must come from the record proper, and not from the recitals in the bill itself." To the same effect are: *Pennowfsky v. Coever*, 205 Mo. 135, 103 S. W. 542; *Hill v. Butler Co.*, 195 Mo., loc. cit. 511, 94 S. W. 518; *Bick v. Williams*, 181 Mo., loc. cit. 527, 80 S. W. 885; *Daggs v. Smith*, 193 Mo., loc. cit. 490, 91 S. W. 1043; *Hogan v. Hinchey*, 195 Mo., loc. cit. 533, 94 S. W. 522.

3. By defendant we are asked in the brief filed to dismiss the appeal. This we cannot do. There are before us, and properly abstracted, all the pleadings in the case. The appeal is taken by the short form, from which we have the judgment and the order granting the appeal, although neither is mentioned in the abstract of record, except in the purported bill of exceptions, and this we cannot go into for any purpose. Neither the judgment nor the order granting the appeal has any place in a bill of exceptions. They belong to what in our cases is denom-

inated the record proper. But in our recent cases we have held that where the appeal is by the short method, and a certified copy of the judgment and order of appeal is on file with our clerk, we will consider such instruments, and, instead of dismissing the appeal, reverse or affirm the case, as may be indicated by the pleadings and the judgment. *Coleman v. Roberts* (Mo.) 114 S. W. 39; *Booth v. Railroad* (not yet officially reported) 117 S. W. 1094; *Elliot v. Delaney* (not yet officially reported) 116 S. W. 494.

In the first case, *supra*, we examined the pleadings and judgment and affirmed the judgment. In the latter case, *supra*, we examined the pleadings and judgment, but reversed and remanded the case. Under these authorities we shall not dismiss the appeal, but will examine the pleadings and judgment and determine the status of defendant's judgment therefrom, when considered with the applicable law.

4. The pleadings are stated in the statement of facts. The judgment as certified to this court reads: "Now on this day, this cause coming on regularly for trial, come the parties hereto by their respective attorneys, and this cause is submitted to the court upon the pleadings, and the court, after hearing all the evidence and being fully advised in the premises, finds that the decree of divorce granted by the district court of the state of Iowa, in and for the county of Polk, to the defendant herein, is valid and binding on the courts of this state, and is a bar to this action. Whereupon the court dismissed this suit. Wherefore it is ordered and adjudged by the court that the plaintiff take nothing by reason of this suit, and that the defendant go hence without day, and recover of and from said plaintiff all costs of suit, and have therefor execution."

To better understand the issues upon which the judgment was entered, it is well to set out in full that part of the answer pleading the Iowa judgment. It reads: "That this defendant, on, to wit, the 17th day of April, 1905, instituted against this plaintiff a suit for divorce in the district court of the state of Iowa, within and for the county of Polk, therein—a court of said state of Iowa having and exercising general common-law jurisdiction at and within said county and having jurisdiction to try and determine suits for divorce—and did file her petition therein alleging due and legal grounds therefor, and praying to be divorced from plaintiff; that thereafter such proceedings were had in said court and cause that this plaintiff was duly and legally summoned as defendant therein, and on the 3d day of May, 1905, upon trial duly and legally had in open court, judgment and decree was duly given and rendered in said court and cause in favor of this defendant (plaintiff there), and against this plaintiff (defendant there), severing and annulling the bonds of

matrimony theretofore existing between plaintiff and defendant (to which reference is made to the petition filed herein), and divorcing defendant from plaintiff. That copies of proceedings had and records made in said suit in said district court, duly certified according to the act of Congress of the United States in that behalf enacted, are hereto attached, marked 'Exhibit A,' and hereby made a part of this plea in abatement. Wherefore defendant prays that this cause be abated, and that defendant may go hence with her costs."

It will be noticed that the answer pleads in appropriate terms the Iowa judgment, and then it winds up by saying that copies of all the proceedings are attached as "Exhibit A" and made a part of the plea. The answer avers that the defendant in the Iowa suit (plaintiff herein) "was duly and legally served." There is nothing to controvert this allegation, unless it could be said that the exhibits attached thereto so controverted it. But can we consider this exhibit as a part of the answer? We think not. In the early case of *Kern v. Insurance Co.*, 40 Mo., loc. cit. 25, where a like question came up, this court said: "It is true that the plaintiff, in declaring upon the policy, refers to it as being attached to and made a part of the petition. But whatever form of words may be used in referring to papers which are to be understood as mere exhibits in the cause, they cannot in any proper sense make them parts of the pleading. *Hadwin v. Home Mut. Ins. Co.*, 13 Mo. 473; *Curry v. Lackey*, 35 Mo. 392; *Baker v. Berry*, 37 Mo. 306; *Bowling v. McFarland*, 38 Mo. 465." It will be observed that in that case the pleader undertook to make the insurance policy a part of the pleading practically in the same manner as the pleader in this case tried to make Exhibit A a part of the plea. The *Kern Case*, supra, has met with frequent approvals by the courts of this state. *Reed Bros. v. Nicholson*, 158 Mo., loc. cit. 631, 59 S. W. 977; *Pomeroy v. Fullerton*, 113 Mo., loc. cit. 453, 21 S. W. 19; *Pharlis v. Surret*, 54 Mo. App., loc. cit. 11; *State, to Use, v. Samuels*, 28 Mo. App., loc. cit. 653. In the latter case, *Rombauer, J.*, said: "The exhibit was not part of the petition, and could not be made such by any statement in the petition to that effect. *Kern v. Insurance Co.*, 40 Mo. 19, 25, and cases cited. This is true even of an instrument forming the basis of an action and executed by the adverse party, and a fortiori of a mere memorandum made by the plaintiff himself, as this exhibit purported to be." Along the same lines are the cases of *Vaughan v. Daniels*, 98 Mo. 230, 11 S. W. 573; *Hickory County v. Fugate*, 143 Mo. 71, 44 S. W. 789. And such seems to be the rule in most jurisdictions. *Ency. of Plead. & Prac.* vol. 8, p. 740.

Eliminating then, as we must, the Exhibit

A from the answer, how does the judgment entered accord with the pleadings? If it is such a judgment as could be properly entered on the pleadings, we should affirm, for the alleged errors are sealed in the alleged bill of exceptions. This answer, eliminating the exhibit, says that the defendant in the Iowa court was duly and legally served with process. In support of this allegation there might have been a judgment introduced showing personal service in Iowa. We are not permitted to go into the evidence to see what in fact was shown. There might have been evidence introduced fully justifying the decree entered. Whether or not there was such evidence, the plaintiff by reason of his faulty abstract has precluded our investigation. With a judgment which could be properly entered upon the pleadings, it will be presumed that there was evidence to support it, in the absence of such evidence in this court, as in the case at bar.

There being nothing before us but the pleadings and judgment, and the judgment being such as under proper evidence might have been entered under the pleadings, we have nothing to do except to affirm it, and it is so ordered. And, whilst the constitutional question is sufficiently raised to confer jurisdiction, the remainder of the record is such as to render it unnecessary to pass thereon.

Let the judgment be affirmed, as above stated. All concur.

#### HUBBARD et al. v. SLAVENS et ux.

(Supreme Court of Missouri, Division No. 1.  
Feb. 25, 1909. Rehearing Denied  
March 31, 1909.)

#### 1. APPEAL AND ERROR (§ 907\*)—RECORD—OMISSION OF EVIDENCE—EFFECT.

Omission of the evidence from an appeal record is an admission that respondents established every part of their case by competent and sufficient proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3673, 3675; Dec. Dig. § 907.\*]

#### 2. EJECTMENT (§ 39\*)—ANCIENT TRANSACTIONS.

Where plaintiffs' ancestor and his estate received the purchase price for the land in controversy 50 years before, plaintiffs would not be permitted to recover the land from persons in possession having an equitable title, unless such result was required by the sternest principles of plain law, the rules of evidence after such lapse of time being relaxed to facilitate the establishment of defendant's equitable defense.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 39.\*]

#### 3. APPEAL AND ERROR (§ 501\*)—SCOPE OF REVIEW—EXCEPTIONS NOT PASSED ON BELOW.

Under Rev. St. 1899, § 864 (Ann. St. 1906, p. 808) forbidding the Supreme Court to consider on appeal any exceptions not passed on

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



below, only such exceptions as are saved in the bill will be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300-2305; Dec. Dig. § 501.\*]

**4. APPEAL AND ERROR (§ 501\*)—SCOPE OF REVIEW—SKELETON BILL—MOTIONS IN ARREST—NEW TRIAL.**

Under a skeleton bill of exceptions, exceptions saved to overruling motions in arrest and for a new trial are not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300-2305; Dec. Dig. § 501.\*]

**5. PLEADING (§ 426\*)—MOTION TO STRIKE—DENIAL—WAIVER.**

An exception to the denial of a motion to strike out part of a pleading is waived by pleading further.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1426; Dec. Dig. § 426.\*]

**6. PLEADING (§ 352\*)—MOTION TO STRIKE—DEMURRER.**

A motion to strike a pleading cannot be considered as a general demurrer thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1073; Dec. Dig. § 352.\*]

**7. EXCEPTIONS, BILL OF (§ 53\*)—EQUITY SUITS.**

In an equity suit, as a general rule, the trial court cannot be compelled to allow bills of exceptions that do not preserve the evidence on the merits.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 53.\*]

**8. APPEAL AND ERROR (§ 685\*)—REVIEW—DEMAND FOR JURY—EVIDENCE.**

Where, in a suit to recover land, defendant pleaded an equitable counterclaim, plaintiff's demand for a jury was in the nature of a challenge to the jurisdiction of the trial judge to try the case on the facts, and hence his refusal of a jury was reviewable on appeal without the evidence being in the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 685.\*]

**9. ACTION (§ 25\*)—NATURE—LAW OR EQUITY.**

Where, in a suit to recover land at law, defendants pleaded certain equitable matter, the case was changed from law to equity, if the substantive facts as pleaded by defendants entitled them to equitable relief, but, if not, the cause continued triable at law.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 25.\*]

**10. EJECTMENT (§ 28\*)—EQUITABLE DEFENSES—ESTOPPEL IN PAIS—AFFIRMATIVE RELIEF.**

In proceedings to recover land, matter constituting an estoppel in pais may be relied on by defendants as an equitable counterclaim on which to base a prayer for affirmative relief, though it is also a sufficient defense at law to a suit in ejectment.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 28.\*]

**11. ESTOPPEL (§ 101\*)—ESTOPPEL IN PAIS—CREATION OF TITLE.**

Since the bare legal title may be substantially defeated by an estoppel preventing the holder from asserting it, it is immaterial that a title may not strictly be created by estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 293; Dec. Dig. § 101.\*]

**12. FRAUDS, STATUTE OF (§ 129\*)—CONVEYANCE OF LAND—NECESSITY OF WRITING.**

An estate in land may be transferred from one to another without writing, by a verbal sale accompanied by actual possession.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287-292; Dec. Dig. § 129.\*]

**13. ESTOPPEL (§ 94\*)—TRANSFER OF INTEREST IN REAL ESTATE.**

An estate in land may be transferred by the failure of the owner to give notice of his title to a purchaser under circumstances amounting to fraud.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 245-247, 276-284; Dec. Dig. § 94.\*]

**14. EQUITY (§ 19\*)—JURISDICTION—TITLE TO LAND.**

Equity has jurisdiction in a suit by which title to land is sought to be divested from the holder of the legal title and vested in another because of matter of equitable estoppel in pais.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 46, 47; Dec. Dig. § 19.\*]

**15. ESTOPPEL (§ 98\*)—PERSONS AFFECTED—PRIVIES AND HEIRS.**

An estoppel in pais enforceable against plaintiffs' ancestor is enforceable against plaintiffs to bar their claim to the land in question.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 290; Dec. Dig. § 98.\*]

**16. PLEADING (§ 418\*)—DEMURRER—WAIVER.**

By answering over, plaintiffs waived their demurrer to defendant's equitable counterclaim, except as to the proposition that it did not state facts sufficient to constitute a cause of action as a cross-petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1403-1406; Dec. Dig. § 418.\*]

**17. WILLS (§ 560\*)—LIFE ESTATES—ESTATE OF HUSBAND.**

Where the whole equitable title to the land in controversy passed out of a widow's husband during his lifetime, a life estate in the land was not cast on her by his will bequeathing to her a life estate in all his property, she being at most only entitled to dower.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 560.\*]

**18. PLEADING (§ 210\*)—"SPEAKING DEMURRER."**

A "speaking demurrer," viz., one that alleges affirmative matter which, taken with the allegations in the petition, shows that no cause of action is pleaded, does not exist in Missouri.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 210.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6564.]

**19. PLEADING (§ 310\*)—DEMURRER—EXHIBITS.**

Exhibits do not constitute a part of the petition to which they are attached for the purposes of a demurrer thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 944; Dec. Dig. § 310.\*]

**20. ADVERSE POSSESSION (§ 13\*)—CHARACTER AND ELEMENTS.**

Where, in a suit to recover land against a defendant who had been long in peaceable and adverse possession under an equitable title, defendant pleaded such possession, his equitable title, and that plaintiffs were estopped to deny such claim, defendant's rights were not barred by limitations, but grew stronger instead of staler by the mere lapse of time.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 13.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Ray County; J. W. Alexander, Judge.

Action by Joseph R. Hubbard and others against Luther C. Slavens and wife. Judgment for defendants, and plaintiffs appeal. Affirmed.

English & English, for appellants. L. H. Waters and L. C. Slavens, for respondents.

LAMM, P. J. Plaintiffs, Joseph R. and Ellen L., as the only children of Chester Hubbard, deceased, and as remaindermen under his will, uniting with Ellen's husband, Horace B., sued defendants (husband and wife) in ejectment in the Jackson circuit court on October 26, 1905. Defendants answer by way of a general denial, by way of the 30-year statute of limitations, and by way of an equitable defense, upon which they ask affirmative, equitable relief. From a decree for defendants, plaintiffs appeal.

The bill of exceptions, containing no evidence, contents itself, first, with showing plaintiffs' motion to strike out parts of the equitable defense, the adverse ruling of the court thereon, and an exception saved; second, plaintiffs' motion to submit the cause to a jury, the adverse ruling of the court, and an exception; and, third, plaintiffs' motions for a new trial and in arrest, the adverse rulings thereon, and exceptions.

The abstract of the record proper shows the petition, the answer and copies of Exhibits A, B, C, and D, a demurrer to the second and third defenses, the order of the court overruling the demurrer, the order of the court overruling the motion to strike out, the reply, the decree, the affidavit for an appeal, the order allowing one, and the record entry showing that the bill of exceptions was settled, allowed, signed, and filed.

Points made seek some elaboration of the pleadings, viz.:

The petition charged that Chester Hubbard died in 1861, seised of certain real estate in Kansas City, Mo. (describing it); that he left a will probated in Iowa at the county of his domicile (also in Jackson county, Mo., in 1865); that by such will he devised to Mary R., his wife, all his real estate, with remainder over to plaintiffs, his children, share and share alike; that Mary R. died in January, 1900; and that her life estate fell in and said remaindermen became entitled to possession. Ouster is laid as of February 1, 1900.

Attending to the answer, it denies all allegations not expressly admitted true; admits possession; avers that the defendant, Luther C., has been the husband of the defendant, Sallie, for 45 years; avers that they are now, and they and those under whom they claim have been, in open, notorious, and continuous adverse possession under a claim and color of title for 48 years; that the title emanated from the government 70 years ago; that neither the said Chester in his lifetime

nor the plaintiffs since his death have been in possession nor paid any taxes for said 48 years, nor have plaintiffs brought any action to recover said premises under Rev. St. 1899, § 4268 (Ann. St. 1906, p. 2342); wherefore, they pray judgment that the title of plaintiffs be adjudged barred, and that the title be vested by the court in the defendant Sallie.

By the third defense it is alleged plaintiffs are the children and only heirs at law of Chester Hubbard, who died July 21, 1861; that by will he left the real estate belonging to him to his wife for life and to his children in remainder; that plaintiffs claim the real estate in controversy as devisees or heirs, but that Chester was not seised of the premises at the time of his death, and, therefore, plaintiffs took nothing under the will either as remaindermen or heirs.

To this end, it sets forth elaborately, in many pages of print, facts constituting an equitable defense and upon which affirmative relief is predicated. For instance (summarizing): It alleges that on the 16th day of September, 1856, Chester and Mary R. Hubbard executed a power of attorney to one Summers authorizing him to collect all debts due them, and to lease and sell and convey any real estate belonging to them in Jackson county, Mo., and to execute and deliver deeds to purchasers, which said power of attorney was put of record one month later, and continued in full force and effect until Chester Hubbard's death; that shortly after its execution Hubbard moved to Keokuk, Iowa, where he resided until his death, in 1861.

(Note. It will aid in understanding the case to say, what will appear presently, that the land sued for was acquired by Hubbard after said power of attorney was executed, and that such fact creates the main basis of plaintiffs' claim.)

The answer goes on to allege that Hubbard on March 12, 1857, bought from one Ranson a large tract of land for \$9,000 (the premises sued for being a part of such large tract); that on that date Ranson conveyed said tract to Hubbard, who, having paid \$1,000 therefore to bind his bargain, on that day executed to Ranson his three promissory notes for the balance of the purchase money, and to secure them executed to Ranson a mortgage on the premises; that Mary R., being absent from the state of Missouri at that time, he (Hubbard) executed the mortgage in his own proper person, and caused said Summers to join with him in executing it as the attorney in fact of Mary, under said power, which mortgage was at once put of record; that Hubbard and Summers, by their joint act in executing said mortgage, construed the power of attorney as authorizing Summers to deal with and convey the premises under said power, and that thereby and by its record said Summers was held out to the world by Hubbard as having such au-

thority; that afterwards on the 21st day of September, 1857, said Hubbard, then being in Kansas City, entered into a written agreement to sell and convey the real estate purchased from said Ranson to one King for the sum of \$13,500, who agreed to buy at that figure; that the terms of sale evidenced by said contract were a cash payment of \$1,500, a certain sum at 30 days, a certain sum (\$3,375) on March 12, 1858, a like sum on March 12, 1859, and a like sum on March 12, 1860—all said deferred payments to be secured on the premises by mortgage; that said contract was put in the hands of one Bouton, a notary public; that on the next morning Hubbard, Summers, King, and Bouton met at the latter's office, and King, in pursuance of his contract, paid to Hubbard in person the said cash payment, who receipted on the back of the contract for the same and employed Bouton to draft the deed and mortgage; that Hubbard then and there stated he was unable to stay for the preparation and exchange of said instruments, but was compelled to go home that afternoon; thereupon he instructed said Summers to execute and deliver the deed to King, and instructed King to deliver said notes and mortgage to Summers, and directed the latter to record the mortgage, and went his way; that in pursuance of those instructions said Summers, as such attorney in fact of Chester and Mary, did execute to King a warranty deed for said premises, and said King made said notes for the deferred payments, and made such mortgage as security, and delivered them to Summers; that Bouton then delivered said contract to Summers; that the deed to King and the mortgage to Hubbard were recorded shortly, to wit, on October 14, 1857; that on the same day the deed from Ranson to Hubbard was put of record; that the deed from Hubbard to King was made and executed on behalf of Chester and Mary R. by said Summers by the express direction and instruction of said Chester, who then and there held him out as having authority to make that deed under his said power of attorney; that King at that time knew that Summers had acted as attorney in fact for Mary R. under the same power of attorney by joining in the execution and acknowledgment of said mortgage from Hubbard to Ranson, and had notice of the recording of said mortgage, and of the fact that Hubbard held Summers out as having full power and authority, and that they so construed said power; that said King, having such notice and knowing that Hubbard had instructed Summers as attorney in fact to execute the deed to him (King), he was led to believe that Summers had such power, and, acting on that belief, he paid said cash payment to Hubbard in person, and as part of the transaction accepted Hubbard's deed made by Summers as attorney in fact, under said directions and instructions of Hubbard, and made and delivered to Sum-

mers, for Hubbard, the said notes and mortgage.

It is next averred that King's notes to Hubbard for the deferred payments were partly paid by King to Hubbard in his lifetime, and that the residue was paid to William Holmes, administrator of Hubbard's estate, after his death; that said Holmes was such administrator in Jackson county, and, after collecting said residue of purchase money, he paid out and distributed such proceeds as part of Hubbard's estate and released said mortgage; that Hubbard took possession under Ranson's deed, and delivered possession to King on the date of King's deed; that King held actual, open, notorious, and continuous adverse possession from that date under claim and color of title until, in 1865, he turned over possession to one Hite, who bought the premises.

The answer next averred that Hubbard in his lifetime paid said Ranson payments, except the last one; that the last Ranson note was transferred to one Scruggs; that in March, 1862, in Jackson county, Mo., Scruggs commenced a suit to foreclose the mortgage, making King, Ranson, and the unknown heirs and representatives of Chester Hubbard parties defendant; that Ranson was duly served, and service was attempted on the other defendants by publication; that in November, 1862, the suit was dismissed as to the unknown heirs and representatives of Hubbard, and thereupon such proceedings were had that a decree was rendered finding the amount due on the last Ranson note and foreclosing the equity of redemption of the remaining defendants, Ranson and King, and decreeing a sale; that a sale was made, and said Hite became the purchaser and received a marshal's deed, which deed assumed and intended to convey the land; that King turned over possession to Hite, and, there being doubts about the validity of the sale, said King executed a deed to the premises shortly thereafter; and that after King's deed to Hite the latter paid Holmes, administrator of Hubbard, the last note due from King to Hubbard, and said administrator discharged the lien of the Hubbard mortgage as said.

The answer then alleges that Hite held adverse, open, and continuous possession under his deeds until in April, 1867, and then conveyed a 10-acre tract of the land to one Gates, who went into possession and held adversely until September 10th of that year, making lasting improvements, and on the 10th of September, 1867, Gates sold and conveyed the north half of his 10 acres to defendant Sallie Slavens, who recorded her deed; that Sallie and her codefendant, Luther C., entered into possession under their deed, and have ever since held open, notorious, and continuous adverse possession, and have made lasting and valuable improvements; that said Sallie is the real and equitable owner of the real estate mentioned in

the petition, the same being a part of that purchased from Gates; that Chester Hubbard lived four years after the deed made by Summers as attorney in fact to King as aforesaid, knew said deed had been executed and recorded, knew King was in possession of the premises under it and claimed them adverse to Hubbard, knew King was receiving the rents and paying the taxes, knew that he (Hubbard) had a mortgage on said premises, and, so knowing, during all that time failed to repudiate said deed to King, failed to disclaim any interest in the mortgage and notes given to him by King, failed to make any claim to said premises or the possession thereof, or to pay taxes or demand rent, failed to return any of the purchase money paid him by King, but, on the contrary, he ratified and acquiesced in the execution of said deed to King so made by said Summers as his attorney in fact.

The answer further pleads certain defects and ambiguities in certain deeds in defendants' chain of title, and alleges that in certain instances deeds of correction were made (describing them), and in other instances alleges that narrations were made which cured ambiguities and uncertainties.

Based on the foregoing allegations, the answer charges that the conduct, acts, words, conveyances, etc., of Chester Hubbard in his lifetime, and those of the said Summers as his attorney in fact, as aforesaid, estopped said Hubbard in his lifetime from denying that he had conveyed said premises to King as recited in the mortgage and deed—from denying that King became the owner of the premises. It further charges that said acts, conduct, and words of Hubbard (again specifying them) not only estopped him from denying that the premises passed to King by the deed to him, but estopped him from denying that Summers had authority under the power of attorney and directions and instructions aforesaid to execute King's deed, and estopped him in his lifetime from claiming any interest in or title to the premises. That plaintiffs as heirs or devisees are bound by the conduct, acts, and doings of their ancestor as set forth, and may not deny that defendant Sallie Slavens is the owner of the premises; and are barring and estopping her from any interest in said land.

It seems there was an original answer to which Exhibits A, B, C, and D were attached. Without otherwise describing such exhibits or pleading the contents thereof, the trial answer then alleges that said exhibits so attached to the original answer are made a part of the defense of this answer.

It prays that the court adjudge and decree that effect be given to said estoppels, and that the title to the premises be vested in defendant Sallie, and winds up with a prayer for general relief.

The exhibits referred to in the answer need not be set forth.

Plaintiffs' demurrer to the second and third defenses was as follows: The defense of the 30-year statute of repose was assailed, because it "does not state facts sufficient to constitute a defense to plaintiffs' petition." The equitable defense was demurred to because it, first, "does not state facts sufficient to constitute a defense to the plaintiffs' cause of action"; second, "it does not state facts sufficient to constitute a cross-petition or cause of action in favor of said defendants"; third, because it "shows on its face that if any cause of action ever existed in favor of said defendants, as stated and claimed in said defense, the same is barred by limitation and lapse of time."

The reply denied some and admitted other averments of the answer, and then charged that it was not the duty of plaintiffs as remaindermen to pay the taxes prior to the year 1900, when the life estate of Mary R. fell in. It alleges that it was the duty of "defendants, as life tenants of said estate, to pay the taxes on said estate during the continuance of the life estate." It admits the averments of the answer relating to the will of Chester Hubbard, admits Ranson's deed to Hubbard, that Hubbard entered into possession under it, admits Hite's possession under the marshal's deed, and admits Gates' possession, but avers it was not under color of title, and then proceeds to deny, seriatim, the averments of the answer.

The decree follows:

"And now on this day come the parties herein in person and by their respective attorneys, and this cause coming on to be heard upon the pleadings and evidence in the case, and the court having heard the evidence and arguments of counsel, and having considered the same, and being fully advised concerning all and singular the matters herein, doth find:

"First. The court finds the issues made by the petition of plaintiffs, and the general denial of the defendants' answer, for the defendants and against the plaintiffs.

"Second. The court finds the issues raised by the second count of said defendants' answer for the defendants and against said plaintiffs.

"Third. The court finds the issues raised by the third count in said defendants' answer, and the equitable defense therein, in favor of said defendants and against said plaintiffs.

"Fourth. It is therefore ordered, adjudged, and decreed by the court that the said plaintiffs take nothing by their action.

"It is further ordered, adjudged, and decreed that the plaintiffs' title in and to the land in controversy in this cause, to wit, beginning 634½ feet north of the southwest corner of the east half of the west half of the southeast quarter of section 33, in township 50 north, in range 33 west, in Jackson county, in the state of Missouri, and running thence west 182¼ feet, and thence east

235 feet, thence south 182¼ feet, thence west 235 feet to the place of beginning, in Kansas City, Mo., be, and the same is, divested out of said plaintiffs, and the title to the same be, and hereby is, vested in the said defendant Sallie Slavens and confirmed in her, and that said defendants have and recover of said plaintiffs the costs of this suit, and that they have execution therefor."

1. On such a record some preliminary observations may aid in reckoning our bearing at the outset. They will serve in the nature of a judicial calculation of our latitude and longitude.

(a) In the first place, appellants have, ex industria, kept back every shred of the evidence. That fact is of obstinate and controlling importance, for from such omission it follows inevitably that they are held to admit on appeal that respondents put in competent and sufficient proof below to establish every jot and tittle of their whole defense. That is, to borrow an old-fashioned chimney-corner figure, homely yet speaking, their noses are judicially held to the grindstone of the concession that each and every averment of the answer was proved to the satisfaction of the trial court, and this admission runs like a marking cord through the whole warp and woof of the case. In order that the full significance of this large admission should stand out in bold relief, we have heretofore set forth at length the substance of the averments of the answer at expense of brevity.

(b) In the second place (as a corollary), it becomes quite vain for appellants' learned counsel to argue the merits of the case on the facts, as he apparently now and then does in his briefs, and as was done orally at our bar. The facts are not only a sealed book, but are settled against him.

(c) In the third place, we take the opportunity of saying that it is a matter of tranquil and entire satisfaction to us that the trial court found itself dealing with facts warranting a decree in favor of defendants. To judicially unsettle land titles, fortified by the healing influence of time, on which owners have rested securely for a half century, is a matter of such gravity and anxiety that this court has consistently, during its whole life, turned a cold eye and a face of stone on such efforts (however learnedly and astutely presented, as here), saying so in words with the bark on. For example, in *McClanahan v. West*, 100 Mo., loc. cit. 324, 13 S. W. 677, it was said: "And it ought to be distinctly understood that this court views with disfavor proceedings like the present, instituted nearly the life of a generation after the transaction on which they are supposed to be based occurred, and which, if successful, to paraphrase the strong language of Judge Scott on one occasion, would 'make the dead sin in their graves.'"

To this end it is trite learning that the rules of evidence are relaxed in support of

ancient and dim transactions—this from the very necessity of things. Not that the adage, "Necessity knows no law," is applied, but that courts administer the law to attain just results, and to that end use the everyday wisdom, the good sense, of mankind in establishing old transactions.

In aid of a title attacked by these very plaintiffs on grounds somewhat similar to those in this case, *Fox, J. (Hubbard et al. v. Kansas City Stained Glassworks & Sign Co. et al., 188 Mo., loc. cit. 35, 86 S. W. 82)* quoted approvingly from *Agnew, J., in Richards v. Elwell, 48 Pa., loc. cit. 364, 367*, language in point and not amiss to repeat: "If the rule," says *Agnew, J.*, with animation, "which requires the proof to bring the parties face to face and to hear them make the bargain, or repeat it, and to state all its terms with precision and satisfaction, is not to be relaxed after the lapse of 40 years, when shall it be? \* \* \* There is a time when the rules of evidence must be relaxed. We cannot summon witnesses from the grave, rake memory from its ashes, or give freshness and vigor to the dull and torpid brain."

Chester Hubbard and his estate had the money for the land in question 50 years gone. For his children to now recover the land itself under such circumstances is a proposition so intolerable to elevated justice that no court would give ear to it unless constrained thereto by the sternest principles of plain law. As will presently appear, it is good ground for congratulation that no such principles are known to us.

(d) In the fourth place, we are forbidden by express statute to consider on appeal any exceptions not passed on below. *Rev. St. 1899, § 864 (Ann. St. 1906, p. 808)*. Therefore, while in this case appellants' brief takes a wide range and many propositions are discussed therein, yet, on referring to the bill of exceptions, we find the statutable chart of our channel well marked out. The exceptions saved in the bill cover two propositions, viz., first, error in overruling the motion to strike out; second, error in overruling the motion to submit the cause to a jury. True, an exception was saved to overruling the motions in arrest and for a new trial, but those motions strike at matters not here for review under the skeleton bill of exceptions, save and except the two enumerated. To the above errors should be added a third, viz., the ruling of the court on the demurrer. Let us attend to them seriatim.

## 2. Of the motion to strike out.

When a party as an intermediate step in the evolution of a lawsuit files a motion to strike out all or a part of his adversary's petition or answer, and the court passes an order overruling such motion, the option is presented to the movant to stand on his motion and thus prove his faith by his works, or to plead over to the merits. When, not standing on the motion, he pleads over to

the merits and on such joinder of issue of fact pitches his battle in a legal forum, and takes his chance of winning or losing on such joinder (and loses), he may not thereafter "tread back in his tracks and trip up his adversary's heels" on the ruling on the motion. He is held to have waived the motion. His exception is a dead coal, and no subsequent blowing, however deft and persuasive, will breathe a spark of fire into it, under the rules of appellate practice in this jurisdiction. *White v. R. R.*, 202 Mo., loc. cit. 561, 101 S. W. 14 et seq., and authorities cited; *Hudson v. Cahoon*, 183 Mo., loc. cit. 557, 91 S. W. 72.

Appellants' counsel frankly concedes, in his brief in reply, so much; except that he argues (as we grasp it) that the motion in some of its phases covers the same ground as a general demurrer, and hence should be judged of as a demurrer. But the office of a demurrer is one thing, the office of a motion to strike out is another; the one seeks a judgment on an issue at law, the other seeks a mere order. It is confusing to orderly procedure to treat them as interchangeable and to be used indifferently, the one for the other. *Ewing v. Vernon County* (but now handed down and not yet officially reported) 116 S. W. 518.

We hold that when appellants joined issue on the facts, by pleading over to the merits by reply to the answer, they waived their motion to strike out.

3. Of the motion to submit the cause to a jury.

(a) Before the trial began the court construed the answer as putting the cause in chancery, to be heard by a chancellor. Thereupon plaintiffs submitted a written demand in the form of a motion for a jury, and saved an exception to the order overruling that motion. This assignment of error presents the main bone of contention.

It has already been pointed out that the evidence is not preserved in the bill of exceptions. As a general rule, in an equity case, the trial court cannot be compelled to allow bills of exceptions that do not preserve the evidence on the merits. *State ex rel. Guinan v. Jarrott*, Judge, 183 Mo. 204, 81 S. W. 876. But presently after the Jarrott Case, in an equity suit, a change of venue was applied for below and disallowed. Thereupon it was contended here that appellant could not have his exception to that ruling considered on appeal without bringing up all the evidence. But we refused to so hold, putting our ruling on the ground that the question presented was one of jurisdiction; that is, whether the court had the right to proceed with any trial whatever. On such question we held the evidence on the merits was immaterial, and, therefore, the bill of exceptions need not contain a transcript of it. *State ex rel. Priddy v. Gibson*, Judge, 184 Mo. 490, 83 S. W. 472. That case was followed in *State ex rel. Priddy v. Gibson*,

Judge, 187 Mo., loc. cit. 547-548, 86 S. W. 177. Since the Jarrott Case, supra, there has been a line of cases holding that we could not review an equity case on the merits unless all the evidence was preserved and brought here. *Guinan v. Donnell*, 201 Mo. 173, 98 S. W. 478; *Patterson v. Patterson*, 200 Mo. 335, 98 S. W. 613; *Pitts v. Pitts*, 201 Mo. 358, 100 S. W. 1047.

Considering the grounds upon which the *Guinan*, the *Patterson*, and the *Pitts* Cases stand, we are inclined to hold that, on principle, they do not control the case at bar, but that the *Priddy* Cases do. Allowing some deference to the trial chancellor, equity cases are tried de novo (in a sense) in an appellate court on the merits, hence there are manifest reasons why the evidence should be preserved and sent up, none of which pertain to the case at bar. The demand for a jury was in the nature of a challenge to the jurisdiction of the trial judge to try the case on the facts. If he erred in holding jurisdiction in equity, it is not clear how the evidence on the merits would throw any light on the point. Hence we shall consider the assignment in the absence of the evidence.

(b) The only question debatable is: Was the answer such a pleading of substantive facts as entitled defendants to affirmative equitable relief? If answered yea, then the cause went into equity and there was no error on overruling the motion for a jury. *Pitts v. Pitts*, supra, and cases cited. If answered nay, then, in spite of the equitable matter set up by way of defense, the cause continued at law, and plaintiffs were entitled to a jury. *Kerstner v. Vorweg*, 130 Mo. 196, 32 S. W. 298; *Thompson v. Bank*, 132 Mo. App., loc. cit. 223, 110 S. W. 681.

Is there substance in the assignment of error? We think not. This, because:

(1) It is argued that matter constituting equitable estoppel in pais is a good defense at law in an ejectment suit. Granted, but it would be a non sequitur to say that a defendant may not use the same matter of estoppel in pais as grounds for affirmative relief in equity, where alone he can get such relief. Estoppels in pais originated in equity; they stand on principles of refined ethics, and were always ahead of equity jurisdiction. The doctrine was merely borrowed by courts of law as a convenience. That the law has been enriched and enlarged by such borrowing principle ought not to oust courts of equity from enforcing the ancient principles of equity, for the jurisdiction of equity often runs concurrently with that of law. If a litigant be in such a fix that on the facts he is entitled to relief, and if the relief at law be inadequate, or "if it is not complete, if it does not attain the full end and justice of the case, if it does not reach the whole mischief and secure the whole right of the party in the present time and in the future, equity will intervene and

give such relief and aid as the exigency of the particular case may require." Story, Eq. (11th Ed.) § 33; *Hanson v. Neal* (Mo., not yet officially reported) 114 S. W. 1073, and cases and authorities cited.

Whether, in strictness of speech, a title may be "created" by estoppel is a refinement of no value in the light of modern equity jurisprudence. If A. by his actions and conduct, having not spoken when in conscience he should speak, is estopped to speak when in conscience he should keep quiet, if he by ratification with knowledge, by the receipt of purchase money, by turning over possession, or by similar means, is estopped to assert title in himself and is also estopped, by the same token, to deny title in B., if he has retained the bare naked legal title to the land under such condition of things as makes him seised merely to B.'s use, we say, if these things occur (as they do, as shown by this answer), then rounded-out justice demands that one other step be taken, viz., when B. asks it in his pleading, the chancellor should not let go of his jurisdiction until A.'s naked and bare legal title is vested out-and-out over into B., who already holds the beneficial title—this under the maxim that equity considers that done which should have been done.

In *Kirk v. Hamilton*, 102 U. S., loc. cit. 77, 26 L. Ed. 79, quoting from 2 Smith Lead. Cas. pp. 730-740 (7th Am. Ed. with notes by Hare and Wallace) it is said: "It is well established that an estate in land may be virtually transferred from one man to another without a writing, by a verbal sale accompanied by actual possession, or by the failure of the owner to give notice of his title to the purchaser under circumstances where the omission operates as a fraud; and, although the title does not pass under these circumstances, a conveyance will be decreed by a court of equity."

Speaking of the appropriation of the doctrines of equitable estoppel by the common law, Herman lays down the rule to be (2 Herm. on Estoppel, § 744) that such appropriation will not "estop the right to seek redress by an application in due form to chancery." A great array of decisions from this court might be cited to sustain the proposition that whether the force of the decree is directed to specific performance, or to some other form of vesting title from one into another, because of matter of equitable estoppel in pais, a court of equity is allowed jurisdiction. See, for example, *Hubbard v. Glassworks*, supra; *Kirkpatrick v. Pease*, 202 Mo. 471, 101 S. W. 651; *Shaffer v. Detle*, 191 Mo. 377, 90 S. W. 131.

(2) But it is argued (as we grasp the thread of it) that the estoppel does not concern the heirs or devisees of Hubbard, that they are not bound because they did not participate in the acts of their ancestor, and had no notice or knowledge of those acts, hence, as estoppel proceeds on knowledge, it

cannot affect them. But counsel in his fervor inadvertently argues unsoundly because he overlooks a proposition, one of the very tap roots of the doctrine of estoppel, to wit, that an estoppel binding an ancestor binds his heirs and privies. "Equitable estoppels," says Herman, "are as binding upon parties and privies as legal estoppels, and are as effectual in courts of law as in equity." 2 Herm. on Estoppel, § 787.

Plaintiffs as heirs and privies are bound.

The assignment of error now up is disallowed.

#### 4. Of the demurrer.

(a) By replying over, appellants waived their demurrer except on one proposition, viz., that the answer did not state facts sufficient to constitute a cause of action as a cross-petition. *Paddock v. Somes*, 102 Mo., loc. cit. 235, 14 S. W. 746, 10 L. R. A. 254; *Hoffman v. McCracken*, 168 Mo., loc. cit. 343, 67 S. W. 878; *Hanson v. Neal*, supra.

(b) It is argued that the second and third defenses were insufficient in point of law. As to the 30-year statute of limitations, it is insisted that it cannot apply because the duty to pay taxes was cast upon the life tenant. But this argument runs in a circle. It begs the question. It assumes Mary R. Hubbard was life tenant under the will. But if the equitable title passed in her husband's lifetime, then she may have been entitled to dower; but a life estate was not cast upon her by the will. There was nothing for that will to operate upon, and no life tenant, or remaindermen so far as the property in this suit is concerned.

(c) The principal argument in support of the assignment of error runs on the theory that we should look into the exhibits filed with the answer, and, so looking, we would discover that the petition states no cause of action. Whatever may be the doctrine elsewhere, there is no such thing as a "speaking demurrer" known to the jurisprudence of this state; that is, a demurrer that alleges affirmative matter which, taken with the allegations in the petition, shows that no cause of action is stated. Whatever may be the doctrine elsewhere, in this state a demurrer strikes squarely at the face of the petition, and nowhere else. Mere exhibits, under our practice, constitute no part of the petition for the purposes of a demurrer. This has been held early and late. 6 Ency. of Pl. & Pr. pp. 298, 299; *Hadwin v. Home Mut. Ins. Co.*, 13 Mo. 473; *Curry v. Lackey*, 35 Mo. 389; *Hoyt v. Oliver*, 59 Mo. 188; *Hickory County v. Fugate*, 143 Mo. 71, 44 S. W. 789; *State ex rel. v. Crumb*, 157 Mo., loc. cit. 561, 57 S. W. 1030; *Pomeroy v. Fullerton*, 113 Mo., loc. cit. 453, 21 S. W. 19.

(d) Finally, we are confronted with the suggestion that the demurrer was well enough because on its face the answer shows that the pleaded matter constituting the equitable defense, in so far as it serves as a cross-petition upon which affirmative equitable re-

relief is predicated, is barred by the statute of limitations, and, consequently, is dead for the purposes of affirmative relief. But this view of it overlooks the fact that if the demurrer were held well taken, then the whole equitable defense would be struck down for every purpose, whether as a mere bar or as a cross-action. *Sebree v. Patterson*, 92 Mo. 451, 5 S. W. 31.

Not only so, but the demurrer was bad from the viewpoint of a challenge at law to the answer as a cross-action. A defendant long in peaceable and adverse possession, buttressed by an equitable title, among the traditional nine points in his favor, is within the protection of, but not within the mischief struck at, by the statute of limitations. Such equitable owner, so disturbed and vexed in his peace and property rights by an attack on his ownership and possession, may summon to his aid very ancient matter of defense—matter growing stronger instead of staler by the mere flux of time—and when he has so summoned it to his aid he may use it by way of counterstroke to make his title impregnable for all time as well as to parry the attack itself. So runs the law. *Michel v. Tinsley*, 69 Mo. 442; *Epperson v. Epperson*, 161 Mo. 577, 61 S. W. 853; *Butler v. Carpenter*, 163 Mo. 597, 63 S. W. 823; *Williamson v. Brown*, 195 Mo., loc. cit. 329, 93 S. W. 791.

The premises all considered, the facts on which the decree was based being conclusively presumed true on this appeal, under the omission of the evidence in the bill of exceptions, and the answer showing facts of the most persuasive and convincing character appealing for relief, we conclude the chancellor dealt out righteousness in his decree. Let it be affirmed. It is so ordered. All concur.

#### WATERS v. HUBBARD et al.

(Supreme Court of Missouri, Division No. 1.  
Feb. 25, 1909.)

Appeal from Circuit Court, Ray County; J. W. Alexander, Judge.

Action by Annie E. Waters against Joseph R. Hubbard and others. Judgment for plaintiff, and defendants appeal. Affirmed.

L. H. Waters and L. C. Slavens, for appellants. English & English, for appellee.

LAMM, P. J. Defendants appeal from a decree of the Ray circuit court defining and adjudging title in plaintiff to lots 8, 9, 10, and 11 in block 2 in Phelps Place addition to Kansas City, Jackson county, Mo., as against defendants (one Chester Hubbard being the common source of title). Said lots are part of the east  $\frac{1}{2}$  of the west  $\frac{1}{2}$  of the southeast  $\frac{1}{4}$  of section 33, township 50 north, in range 33 west, in said Jackson county. This case was tried below with three others (one of them, Hubbard et al. v. Luther C. Slavens et al., 117 S. W. 1104, just handed down by this division). By stipulation it was heard here with said Slavens Case—the abstract, briefs, and points being common (mutatis mutandis)—and the judgment was

to follow the disposition of the principal case.

Accordingly, as was done in the Slavens Case, so let it be done here. The decree is in all things affirmed. All concur.

#### HALL v. HUBBARD et al.

(Supreme Court of Missouri, Division No. 1.  
Feb. 25, 1909.)

Appeal from Circuit Court, Ray County; J. W. Alexander, Judge.

Action by Inez C. Hall against Joseph R. Hubbard and others. Decree for plaintiff, and defendants appeal. Affirmed.

L. H. Waters and L. C. Slavens, for appellants. English & English, for appellee.

LAMM, P. J. Defendants appeal from a decree of the Ray circuit court defining and adjudging title in plaintiff to all that piece or parcel of land described by metes and bounds as follows: Beginning at a point 544 $\frac{1}{2}$  feet north of the southwest corner of the east  $\frac{1}{2}$  of the west  $\frac{1}{2}$  of the southwest  $\frac{1}{4}$  of section 33, in township 50 north, in range 33 west, in Jackson county, Mo., thence north 90 feet, thence 235 feet east, thence 90 feet south, and thence 235 feet west to the place of beginning—as against defendants (one Chester Hubbard being the common source of title); said parcel being part of the east  $\frac{1}{2}$  of the west  $\frac{1}{2}$  of the southeast  $\frac{1}{4}$  of section 33, township 50 north, in range 33 west, in said Jackson county. This case was tried below with three others (one of them being Hubbard et al. v. Luther C. Slavens et al., 117 S. W. 1104, just handed down by this division). By stipulation it was heard here with said Slavens Case—the abstract, briefs, and points being common (mutatis mutandis)—and the judgment was to follow the disposition of the principal case.

Accordingly, as was done in the Slavens Case, so let it be done here. The decree is in all things affirmed. All concur.

#### DEVOL et al. v. HUBBARD et al.

(Supreme Court of Missouri, Division No. 1.  
Feb. 25, 1909.)

Appeal from Circuit Court, Ray County; J. W. Alexander, Judge.

Action by Harriet B. Devol and another against Joseph R. Hubbard and others. From a decree in favor of plaintiffs, defendants appeal. Affirmed.

L. H. Waters and L. C. Slavens, for appellants. English & English, for appellees.

LAMM, P. J. Defendants appeal from a decree of the Ray circuit court defining and adjudging title in plaintiffs to lots 8, 9, 10, and 11 in block 1, in Phelps Place addition to Kansas City, in Jackson county, Mo., as against defendants (one Chester Hubbard being the common source of title). Said lots are part of the east  $\frac{1}{2}$  of the west  $\frac{1}{2}$  of the southeast  $\frac{1}{4}$  of section 33, township 50 north, in range 33 west, in said Jackson county. This case was tried below with three others (one of them being Hubbard et al. v. Luther C. Slavens et al., 117 S. W. 1104, just handed down by this division). By stipulation it was heard here with said Slavens Case—the abstract, briefs and points being common (mutatis mutandis)—and the judgment was to follow the disposition of the principal case.

Accordingly, as was done in the Slavens Case, so let it be done here. The decree is in all things affirmed. All concur.



## POWELL et al. v. POWELL et al.

(Supreme Court of Missouri, Division No. 2.  
March 30, 1909.)

## 1. VENDOR AND PURCHASER (§ 261\*)—VENDOR'S LIEN—ASSIGNMENT—EVIDENCE.

Evidence held to show that the owner of a vendor's lien transferred by assignment all his title and interest therein to others, and did not merely transfer the lien to them for collection.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 261.\*]

## 2. VENDOR AND PURCHASER (§ 261\*)—VENDOR'S LIEN—ASSIGNMENT—BONA FIDE PURCHASER.

Evidence held to show that persons purchasing a vendor's lien from the former owner after it had been assigned to another were not bona fide purchasers without notice of the prior assignees' claims.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 261.\*]

## 3. ESTOPPEL (§ 91\*)—EQUITABLE ESTOPPEL—FAILURE TO ASSERT CLAIM.

Where persons purchased a vendor's lien with notice that it had been already assigned to others, and brought suit against the lienees, obtaining judgment, the prior assignees were not estopped to assert their claim to the judgment, where they were not made parties to the suit to enforce the lien and did not cause the persons suing to enforce it to change their position nor in any way mislead them.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 257-259; Dec. Dig. § 91.\*]

## 4. VENDOR AND PURCHASER (§ 269\*) — VENDOR'S LIEN — ENFORCEMENT.

The land subject to the lien having been already seized and sold for its satisfaction by the subsequent purchasers of the lien, the remedy of the prior assignees would not be against the land in an action against the lienees.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 269.\*]

## 5. CANCELLATION OF INSTRUMENTS (§ 55\*) — EQUITY—RELIEF.

Under the rule that equity having once acquired jurisdiction will grant full relief, where a vendor, after having assigned the lien, again assigned it to others, who had notice of the other assignment, and gave them a quitclaim deed to the land, and the holders of the second assignment and deed sued the lienees, obtained judgment, and sold the land for payment of the debt, the court, upon setting aside the quitclaim deed at the suit of the prior assignees and true owners of the lien, could give them the full benefit of the judgment obtained from the lienees.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 55.\*]

## 6. CANCELLATION OF INSTRUMENTS (§ 35\*) — PARTIES.

The lienees having had their day in court when the lien was enforced against the land, it was of no consequence to them who had the right to enforce the judgment against them, and it was not necessary to make them or their representatives parties in the suit by the true owners of the lien against those who had enforced it.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 35.\*]

## 7. SUBROGATION (§ 1\*)—TRANSFER OF JUDGMENT AGAINST VENDOR'S LIENEES TO OWNERS OF LIEN.

The transfer of the judgment from the subsequent purchasers of the lien to the prior as-

signees and true owners involved neither legal nor conventional subrogation.

[Ed. Note.—For other cases, see Subrogation, Dec. Dig. § 1.\*]

Appeal from Circuit Court, Dunklin County; J. L. Fort, Judge.

Action by T. Cole Powell and another against L. B. Powell and others. Decree for plaintiffs, and defendants appeal. Affirmed.

J. R. Brewer and W. S. C. Walker, for appellants. C. G. Shepard and Sam J. Corbett, for respondents.

BURGESS, J. This is a proceeding in equity, instituted in the circuit court of Pemiscot county for the purpose mainly of divesting out of the defendants all of their right, title, and interest in and to a certain judgment previously rendered in said circuit court, and investing the same in plaintiffs herein. Upon application for change of venue, the cause was transferred to the circuit court of Dunklin county, where trial was had and a decree entered in favor of plaintiffs, from which decree the defendants have prosecuted this appeal.

The facts developed at the trial of the cause are as follows:

T. C. Powell, father of plaintiffs, T. Cole and J. H. Powell, and of defendant L. B. Powell, was owner of several large tracts of wild timber land in Pemiscot county, Mo., and resided in Tennessee, just across the river from the city of Caruthersville, Pemiscot county, in which city lived his said three sons. On the 6th day of May, 1896, he and one J. W. Canady entered into a contract in the nature of a warranty deed, by which he conveyed to said Canady lands owned by him in Pemiscot county, and described as the west half of section 13, all of section No. 14 except the north half of the northeast quarter, the north half of section No. 23, the east half of the southeast quarter of section No. 12, the northwest quarter of section No. 12, the north half of the northeast quarter of section No. 12, all of section No. 15, all in township No. 17 north, of range No. 12 east; retaining in said conveyance a vendor's lien on said lands for the purchase price of \$5 per acre. Canady paid \$500 of the purchase price, and went into possession of the lands, and began cutting and removing the timber thereon. He made some other small payments to Powell, also paying some back taxes, and failed to make further payments.

In the latter part of the year 1900 T. C. Powell made an assignment of said vendor's lien to his sons, J. H. and T. Cole Powell, and delivered same to Dinning & Bragg, attorneys, in the city of Caruthersville, stating to them that said contract and vendor's lien had been assigned by him to the said parties, and that T. Cole Powell would arrange about

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

making bond for suit if suit should be found necessary. Later, T. Cole Powell called on said attorneys, and suggested that suit should not be brought at that time. It also appears that T. Cole Powell, at that time or later, took the paper out of the possession of said attorneys, went to the office of C. B. Farris, another attorney of the city of Caruthersville, and consulted him about the matter of bringing suit to enforce the lien, and, Mr. Farris having informed him that he could not undertake to bring suit for him for the reason that the interests of other clients of his would be affected thereby, he returned the paper to Attorneys Dinning & Bragg. Mr. Farris testified that he examined the contract and vendor's lien at the time; that his recollection was that the assignment was in the ordinary form, and that the same was properly acknowledged.

On February 13, 1902, defendant L. B. Powell, who was known as Bunk Powell, procured from his father, T. C. Powell, a written assignment of all his right, title, and interest in and to the contract and vendor's lien which had previously been assigned by T. C. Powell to the plaintiffs, and at the same time procured from him a quitclaim deed to all the lands mentioned in said contract. As to this transaction the testimony of A. P. Campbell and his wife, who were living at the time with T. C. Powell was to the following effect: Bunk Powell came to see the old man two or three times for the purpose of purchasing this contract and vendor's lien from him. The old man explained to him that he had already assigned the contract and lien to his sons J. H. and T. Cole Powell, and that he could not assign the same to him except subject to their approval, or unless he could procure the paper from them. To this Bunk replied, "All right; I can get it from them myself." Campbell drew up the assignment and deed, and his understanding was that Bunk was to pay the old man \$2,250 as consideration therefor, but he did not know whether he ever paid that sum. He did know, however, that Bunk afterwards gave the old man some horses, mules, and old wagons. On being asked if he was present when the papers were signed and delivered to Bunk by his father, witness Campbell replied, "No, sir; the old man was very ill at the time this trade was made, and Bunk rode off to get a notary—drove off in a run nearly—and he got back there, and they got it signed up some time that night." In the course of a conversation between Campbell and Bunk a few weeks after the trade was consummated, Bunk informed witness that J. R. Brewer and J. J. Williams, defendants herein, were interested with him in the trade, and remarked, "I am out nothing; Mr. Williams puts up so much money, and Mr. Brewer does the lawing, and I get one-half of what we get out of it." Campbell had a conversation also with T. C. Powell after the assignment to Bunk, and

the old man remarked that Bunk was buying against chances, and that, if he did not get the papers from the other parties, he was out. Mrs. Annie Campbell, wife of witness A. P. Campbell, testified that at the time the deal was made the old man told Bunk Powell that he would assign the lien to him if he would obtain from T. Cole and J. H. Powell their interest in it. She copied the written assignment to Bunk Powell in a book at T. C. Powell's house. Other testimony showed that after the death of T. C. Powell, which occurred in August, 1903, Bunk Powell had charge of all his books and papers, and that before this trial the leaves of the book containing said copy of the assignment had been torn out.

With reference to the transaction with his father, Bunk Powell testified that he paid his father, as consideration for the assignment to him of the lien, \$500 in cash, also delivered to him six horses, one mule, a log wagon outfit, a road wagon, and paid \$104 on a note owing by him. In all, he paid him \$1,550, or its equivalent. He further testified that it was his understanding that the assignment to Cole and J. H. Powell was merely for the purpose of collecting the debt secured by the lien, and that they were to get 10 per cent. of the amount collected; that, after the assignment to him, J. H. Powell wrote him a letter in which he offered to sell him his interest in the contract and lien for \$500. This letter, however, was not produced by the witness.

Upon procuring said assignment from his father, Bunk Powell went to the office of Dinning & Bragg and stated that he had made a trade with his father, and that his father sent him for the contract and vendor's lien which had been assigned to T. Cole and J. H. Powell, whereupon he was given possession of the papers. Thereafter, on April 4, 1902, he transferred and assigned to his codefendants, J. R. Brewer and J. J. Williams, for a consideration of \$2,000, a 40/83 interest in the debt and vendor's lien assigned to him. Suit was then instituted by the defendants in the Pemiscot county circuit court to enforce the vendor's lien against the lands in question, said suit being styled "L. B. Powell, J. R. Brewer, and J. J. Williams vs. J. W. Canady and William Hunter." Trial was had on the 1st day of August, 1903, and judgment in the sum of \$16,275.50 rendered in favor of the plaintiffs, defendants herein, which judgment was declared to be a lien upon said lands and the lands ordered sold, in obedience to which order the sheriff of Pemiscot county, at the next term of said court, sold the lands to satisfy said judgment, J. R. Brewer becoming the purchaser thereof for himself and codefendants; but he paid to the sheriff only a sum sufficient to pay the costs of suit and the sheriff's fee for selling, the balance of the purchase price being credited on the judgment. It appears that after Canady

purchased the land from T. C. Powell, as above mentioned, he sold the west half of section 13, in township 17, range 12, to Wm. Hunter, one of the parties defendant in said suit, who appealed from the judgment in said cause as affecting the said west half of section 13, claimed to be owned by him. This half section was, therefore, not sold at the foreclosure sale, but all the balance of the land was sold by the sheriff and bought in by J. R. Brewer, and the same was held by him for himself and his codefendants at the time of the trial of this cause.

Defendant J. R. Brewer testified that he had no knowledge that T. Cole and J. H. Powell had any interest in the property or lien until after the 4th day of April, 1902, when the 40/83 interest in the lien was purchased by himself and Williams; and Williams, in his own behalf, testified to the same effect.

Samuel J. Corbett, an attorney, testified for plaintiffs that in the fall of 1901 or spring of 1902 he had a conversation with defendant Brewer with reference to some trouble which Brewer had had with Canady respecting the land in controversy, during the course of which conversation Brewer said that in order to get even with Canady he would get Bunk Powell to buy the contract and vendor's lien from old man Powell, and he would then break Canady up; that witness remarked, "That will do you no good, because the contract has already been assigned to Bud and Cole Powell," whereupon Brewer said that he didn't make any difference, as they had never paid a thing for it.

Brewer, on the witness stand, denied that he had ever had any conversation with witness Corbett such as related by him.

A transcript of the testimony of T. Cole Powell and J. H. Powell taken in the case of L. B. Powell, J. R. Brewer, and J. J. Williams vs. J. W. Canady and Wm. Hunter, wherein they appeared as witnesses, was introduced in evidence in this case by the defendants. This showed that J. H. Powell, while being examined touching his interest in the vendor's lien in question, testified as follows: "Q. What did you and your brother Cole pay for this—anything? A. No, sir. Q. What were you to pay for it? A. We were just simply to take it and collect it, and we were to get 20 per cent. Q. You never attempted to collect it? A. The reason we didn't, he asked us to wait."

T. Cole Powell's testimony, as shown by said transcript, was as follows: "Q. You never paid T. C. Powell anything on this? A. No, sir. Q. You simply was to get part for collection? A. He didn't say what; just handed it over for value received. Q. You didn't pay anything, and wasn't to get anything except what you get out? A. That part was not explained to me. Q. You simply was to collect for part of it? A. Nothing was said about that."

As explaining his testimony aforesaid, J.

H. Powell testified at the trial of this cause as follows: "Q. You testified in the case of L. B. Powell et al. vs. Canady et al., in Pemiscot county? A. Yes, sir. Q. I will ask you if your testimony in that case relative to holding this contract for collection or otherwise— Did you testify relative to that? A. Yes, sir; I think that is the way the deposition read. Q. Now, state fully what you meant at that time. A. When the paper was given to us, or assigned to us, it was a present, and afterwards father complained that he was doing too much for us, and then insisted we keep it for collection. Q. Was T. Cole Powell, your brother, present at any time during the conversation with your father in which the matter of that assignment was brought up? A. No, sir, I don't think he was. Q. I will ask you what you was to receive out of this matter? A. He said at first that he gave it to us, and the last time we talked about it he agreed he would pay us 20 per cent. for collecting it—for attorney's fees and trouble—and would divide the balance equally with me and Cole. Q. Your father first made a straight-out assignment to you and your brother, and it became your property? A. Yes, sir. Q. And afterwards, feeling that he had given you quite a little sum, when the amount was collected he thought you ought to give him something back out of it? A. Yes, sir. Q. I will ask you if T. Cole Powell ever consented to this agreement you speak of between your father and you? A. No, sir. Q. He knew nothing of it? A. No, sir."

After hearing all the evidence, it was adjudged and decreed by the court that the quitclaim deed from T. C. Powell to L. B. Powell be canceled, set aside, and for naught held, and that all of the right, title, interest, and claim of whatsoever kind or nature of the defendants in and to the lands in controversy be divested out of them and invested in the plaintiffs; also that all the right, title, and interest of the defendants in and to the judgment rendered in their favor and against J. W. Canady and William Hunter by the circuit court of Pemiscot county, on the 28th day of November, 1903, be divested out of them and invested in the plaintiffs in this cause. The defendants duly filed motion to set aside the finding, judgment, and decree of the court, and to grant them a new trial, also a motion in arrest of judgment, both of which motions having been overruled, defendants appealed to this court.

Defendants' first insistence is that the transaction between T. C. Powell and his sons T. Cole Powell and J. H. Powell, with reference to the contract involving the vendor's lien, amounted to nothing more than an agreement to have them collect said cause of action, and that said agreement could have been revoked at any time, there having been no stipulation as to the length of time they might hold said claim for collection. If the facts in evidence supported that theory

of the case, then, as plaintiffs concede, the contention as to the right to revoke would have been correct; but plaintiffs insist that the evidence not only does not support such contention, but is all the other way. The chancellor's finding on this issue was in favor of the plaintiffs, and his finding was well supported by the evidence.

The next contention of defendants is that defendant L. B. Powell bought said contract in good faith, and sold to defendants Brewer and Williams in good faith, and that they became the owners of all the interest of T. C. Powell in the contract. The evidence, we think, clearly shows that L. B. Powell was not a purchaser in good faith. He himself testified that he learned of the claim of T. Cole Powell and J. H. Powell before the deed to him was signed and acknowledged, at which time he paid his father \$400, having previously paid him \$100 on the contract; that before the transaction was consummated he told Brewer of the claim of T. Cole and J. H. Powell, and that Brewer advised him to go ahead and make the deal. It is, therefore, clear that he was not an innocent purchaser, and that he paid the money to T. C. Powell with full knowledge of the plaintiffs' claim. While L. B. Powell testified that T. Cole Powell told him they were only holding the vendor's lien for collection, he admitted on cross-examination, that T. Cole Powell did not say that, but that he simply said, "There is nothing in it." The testimony of A. P. Campbell, Annie Campbell, C. E. Bragg, and S. J. Corbett all goes to show that the purchase was not made in good faith, or without notice of plaintiffs' claim. It plainly appears that, T. C. Powell having previously assigned all his right, title, and interest in and to said vendor's lien to J. H. and T. Cole Powell, he had no interest to assign to L. B. Powell, and it must needs be that nothing passed by such assignment.

It is also claimed by defendants that the plaintiffs knew of the purchase, but made no claim to the lands or any interest therein until after the defendants had obtained the judgment against Canady on the contract, and that they now seek to appropriate that judgment to their own use. This, if anything, is a plea of estoppel; but there is no element of estoppel in the case. While T. Cole Powell and J. H. Powell claimed to be the owners of this vendor's lien at the trial between these defendants and J. W. Canady, they were not parties to that suit, did not cause the defendants to change their position, and did not in any way mislead them.

Defendants also contend that, "if respondents have any title or interest in that contract, or any rights thereunder, they should assert them against the land in a suit against Canady and the others interested in said lands." In view of the fact that defendants had already seized upon and sold this land for the payment of this same debt, we are

unable to appreciate the force or merit, or even the plausibility, of such contention. To say the least, the manner of the attempt on the part of the defendants to obtain the title to this land is not to be commended. In the case of *Waddington v. Lane*, 202 Mo. 387, 100 S. W. 1139, wherein the facts were very similar to those in the case at bar, the court divested the title to the property in dispute out of the party obtaining the same through fraud, and vested the title in the party justly entitled thereto, just as was done by the trial court in this case.

Defendants further insist that, "if the court had any power to set aside the deed from T. C. Powell to L. B. Powell, it could not undertake to project the title over and into T. Cole Powell and J. H. Powell, as they never claimed to have any deed; that, if the court had any power to hold that defendants herein should not have obtained judgment against Canady and others, it did not have any power to transfer that judgment, improperly obtained, to T. Cole Powell and J. H. Powell; and that, if it had the power to ascertain and decree that T. Cole Powell and J. H. Powell were the lawful owners of the contract with Canady, that is all that it could decide."

As to the first proposition, the defendants are evidently mistaken. The court did not hold that plaintiffs derived any title by or through the quitclaim deed from T. C. Powell to L. B. Powell, but that deed was by the decree of the court set aside and for naught held, and the court gave the plaintiffs the full benefit of the judgment theretofore obtained by defendants herein in their suit against Canady et al., in doing which it acted within the jurisdiction and bounds of a court of equity.

In *Baker v. McDaniel et al.*, 178 Mo. 447, 77 S. W. 531, Judge Fox, speaking for the court, said: "The rule that a court of equity, after once acquiring jurisdiction of a cause, will do complete justice and grant full relief, means that the court, keeping in view the purpose of the action, will reach out and adjust all equities necessary to give force and effect to the decree and remedy the evil sought to be corrected by the action." In the case of *Evans v. Missouri, I. & N. Ry. Co.*, 64 Mo. 462, the court said: "A court of equity, owing to the flexibility of its powers, is not confined to a single method of affording redress, but will as just seen, adopt that method of administering relief as will, without circuity of action, compel the party in default to do equity."

Another insistence of defendants is that the circuit court had not power or jurisdiction to render this judgment, and could not have, unless and until the administrator of J. W. Canady, and the heirs of J. W. Canady, as well as William Hunter, were made parties to the suit. We cannot admit this contention. Canady and Hunter had each

had his day in court, trial of the issues was had, with all parties represented, and Hunter appealed from the judgment rendered against him. Neither Canady's nor Hunter's interests were affected by this litigation. The cause of action against Canady and Hunter which the defendants, through fraud, procured from T. C. Powell, and upon which they obtained judgment against Canady and Hunter, was plaintiffs' cause of action; and inasmuch as defendants have already brought suit upon that cause of action, and obtained judgment against Canady and Hunter, it would be an act of injustice as to the latter to set aside all the proceedings and put them to the additional and unnecessary expense of defending a new suit instituted against them by the plaintiffs, when such can be avoided, and complete justice done, now that all the necessary parties are before the court, by divesting the judgment obtained by these defendants out of them, and vesting said judgment in these plaintiffs, for whom, as it were, they hold it in trust. It is of no consequence to Canady or Hunter who has the right to enforce and collect this judgment. So far as this record discloses, neither of them has any interest in this litigation, nor are they, or either of them, here complaining. Besides, if the defendants believed it necessary, they could have made Canady and Hunter parties to this action, which, however, they did not choose to do.

Defendants further say, "there was and is no warrant in law for the attempted subrogation of respondents to the rights of appellants herein and to the judgment obtained by appellants against Canady." What we have already said is a sufficient answer to the proposition here intended to be stated. This is not a question or matter of either legal or conventional subrogation, nor was the case tried upon any such theory, nor does the word "subrogation" occur anywhere in the court's decree.

The findings of the court were in accordance with the evidence, and the decree is eminently right and just. The judgment is affirmed. All concur.

# REMMERS v. REMMERS et al.

(Supreme Court of Missouri, Division No. 2.  
March 30, 1909.)

## 1. CONSPIRACY (§ 5\*)—ESSENTIALS.

Mere conspiracy, without action thereunder, is not actionable.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 4; Dec. Dig. § 5.\*]

## 2. FRAUD (§ 3\*)—ESSENTIALS—"DECEIT."

To constitute actionable deceit, representations must be false to defendant's knowledge, must be made with intent to deceive, must de-

ceive, and must result in injury from reliance thereon.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 1; Dec. Dig. § 3.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1894-1896; vol. 8, p. 7629.]

## 3. EVIDENCE (§ 393\*)—PAROL EVIDENCE—CONTRADICTION OF WRITTEN AGREEMENTS.

One suing at law cannot contradict the terms of a written lease to which he was a party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1736-1744; Dec. Dig. § 393.\*]

## 4. EVIDENCE (§ 429\*)—PAROL EVIDENCE—ADMISSIBILITY TO AFFECT WRITING.

Antecedent or contemporaneous oral agreements are inadmissible to alter or contradict a written contract, but such contract may be shown never to have legally existed, because fraudulently accomplished or because no agreement was made in contemplation of law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1969-1971, 1973, 1974; Dec. Dig. § 429.\*]

## 5. BANKRUPTCY (§ 890\*)—RECOVERY OF PROPERTY OR DAMAGES—TRUSTEE ONLY PROPER PARTY.

A bankrupt cannot sue to recover stock or damages for its conversion or wrongful procurement, the trustee being the only proper party plaintiff.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 890.\*]

## 6. CONSPIRACY (§ 18\*)—PLEADING—EFFECT.

Allegations that a lease, advancements, and promise of other advancements made by defendants to plaintiff were not made in good faith as believed by him, but were made as part of a conspiracy by defendants to defraud plaintiff and to deprive him of his stocks and other property, and to injure him in his good name, fame and reputation, and in his business, etc., cannot be sustained as stating a cause of action for a conspiracy to injure plaintiff's reputation.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 13.\*]

## 7. ASSIGNMENTS (§ 24\*)—RIGHT OF ACTION FOR TORT.

The common-law rule that no right of action for tort to person or property could be assigned has been much relaxed, and torts affecting the person or family relations and those affecting property are now distinguished.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 42-46; Dec. Dig. § 24.\*]

## 8. LIBEL AND SLANDER (§ 85\*)—PLEADING—SUFFICIENCY.

Allegations that defendants injured plaintiff's business by seeking to prevent sales by him and by circulating false reports reflecting upon his integrity are insufficient to charge libel or slander; it being necessary to aver the offensive language and reports.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 85.\*]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by Henry J. Remmers against Frederick J. Remmers and others. Judgment for defendants, and plaintiff appeals. Affirmed.

This cause was brought to this court by appeal on the part of the plaintiff from a judgment of the circuit court of the city of St. Louis sustaining a demurrer to plaintiff's

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

amended petition. The petition to which the demurrer was interposed was as follows:

"Plaintiff states that, at the times herein stated, the College Hill Press Brick Works was a corporation, organized under the laws of the state of Missouri; that at said times the Carthage Marble & White Lime Company was likewise a corporation organized under the laws of the state of Missouri; that plaintiff was on or about the 19th day of July, 1902, the owner of 29 shares of the capital stock of the said Carthage Marble & White Lime Company, of the par value of \$100 per share, and that said stock was, at that time, of the actual value of, to wit, \$35,000; that at said times the Goesse & Remmers Building & Contracting Company was likewise a corporation organized under the laws of the state of Missouri; that on or about the 19th day of July, 1902, plaintiff was the owner of 50 shares of the capital stock of said Goesse & Remmers Building & Contracting Company, of the par value of \$100 per share, and that said stock was at that time of an actual value of, to wit, \$12,500; that on and prior to the 19th day of July, 1902, the defendants Remmers and Otto and Joseph J. Kulage were the owners of more than 51 per cent. of the capital stock of said College Hill Press Brick Works; that at that time said persons controlled said corporation, and acted as its officers and directors; that at said times said company owned a plant and grounds for the manufacture of bricks, located in the vicinity of College avenue and Broadway, in the city of St. Louis; that said plant had been unused for several years and was in bad repair, and to put same in condition for the manufacture of bricks would require the expenditure of large sums of money; that the grounds surrounding the plant, valuable only for the clay they contained, were covered with débris, requiring the expenditure of large sums of money for its removal; that on and prior to the 19th day of July, 1902, defendants were desirous and anxious to have the defendant the College Hill Press Brick Works to lease the said brick manufacturing plant and appurtenances to plaintiff, who at the time was inexperienced in the manufacture of bricks; that, being so desirous to lease said brick manufacturing plant and appurtenances to plaintiff, defendants, acting principally through defendant Otto Kulage, induced plaintiff, by promise of financial assistance in repairing, maintaining, and operating said plant, and by the representation that large profits could be made in the manufacture of bricks and the sale thereof, to become the lessee of said brick manufacturing plant and appurtenances; that said lease was in words and figures as follows, to wit:

"This indenture made this 19th day of July, 1902, by and between the College Hill Press Brick Works, a corporation, party of the first part, and Henry J. Remmers, party

of the second part, both parties residing and doing business in the city of St. Louis, Missouri, witnesseth: That the party of the first part, for and in consideration of the covenants and agreements, hereinafter mentioned to be kept and performed by the said party of the second part, has this day demised and leased to the said party of the second part, all of the premises, machinery, tools and appliances used in connection with brick making, situate, lying and being in the city of St. Louis, and state of Missouri, known and described as follows, to wit: "Beginning at the southeast corner of city block 3386, being the northwest corner of Bellview street and Linton avenue, and continuing on the north line of Linton avenue, crossing Von Phul and Zealand streets to alley in city block 3388, thence along the eastern line of said alley to the southern line of said alley crossing said Zealand and Von Phul streets to said Bellview street, then along the western line of said Bellview street, to the point of beginning." Also all the machinery, tools, appliances and fixtures of every nature and description, and in condition as said machinery, tools, appliances and fixtures as may be this present day on said premises.

"To have and to hold the above said described premises with all the privileges and appurtenances belonging to the same, unto the said party of the second part, from this the 19th day of July, 1902, to the 19th day of July, 1912.

"And the said party of the second part, in consideration of the leasing of said premises as aforesaid, does covenant and agree with the said party of the first part, to pay the said party of the first part, as rent for said premises, the sum of fifty thousand dollars in the following manner, to-wit: Five thousand dollars to-day, and forty-five thousand dollars divided into nine (9) good, satisfactory and negotiable notes of five thousand dollars each, to mature and become payable on the first day of March, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911 and 1912. It is further agreed that at the expiration of such term of ten years, this lease may be extended for a further period of one year, at the same rental, namely, five thousand dollars per annum, payable by said second party to said first party. And it is further agreed by said party of the second part, that neither he nor his legal representatives will take any ground or clay lower than the established adjoining street grades, from said premises, nor will permit nor allow others to do so, nor will underlet said premises or any part thereof, or assign this lease, without the written assent of the said party of the first part had and obtained thereto, that he will put into repair, and at all times during the term of this lease, at his own expense, maintain and repair the kilns and boilers at press building, and aforesaid machinery, tools, appliances and fixtures on said prem

ises; that the said party of the second part will peaceably deliver all of aforesaid premises, machinery, etc., up to said party of the first part, its heirs, executors, administrators and assigns at the termination of this lease, or at the option of said party of the first part, whenever said party of the second part fails to pay the said notes, or rent when due, or to keep or perform any other of the covenants and agreements heretofore stated.

"In witness whereof, the said parties have hereunto in the city of St. Louis, Missouri, and to duplicate copies hereof, set their hands the day and year first above written."

"Plaintiff says that he accepted said lease upon verbal conditions mutually agreed to between the parties at the time, as follows: That the plaintiff should hypothecate or pledge his said 50 shares of stock to the Goesse & Remmers Building & Contracting Company, and his 29 shares of stock in the Carthage Marble & White Lime Company with the defendant Otto Kulage, which, as the defendants well knew at the time, was substantially all the property possessed by plaintiff, to secure an advancement of \$8,000 then made to plaintiff by said Kulage, as well as further advancements, to an aggregate of \$30,000, which said Kulage then and there agreed to make as needed by plaintiff in the repair, maintenance, and operation of said plant. And it was also mutually agreed that the plaintiff should have the privilege of repaying the sums so advanced, and to be advanced, at any time, with legal interest, until all said advancements were paid, and that said Kulage should hold said stock until all said advancements were repaid, and not present the certificates representing the same to the issuing corporation for transfer on its books; that thereupon, relying on the promises and agreements aforesaid, and in consideration thereof, plaintiff indorsed the blank power of attorney on the back of each of the certificates representing said stock, and at the same time executed a memorandum in writing, as follows, to wit:

"St. Louis, Mo., July 19th, 1902. This is to certify that I have sold to Otto Kulage the following shares of stock, namely, 29 shares of the Carthage Marble & White Lime Company; 50 shares of the Goesse & Remmers Building and Contracting Company, and that I authorize and hereby request the transfer of said shares of stock to said Otto Kulage on the books of said corporation."

"Plaintiff says that it was mutually understood and agreed between plaintiff and defendants, at the time, that while said memorandum was in form a certificate purporting to represent by its terms an absolute sale of said property, it was in fact mutually understood and agreed between plaintiff and said Kulage, at the time, that said transfer was only to be a pledge or hypothecation of said shares as security for the \$8,000 then advanced and loaned to plaintiff by defendants,

and was intended as well to secure other advancements that should be made to plaintiff from time to time as needed, as hereinbefore alleged, and to the extent hereinbefore stated.

"Plaintiff says that the execution and delivery by defendants to plaintiff of said lease, the said advancement of \$8,000 on said stock, and the promise of other advancements, as needed, to plaintiff by defendants, although believed by the plaintiff at the time to be made in good faith by the defendants, were not in fact made in good faith by the defendants or either of them, but were, on the contrary, a part of a plan, scheme, and conspiracy entered into between the defendants to cheat and defraud plaintiff, and to deprive him of his said stocks and other property, and to injure him in his good name, fame and reputation, and in his business, and to secure for themselves the possession of said brick manufacturing plant and appurtenances after plaintiff should have put the same in repair and condition for the manufacture of bricks.

"Plaintiff says that relying upon said promises of the defendants to make other and additional advancements as aforesaid, as provided in the argument aforesaid, he paid the defendant the College Hill Press Brick Works \$5,000 in full of the first year's rental of said plant and appurtenances, as provided in the lease aforesaid, and entered into possession of said property under said lease, and expended large sums in necessary repairs and alterations, and began the manufacture of bricks before the defendants refused to advance, as agreed, other sums, and before he discovered that the defendants did not propose to keep their agreements with him, and make said other advancements; that about that time defendants, instead of acknowledging a pledge of said stock under the terms and conditions in said agreement provided, and as herein stated, repudiated the same and claimed ownership of said stocks. Plaintiff also discovered, about that time, that while defendants represented at and before the making and delivery of said lease that there was sufficient clay on said grounds to last 10 years in the manufacture of bricks therefrom, and as provided in said lease, there was in reality only clay sufficient to last for about 4 years.

"Plaintiff further says that the defendants, instead of keeping their said agreement to make the advancements as aforesaid, and relied on by plaintiff as aforesaid, never after the 19th day of July, 1902, made any other advancements to plaintiff under said agreement or otherwise. Plaintiff charges that, secretly and known only to themselves, and without knowledge thereof by plaintiff, defendants never purposed or intended to keep their said agreement to make advancements other than said \$8,000; and plaintiff charges that they made said advancement of \$8,000

for the purpose of getting possession of plaintiff's said stocks and the said plant after plaintiff should have put the same in order and condition for the manufacture of bricks, and for the further evil purpose and intent of injuring plaintiff in his good name, fame, and reputation, and for the purpose of driving him out of business and away from the city of St. Louis, all of which, as well as the other evil purposes and acts as herein alleged, were a part of a plan, scheme, and conspiracy entered into between the defendants for the purpose of cheating and defrauding plaintiff out of his said stocks and of the investment of the funds secured by the pledge aforesaid, and other funds contributed and used by plaintiff in said business, as well as the dividends and earnings of said stocks.

"The plaintiff says that in pursuance of said plan, scheme, and conspiracy to cheat and defraud plaintiff, that although plaintiff fully kept and performed all the terms of said agreement required by him to be kept or performed, as well as the terms of the said lease, the defendants set about, in pursuance of said plan, scheme, and conspiracy, systematically to undermine plaintiff in his business, reputation, and credit, by seeking to prevent sales of brick by him, by circulating false and untruthful reports reflecting on his integrity, and by soliciting creditors of plaintiff, whom he was unable to pay because of the default and refusal of defendants in failing to make the advancements as provided in the agreement as hereinbefore set forth, to bring against plaintiff an involuntary proceeding in bankruptcy in the District Court of the United States for the Eastern District of Missouri; that they did induce certain creditors of plaintiff to join certain of the defendants to bring such proceedings and as a result, on or about the 25th day of April, 1903, plaintiff was, on the petition of said parties, by said court adjudged a bankrupt, by reason of all of which plaintiff has been injured in his good name, fame and reputation, has been humiliated and mortified, and has suffered great pain of body and mind, was rendered for the space of about one year almost a mental and physical wreck, and during that time was unable to follow any useful occupation, and plaintiff was ruined financially and in his business reputation and standing in the community, and that he has lost said stocks and the money invested by him in said brick business; and plaintiff has also lost his profits on the brick manufactured by him, as well as the dividends on said stock, all to his damage in the sum of \$75,000, and for his costs he prays judgment."

To this petition the defendants interposed a demurrer, which was as follows:

"Now comes the above-named defendants, by their attorney, and demur to the amended petition filed by plaintiff, and for cause of demurrer state:

"First. That it appears upon the face of the petition that plaintiff has not the legal capacity to prosecute this action, for the reason that he has been adjudged a bankrupt, under the laws of the United States, since the alleged happening of the matters and things in said petition mentioned and set forth.

"Second. That said petition does not state facts sufficient to constitute a cause of action against these defendants or any or either of them.

"Third. That plaintiff in his said petition has attempted to state a number of alleged causes of action in one count."

On the 4th day of December, 1905, at the December term of said circuit court, this demurrer was sustained, and, the plaintiff declining to plead further, final judgment was rendered upon the demurrer. From this judgment the plaintiff prosecuted this appeal, and the record is now before us for consideration.

Benj. J. Klene, for appellant. Robt. L. McLaran, for respondents.

FOX, J. (after stating the facts as above). The legal propositions disclosed by the record in this cause rest within a very narrow compass; that is, does the action of the court in sustaining the demurrer to the petition interposed by the defendants constitute such error as would warrant this court in reversing the judgment in this cause?

We have reproduced in full the petition of the plaintiff, as well as the demurrer interposed by the defendants. Exhaustive briefs by learned counsel for appellant as well as the respondents are presented to us, in which numerous authorities are cited in support of the respective contentions of the parties to this litigation. It can serve no good purpose to burden this opinion with a review of the numerous authorities cited by counsel. We have carefully analyzed each and every allegation embraced in the petition, and have fully considered all of the authorities applicable to the legal propositions confronting us; that is, whether or not the petition in this cause states sufficient facts to constitute a cause of action. After a most careful consideration of the proposition presented to our consideration, we have reached the conclusion that the petition in this cause does not state facts sufficient to constitute a cause of action upon which the plaintiff in this action has any right of recovery. While it is true that this petition alleges that there was a conspiracy between the defendants, and this allegation of conspiracy is repeated at different places in the petition, yet the law is well settled that the mere fact of a conspiracy cannot be made the subject of a civil action.

Mr. Cooley, in his standard work on Torts (2d Ed.) p. 143, thus correctly states the rule: "The general rule is that a conspiracy



cannot be made the subject of a civil action unless something is done, which without the conspiracy would give a right of action." Continuing the discussion of that subject, Mr. Cooley says: "The significance of the conspiracy consists, therefore, in this: that it gives the persons injured a remedy against parties not otherwise connected with the wrong. It is also significant as constituting matter of aggravation, and as such tending to increase the plaintiff's recovery." Hence it follows that the repeated allegations of conspiracy between these defendants have but little significance, unless in addition there is stated a concrete cause of action.

After making the formal allegations identifying the defendants, it is then alleged that "the defendants Remmers and Otto and Joseph J. Kulage were the owners of more than 51 per cent. of the capital stock of said College Hill Press Brick Works; that at that time said persons controlled said corporation, and acted as its officers and directors; that at said time said company owned a plant and grounds for the manufacture of bricks, located in the vicinity of College avenue and Broadway in the city of St. Louis; that said plant had been unused for several years, and was in bad repair, and to put same in condition for the manufacture of bricks would require the expenditure of large sums of money; that the grounds surrounding the plant, valuable only for the clay they contained, were covered with debris, requiring the expenditure of large sums of money for its removal; that on and prior to the 19th day of July, 1902, defendants were desirous and anxious to have the defendant the College Hill Press Brick Works to lease the said brick manufacturing plant and appurtenances to plaintiff, who at the time was inexperienced in the manufacture of brick; that, being so desirous to lease said brick manufacturing plant and appurtenances to plaintiff, defendants, acting principally through the defendant Otto Kulage, induced plaintiff by promise of financial assistance in repairing, maintaining, and operating said plant, and by the representation that large profits could be made in the manufacture of brick and the sale thereof, to become the lessee of said brick manufacturing plant and appurtenances." Then follows the contract of lease.

Clearly these allegations do not state any cause of action. It is not sought by the allegations of such promises and representations, which the plaintiff avers induced him to become the lessee of said brick manufacturing plant, to annul or cancel the contract of lease as entered into between the parties, and if such allegations are made for the purpose of stating a cause of action for deceit they fall far short of meeting the requirements of the law upon that subject. It is essential, to state a cause of action of that character, to aver that such representations were false and so known to be by the de-

fendant, and that such representations were made with the intention of deceiving plaintiff, and that plaintiff was deceived thereby, and, relying upon such promises and representations, he was induced to act to his injury.

The petition then proceeds to state that "the plaintiff accepted said lease upon verbal conditions mutually agreed to between the parties at the time; that is, that the plaintiff should hypothecate or pledge his said 50 shares of stock to the Goesse & Remmers Building & Contracting Company, and his 29 shares of stock in the Carthage Marble & White Lime Company with the defendant Otto Kulage which, as the defendants well knew at the time, was substantially all the property possessed by plaintiff, to secure an advancement of \$8,000 then made to plaintiff by said Kulage, as well as future advancements, to an aggregate of \$30,000, which said Kulage then and there agreed to make as needed by plaintiff in the repair, maintenance, and operation of said plant. And it was also mutually agreed that the plaintiff should have the privilege of repaying the sums so advanced and to be advanced, at any time, with legal interest, until all said advancements were repaid, and that said Kulage should hold said stock until all said advancements were repaid, and not present the certificates representing the same to the issuing corporation for transfer on its books." Then follows the allegation in the petition that it was by relying upon the promises and agreements as heretofore indicated, and in consideration thereof, that plaintiff executed the absolute bill of sale to the stock heretofore mentioned. It was further alleged in the petition that it "was mutually understood and agreed between the plaintiff and defendants, at the time that while said memorandum of the sale of said stock was in form a certificate purporting to represent by its terms an absolute sale of said property, it was in fact mutually understood and agreed between the plaintiff and said Kulage at the time that said transfer was only to be a pledge or hypothecation of said shares as security for the \$8,000 then advanced and loaned to plaintiff by defendants, and was intended as well to secure other advancements that should be made to plaintiff from time to time as needed, as hereinbefore alleged, and to the extent hereinbefore stated."

Manifestly these allegations undertake to contradict the terms, not only of the written lease, but of the written memorandum by which certain shares of stock were sold by plaintiff to the defendants. Clearly, whatever the nature of this action may be, when the petition is considered in its entirety it manifestly undertakes to state a cause of action at law. This being true, clearly the plaintiff cannot be permitted to seek the contradiction of the terms of the written

instrument heretofore indicated in that character of action. It is conceded by learned counsel for plaintiff that this is not an equitable proceeding for the purpose of reforming either the lease or the bill of sale as heretofore referred to. It nowhere appears from the allegations in the petition that plaintiff seeks to redeem the stock, and manifestly there is no breach of contract declared upon.

Counsel for appellant, in support of the foregoing allegation, direct our attention to the case of *Culp & Co. v. Powell*, 68 Mo. App. 238. An examination of that case will demonstrate that it falls far short of maintaining the contention of the appellant in this case. The well-settled rule which forbids the introduction of oral agreements prior or contemporaneous with a written agreement, whereby the terms of the latter are varied, altered, or contradicted, is fully recognized in that case; however, on the other hand, the rule is announced, which is equally well settled, that you may show that a written agreement never had any legal existence by reason of the fact that it was fraudulently accomplished, and in contemplation of law was no agreement at all. But that is not this case. The allegations now under discussion do not pretend to say that there was no agreement at all, but it is sought to vary, alter, and contradict the terms of the agreement as heretofore mentioned. In other words, it is sought by these allegations in a pure action at law to reform written instruments and have them conform to certain verbal agreements which plaintiff alleges were made in addition to the written agreements. But aside from all this, the petition shows upon its face that there has been appointed a trustee in bankruptcy who has charge of the estate of the plaintiff, and if the allegation now under consideration means anything—that is, that the defendants fraudulently obtained the stock heretofore referred to belonging to the plaintiff—and if it is sought by these allegations to recover this stock or damages for the conversion of it, or for the wrongful procuring of it, clearly the trustee in bankruptcy is the only proper party plaintiff, and the present plaintiff is in no position to seek a recovery upon that ground.

Finally, counsel for appellant insist that this petition states a cause of action for a conspiracy to defraud and injure plaintiff's reputation. In other words, the contention of the plaintiff is thus briefly stated by his counsel; "It is therefore respectfully submitted that the said petition states against the defendants a case of combination and conspiracy by means of the various matters alleged to defraud plaintiff and injure him in his good name, fame and reputation, against which he must have the relief prayed." In the consideration of this insistence by appellant, it is well to keep in view the allegations in the petition concerning the particular cause of action plaintiff insists is embraced

in his petition. The first allegation to which our attention is directed is: "Plaintiff says that the execution and delivery by defendants to plaintiff of said lease, the said advancement of \$8,000 on said stocks, and the promise of other advancements, as needed, to plaintiff by defendants, although believed by the plaintiff at the time to be made in good faith by the defendants, were not in fact made in good faith by the defendants or either of them, but were, on the contrary, a part of the plan, scheme, and conspiracy entered into between defendants to cheat and defraud plaintiff, and to deprive him of his said stocks and other property, and to injure him in his good name, fame and reputation, and in his business, and to secure for themselves the possession of said brick manufacturing plant and appurtenances after plaintiff should have put the same in repair and condition for the manufacture of brick." Treating of the allegations in this petition wherein it is alleged that there was a conspiracy entered into between the defendants to cheat and defraud plaintiff, it is sufficient to say that those allegations cannot have any reference to anything else other than to cheat and defraud plaintiff out of some of his property or property rights, and, so far as a statement of a cause of action to cheat and defraud the plaintiff is concerned, obviously that cause of action could only be maintained by the trustee in bankruptcy. In other words, if the plaintiff has been cheated or defrauded out of certain property, such cause of action rests with the trustee in bankruptcy.

The rule of the common law that no cause of action in tort, whether to person or property, could be assigned, has been very much relaxed, and the distinction is now marked between rights of action for tort affecting the person or family relations, and those affecting property. In the case of *Snyder v. Wabash Ry. Co.*, 86 Mo. 613, this court reviewed the authorities, and expressly ruled that all causes of action arising in tort may be assigned which would survive to the personal representative, and in that case the court approvingly quoted from Mr. Pomeroy in his work on Remedies and Remedial Rights, wherein it was said: "It is now the general American doctrine that all causes of action arising from torts to property, real or personal—injuries to the estate by which its value is diminished—do survive, and go to the executor or administrator as assets in his hands. As a consequence such choses in action, although based upon a tort, are assignable."

Our attention is next directed to the following allegations in plaintiff's petition: "Plaintiff further says that the defendants, instead of keeping their said agreement to make the advancements as aforesaid, and relied on by plaintiff as aforesaid, never after the 19th day of July, 1902, made any other advancements to plaintiff under said agree-

ment or otherwise. Plaintiff charges that secretly, and known only to themselves, and without knowledge thereof by plaintiff, defendants never purposed or intended to keep their said agreement to make advancements other than said \$8,000, and plaintiff charges that they made said advancement of \$8,000 for the purpose of getting possession of plaintiff's said stocks, and the said plant after plaintiff should have put the same in order and condition for the manufacture of brick, and for the further evil purpose and intent of injuring plaintiff in his good name, fame, and reputation, and for the purpose of driving him out of business and away from the city of St. Louis, all of which, as well as the other evil purposes and acts as herein alleged, were a part of a plan, scheme, and conspiracy entered into between the defendants for the purpose of cheating and defrauding plaintiff out of his said stocks, and of the investment of the funds secured by the pledge aforesaid, and other funds contributed and used by plaintiff in said business, as well as the dividends and earnings on said stocks."

It is sufficient to say of these allegations that what was said respecting similar allegations to which attention has been directed is equally applicable to these particular allegations. It will be observed that the plaintiff says that the defendants made the advancement of \$8,000 for the purpose of getting possession of plaintiff's said stocks, and the said plant after plaintiff should have put the same in order and condition for the manufacture of brick, and for the further evil purpose and intent of injuring plaintiff in his good name, fame, and reputation, and for the purpose of driving him out of business and away from the city of St. Louis, all of which, as well as the other evil purposes and acts as herein alleged, were a part of a plan, scheme, and conspiracy entered into between the defendants for the purpose of cheating and defrauding plaintiff out of his said stocks, and of the investment of the funds secured by the pledge aforesaid, and other funds contributed and used by plaintiff in said business, as well as the dividends and earnings on said stocks.

It will be noted that in the allegations now under consideration, in their final analysis, plaintiff expressly alleges that all of the acts as herein alleged were a part of a plan, scheme, and conspiracy entered into between the defendants for the purpose of cheating and defrauding plaintiff out of his said stocks, and of the investment of the funds secured by the pledge aforesaid, and other funds contributed and used by plaintiff in said business, as well as the dividends on said stocks. In this allegation we have marshaled all the acts and allegations of evil purposes on the part of these defendants in which it is charged that those acts were done for the purpose of cheating and defrauding plaintiff out of certain funds, and other funds con-

tributed and used by plaintiff in said business. Obviously, plaintiff, whose estate is now in the hands of a trustee in bankruptcy, is in no position to maintain the cause of action which is sought to be alleged by these allegations. By these allegations plaintiff sums up all of the acts of the defendants, and alleges that those acts were committed for the purpose of cheating and defrauding him out of certain property. If the defendants should by false and fraudulent promises and representations have secured any property or property rights of the plaintiff, the trustee in bankruptcy has full power to remedy such wrongs and recover such property as was fraudulently obtained, or for any injury that has been done the property rights of the plaintiff.

Finally, plaintiff alleges that the defendants, by "this conspiracy, set about, in pursuance of said plan, scheme, and conspiracy, systematically to undermine plaintiff in his business, reputation, and credit, by seeking to prevent sales of brick by him, by circulating false and untruthful reports reflecting on his integrity, and by soliciting creditors of plaintiff whom he was unable to pay because of the default and refusal of defendants in failing to make the advancements, as provided in the agreement as hereinbefore set forth, to bring against plaintiff an involuntary proceeding in bankruptcy in the District Court of the United States for the Eastern District of Missouri." It is sufficient to say of this allegation that, if it is sought by it to state a cause of action for slander against the person or the business of the plaintiff, it is entirely insufficient. If the defendants sought to injure the business of the plaintiff by seeking to prevent sales of brick by him, by circulating false and untruthful reports reflecting upon his integrity, then clearly there should be a definite statement made as to what the reports were and what was said. Clearly it will not be seriously contended that a mere general allegation, as in the petition in this case, that the defendants injured the business of the plaintiff by seeking to prevent sales of brick by him, by circulating false and untruthful reports reflecting upon his integrity, would be sufficient to constitute a good cause of action. The offensive language, as well as the reports charged to have been false and the acts of the defendants, under the well-settled rules of law, should be distinctly averred. The allegations of this petition now under consideration fall far short of constituting a cause of action for slander or libel of the person or business of the plaintiff.

We see no necessity for pursuing this subject further. We have carefully analyzed all of the allegations in the petition, and have considered them in every phase to which they may be applicable, and we see no escape from the conclusion that there is no well-defined or concrete cause of action stated by the plaintiff.

We have examined the authorities to which our attention was directed by learned counsel for appellant, and it is sufficient to say that an examination of them fails to disclose that they are in any way in conflict with the conclusions as herein reached.

The trial court correctly and properly sustained the demurrer interposed by the defendant, and its judgment upon such demurrer should be affirmed, and it is so ordered. All concur.

### HARTZLER v. METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, Division No. 1.  
March 31, 1909.)

#### 1. APPEAL AND ERROR (§ 170\*)—JURISDICTION—CONSTITUTIONAL QUESTIONS.

A constitutional question was raised too late by motion for new trial, so as to give the Supreme Court jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1037; Dec. Dig. § 170.\*]

#### 2. APPEAL AND ERROR (§ 758\*)—CONSTITUTIONAL QUESTIONS—BRIEFS—SPECIFICATION OF ERRORS.

The burden is on an appellant, relying on the unconstitutionality of a statute, to specifically point out wherein it is unconstitutional, and a mere recitation in the brief of the clauses of the Constitution alleged to be violated is insufficient to call for a review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. § 758.\*]

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by John C. Hartzler against the Metropolitan Street Railway Company. Judgment for plaintiff, and defendant appeals. Cause transferred to Kansas City Court of Appeals.

Scarritt, Scarritt & Jones and Chas. M. Miller, for appellant. John H. Lucas and C. L. Botsford, for respondent.

LAMM, P. J. Plaintiff sues for \$10,000 for the wrongful death of his wife; his action obviously grounded on the amendment to section 2864 of the old damage act (Rev. St. 1899, § 2864, as amended by Laws 1905, p. 135 et seq. [Ann. St. 1906, p. 1637]), and recovers \$4,000. The answer is a plain general denial and an allegation of contributory negligence. Up to the moment of verdict and judgment, no constitutional guaranty was invoked by defendant. In a motion for a new trial defendant for the first time raised a constitutional question below. Point 8 of that motion runs: "The court denied to this defendant, in the giving of the instructions numbered 1 and 5, the guaranties afforded to it by the Constitution of the state of Missouri, viz., those afforded by sections 4, 20, and 30 of article 2 of said Constitution (Ann. St. 1906, pp. 128, 146, 166), in this: That the said instruction denied to the defendant the

natural right to the enjoyment of the gains of its own industry and take from the defendant its property for private use without any compensation therefor, and deprive the defendant of its property without due process of law; and deny to the defendant the protection afforded by section 53, art. 4, of the Constitution of the state of Missouri (Ann. St. 1906, p. 197), in this: That they authorize the rendition of a judgment against this defendant based upon a special law purporting to have been passed by the said Legislature without any notice therefor, and without any authority for the passage of the same, and delegating to the jury in the assessment of damages the affixing of a penalty, the power of which to affix is vested solely and alone in the Legislature, and by charging and declaring to the jury that the act of the Legislature of the state of Missouri entitled 'An act to amend section 2864 of chapter 17 of the Revised Statutes of the state of Missouri of 1899, entitled "Damages and Contributions in Actions of Tort," approved April 13, 1905' (Laws 1905, p. 135), was and is a valid exercise of the legislative power of the state of Missouri, when the said act aforementioned is in truth and in fact, and was averred and charged to be by this defendant, violative of every provision of the Constitution hereinbefore referred to." The motion being overruled, defendant appeals here.

The amount involved is below our jurisdiction. If this court has any, it is by virtue of the fact that defendant waited until the judgment rendered was too small to give it, and then sought to give it by the foregoing clause in that motion. It becomes apparent, from an examination made of the record, that the constitutional question, in due course of orderly procedure below, could have been put on the case by the answer, or in the instructions, or in other timely ways, so as to save it. The motion for a new trial was not the first door open for the question to enter, and in our later decisions we have ruled that a question of such gravity must be raised as soon as orderly procedure will allow; and this in order that the trial court may be treated fairly, and the question get into the case under correct safeguards and earmarked as of substance and not mere color. In *Suess v. Insurance Co.*, 193 Mo., loc. cit. 570, 91 S. W. 1041, a constitutional question was held properly preserved; the court saying: "That point was well preserved in the trial court, in objection to the evidence, in an instruction asked, and in the motion for a new trial. It could not have been made in this case any sooner than it was." In *Ash v. City of Independence*, 169 Mo. 77, 68 S. W. 883, some stress was laid, arguendo, on the fact that the constitutional point was made timely. So in *Barber Asphalt Co. v. Ridge*,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

169 Mo., loc. cit. 387 et seq., 68 S. W. 1043. In *Shell v. Railroad*, 202 Mo. 339, 100 S. W. 617, it was pointed out how a constitutional question in the answer might become lifeless through after proceedings. In *Lohmeyer v. St. Louis Cordage Co.* (not yet officially reported) 113 S. W. 1108, the constitutional question was raised for the first time in the motion for a new trial, and it was held, on review of many cases, that under the circumstances there present it could have been raised sooner, and therefore was not raised at all, so as to give this court jurisdiction. That case is on all fours with this, and must control, if it be followed. In *State v. Gamma* (not yet officially reported) 114 S. W. 619, the *Lohmeyer* Case was followed, and it was held that a constitutional question could not be raised for the first time in a motion for arrest, under the record presented there.

Here, as in the *Lohmeyer* Case, appellant makes the constitutional point in its brief, and stops short with that; counsel contenting themselves there (as here) with making the point and leaving it wholly unreasoned. In this condition of things, it is pertinent to observe that a stout presumption runs that all statutes are prima facie constitutional. The burden lay, then, on appellant to specifically point out wherein, why, and wherefore the law was unconstitutional. Appellant omits the why and the wherefore. A mere recitation is made in the brief of the clauses of the Constitution, state and federal, alleged to be violated. But a mere bare schedule of the clauses of the Constitution alleged to be violated has no tendency to show wherein they are violated. The failure of counsel to reason the point (though well equipped to do so) is tantamount to an abandonment. By saying so much as that, we do not mean to rule that if we, prima facie, had jurisdiction, we would lose it by the mere abandonment of the point; for jurisdiction is not given or lost by mere consent. What we mean to say is that we feel invited to broadly infer that, by their refusal to reason the point, counsel concede it no point to reason; and this since briefing a case necessarily involves the elemental idea of aiding an appellate court to determine controverted questions by presenting legal principles and citing authorities. Rule 15 (73 S. W. vi). This court will neither grasp jurisdiction nor shirk the responsibility of assuming it, and our disposition of this case is softened to us because of the construction we have put on counsel's position. We remain content with the reasoning of the *Lohmeyer* Case and the conclusion there reached. Hence, as we ruled there, we rule here. Because the constitutional point was not timely invoked in accordance with the usual course of orderly procedure, we hold this court has no jurisdiction of this appeal.

The cause is transferred to the Kansas City Court of Appeals for its decision. All concur.

# STARR et al. v. BARTZ et al.

(Supreme Court of Missouri, Division No. 1.  
March 31, 1909.)

## 1. PARTITION (§ 9\*)—VOLUNTARY PARTITION—EFFECT ON TITLE.

The husband of an heir takes no greater title, because joined with her as a joint grantee in a voluntary partition deed, than he would have taken as her husband if he had not been named in the deed at all, since title passes to the heir, not as a purchaser under the deed, but by inheritance.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 26; Dec. Dig. § 9.\*]

## 2. DEEDS (§ 121\*)—TITLE ACQUIRED—QUITCLAIM DEED.

A purchaser for value under a quitclaim deed acquires whatever title the grantor had at the delivery of the deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 395; Dec. Dig. § 121.\*]

## 3. VENDOR AND PURCHASER (§ 224\*)—QUITCLAIM DEED—PRIORITIES.

A purchaser for value under a quitclaim deed is within the protection of the registry act, and his title is good against a prior unrecorded deed of which he has no actual notice.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 472; Dec. Dig. § 224.\*]

## 4. VENDOR AND PURCHASER (§ 224\*)—BONA FIDE PURCHASERS—QUITCLAIM DEED.

A purchaser under a quitclaim deed is not a bona fide purchaser, and takes whatever title grantor had to convey, subject to existing equities, except where the registry act protects his title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 472; Dec. Dig. § 224.\*]

## 5. VENDOR AND PURCHASER (§ 224\*)—BONA FIDE PURCHASERS—QUITCLAIM DEED—CONSIDERATION.

To fall within the exception that a quitclaim deed is not subject to equities to which the registry act applies, but is protected thereby, value must have been given therefor.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 472; Dec. Dig. § 224.\*]

## 6. LIMITATION OF ACTIONS (§ 80\*)—RECOVERY OF REAL PROPERTY.

Rev. St. 1899, § 4267 (Ann. St. 1906, p. 2342), providing that if a married woman, entitled to sue to recover real estate, shall die, her heirs may sue within three years after her death, but not thereafter, does not bar an action by heirs where the deed attacked, on its face, in the light of the record title, conveyed nothing, and cast no cloud on their mother's title while she lived, because not recorded till after her death, and she was without knowledge of it, so that there was nothing that would support an action by her.

[Ed. Note.—For other cases, see *Limitation of Actions*, Dec. Dig. § 80.\*]

## 7. ESTOPPEL (§ 94\*)—EQUITABLE ESTOPPEL—CONSTRUCTIVE KNOWLEDGE OF FACTS.

Constructive knowledge of what the records showed relative to the title to real estate cannot be made the basis of a charge, in the face of positive proof that there was no actual knowledge, that the persons having notice fraudulent-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ly kept silent when they should have spoken and were estopped to thereafter speak.

[Ed. Note.—For other cases, see *Estoppel*, Dec. Dig. § 94.\*]

**8. ESTOPPEL (§ 94\*)—EQUITABLE ESTOPPEL—CONDUCT.**

Where heirs knew nothing of a sale of land by a coheir until after it had been made, and there was nothing to show that the purchaser was misled by any conduct of theirs, or that he relied on anything they said or did, but, on the contrary, it appears that he had the records searched and was guided by that examination, such heirs are not estopped to sue for their interest in the land.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 276-284; Dec. Dig. § 94.\*]

Appeal from Circuit Court, Bates County; C. A. Denton, Judge.

Action by Annie R. Starr and another against John F. Bartz and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Silvers & Silvers, for appellants. Thos. J. Smith, for respondents.

VALLIANT, J. From the plaintiffs' petition, as set out in the abstract, it is not entirely clear what kind of a suit this was intended to be. Plaintiffs in their brief say the petition is in two counts; but, if so, some of it has been omitted from the abstract, as it is evident some of the judgment or decree has also been omitted, both from the abstract and from the short transcript on which the cause was brought to this court. But the suit was tried on the theory that it was a suit for the partition of land, and as both parties seem to acquiesce in that view of the case, and as the petition is susceptible of that construction we will so consider it.

The land in question lies in Bates county. It, with other lands, was owned in his lifetime by Samuel Grosshart, who was the grandfather of the plaintiffs, Annie and Dennie Starr, and of the defendant Margaret Kisner. Grosshart died intestate in 1862, leaving six children, four sons and two daughters. One of the daughters, Mildred, the wife of Dr. D. L. Lee, died intestate in 1882, leaving her husband, Dr. Lee, and four children, Annie Starr, Dennie Starr, Margaret Kisner, and Joel Lee. At the time of her death, in 1882, Mrs. Lee owned the land involved in this suit in fee simple, and it descended to her four children in equal parts, subject to her husband's right of curtesy, unless the title in fee devolved on him at her death by virtue of a deed to be presently mentioned. The plaintiffs claim title as heirs of their mother, each an undivided one-fourth, conceding to their sister Mrs. Kisner, and to the defendant Bartz, as assignee of their brother Joel, each an undivided one-fourth; but Mrs. Kisner asserts no claim to the 50 acres involved in this suit. The land she claims is in question in another suit (117 S. W. 1129), which is a twin

to this one and will be considered next after this one. In 1887, five years after the death of his wife, Dr. Lee executed a deed whereby he essayed to convey (and, if he had title, did convey) to his son Joel the land in suit, and December 31, 1900, Joel conveyed whatever interest he had to defendant Bartz. Dr. Lee died in 1898. If Dr. Lee held the fee-simple title in 1887, when he made the deed to Joel, the plaintiffs have no title to the land; but, if he had then only a life estate by curtesy, the plaintiffs have a right each to one-fourth, unless they have lost their right by operation of the statute of limitations, or are estopped to assert it.

We will now turn back to the source of title. The plaintiffs' mother married Dr. Lee, their father, in 1855, when the common law as to marital rights prevailed. Samuel Grosshart in his lifetime owned about 700 acres of land, the most of it in Cass county; but about 140 acres lay in Bates county. The land in this suit is 50 acres of the Bates county land. Grosshart died in 1862, and descent was then cast on his six children above named. In 1877 these six heirs made an amicable partition of the land they had inherited, setting off to each his or her share, and executed deeds *inter sese* to carry the partition into effect. Whether there were several deeds, one to each heir, or only one deed, signed by all, is not entirely clear; but a deed or deeds were executed carrying that partition into effect. In that partition the 140 acres of Bates county land was set apart to Mrs. Lee, and a deed to her from her co-heirs, or the joint deed, if but one was made, was delivered to her. That deed was not produced in evidence; but the fact that it was made and delivered to her, and that thereupon she and her husband went into possession of the land so allotted to her, and that they lived on it until her death, are facts conceded. In fact, none of the deeds on which the parties seem to rely appear in the record before us, although a brief description of some of them is given, and at the close of the evidence there was an agreement of counsel in a colloquy with the court that thereafter, when the argument should be heard, either party should have the right to produce any deed or deeds he might see fit to produce. Whether either party availed himself of that right does not appear. It would have been more satisfactory to us if we could have seen the deeds, or copies of them; but we will have to take the record as we find it.

Some time after the execution of the partition deed or deeds, and after Dr. Lee and Mrs. Lee had taken possession of the land allotted to her, Dr. Lee went to Cass county, where the other heirs lived, and told them that the deed they had made setting apart the Bates county land to Mrs. Lee was defective in respect of the acknowledgment, and,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to cure that defect, he asked them to execute another deed, which he had already prepared, and which was a quitclaim deed to himself and his wife for the Bates county land, and on that request they executed the deed; that is, all of them but one, to wit, G. W. Grosshart. That occurred in 1877 or 1878. That deed was not put on record during the lifetime of Mrs. Lee, and there is no evidence that she ever heard of it. It was recorded in 1887, five years after her death. When defendant Bartz bought the land from Joel, he had the title examined, and was advised that there was a defect in it, owing to the fact that one of the heirs—that is, one of the sons of Grosshart—had not joined the other heirs in the execution of the quitclaim deed to Dr. Lee and wife, and he applied to that one, to wit, G. W. Grosshart, to make a quitclaim deed to cure the defect, and it was done. There is a good deal of testimony on the subject of the improvements made by Joel, and afterwards by defendant Bartz, on the land. It appeared in the evidence that a good deal of the improvements claimed were made by Joel during the lifetime of his father; that is, during his father's life estate as tenant by the curtesy. The trial court weighed this testimony pro and con, and, balancing the value of the improvements against the rents and profits, found that the improvements exceeded the rents and profits to the amount of \$64.50, and in the decree required that much to be paid to defendant out of the proceeds of that land at the partition sale before division. As the case is now presented to us, there is no complaint as to the correctness of the balance. The decree was that the plaintiffs were entitled to half of the land—that is, one-fourth each—and the defendant the other half; that the land be sold for partition, and the proceeds, after deducting costs and paying defendant the \$64.50 above mentioned, should be divided as above indicated. The defendant Bartz has appealed from that decree.

1. The quitclaim deed to Dr. Lee and wife, made by her coheirs after the original partition deed had been executed and after he and his wife had taken possession of the land set apart to her in the partition, conveyed no title at all. After the partition had gone into effect, the brothers and sister of Mrs. Lee had no title to the land they had allotted to her—no interest either to convey or to release. Even if in the original partition deed it had been expressed that the land allotted to Mrs. Lee as her share of her inheritance was thereby conveyed to her and her husband, the latter would have taken no title greater than that which he would have taken, as her husband, if he had not been named in the deed at all. The title went to Mrs. Lee, not as purchaser under the deed, but by inheritance. The law in such case is declared in *Whitsett v. Wamack*, 159 Mo. 14, 59 S. W. 961, 81 Am. St. Rep. 339. During the lifetime of Mrs. Lee, under the law as it then

was, her husband was entitled to the possession of her legal real estate, and after her death he became a tenant by the curtesy for life. The deed from Dr. Lee to his son Joel conveyed only such title as the grantor himself had. Even if it had been a warranty deed, it was only a deed of gift, and therefore no claim of a bona fide purchaser for value could be made. The deed conveyed to Joel his father's life estate in the land; neither more nor less. The father died in January, 1898, and in December, 1899, Joel sold the land to Bartz. The deed from Joel to Bartz is not in the record, and therefore we cannot say what kind of a deed it was. But, even if we assume that it was a warranty deed, it conveyed no title, because Joel's title had expired when his father died, and his possession had continued only two years.

It is insisted, however, that the record showed the title to be in Dr. Lee when he made the deed to Joel, and that defendant Bartz relied on the record when he purchased. The evidence does show that Bartz had the records examined, and he became satisfied from the examination that his vendor had a good title. His examination of the record, if he conducted it with reasonable care, must have shown him that the land was owned by Samuel Grosshart at the time of his death in 1862, and he should have known that the title then passed either to a devisee, if there was a will, or to the heirs of Grosshart, and it behooved him to inquire where it went. Pursuing this inquiry, he found on the record a quitclaim deed from four of the heirs of Samuel Grosshart to Dr. Lee and wife. He also found that the recording of this quitclaim deed bore the suspicious evidence of having been withheld from record until a belated period, until after one of the heirs, to wit, Mrs. Lee herself, had died, and that it lacked the signature of one of the heirs yet living; and to supply this latter defect he obtained a quitclaim deed from this last-mentioned heir, G. W. Grosshart, which deed was given without any consideration at all. Thus the evidence shows that the defendant bought with notice that the land had descended to the heirs of Samuel Grosshart, and with such notice he can make out a record title only by tracing it to that source; and this he attempted to do.

It is the law of this state that a purchaser for value under a quitclaim deed acquires whatever title the grantor had at the time of the delivery of the deed. *Wilson v. Albert*, 89 Mo. 537, 1 S. W. 209; *McAnaw v. Tiffin*, 143 Mo. 667, 45 S. W. 656. We have also held that a purchaser for value under a quitclaim deed is under the protection of our registry act, and that his title so acquired is good against a prior unrecorded deed of which he had no actual notice. *Fox v. Hall*, 74 Mo. 315, 41 Am. Rep. 316; *Boogher v. Neece*, 75 Mo. 383; *Willingham v. Hardin*, 75 Mo. 429. But that is the extent

to which our law has gone in upholding the title under a quitclaim deed. A purchaser under such a deed is not a bona fide purchaser. He takes whatever title the grantor had to convey, subject to existing equities, except in cases where the registry act protects his title. *Ridgeway v. Holliday*, 59 Mo. 444; *Campbell v. Laclede Gas Lt. Co.*, 84 Mo. 352; *Schrader v. Albright*, 93 Mo. 42, 5 S. W. 807; *Hope v. Blair*, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366. In *Campbell v. Laclede Gas Lt. Co.*, above cited, the court, after saying that the rule that the purchaser under a quitclaim deed took subject to existing equities was subject to the exception that the equities referred to were such as could be spread on the records, said that the quitclaim deeds in that case were wanting in another very essential element to exempt them from the rule that charges them with notice of outstanding equities; that is, it was necessary for the party claiming under such a deed to show that value was paid for it. In that case the court said the deeds were not in the record before the court, so that there was not even a prima facie showing by their recitals that value was paid; but, instead of producing the deeds, the counsel had contented themselves with stating in the record that a quitclaim deed, duly executed, etc., was offered. The court, speaking through Martin, C., said: "I do not think this statement is equivalent to the proof of payment of value, which was necessary to exempt them from the general rule making quitclaim deeds notice of pre-existing equities." That is just the condition of this record. None of these deeds are produced before us, and no effort was made to show that value was paid for either of them, except the last deed from Joel to Bartz. On the contrary, it is shown that Dr. Lee paid nothing for the quitclaim deed to him, that the deed to Joel was a gift, and that the quitclaim deed obtained from G. W. Grosshart was without consideration. Bartz knew that this land had descended from Samuel Grosshart to his heirs, that during the lifetime of Mrs. Lee it was in the possession of herself and her husband, that she was one of the heirs of Samuel Grosshart, and that the title which he (Bartz) was buying came from that source through quitclaim deeds. He was chargeable with notice of the character of title he was buying.

2. Defendant contends that the plaintiffs' right to maintain a suit of this kind is barred by the statute of limitations. The point presented is that the mother of the plaintiff in her lifetime could have maintained a suit in equity against her husband to divest him of the title he had fraudulently obtained, or to have him declared a trustee of the title to her use; but, not having done so, the right to sue descended to her heirs, but their right to sue was limited to three years after the death of their mother, as prescribed in section 4267, Rev. St. 1899 (Ann. St.

1906, p. 2342). Defendant refers to *Reed v. Painter*, 145 Mo. 341, 46 S. W. 1089, construing that section of the statute of limitations. In that case the husband, having been intrusted with money of the wife with which to buy land for her, bought it, but fraudulently took the title in his own name. The suit was by the heirs of the wife against the husband to divest the title or declare a resulting trust. But this is not that kind of a suit. These plaintiffs are not seeking to set aside the deed their father obtained on the ground of his fraud in obtaining it. They say that on the face of the quitclaim deed itself, in the light of the record title, the deed conveyed nothing; that the title was in their mother by inheritance from her father and by the allotment of this land to her in the amicable partition.

And so the evidence shows. The quitclaim deed which their father afterwards obtained is not in their way. It was a nullity in his hands, and is a nullity in the hands of his assignee with notice. There was nothing about which Mrs. Lee could go to law with her husband in her lifetime. At the most that could be said for the deed, it was but a cloud in her title; but it was not even that, because it was not recorded. It was concealed during her lifetime, and not recorded until five years after her death. Certainly no cloud was cast on her title while she lived, and she knew nothing of the existence of the deed. What, then, could she have said to a court of equity, if she had gone into that court to complain of her husband? He had a right to the possession of the land during the lifetime of his wife, because so the law was at the date of his marriage in 1855, and so it was at the date the title descended to his wife on the death of her father in 1862, and after her death he was entitled to possession as tenant by the curtesy. Joel's possession was not adverse while his father lived, because he was holding by deed of the life tenant. The life tenant died in 1898, and this suit was begun in 1905. The plaintiffs are not barred by the statute of limitations. In fact, the statute has not yet begun to run against them, because they are both married women.

3. But it is said they are estopped; that they have stood by and seen all these vast improvements made, and have suffered their brother to sell this land to defendant Bartz, and have suffered Bartz to continue making improvements, etc. As to the improvements, the evidence shows that part of them, at least, were made by Joel during the lifetime of his father. But the evidence shows, and the chancellor found, that, weighing the value of the improvements against the rents and profits, the balance in favor of the improvements was only \$64.50, and that is allowed by the decree to the defendant Bartz out of the proceeds of the sale to be made, and there is no complaint now made of the decree on that account. The evidence shows



that, at about the time Dr. Lee made the deed conveying this land to Joel, he made a deed to his daughter Mrs. Kisner, conveying to her the other 90 acres of this Bates county land, and that conveyance is the subject of the other suit now pending as above mentioned; and about the same time he made to each of the plaintiffs a deed to certain land, to what extent in value as compared with that conveyed to Joel and Mrs. Kisner does not clearly appear, but that is unimportant, because the land their father conveyed to the plaintiffs was land of his own, not derived from his wife. It is referred to by counsel for defendant in connection with the plea of estoppel. It was not shown, however, that either of the plaintiffs knew the character of the title that was attempted to be conveyed to Mrs. Kisner and Joel, or, in fact, that they knew anything about how their father derived, or supposed he derived, title to the land in question. Joel himself, when he took the deed, did not in fact know that the land had come to his mother by inheritance, or that it was her land; and the plaintiffs knew nothing about it until a very short while before they brought this suit. Their first information came from one of their uncles, in December, 1904, and this suit was begun in January, 1905. True, they had constructive knowledge of what the county records showed; but constructive knowledge, in the face of proof positive that there was no actual knowledge, cannot be made the base of a charge that they fraudulently kept silent when they should have spoken, and are therefore estopped from speaking now. These plaintiffs knew nothing of the sale by Joel to Bartz until after it had been made. Therefore they could have done nothing to induce the defendant to make the purchase. There is no evidence that defendant was misled by any conduct of the plaintiffs, or that he relied on anything they did or said. On the contrary, the evidence shows that he had the records of land titles searched, and was guided by what he was informed was the result of the examination. Even, therefore, if these plaintiffs had not been, as they are, married women, and therefore, with reference to land acquired before the married woman's act made it their separate estate, not subject to the law of estoppel in its strictest sense, they are nevertheless, under the facts of this case, not estopped.

We find no error in the record. The judgment is affirmed. All concur.

#### STARR et al. v. KISNER et al.

(Supreme Court of Missouri, Division No. 1.  
March 31, 1909.)

Appeal from Circuit Court, Bates County;  
C. A. Denton, Judge.

Action by Annie R. Starr and another against Margaret S. Kisner and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Silvers & Silvers, for appellants. Thos. J. Smith, for respondents.

**VALLIANT, J.** The facts of this case are in the main like those in the case of *Annie R. Starr et al. v. John F. Bartz et al.* (No. 13,563) 117 S. W. 1125, the opinion in which is just now delivered. The only points of difference between this case and that are as follows:

The petition is copied in full in the abstract, and it has not the defect noted in that petition. It is in due form as a petition for partition of land. The land involved is the 90-acre tract mentioned in the opinion in the Bartz Case as having been deeded by Dr. Lee to his daughter, Mrs. Kisner. The plaintiffs are the same as in the Bartz Case. The defendants are Mrs. Kisner and Joel Lee. It is a suit, therefore, between the four children of Mrs. Lee, deceased. Mrs. Kisner has never sold her interest in the 90 acres, but has continued to occupy it, claiming it as her own, ever since it was deeded to her by her father in 1887. She was at that date about 15 years old. The pleas of the statute of limitations and estoppel are the same as in the Bartz Case. The court stated the account, involving the value of the improvements and taxes paid against the rents and profits, and found the balance in Mrs. Kisner's favor on that accounting to be \$153.50. The decree was that each of the plaintiffs was entitled to a fourth of the land and Mrs. Kisner the remaining half, Joel not claiming any part; that the land be sold for partition; that out of the proceeds, after paying costs, Mrs. Kisner be paid \$153.50, and what remained was to be divided, one-fourth to each of the plaintiffs and the balance to Mrs. Kisner. From that decree Mrs. Kisner has prosecuted this appeal.

The law applicable to the facts of this case is the same as that stated in the opinion in the Bartz Case as applicable there; and for the reasons stated in that opinion the judgment in this case must be affirmed. It is so ordered. All concur.

#### HAYDEN v. GOODWIN et al.

(Supreme Court of Missouri, Division No. 2.  
March 30, 1909.)

##### 1. EJECTMENT (§ 19\*)—POSSESSION BY DEFENDANT.

Ejectment will not lie unless defendant is in actual possession of the land at the commencement of the action.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 65; Dec. Dig. § 19.\*]

##### 2. JUDGMENT (§ 713\*)—CONCLUSIVENESS—ACTION TO RECOVER LAND.

The record of an action for forcible entry, showing that defendant therein took actual possession of the premises, is conclusive of that fact in a subsequent action of ejectment by such defendant to recover the same premises.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1236-1240; Dec. Dig. § 713.\*]

##### 3. EJECTMENT (§ 91\*)—POSSESSION BY DEFENDANT—EVIDENCE.

To show possession in defendants in ejectment at the commencement of suit, plaintiff may show that in a former action of forcible entry, wherein plaintiff was defendant, on an adverse judgment therein he delivered possession to defendants in ejectment, without the necessity of a writ of restitution.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 278; Dec. Dig. § 91.\*]

#### 4. EJECTMENT (§ 96\*)—POSSESSION BY DEFENDANT—EVIDENCE.

Evidence in ejectment held to show that defendants were in the actual possession of the premises at the commencement of the action.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 297; Dec. Dig. § 96.\*]

Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Action by George S. Hayden against Carrie E. Goodwin and others. From a judgment for defendants, plaintiff appeals. Reversed.

Shain & Barnett, for appellant. Sangree & Bohling and Wm. D. Steele, for respondents.

GANTI, P. J. This is an action of ejectment for a strip of ground off of the south side of lot 7 of block 3 of Westenburger's addition to the city of Sedalia. This action was commenced in the circuit court of Pettis county, September 1, 1905. The petition was in the ordinary statutory form, and ouster was laid as of August 2, 1905. At the October term, 1905, the defendants Charles Goodwin and James Owens each filed separate answers, which were general denials. The defendant Carrie E. Goodwin, in her separate answer, denied each and every allegation of the petition, and, for a further defense, pleaded that she was the owner of lot 8 of block 3 of said Westenburger's subdivision, and that plaintiff was and is the owner of lot 7 of said block 3; that in the year 1891 the division line between the two said lots was uncertain and unknown, and that then the defendants and plaintiff's grantor agreed upon a boundary line between said lots, and located a fence upon the line so agreed upon, and that defendants have ever since that date claimed all of said lot 8 and up to said fence so located, and have had the peaceable, open, and notorious possession of the same up to the 7th day of August, 1905, on which last date the plaintiff and one Zenobia Hayden, with strong hands, made unlawful, forcible entry upon said premises and tore down the defendants' fence, and built a foundation for an addition to the dwelling on the south side of the line so agreed upon by the defendants and plaintiff's grantor to be the boundary line between them as aforesaid; that afterward, to wit, on the 15th day of August, 1905, defendant's tenant James A. Owens, who was in possession of said premises, instituted a forcible entry and detainer suit against the plaintiff herein, and the said Zenobia Hayden, before N. H. Rogers, a justice of the peace, and on the 29th day of August, 1905, the same was tried before a jury, and the jury found the plaintiff herein and the said Zenobia Hayden guilty in the manner and form as charged in the complaint of the said James A. Owens. For further answer, defendant states that the plaintiff herein nor the said Zenobia

Hayden have ever redelivered the possession of the premises so unlawfully entered by them to this defendant's tenant, James A. Owens, nor to this defendant, but that the plaintiff and the said Zenobia Hayden still retain possession of the said premises the same as before the institution of the said suit before said justice. This defendant, for further answer, states that on the 30th day of September, 1905, the said N. H. Rogers, the justice before whom said forcible entry and detainer was tried, issued a writ of restitution against the plaintiff and the said Zenobia Hayden to remove them from said premises and restore said possession to the said James A. Owens, defendant's tenant, and said writ is now in the hands of the constable of Sedalia township. Defendant denies that she was in possession of the premises described in plaintiff's petition at the commencement of this suit. For further answer, defendant states that, if the court should find upon the hearing of this case that at the institution of this suit she was in the possession of the premises described in plaintiff's petition, she has had the peaceable, adverse, and continuous possession of said premises for more than 10 years prior to the institution of this suit, claiming the same adversely to the plaintiff and his grantors, to wit, from the ——— day of ———, 1891, to the 7th day of August, 1905; and, having fully answered, defendant asks to go hence with her costs.

Plaintiff for reply admitted that the defendant Carrie Goodwin is the owner of lot 8 of block 3 of said Westenburger subdivision, but denies that there was ever an agreement as to the boundary line between said lots 7 and 8, and denies that there was a fence located upon an agreed boundary line between said lots. Denies the adverse possession of the tract in dispute by the defendant. Plaintiff alleges the fact to be that a fence was located upon the plaintiff's said lot 7, whereby certain portions of said lot were thrown within the inclosure of the defendant's said lot 8 at a time of which the plaintiff is not informed; but plaintiff alleges that it has been understood between defendant and plaintiff that this said fence was not on the true line between said lots, and was left as a matter of convenience with the understanding that plaintiff could at any time occupy lot 7 up to the true line. Plaintiff admits the institution of the forcible entry and detainer suit as alleged in Carrie E. Goodwin's answer, and that the finding of the jury was as therein set forth. But plaintiff denies that either he or Zenobia Hayden still retained possession of said premises. Plaintiff alleges the fact to be that on the 31st day of August, 1905, and before the institution of this suit, plaintiff and said Zenobia Hayden paid the damages assessed. to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gether with the costs, in said forcible entry and detainer cause, and, as far as within the power of plaintiff and said Zenobia Hayden, restored the possession to the defendant, and defendant had the possession of the same at the commencement of this suit. This cause was tried in the circuit court, and, in obedience to a peremptory instruction, the jury returned a verdict for the defendants. Within due time and in proper form an appeal was perfected to this court.

There is very little controversy about the facts. As already indicated in the pleadings, it stands admitted that the plaintiff is the owner of lot 7, and the defendant Carrie E. Goodwin owns lot 8, which joins lot 7 on the south. Charles Goodwin is the husband of Carrie E. Goodwin, and James Owens was and is the tenant of Carrie E. Goodwin, and he occupied the said lot at the time of the commencement of the forcible entry and detainer case. The testimony very clearly indicates that when the dividing fences in this block were built they were not put upon the true lines between the same, and for some time the strip of ground in controversy in this suit was within the inclosure of the defendant Carrie E. Goodwin. The survey made by the city authorities in 1905 located the true line between lot 7 and lot 8, and showed that this strip of land was within the Goodwin inclosure. In August, 1905, the plaintiff, desiring to build an addition to his residence on lot 7, tore down a part of the dividing fence, and built a foundation wall on this strip south of where the said fence stood. Thereupon the defendants Goodwin, by and through their tenant, Owens, instituted a forcible entry and detainer case against the plaintiff, and judgment was rendered in Owens' favor against plaintiff and his wife on the 29th of August, 1905, for the possession of this strip and one cent damages. On August 31, 1905, and before the commencement of this action, the plaintiff George S. Hayden, the defendant in said forcible entry case, paid in full the judgment for damages and all the costs taxed in the said case, and the justice's docket of that date contains this entry: "Constable Chaney reports this case satisfied and all costs paid." And the itemized costs upon the justice's docket were all marked paid. The testimony further shows that on that date the plaintiff herein went to the land in controversy and called out James A. Owens, the plaintiff in said forcible entry case and tenant of Carrie E. Goodwin of her said lot 8, and told him that he had now paid the damages, and said to him, "I am now off of the ground." The testimony further shows that immediately afterwards Owens had the grass cut on this disputed piece of ground, borrowing plaintiff's mower to do it. The testimony also shows there was a grapevine on this strip, and Mr. Owens gathered grapes from it.

1. The circuit court having sustained the demurrer to the testimony on the ground

that the evidence did not establish that the defendants were in possession of this disputed strip of land on the day of the commencement of this action in ejectment, the first question is as to the propriety of that action by the court. Of course, the action in ejectment cannot be maintained against a defendant unless he is in the actual possession of the land in dispute at the commencement of the action. Sections 3056, 3060, Rev. St. 1899 (Ann. St. 1906, pp. 1756, 1759); *Llewellyn v. Llewellyn*, 201 Mo., loc. cit. 303, 307, 100 S. W. 40. Plaintiff does not controvert this settled principle of law in this state. That this strip of land was within the inclosure of the defendants prior and up to August 7, 1905, when the plaintiff entered for the purpose of building his foundation for his addition to his residence, is conceded on all hands. The record of the action for forcible entry by Owens against the plaintiff conclusively established that plaintiff took actual possession of this strip for the purpose of making said improvement without having first resorted to any legal process to obtain the actual possession, and he was convicted of a forcible and unlawful entry on August 29, 1905. Thereupon, on August 31st, the plaintiff herein sought out the constable and obtained from him a full statement of all the costs and damages which had accrued in said action and paid the same in full, and this satisfaction was entered on that date on the justice's docket. In addition to this, the plaintiff at once on the same day repaired to the premises in dispute, and, calling upon Mr. Owens, the tenant in possession of said lot 8, notified him that he had paid to the constable all the damages and costs, and said to him, "I am now off of the ground." And thereafter, within a few days, at least, the evidence shows that Owens cut the grass upon this disputed strip and gathered the grapes from a vine growing thereon. But the defendants say that this did not constitute a sufficient turning over and redelivery of possession to them. For that, they say, afterwards, on the 20th or 30th of September, at the instance of the attorney for Owens, the justice issued a writ of restitution in the aforesaid forcible entry case, and that plaintiff is estopped by reason, as they say, of having introduced the record of the issuance of this writ of restitution after the commencement of this action in ejectment, showing that the possession had not up to that time been redelivered to them. Inasmuch as only so much of the division fence was taken down as was necessary to enable plaintiff to lay his foundation for the addition to his residence, and as the remainder of the fence stood just as it did before plaintiff constructed his foundation wall, and as he had paid all the damages and costs and had gone in person and notified the tenant in possession that he was now off of the premises, and the undisputed evidence was that the tenant immediately resumed pos-

session and cut the grass and gathered the grapes on this disputed strip, we think there was ample evidence of a redelivery of the premises to the defendants. Nothing more in reason could have been demanded. The law never exacts an unnecessary thing. Nor do we think the plaintiff is estopped by what occurred in regard to the issuing of the writ of restitution. The issuing of that writ was the act of the defendants themselves, and at the time it was issued the possession had already been redelivered. Nor does the record put the plaintiff in the attitude of maintaining contradictory position in this respect. The colloquy which occurred between counsel and the court at the time this writ of restitution was brought to its attention was as follows: Mr. Rogers, the justice, was recalled in order that he might correct a statement which he had made in answer to counsel for the defendants, when he was on the stand, that he had issued the writ of restitution on September 30th, and he stated that it must have been issued on the 25th. Thereupon counsel for the defendants said: "If the other side do not wish to offer this writ in evidence, we will offer it in evidence. The Court: Of course, it would not be proper for you to introduce it at this time. Counsel for Plaintiff: We will not make any objection to it." Thereupon, on cross-examination by counsel for the defendants, the following occurred: "Q. Judge Rogers, this is the writ that you issued? Ans. Yes, sir. Q. In the case of Owens v. Haden, and it is returned by the constable? Ans. Yes, sir, with his return on it. Counsel for Defendants: We now ask the stenographer to identify it. (And the paper was marked 'Exhibit B.')

Counsel for Plaintiff: We have no objection to his offering it; we will offer it in evidence ourselves. Counsel for Defendants: Do you want it read now? Counsel for Plaintiff: We do not care about reading it now; it can be considered in evidence. By the Court: You, gentlemen, do not insist upon this being read now? Counsel for Defendants: No, sir."

When the justice was being examined prior to this, after the defendants had shown the issuance of this writ, and the date of its issuance at the instance of the attorneys for the defendants, and the return upon the writ, the court said: "Why not introduce the original paper?" Whereupon counsel for the defendants said: "It will be here in a moment." Thus it appeared that, without objection on the part of the plaintiff, the defendants themselves had already proved the issuance of this writ of restitution and its service and return, and the fact was fully established before the colloquy above recited. To now hold that the plaintiff was conclusively estopped by what occurred when the defendants offered to introduce the writ itself, we think, be utterly unreasonable. We think

it was perfectly competent for the plaintiff herein, the defendant in a forcible entry and detainer case, to show as a matter of fact that, without waiting to be ousted of the forcible possession by a writ of restitution, he had, in obedience to the judgment of the court, turned back the possession to the defendants, and the subsequent issue of the writ at the instance of the defendants could not and did not in any manner change the effect of the actual redelivery of the premises to the defendants. And we think that the learned circuit court erred in holding it did.

Under this ruling the defendants are placed in the position of being in actual possession of this strip, enjoying all the rights and privileges belonging thereto, but not sufficiently in possession to enable the plaintiff to maintain his action for possession. We think that the issuing of a writ of restitution at the time and under the circumstances was wholly nugatory and unnecessary. The defendants offered no evidence, of course, to sustain their plea of the statute of limitation, having obtained a ruling in their favor that the plaintiff could not maintain his action on the ground that they were not in possession, and, of course, it would be unfair to construe the record as holding that the court passed upon that question at all.

For the reasons assigned, the judgment of the circuit court is reversed, and the cause remanded in order that the question of adverse possession may be tried, if defendants desire to be heard on that issue.

BURGESS and FOX, JJ., concur.

STATE ex rel. CARTER et al. v. BOLLINGER et al., Justices of County Court. (Supreme Court of Missouri. April 13, 1909.)

1. COUNTIES (§ 113\*)—AUTHORITY OF COUNTY COURT — REPAIR AND IMPROVEMENT OF COURTHOUSE.

Under Rev. St. 1899, § 6736 (Ann. St. 1906, p. 3322), providing that the county court shall have the power to alter or build any county buildings as circumstances may require and the funds of the county may admit, the county court has authority to construct vaults in the courthouse and establish a fund for the payment of the necessary expense, where the county has sufficient funds with which to pay for the improvement.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 176; Dec. Dig. § 113.\*]

2. PROHIBITION (§ 6\*) — PROCEEDINGS OF COUNTY COURT.

Where a county court proceeds under Rev. St. 1899, § 6736 (Ann. St. 1906, p. 3322), to improve county buildings, to construct vaults for the courthouse, and to establish a fund for the payment of the expense, prohibition will not lie to restrain its action, although it has neglected to proceed under Rev. St. 1899, § 9283 (Ann. St. 1906, p. 4264), by apportioning the revenue to certain purposes specified in such section, and the money set apart in the fund for the payment of the vaults was obtained by failure to apportion the county revenue, as the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

performance of a duty cannot be secured by such writ.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 18; Dec. Dig. § 6.\*]

**3. MANDAMUS (§ 1\*)—ACTS OF PUBLIC OFFICERS.**

Mandamus lies to compel action on the part of a public officer in a matter within his jurisdiction.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 1; Dec. Dig. § 1.\*]

In Banc. Petition by the State, on the relation of A. H. Carter and others, for a writ of prohibition to D. C. Bollinger and others, Justices of the County Court. Writ denied.

This is an original proceeding instituted in this court by relators, seeking to prohibit respondents, as judges of the county court of Stoddard county, from building a vault and repairing the courthouse of said county.

The petition upon which the provisional writ of prohibition was issued, omitting formal parts, is as follows:

"Now, this day, comes A. H. Carter, J. N. Miller, Samuel Ulen, A. Morgan, S. N. Jeffers, J. H. Cummings, E. C. Mohrstadt, C. O. Biggs, R. L. Ladd, and Lee Williams, and respectfully represent to this honorable court that they are solvent, resident taxpayers of Stoddard county, Mo., and bring this proceeding on behalf of themselves and on the behalf of all other taxpayers similarly situated; that respondent D. C. Bollinger is now, and was at all times herein mentioned, presiding justice of the county court of said Stoddard county, duly elected and qualified; that John H. Harper and T. W. Boyd are now and were at all times referred to herein associate justices of said county court of Stoddard county, Mo., duly elected, qualified, and acting as such; that under and by virtue of section 9283, Rev. St. 1899 (Ann. St. 1906, p. 4264), of the state of Missouri, it became and was the duty of respondents herein, as said county court, at its May term, 1907, to appropriate, apportion, and subdivide all the revenue collected and to be collected, received and to be received, for county purposes in the following order: (1) A sum sufficient for the payment of all the necessary expenses that may be incurred for the care of paupers and insane persons of such county. (2) A sum sufficient for the payment of all necessary expenses for the building of bridges and repairing of roads, including the pay of road overseers of such county. (3) A sum sufficient for the payment of the salary of all county officers, where the same is by law made payable out of the ordinary revenues of the county. (4) A sum sufficient for the payment of the fees of grand and petit jurors, judges and clerks of elections, and fees of witnesses for the grand jury of the county. (5) A sum sufficient for the payment of the other ordinary current expenses of the

county not hereinbefore specially provided for, which shall be known and designated as the 'Contingent Fund' of such county, which last sum shall in no case exceed one-fifth of the total revenue of such county for county purposes for any one year.

"That, in violation of their duty as prescribed by said section 9283, respondents, constituting the county court aforesaid, did not at the May term, 1907, of said court, or at any other time during said year 1907, appropriate, apportion, and subdivide the revenues of said Stoddard county as required by said section; and your petitioners further represent that said Stoddard county has not adopted and is not now under township organization. Your petitioners further represent that on the 9th day of October, 1907, respondents herein, in violation of their duties as justices of the county court, by order of record, a copy of which duly certified under the seal of said court, is hereto attached, illegally, unlawfully, and without jurisdiction so to do, ordered and directed the treasurer of said Stoddard county to keep, in connection with the county treasurer, a special fund in the sum of \$8,189.38, which said last-mentioned sum is and was a part of the general revenue fund of said Stoddard county, and the said sum has been by the said order, of date October 9, 1907, unlawfully diverted and withdrawn from the funds of said Stoddard county and made to constitute a fund unknown to the law; that the purpose and intent of respondents in diverting the fund above mentioned from the general revenue fund of said county and creating a special and unlawful fund was to provide and accumulate money in said fund for the improvement of and erection of additions to the courthouse of said Stoddard county, and not for repairs incident to the maintenance and use of said courthouse, as will more fully appear by the order made by said court on October 15, 1907, a copy of which, duly exemplified under the seal of said county court, is hereto attached, also by another order of said county court, dated the 18th day of December, 1907, an exemplified copy of which, under the seal of said court, is herewith annexed.

"Your petitioners also represent to this honorable court that until respondents at its May term, 1907, or at some other date, met and apportioned the revenue of said county, in accordance with the provisions of said section 9283, they were without power, jurisdiction, or authority to apportion said revenues in any manner or to any purpose whatsoever; and especially your petitioners represent that respondents, having failed and refused at any and all times during the year 1907 to apportion the revenues of said county as required and commanded by section 9283, are and were without authority and jurisdic-

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tion to apportion and set aside during said year the said unlawful fund taken from the unapportioned and undivided revenues of said county.

"Your petitioners also state that there is now on hand to the credit of said Stoddard county with the treasurer thereof a large sum of money belonging to the revenue of said county, which fund it will be the duty of respondents at the May term, 1908, of the county court of said county, to apportion and subdivide in accordance with said section 9283; and until May term, 1908, respondents are without authority and jurisdiction to apportion and subdivide in any manner whatsoever, and said sum now on hand has not been heretofore apportioned or subdivided by order of the county court of Stoddard county by virtue of the authority contained in said section 9283; but petitioners herein charge the fact to be that respondents are now preparing and are about to divert and apportion said sum now on hand and thereby augment the unlawful fund heretofore created by respondents, known upon their records as the 'Vault Fund'; that respondents threaten and are about to, on the 7th day of February, 1908, contract, on the part of said Stoddard county, large debts for the improvement and building of additions to the courthouse of said Stoddard county in manner and form unwarranted by law, and to provide for the payment of said unlawful debt about to be contracted, on the date last mentioned, respondents herein intend and threaten on or before the said 7th day of February, 1908, to unlawfully divert and set aside to the credit of said vault fund the large sum of money now in the treasury of said county, unapportioned and not subdivided as the law directs, and which cannot be apportioned and subdivided until the May term, 1908, of said Stoddard county, all of which petitioners say respondents have no authority or jurisdiction to do.

"Your petitioners further say that respondents threaten and are about to expend the said sum of \$8,189.38, belonging to the general revenue fund of said county and heretofore unlawfully diverted therefrom, in discharge of debts about to be created illegally and without authority and for the purpose of building additions to said Stoddard county courthouse; that none of the funds above mentioned as unlawfully set aside by respondents, or about to be set aside by respondents, belong to other than the revenue of said Stoddard county, which the county court thereof is required to apportion and subdivide in accordance with the provisions of said section 9283.

"That respondents, constituting said county court, failed and refused at the May term, 1907, of said court, or at any other date during the year last named, to subdivide the revenues of said county as required by law, that they might thereby, when by them deemed

proper, by order of record, divert the same and create thereby an illegal fund known by the records of said county court as the 'Vault Fund'; that said fund now on hand is now about to be set aside, as above mentioned, into said vault fund in order that the debt about to be entered into on the 7th day of February, 1908, may be therewith paid off and discharged; that as a consequence of said failure and refusal to respondents as the county court of said county to apportion and subdivide at its May term, 1907, the county revenues as required by law, said Stoddard county is without a road and bridge fund or any other fund required by said section 9283; and if the respondents are permitted to divert and place the sum now on hand for county purposes, as said respondents intend and threaten to do, then, at the May term, 1908, of said court, there will be no fund to subdivide and apportion on as required by law, and the taxpayers of said Stoddard county will again be deprived of the said funds, as by said section 9283 required.

"Your petitioners say that respondents are attempting to exceed their jurisdiction in the manner above mentioned; that respondents are now about to contract for the building of additions to the courthouse of said Stoddard county in a manner not warranted by law, and that respondents herein are without jurisdiction to divert and set aside the revenues of the county, except as prescribed by section 9283; that said revenues may be applied to the payment of a debt unlawfully contracted, in consequence of which the funds created by statute will not exist, and the necessary expenses of said Stoddard county will not be paid.

"That the said sum of \$8,189.38 exceeds one-fifth of the entire revenue of said Stoddard county for the year 1907, and the amount now threatened to be diverted and kept with said above-mentioned fund exceeds one-fifth of the entire levy for county purposes for the year 1908. Your petitioners charge that respondents herein propose on the 7th day of February, 1908, to award a contract for the building and completion of the courthouse of said Stoddard county, and the only funds on hand to pay for the same are the funds required to be apportioned by section 9283, and that the voters of said Stoddard county have never, by their vote held as required by law, provided any other fund with which to pay for said contemplated building and completion, all of which will appear to be the record of said county court, duly certified and annexed hereto. Your petitioners say that all the funds diverted and about to be diverted, and all the funds about to be used and expended, in improving and building additions to said courthouse, are the funds required to be apportioned by said section 9283.

"Petitioners further say that Honorable J. L. Fort, judge of the Twenty-Second judicial

circuit, is one of the commissioners appointed by respondents to carry out said work, and is therefore interested in the proceeding.

"Wherefore, your petitioners pray to be relieved that they may have the state writ of prohibition directed to D. C. Bollinger, John H. Harper, and T. W. Boyd, composing the county court of Stoddard county, to prohibit them from pursuing and following the order diverting the said \$8,189.38 aforesaid, from diverting or setting aside any of the funds belonging to the general revenue fund of said county for the purpose of improving, altering, or building additions to said courthouse, and from contracting for said improvement, alterations, and additions to be paid out of the general revenue fund of said Stoddard county."

The return was as follows:

"The respondents, D. C. Bollinger, presiding justice, and John H. Harper and T. W. Boyd, associate justices, of the county court of Stoddard county, Mo., in obedience to the writ issued by this court in this cause, reserving to themselves all manner of benefit and advantage by exception, which can or may be had or taken to the many errors, uncertainties, and other imperfections in the petition for prohibition filed herein by relators contained, for their return to said writ and answer to said petition, say:

"(1) That it is true, as by relators alleged, that the county court, of which these respondents are justices, did not at the May term, 1907, of said court apportion or subdivide the revenues of said county as said court might have done under section 9283, Rev. St. Mo. 1899. These respondents did not construe said section of the statute as mandatory, and their omission to make the apportionment or subdivision of the revenues of the county to the several funds therein named was not for the purpose of avoiding any obligations of the county or for the purpose of diverting or authorizing the diversion of said revenues to unlawful purposes, but they regarded said section of the statute as directory, and, as no apportionment or subdivision had ever been made by the county court of said county in any previous year, they made no such order.

"(2) These respondents aver, however, that the object of the statute in authorizing and empowering the county court to appropriate, apportion, or subdivide the revenues is to provide for the payment of the obligations of the county for the year in which they accrue, and to prevent the revenues from being drawn from the treasury of such county, except by warrants on the respective funds so set apart. The statute does not contemplate that the aggregate amount which the court may set aside to meet the obligations mentioned in section 9283, Rev. St. 1899, shall include all the revenues of the county, whatever the amount may be, but only 'a sum sufficient for the payment' of the indebtedness in each subdivision of the section named.

"(3) Further answering, these respondents represent that the said county of Stoddard has paid and discharged its indebtedness and liabilities on the accounts following for the year 1907 and for all prior years: First, all expenses for the care of paupers and insane persons of said county; second, all expenses for the building of bridges and repairing roads, including the pay of road overseers of said county; third, the payment of all salaries of county officials of said county; fourth, the payment of all fees of grand and petit jurors, judges and clerks of elections, and fees of witnesses for the grand jury of said county; fifth, the payment of all other ordinary current expenses of said county of every kind and character not hereinbefore specially named—as shown by the certificates of the county clerk and county treasurer of said county of Stoddard on the 24th day of February, 1908, herewith filed.

"(4) Respondents admit that, as justices of said county court, on the 9th of October, 1907, they made the order, a copy of which is attached to the petition herein, directing the treasurer of the county to transfer from the general fund to what is designated as the 'Vault Fund,' the sum of \$8,189.38, to be used for the construction of vaults and otherwise repairing and improving the courthouse, and they also admit that to carry out that purpose they made the orders of October 15, 1907, and December 18, 1907, exemplified copies of which are filed with the petition. They then believed, as they do now, that it was within the power and that it was the duty of the court, acting under section 6736, Rev. St. Mo. 1899 (Ann. St. 1906, p. 3322), to cause to be made and constructed suitable vaults for the protection of the records of said county, and to make the repairs of and extensions to the courthouse in said orders named, when, as was the case at the date of said orders, all the debts of said county had been paid and there was, in addition to said \$8,189.38, a large sum of money sufficient to meet all current obligations of said county, belonging to the general revenue fund of the county, in its treasury; and respondents allege that there is now in said treasury, belonging to said county, free from all claims and demands whatsoever against said county and not needed for the payment of expenses of said county for the year 1908, \$22,500.04, as shown by the said certificates of the county clerk and county treasurer of said Stoddard county, dated February 24, 1908; that no part of said \$8,189.38 is or will be needed to meet any obligations of said county which have accrued or may accrue during the year 1908; that the current revenues of said county collected and to be collected will be adequate to pay all of the indebtedness of the county for the purposes named in said section 9283, Rev. St. 1899, for said year.

"Respondents further state that in addition to said \$22,500.04 in the treasury of

said county on the 12th day of February, last, a sum exceeding \$2,000 due said county for the insurance tax of 1907 has been paid into its treasury, and that there will be paid into the treasury of said county during the fiscal year the further sum of \$2,000 for the insurance tax of 1908, both of which sums were appropriated to said county by act of the Legislature, approved May 13, 1907 (Laws Mo. 1907, p. 11, § 46). No part of this amount is credited to the general revenue fund of the county in the certificates of said treasurer and county clerk, before referred to, for the reason that the amounts due to the incorporated towns of said county have not been apportioned to them as the law requires. Respondents aver that, after the apportionment of said \$4,000 shall have been made to said incorporated towns of the amounts due them, there will remain in the treasury of said county of Stoddard of said \$4,000 insurance tax for the years 1907 and 1908, as a part of the general fund of said county, at least \$3,200, no part of which latter sum will be needed for the payment of the expenses of the county.

"(5) These respondents, further answering, deny that they are preparing or are about to apportion any part of the revenues of said county, or to use or permit to be used any part of such revenues of said county, except the sum of \$8,189.38, for the making of the vaults and the improvements as before stated. They state that it is not their purpose to set apart or appropriate any more than the said sum of \$8,189.38 for the improvements mentioned. If, however, it becomes necessary to expend more than that sum, and the funds of the said county admit, then they will, as they may lawfully do, make the necessary appropriation for such improvements.

"These respondents deny that they threaten, intend, or that they will make any contract or contracts with respect to the construction of said vaults, or the improvements of said courthouse, which will constitute a debt or debts against said Stoddard county not warranted by law, and they deny that any contract will be made by said county court which will exceed the powers of said court to make, or which will in any way interfere with the payment of the items of expenditures mentioned in said section 9283, or with any other lawful obligation of the county.

"(6) These respondents aver, as in substance they have heretofore averred, that said county court was not compelled to make the apportionment mentioned in said section 9283, Rev. St. 1899, and they deny that it will be the duty of the county court in May, 1908, to make such apportionment, and they further aver that no necessity exists or will exist for the use of any part of said \$8,189.38 to meet any of the obligations of said county for the year 1908.

"Wherefore respondents say that petitioners ought not to be permitted to have or maintain this suit, and they ask that the writ of prohibition be denied."

The reply is quite lengthy, and put in issue some of the statements of the answer, which required the taking of testimony and a finding of the facts of the case. This court, by proper order, appointed Mr. Lew R. Thomason, of Poplar Bluff, to take the testimony and make a finding of the facts, and to report the same to the court. In pursuance to that order, Mr. Thomason heard the evidence, found the facts, and reported them to this court.

Omitting formal parts, this report is as follows:

"That the relators, and each of them, are solvent, resident taxpaying citizens of Stoddard county, Mo.; that the respondents are the duly elected, qualified, and acting justices of the county court of Stoddard county, Mo., and as such constitute the county court of Stoddard county, Mo.; that the respondents, as such court as aforesaid (as admitted by their answer and return to the writ herein), did not appropriate, apportion, and subdivide all the revenues collected and to be collected, and moneys received and to be received, for county purposes, in the following order: (1) A sum sufficient for the payment of all necessary expenses that may be incurred for the care of paupers and insane persons of said county. (2) A sum sufficient for the payment of all necessary expenses for the building of bridges and repairing of roads, including the pay of road overseers of said county. (3) A sum sufficient for the payment of the salary of all county officers, where the same is by law made payable out of the ordinary revenue funds of the county. (4) A sum sufficient for the payment of the fees of grand and petit jurors, judges, and clerks of elections, and fees of witnesses for the grand jury of the county. (5) A sum sufficient for the other ordinary current expenses of the county, not hereinbefore specially provided for, which shall be known and designated as the 'Contingent Fund' of such county, which last sum shall in no case exceed one-fifth of the total revenue of such county for county purposes for any one year.

"That said respondents, justices of the county court as aforesaid, on the 9th day of October, 1907, by an order of record, did order and direct the treasurer of said Stoddard county to transfer from the general revenue fund of said Stoddard county to what was designated the 'Vault Fund' the sum of eight thousand one hundred and eighty-nine dollars and thirty-eight cents (\$8,189.38); that said sum so transferred was in excess of one-fifth of the total revenue of the county for the year 1907, which was the sum of twenty-nine thousand dollars (\$29,000); but I do further find that the said sum so trans-



ferred as aforesaid was, and had accumulated from, the excess over expenditures of the revenues collected from and after the year of 1903 to the year 1907, inclusive, and that the said sum was not appropriated from the revenue of 1907.

"I do further find that during the month of September or October, 1907, there was received by the county of Stoddard for what is commonly known as the 'War Debt' the sum of five thousand dollars (\$5,000) for the use and benefit of the road fund of said county; that respondents, as justices of the county court aforesaid, to reimburse the general revenue fund of said county for moneys advanced to the various districts in said county, transferred out of said moneys so received to the general revenue fund of the county the sum of twenty-five hundred dollars (\$2,500); that including the said sum of twenty-five hundred dollars (\$2,500) so transferred, together with the sum of eight thousand one hundred eighty-nine dollars and thirty-eight cents (\$8,189.38) in the 'Vault Fund,' there was on the 12th day of February, 1908, and at the time of the suing out of the writ by relators herein, in the hands of the treasurer of Stoddard county, the sum of twenty-two thousand five hundred dollars (\$22,500); that said county is not indebted in any sum whatever for the care of any paupers or insane persons of said county, and is not indebted in any sum whatever for the building of bridges and repairing of roads, including the pay of road overseers of said county, and is not indebted in any sum for the payment of the salary of any county officer payable out of the ordinary revenue fund of the county, and is not indebted for the fees of any grand or petit jurors, judges, or clerks of election, or the fees of witnesses for the grand jury of said county, and that said county has no indebtedness other than the ordinary current expenses.

"I do further find that respondents, as justices of the county court aforesaid, by order of record, dated October 15, 1907, did appoint James L. Fort, James B. Buck, and W. J. Ward a commission to confer with a competent architect to ascertain the probable cost of constructing suitable vaults for the protection of the records of said county, and to obtain plans and specifications for said vaults and such repairs of the courthouse of said county as may be made necessary; that said commission did obtain the services of an architect, and did obtain plans and specifications for the building of said vault or vaults and improvement of said courthouse, and did recommend to respondents, as the justices of said court, that said courthouse be improved in accordance therewith.

"And I do further find that respondents, as justices of the county court aforesaid, did, by order of record, approve and adopt said plans and specifications, and did order and direct that said courthouse be improved and repaired in accordance therewith, and did or-

der and direct the clerk of the county court to advertise for bids upon such work.

"I do further find that the cost of the improvements and repairs upon said courthouse, according to the plans and specifications as approved and adopted by respondents, will amount to the sum of from eighteen to twenty thousand dollars, and that such improvements and repairs upon said courthouse as contemplated by respondents, anticipating the current revenue for the year 1908, may be made without incurring any indebtedness upon the part of said county."

Munger & Larimore and H. S. Shaw, for relators. Ralph Wammack, Martin L. Clardy, and N. A. Mozley, for respondents.

WOODSON, J. (after stating the facts as above). 1. At the threshold of this case we are presented with the insistence of counsel for respondents that, conceding for argument's sake relators are entitled to some kind of relief, yet prohibition is not the proper remedy. Section 6736, Rev. St. 1899 (Ann. St. 1906, p. 3322), reads as follows: "The county court of each county shall have the power from time to time to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall moreover take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage." Clearly that section of the statute gives the county court of Stoddard county jurisdiction over the subject-matters complained of in the petition; and the pleadings, evidence, and report of the referee filed herein disclose the fact that the county has sufficient money on hand with which to pay for the proposed improvements. That being true, then the county court of that county was acting within its jurisdiction, and prohibition will not lie. *State ex rel. v. Reynolds*, 209 Mo. 161, 107 S. W. 487, 15 L. R. A. (N. S.) 963, 123 Am. St. Rep. 463; *State ex rel. v. Riley*, 203 Mo. 175, 101 S. W. 567, 12 L. R. A. (N. S.) 900.

In answer to that insistence, it is suggested by counsel for relators that the surplus money set apart by respondents with which to pay for said improvements was obtained by their neglect and refusal to obey section 9283, Rev. St. 1899 (Ann. St. 1906, p. 4264), which made it their duty to appropriate, apportion, and subdivide all of the moneys collected and to be collected, received and to be received, for county purposes into five different funds for the purposes in said section stated. Conceding the position of counsel for relators in that regard to be correct, without deciding it, yet it must also be conceded that prohibition is not the proper remedy by which the judges of the county court could be compelled to perform their duty in that particular. The office of the writ of prohibition is to prevent

action on the part of an officer when he threatens to act outside of or beyond his jurisdiction, and not for the purpose of compelling action upon his part within his jurisdiction. The performance of the latter duty is secured by a writ of mandamus. *State ex rel. v. Patterson*, 207 Mo. 129, 105 S. W. 1048.

We are, therefore, of the opinion that the permanent writ should be denied, and that respondents should be discharged from the rule heretofore issued. It is so ordered. All concur.

LAMM, J., concurs in result, and puts his concurrence on the ground that the county court in the matter complained of was acting as an administrative body ministerially, hence writ of prohibition would not go.

#### PARTELLO v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 2.  
March 30, 1909.)

##### 1. EVIDENCE (§ 477\*)—OPINION EVIDENCE—MATTERS OF OPINION—HEALTH.

A nonexpert witness may testify as to the apparent health of a person whom he has had an opportunity to observe, such testimony as a rule being confined to matters open to observation, but incapable of exact description, so that in an action for injuries by being thrown against a car seat in a collision, where no member was injured, but plaintiff complained of severe abdominal injuries and swelling, etc., nonexpert's evidence was admissible that, before the accident, she was healthy and robust, and thereafter appeared to have suffered from a violent shock, and was a nervous wreck, etc.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2237-2241; Dec. Dig. § 477.\*]

##### 2. TRIAL (§ 194\*)—INSTRUCTIONS ON WEIGHT OF EVIDENCE—AMOUNT OF DAMAGES.

In an action for injuries to a passenger an instruction that, upon finding for plaintiff, to allow her such damages as would compensate her for bodily and mental anguish, not to exceed the sum demanded, was not erroneous as an instruction that the evidence warranted a verdict for any sum up to that amount.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-466; Dec. Dig. § 194.\*]

##### 3. DAMAGES (§ 95\*)—PERSONAL INJURIES—MEASURE OF DAMAGES.

A passenger was only entitled, in an action for personal injuries, to just and adequate compensation for her injuries, pain, and suffering, where there was no element of wantonness in the case.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 222; Dec. Dig. § 95.\*]

##### 4. APPEAL AND ERROR (§ 1004\*)—VERDICT—CONCLUSIVENESS—AMOUNT OF RECOVERY—PERSONAL INJURY ACTIONS.

The amount of damages in personal injury actions being largely in the jury's discretion, the verdict will not be disturbed unless the amount awarded is so gross as to compel the inference that it must have resulted from passion, prejudice, or bias.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3944; Dec. Dig. § 1004.\*]

##### 5. DAMAGES (§ 130\*)—EVIDENCE—EXCESSIVE DAMAGES—PERSONAL INJURIES.

In a passenger's action for injuries sustained in a collision, evidence held to show that a verdict for \$20,000 was so excessive as to show that it resulted from passion and prejudice, and required a new trial.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 357; Dec. Dig. § 130.\*]

Appeal from Circuit Court, Jackson County; Edward P. Gates, Judge.

Action by Annie V. Partello against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Reed, Yates, Mastin & Harvey, for appellant. Martin L. Clardy and Elijah Robinson, for appellee.

BURGESS, J. This is an action for damages for personal injuries received by plaintiff in a collision occurring on defendant's railroad, and alleged to have been caused by the negligence of defendant, its agent, and servants. The jury trying the cause returned a verdict for \$30,000 in favor of plaintiff, and judgment was rendered accordingly. Afterwards, upon the hearing of defendant's motions for a new trial and in arrest of judgment, plaintiff by attorney remitted \$10,000 of said judgment. The court overruled defendant's said motions, whereupon an appeal was taken to this court.

Plaintiff is the wife of an army officer, stationed at Ft. Reno, Okl. On the 9th day of October, 1904, plaintiff, her husband, daughter, and son were passengers on one of defendant's trains going from the union depot at Kansas City to Leavenworth, Kan., and when the train was passing through the defendant's yards in Kansas City, at a point about 300 yards west of the union depot, the engine collided with the tender of another engine. A crossing switch was left open, and the engine, instead of proceeding westwardly on the main track, ran in on this cross-over track, and collided with the tender of the other engine which was backing eastwardly on another track. The pilot or cowcatcher of the passenger engine by reason of the collision was broken and the forward part of the engine damaged, and the trucks of the tender of the other engine were knocked off the track, and a large hole made in the water tank. When the collision occurred, plaintiff was thrown forward from her seat in the chair car, her face striking the back of the chair immediately in front of her, causing her nose to bleed, and she fell to the floor on her knees. Dr. A. J. McDonald, a dentist residing in Kansas City, was sitting on the opposite side of the aisle from plaintiff, and he, with Maj. Partello, plaintiff's husband, assisted her back to her seat. She was bleeding freely at the nose, and seemed to be suffering great pain,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

and Dr. McDonald got a damp towel and bathed her face and otherwise tried to alleviate her suffering. This witness testified that the concussion between the two engines was violent, and threw him forward, but that he put his hands on the seat in front of him, and remained uninjured. He further testified that nothing intelligible was said by plaintiff in his presence after she was injured, but that she was in a semi-conscious condition, and moaning practically all the time. Plaintiff was removed through the car window on a stretcher and taken to St. Joseph's Hospital; she being at the time in an unconscious condition. Describing her condition after she regained consciousness, she said: "I felt as though I was hurt in some way in my lower parts, and could not move them." Dr. Fulton and Dr. Hamel, two surgeons connected with the defendant railway company, came to see plaintiff on the day of the injury and administered strychnine, and put her womb back in place; Dr. Fulton forcing it back in place with a pack.

Miss Carrico, the nurse who waited on plaintiff at the hospital, testified that, when plaintiff came to the hospital, she was in great pain, and continually asked for something to relieve her. She saw Dr. Fulton examine plaintiff, and force back her womb by means of a pack saturated with ichthyol oil. The doctors also applied antiphlogistine to the lower part of her abdomen, on the right side, which was greatly swollen, and this treatment was continued for weeks. During plaintiff's stay at the hospital she was unable to sleep without the aid of an opiate, and she suffered from nervousness and nausea. She failed in flesh, and during the first three weeks of her stay at the hospital she was out of bed once, when she was put in an invalid's chair and taken to the porch for a few minutes. After plaintiff had been at the hospital some two or three weeks, Dr. Lester Hall, who had been asked by plaintiff's husband to attend his wife, performed a minor operation on plaintiff. He found that in giving birth to her first child the perineum was lacerated, and he cut away the old scar tissue, and sewed up the lacerated perineum. At the end of five weeks, plaintiff left the hospital and was taken in a carriage to the Coates House, in Kansas City, where she remained three days, and then took a night train for home, lying down in a sleeper as soon as she entered it. Reaching Ft. Reno, she was immediately put to bed, which she was unable to leave, even with the help of assistants, for two or three months afterwards, during which time a nurse constantly attended her.

Dr. A. M. Chase, an army surgeon stationed at Ft. Reno, was called in immediately upon Mrs. Partello's arrival. He found her in a fainting condition, and gave her several hypodermic injections of strychnine, and did not leave her for hours. She was par-

tially unconscious. Her extremities were cold and pulseless, and she was without rallying power. In appearance she was emaciated and sallow. A few days later Dr. Chase made a physical examination of plaintiff, and found the womb fixed and the patient suffering from great tenderness of the abdomen. The broad ligaments supporting the womb and the surrounding tissue he found inflamed and enlarged. There was also a swelling in the abdominal region which lasted for weeks. In his opinion this condition was due to an acute injury, a blow or concussion. He visited her three times a day for a period of about two months, and continued to visit her at intervals up to the time of testifying. He thought that the injury received by plaintiff had almost destroyed her nervous system, and that her health and vigor were permanently impaired.

Dr. J. H. Ford, assistant surgeon at Ft. Reno, testified that plaintiff before her injury was remarkably strong and robust and in excellent health. She had been accustomed as the wife of the commanding officer to attending the balls and social functions at the fort, and taking a leading part therein, and she was also fond of doing her own housework, although it was not necessary for her to do so. She had not suffered from any chronic disease or serious womb trouble. The first time Dr. Ford saw plaintiff after the infliction of the injury was on November 15, 1904, at the Coates House, after she left the hospital and just prior to her return to Ft. Reno. To him "her appearance indicated that she had undergone some violent shock. \* \* \* She had lost greatly in weight, and was suffering from a nervous lack of strength." He further testified that her ill condition had steadily progressed, and that she was a nervous and physical wreck. He did not think it possible that she could ever be restored to health.

Dr. Jno. R. Snell, a physician living in Kansas City, made an examination of plaintiff just before the trial, and testified that he regarded Mrs. Partello as a nervous wreck, and that her ill condition was permanent.

The testimony further showed that plaintiff and her family had attended the World's Fair at St. Louis, and that the injury occurred while returning therefrom; that while in St. Louis she attended the Fair regularly, walked about a great deal, never complained of being tired, and had all the appearance of a strong and vigorous woman. According to plaintiff's own testimony, she had journeyed twice with her husband to the Philippines, where she was in the habit of taking long horseback rides, lasting for days, merely for pleasure's sake, and had also ridden horseback at Ft. Reno. A number of witnesses testified as to the difference in plaintiff's appearance and health between the time she

left Ft. Reno for St. Louis and the time she returned after the injury.

Dr. A. L. Fulton, connected with the defendant railway company as consulting surgeon, testified for the defendant that he in company with Dr. Hamel made an examination of plaintiff on the day of the injury. Her nose had been bleeding, but he could not see that it had been injured or broken. She complained of pain in the abdominal region, and that something was wrong with her womb, and, in order to relieve any irritation that might exist there, Dr. Fulton inserted a small quantity of wool, saturated with ichthyol oil. He made no further examination save by palpation of the bowels. His opinion was that there was no displacement of the womb. Two weeks afterwards he and Dr. Hamel visited the plaintiff at the hospital, and found her sitting in a chair beside her bed. They asked her how she felt, and she replied that she was practically well, and they understood her to say that she was going to leave the hospital next day.

Dr. Lester Hall, a physician and surgeon of Kansas City, who took charge of plaintiff a day or two after the injury, testified that he examined her externally and found her suffering from pain in the abdomen. He advised local applications of antiphlogistine and hot water bottles to relieve the soreness, and this was kept up for about two weeks. He also discovered that the womb was much enlarged, but not extraordinarily sensitive, and that there was no displacement. Her side was somewhat swollen and very sensitive to pressure, and it was his opinion that such condition might result from a severe muscular strain or a blow or concussion. About two weeks after this examination he performed an operation upon her. There had been a rupture of the perineum in giving birth to a child, and he cut away the scar tissue and sewed up the lacerated parts. This, however, was an old laceration, and she had been going about for years in that condition. He also performed an operation on plaintiff's womb, curetting it. She remained in the hospital about five weeks, and kept to her bed during nearly all that period, and, when she left the hospital, she was carried to her carriage.

The testimony of witnesses differed as to the rate of speed of the passenger train at the time of the collision. The engineer and fireman testified that the speed was about four or five miles an hour; while Dr. McDonald, who was in the same car with plaintiff, testified that in his judgment the train's speed was at the rate of twelve or fifteen miles an hour. The testimony further tended to show that there was a curve in the main track at the point where it converged with the cross-over track, and that neither the engineer nor fireman from the positions they occupied on the engine of the passenger train could see the misplaced switch in question, and had to depend on

the signals of the switchman. As soon as the engine turned in on the cross-over track, the engineer, according to the testimony, put on the emergency brakes, and did all in his power to stop the train and prevent the collision. Defendant's switchman testified that he lined up the switches properly five minutes before the starting time of the train, and gave the signal to go ahead, and that he was about 300 feet away from the misplaced switch at the time of the collision. The conductor on board the train testified that he was in the smoking car, standing up, and that, when the collision occurred, he was thrown backward against the door, but that he kept to his feet.

It is claimed by defendant that the trial court committed error in permitting non-expert witnesses to state their opinions as to plaintiff's state of health before and at the time of her injury. It is well settled by the authorities that a nonexpert witness may give his opinion as to the apparent health of a person whom he has had the opportunity to observe. So may a nonexpert give his opinion in a great variety of cases when the facts known to him, and to which he would be competent to testify, would furnish no predicate whatever for the opinion of an expert witness. As a rule, such are confined to questions of identity, and such matters as may be open to the senses, but incapable of exact description. Thus a nonexpert "may testify that a person appeared to be suffering, was weak and helpless, appeared sick, looked pale or paler than usual, or was declining in health." 12 Am. & Eng. Ency. Law (2d Ed) p. 491. In *State v. Buchler*, 103 Mo. 207, 15 S. W. 332, it is said: "If the expression of the countenance of one accused of crime could be seen by or reproduced before the jury exactly as it was at the time, and immediately before and after the act, there can be no doubt it would have great weight in determining the intent and purpose of the accused. Often it would be absolutely convincing. Such being its character, evidence of such expressions would certainly be admissible. The general rule, it is true, is that a witness must testify to facts and the jury draw its conclusions from these facts. There are, however, manifestations, expressions, and conditions which language, at least of ordinary persons, cannot produce. Of such matters a witness is allowed to give the impression produced upon himself. This impression may be very near to an opinion. \* \* \* A person of ordinary understanding could not detail facts which would give to a jury the remotest idea of the passions expressed on the countenance, though a child one year old would distinguish anger from love in its mother's face. Witnesses are permitted to testify to their impressions or opinions on such matters for want of any other way to get the evidence before the jury." In confirmation of what

has been said, we call attention to the case of *State v. Ramsey*, 82 Mo. 137, where a witness was allowed to state that a certain man "looked like he was scared." In *State v. Parker*, 96 Mo., loc. cit. 393, 9 S. W. 728, a witness was permitted to state that certain weeds looked like they had been pressed down by one's knees; and in *Fulton v. Met. St. Ry. Co.*, 125 Mo. App. 247, 102 S. W. 47, it is ruled that a nonexpert witness may give his opinion as to state of health, hearing, or sight or the ability of another to use his arms or legs naturally, and whether such other is apparently suffering pain or is in possession of his or her mental faculties or is intoxicated, excited, calm, angry, or the like. *State v. David*, 131 Mo. 380, 33 S. W. 28; *Rearden v. St. Louis & S. F. R. Co.* (not yet officially reported) 114 S. W. 961. The court in our opinion did not err in permitting the witnesses or either of them to testify as they did under the facts and conditions disclosed by the record.

It is next insisted by defendant that instruction No. 5, given at the instance of the plaintiff, is erroneous, on the ground that it practically amounts to a statement to the jury that in the opinion of the court the evidence warranted the jury in returning a verdict for any sum up to \$50,000. Said instruction is as follows: "The jury are instructed that if, under the other instructions and evidence in this case, they should find for the plaintiff, they will assess her damages at such sum as they may find and believe from the evidence will compensate her for all bodily pain and mental anguish that they may find and believe from the evidence she has suffered as a necessary, natural, and proximate result of any injury she has sustained by reason of the bruising or breaking of her nose, if any, or by reason of the bruising or mashing of her side or lower portion of her body, if any, or by reason of any such bruising or mashing of her side or lower portion of her body resulting in the displacement of her womb, if any, or by reason of any injury to her nervous system resulting from a blow to her side or lower portion of her abdomen, if any, as well as any permanent injury, if any, she has sustained from any of the above-named injuries, not exceeding the total sum of \$50,000." As to this instruction defendant contends that, in a case of this kind, it is contrary to the great weight of authority in this country. While counsel for defendant concedes that some of the decisions of this court seemingly approve the giving of an instruction limiting the amount of recovery to the amount claimed in the petition, he contends that the case in which that practice has been approved or in which it was said that an instruction of that kind should have been given were cases growing out of contract where the damages were susceptible of definite ascertainment, and that in a case like this the dam-

ages are not susceptible of definite ascertainment. We are unable to concede that such an instruction is given only in cases growing out of contract where the damages are susceptible of easy ascertainment. An instruction of that kind has in many instances been given in actions for personal injuries, slander, libel—in fact, in all kinds of actions sounding in damages. Indeed, the correctness of such an instruction in damage cases does not seem to have ever been questioned by this court. It is almost a literal copy of an instruction given in *Logan v. Railway Co.*, 183 Mo. 582, 82 S. W. 126. Instruction No. 2 in *Devoy v. Transit Co.*, 192 Mo. 197, 91 S. W. 140, concludes with like language, with reference to which instruction and one other given in that case Lamm, J., says: "The following instructions, to be commended as models of everyday simplicity, legal precision and comprehensiveness, \* \* \* were allowed." In *Tandy v. St. Louis Transit Company*, 178 Mo. 240, 77 S. W. 994, an instruction which told the jury that, "if they find for the plaintiff, they will assess at such sum as they believe from the evidence will be a fair compensation to plaintiff, \* \* \* not exceeding the specified amount," was approved. While similar instructions seem to have been condemned by the courts of other states, as shown by the decision cited by counsel for defendant in his brief, we prefer to adhere to our own decisions as the settled law of this state, and as supported by the better reason. Said instruction is criticised upon the further ground that it submitted to the jury issues not presented by the petition. This criticism we regard as too technical as well as unjustifiable. The instruction embraces no matter of importance not covered by the petition.

In the motion for a new trial it is alleged that the amount of the verdict is excessive. At the time of the trial Mrs. Partello was 46 years of age, and the testimony was that at the time of and prior to the injury she enjoyed excellent health. The evidence would indicate that she was severely injured, but the exact nature of the injuries sustained is not very plain. Miss Carrico, the nurse who waited on her at the hospital, was the only witness who testified that plaintiff's womb was displaced; the physicians who examined her the day after the injury testifying that there was no displacement. It is shown by the evidence that the lower part of her right side was swollen, and that there was great soreness in the abdominal region, which was the condition for some weeks, and her physicians at Ft. Reno testified that in their opinion this was caused by a severe blow or concussion. None of her bones were broken, and no joint dislocated or injured, and at the time of the trial there was no apparent disfigurement save a slight mark on the nose. The physicians who made personal examinations of her condition disagree

In their opinions as to the permanency of her injuries; those testifying on the part of plaintiff stating that they were, and those on the opposite side that they were not. She testified that she had been a nervous wreck since the time of the injury, and a physician who examined her just before the trial testified to the same effect. The plaintiff was entitled to just and adequate compensation for her injuries, pain, and suffering, and no more; there being no elements of malice in the case. As said in *Spohn v. Railway Co.*, 87 Mo. 74: "The amount of damages in cases of this character rests largely in the discretion of the jury, and their verdict ought not to be disturbed unless the amount is so gross as to shock the sense of justice of the judicial mind, and satisfy it that such a verdict must have been the result of passion, prejudice, or partiality." The verdict should not be permitted to stand when no inference can be drawn therefrom other than that it is the result of passion or prejudice.

In the case of *Ice Co. v. Tamm*, 90 Mo. App. loc. cit. 202, the St. Louis Court of Appeals used the following language: "When the amount assessed is so glaringly unauthorized by any evidence, so outrageous and conscienceless as to compel a conviction that the jury were poisoned with prejudice and inflamed with resentment against the losing party, and therefore incapable of impartially weighing the evidence on the various issues submitted to them, their verdict must be wholly set aside. They are proved by the event to have been dominated by sentiments which unfitted them to participate in the administration of justice, and this would have been ground for setting aside the array in the first place had their state of mind been known." *Chlanda v. St. Louis Transit Co.*, 213 Mo. 244, 112 S. W. 249, is in many of its features very similar to the case at bar. In that case the amount sued for was \$35,000, and the verdict was for \$18,000. On motion of the defendant the court granted a new trial, and the plaintiff appealed. In course of the opinion delivered by this court Lamm, J., speaking for the court, said: "The verdict is a heavy one. While it must be viewed with serene judicial judgment, yet its very size bespeaks anxious judicial scrutiny. It stands conceded there were no broken bones. There was once a slight and very temporary discoloration, but never a visible scar. There were and are no discoverable lesions or known existing abnormal organs traced to the injury. That Mrs. Chlanda has resulting nervous trouble seems put beyond all question. Her main symptoms are classified by men of science as subjective instead of objective—that is, they are got at through her own statements, except as to those visible indices such as the expression

of her countenance, her loss of weight, and her use of artificial aids in moving about. The testimony of her experts was based on examinations antedating the trial by a year or more. Their conclusion as to the permanency of the injuries to her nervous system must be tempered by that fact. The disinterested commission of doctors appointed by the court gave it as their opinion that the probabilities of recovery were in her favor. We find no testimony from physicians who examined her condition at or close to the time of the trial tending to show that she was not in a class suffering from nervous trouble colored and somewhat affected by psychological phenomena prone to disappear when her mind was set at rest. We say this without the slightest intent to indicate our belief in the lack of sincerity and honesty of the worthy lady whose cause is held in judgment. There being no elements of malice in the case, she was entitled (not to punitive damages, but) to just compensation—no more. We are of opinion the order granting a new trial may be sustained on the theory of an excessive verdict somewhat attributable to such overwrought sympathy on the part of the jury as amounts (in legal effect) to prejudice and passion. There was an assignment of error to that effect in the motion for a new trial, and the order granting one may stand on that assignment."

From a reading of the facts disclosed by the record in this case, it is apparent that the amount of the verdict is excessive and beyond reason, and so gross as to shock the sense of justice. It cannot be accounted for upon any theory other than prejudice or passion. That it was largely excessive was tacitly admitted by plaintiff when she remitted therefrom the large sum of \$10,000, leaving the verdict yet remaining at an excessive amount. *Gibney v. Transit Co.*, 204 Mo. 704, 103 S. W. 43. We think the ends of justice will be subserved by a new trial.

The judgment is reversed, and the cause remanded. All concur.

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**BLACK v. METROPOLITAN ST. RY. CO.**  
(Supreme Court of Missouri, Division No. 1  
March 31, 1909.)

**CARRIERS (§ 321\*)—PASSENGERS—INJURIES—ACTIONS—INSTRUCTIONS—CONFORMITY TO PLEADINGS.**

In an action by a street car passenger for injuries, where the petition alleged that, while plaintiff was attempting to walk from the rear vestibule into the car, he stepped one foot upon the metallic cover of the sand receptacle, and the other foot upon the metallic part of the door sill, and was injured by an electric shock, an instruction to find for plaintiff if he stepped upon said metallic cover and upon the metallic sill, and received from them "or either of them" an electric shock, was erroneous as being broader than the allegations, and authorizing a re-

covery if he was shocked by stepping on either the sand cover or the door sill.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 821.\*]

Lamm, P. J., and Graves, J., dissenting in part.

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by William H. Black against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The plaintiff brought this suit against the defendant in the circuit court of Jackson county to recover damages for injuries alleged to have been received by him through the negligence of defendant by a shock caused by an electric current passing through his body while a passenger upon one of defendant's cars. A trial was had and a judgment was rendered in favor of plaintiff for the sum of \$8,500. After taking the proper preliminary steps, the defendant duly appealed the cause to this court.

In substance, the petition alleges that on the car in question there was a sand box below the platform of the car, upon which there was a metallic cover, which was set in the floor of the platform so as to become a part thereof. The petition alleges that defendant negligently permitted the electrical apparatus and equipment of the car to become and remain defective, and, in another paragraph, negligently managed and operated the electrical apparatus and equipment "in such manner that the aforesaid metallic cover to said sand receptacle and other metallic parts of the rear end of said car became charged with electricity, and thereby became dangerous and unsafe and liable to injure passengers standing upon or passing over same." Plaintiff alleged his inability to more accurately describe the negligent condition and operation of the car. He then sets out the manner of receiving his alleged injury: "That on the date hereinbefore mentioned while plaintiff was a lawful passenger upon said car, and while said car was at or near the intersection of Nineteenth street with Main street, he attempted to walk from the rear vestibule of said car into the body or inclosed part of said car, and in doing so he stepped one foot upon said metallic cover of said sand receptacle and the other upon the metallic part of the sill of the door connecting the said vestibule with the inclosed part of said car; that immediately he received a powerful electric shock, the electric current passing through his body and injuring him as follows," etc. The answer was a general denial.

The plaintiff was the only witness who described the manner in which he claims to have received the shock; and his testimony in that regard is as follows: "Q. Now, just tell the jury what happened to you, if any-

thing, when you got on that car? A. Well, I stepped on the steps of the platform—that is, the lower step, leading to the platform—and, as I stepped on there, they started the car, and, of course, I caught the door sill, and that brought me around, and I brought my left foot down on this metal plate on the platform. Q. What metal plate is that, Mr. Black? A. That is the sand receptacle, and there is a metal plate on top of it, some four to six inches across the top, to the right of the door as you go in. Q. Suppose you are going in to the door this way now [showing], about how close to the back end of the car is this metal plate? A. I judge about six inches—something like that. Q. And is it on a level with the floor? A. Yes, sir; it makes a part of the floor. Q. When the car started and you swung around on there, what did you have hold of with your hand? A. When I first took hold, I had hold of the hand railing. Q. The metallic hand rail on the back end of the car? A. Yes, sir; then it started and I went to step up. Q. Now, did you have hold of that with your hand at the time your foot stepped on this sand plate? A. I had hold of the door post. Q. Now, what happened to you, if anything, when you stepped on this metal cover? A. I had a sensation that was something continuing and went up my whole body, clear up into my head, and that brought me up into a rigid condition—made me perfectly rigid for a minute. I don't know just how long. Q. What was the sensation? A. Just like driving nails through my flesh. Q. What part of your flesh? A. All over my body and down the legs. Q. How about the state of your muscles? A. It made me perfectly stiff—set the muscles, as if they were firm. Q. What effect did it have on your hands where you had them grasped to the door? A. It set the muscles—brought them around rigid—perfectly tight for an instant. Q. Tell the jury whether this sensation was very painful or not? A. It was; yes, sir; very painful. Q. Now, how did you get off of this box cover? A. With my left foot—that is, the one that I placed on the sand box cover—I went to make a step after I came to I was kind of dazed at the time, and, when I went to raise my foot, it was stuck to this place, and, in order to do that, to get off that plate—in order to move—I had to put my hand like this [showing], and bring my foot up that way off the plate. It popped like clapping hands together when I dragged my foot from the metal to the platform. That was the first I got straightened up from that, and made a step with my right foot to the door sill. It is metal also, and I received another that didn't seem to be so strong as the other one. I didn't feel it so strong. It may have been, but I didn't feel it so strong. Q. What effect did that have upon your hands and muscles, this second shock?

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

A. I don't remember that. Q. Was there any difference between the sensation of the first one and the other except that the second one wasn't quite so severe? A. I don't think there was. Q. Otherwise it was the same kind of sensation? A. Yes, sir. Q. Where was the conductor at the time you got on—the conductor of this car? A. I couldn't tell you what position he was in. He was there at the rear of the car, though. Whether he was in the vestibule or inside the door now I couldn't say. I don't remember now, but he was in the car. Q. There at the end of the car? A. Yes; he was at the rear end of the car. Q. Did he warn you or say anything to you when you started to get on the car to look for this place? A. No, sir; he did not. Q. What kind of a day was it, with reference to whether or not it was thawing? A. It was thawing—a clear day. There had been a heavy snow and the water had run down there and I had to wade through water half a shoe top to get to the car. Q. After you got on there, your feet were wet? A. Yes, sir. Q. You mean just before you got on the street car? A. Yes, sir. Just before I got on the car I stood on the sidewalk until the car came north; coming, and turned and stopped the car, so that I had to wade through this water in order to get on this car. \* \* \* Q. What do you mean by that? A. It put these muscles in a strain so it would keep them from jerking. I could hold them up like that and it kept them from jerking. The same sensation I have to-day, only it isn't so strong now as then. Q. Do you remember of getting a shock on the platform before you put your foot up on the door plate? A. I got it on the platform, on the sand box; yes, sir. Q. That is what I want to understand—before you had stepped up onto the door plate you had gotten the shock? A. Yes, sir. Q. There is a little step up from the platform, a step something like this—four or five inches? A. Yes, sir. Q. There is something of an offset—that is, the platform and vestibule is lower than the front end of the car. A. I think so; yes, sir. As near as my memory serves me I think it is. Q. Now, which foot do you say you stepped onto the sand box cover with? A. My left foot. Q. And where was your right foot at that time? A. I couldn't tell you where it was. It was coming along there somewhere. Q. You feel certain that at the time when you got your left foot on the sand cover that you got a shock, before you got your right foot off of the platform up onto the door sill? A. I know I got a shock before I got onto the door sill with my right foot. Q. You are positive of that? A. Yes, sir; I am positive of that. Q. And you got what you call a very severe shock there? A. Yes, sir. Q. Much more severe as it impressed you than the shock that you got when you put your other foot on the door sill? A. Yes, sir. Q. Was it your right foot you put on the door sill? A. Yes, sir. Q. You do think after you put your

right foot on the door sill that you got another shock? A. Yes; I know I did. Q. And then you went on into the car? A. Yes, sir. Q. Now, when was it that you had the trouble in getting your foot loose from the sand cover? Was it before you stepped onto the door sill? A. Yes, sir. Q. While you were wholly in the vestibule—that is the time you had to take hold of your leg with your hands? A. With my one hand. Q. And how did you manage to get loose, did you say? A. I will show you. I went to step—raise this foot up—and it was stuck to this cover. Q. Which foot? A. Left foot. Q. Your left foot was stuck tight to the cover? A. Yes, sir; it was stuck tight, and I put my hand on my knee, like that [showing]. Q. You sort of pried it loose? A. Yes; that is just what I done. Q. How long did it take you to do that? A. That I am unable to say. Q. Did you have to stoop to do it? A. That is something I couldn't state. I didn't make any note of it. Q. You say you did that with your right hand—where was the other hand? A. I suppose I had hold of the door post, or something any way. Q. You don't remember just how you had it? A. No, sir. Q. And you had to take hold of your knee there? A. Yes, sir. Q. And turned it to get it loose? A. Yes, sir. Q. And then, after you got your foot loose, where did you put your left foot then? A. On the platform of the vestibule somewhere, I suppose. Q. You took it off the sand box cover? A. I did; yes, sir. Q. And then, after taking it off of the sand plate cover, then you put your right foot up onto the door plate? A. Yes, sir. Q. And then it was that you got the second shock? A. Yes, sir. Q. Now, that first shock that you got you have described several times as being the sensation of twentypenny nails being driven into your flesh. A. That is about as near as I could express it. Q. That is the nearest you could give in order to give to the jury the feeling that you had? A. Yes, sir. Q. It felt like twentypenny nails were being driven into your flesh, all over? A. As near as I could tell, it felt like twentypenny nails were driven in my body. Q. Did this sensation like nails being driven into your body—is that confined to the calves of your legs? A. Yes; it was in my legs, and my whole body for an instant there. It shot right into me. Q. Over your whole body? A. Yes, sir. Q. Up your arms as much as in your legs? A. I don't know that I felt it so much in my arms as I did in my legs. Q. But you felt it up in your body? A. Yes, sir. Q. And you felt it up in your head? A. I don't know that it felt like nails in my head."

Plaintiff also introduced testimony tending to prove the character and extent of his injuries, and the defendant's testimony tended to show that neither the car nor the electrical appliances thereof were defective or out of repair, and that he was simulating, and had, in fact, received no injury whatever.



At the request of and on behalf of plaintiff the court gave the following instruction: "(1) The court instructs the jury that if they believe and find from the evidence that on or about the 18th day of January, 1905, the plaintiff was a passenger on one of defendant's electric cars running over and along East Nineteenth street, in Kansas City, Mo., and that defendant carelessly and negligently permitted the electrical apparatus and equipment of said car to become and remain defective and out of repair in such manner that a metallic cover on a sand receptacle and other metallic parts of the rear end of said car became heavily charged with electricity and thereby became dangerous and unsafe and liable to injure passengers standing upon or passing over the same, and that defendant knew, or by the exercise of ordinary care and caution could have known, of the dangerous and defective condition of said car, if any, in time to have repaired same before the happening of the injuries complained of, if any, or by the exercise of ordinary care and caution could have warned plaintiff of the dangerous and defective condition thereof, if any, in time by the exercise of ordinary care to have prevented said injuries, but that defendant carelessly and negligently failed so to do, and that on said date, while plaintiff was a passenger upon said car, he attempted to walk from the rear vestibule of said car into the body or enclosed part thereof, and that while doing so *he stepped upon said metallic cover of said sand receptacle and upon the metallic sill of the door connecting the said vestibule with the body of said car, and received from said metallic cover of said sand receptacle and said metallic sill of said door or either of them an electric shock*, and was thereby injured, then your verdict should be for the plaintiff. And by ordinary care is meant such care as an ordinarily prudent and careful person would usually exercise under the same or similar circumstances." To the giving of this the defendant duly objected and saved its exceptions.

John H. Lucas and F. G. Johnson, for appellant. Reed, Yates, Mastin & Harvey, for respondent.

WOODSON, J. (after stating the facts as above). Counsel for appellant presents two objections to instruction No. 1 given by the court on behalf of the respondent. It is first insisted there was no evidence introduced upon which to base a part of that instruction, and that another part thereof submitted to the jury an issue not made by the pleadings. We will consider these two propositions in the order stated.

The objections are leveled at that part of the instruction italicized; and it is insisted that there was no evidence upon which to base the first part thereof, which told the jury that if they believed "that while doing so *he* [the respondent] stepped upon said

metallic cover of said sand receptacle and upon the metallic sill of the door connecting the said vestibule with the body of said car, and received from said metallic cover of said receptacle and said metallic sill of said door," then they would find for plaintiff. In our judgment that objection is well taken. There is no evidence disclosed by this record bearing upon that question, except the testimony of respondent himself, and he testified that he received two shocks—one while he was standing with his right foot upon the floor of the vestibule of the car, and with the left foot upon the metallic cover of the sand receptacle, and that the current of electricity glued or fastened him firmly to said cover, and that with the greatest of effort on his part he finally freed himself therefrom, and that he received the second shock when passing from the vestibule to the interior of the car, when he stepped with his right foot upon the metallic sill of the car door. Clearly this testimony did not support that part of the instruction indicated, for the reason that the instruction was drawn upon the theory that by placing one foot upon the cover of the sand receptacle and the other upon the metallic door sill his body completed the circuit between the cover and the sill which caused his injury. The instruction was drawn in that manner in order to conform to the allegations of the petition; and it was incumbent upon him to prove that fact before he was entitled to a recovery, but he totally failed to do so.

A second objection is lodged against this instruction because it authorized the jury to find for the respondent, provided they believed from the evidence that he stepped upon either the metallic cover of the sand receptacle or upon the metallic door sill, and that in consequence thereof he received the shock and injury complained of. In order to clearly comprehend this objection, we must bear in mind the issues presented by the pleadings. The charge of negligence contained in the petition is that the appellant negligently permitted the electrical apparatus of the car to become and remain in a defective and dangerous condition, and that, in consequence thereof, the metallic cover of the sand receptacle and the other metallic parts of the rear end of the car became heavily charged with electricity, and thereby rendered dangerous and unsafe for passengers upon entering the same, and that while he was attempting "to walk from the rear vestibule of said car into the body or inclosed part of said car, and in doing so he stepped one foot upon said metallic cover of said sand receptacle and the other upon the metallic part of the sill of the door connecting the said vestibule with the closed part of said car; that immediately thereafter he received a powerful electric shock, the electric current passing through his body and injuring him as follows," etc. In pleading

specific negligence it was necessary to make that allegation, for the reason that, before respondent could have received an electrical shock of any kind, it was necessary that some portion of his body should have constituted a portion of the circuit connecting the positive and negative poles; and, when he made that charge in the petition, he thereby notified appellant that it must appear in court prepared to meet and defend that charge and none other. *Beave v. Transit Co.*, 212 Mo., loc. cit. 352, 353, 111 S. W. 52. But, after respondent introduced his testimony, which completely failed to sustain that charge of the petition, as before shown, his counsel drew this instruction on dual theories, the first along the lines of the petition, and of which there was no evidence introduced to sustain it, and the other upon the theory that, if the jury believed he stepped upon either the metallic sand cover or upon the metallic door sill, they would find for him. Clearly that was a complete departure from the allegation of the petition. The petition stated that the circuit was completed by his placing one foot upon the cover and the other upon the sill, and that in consequence thereof he sustained the injury complained of, while this instruction authorized the jury to find for him if they believed he was standing upon only one of them. That changed the whole cause of action, and submitted to the jury a cause not stated in the petition. If respondent was injured while standing with his feet upon only one of those objects, the cover or the sill, then common knowledge tells us that some other portion of his body must of necessity have come in contact with some other negative or positive object, as the case might be, in order to have completed the circuit before he could have received the shock complained of, and neither that object nor circuit was stated in the petition and was not known to any one, so far as is disclosed by this record. Appellant was not called upon to meet or disprove such case, but was only required to answer and disprove the cause stated in the petition, which it did completely; and it was that fact which gave rise to and necessitated the asking of this instruction in this dual form. We are clearly of the opinion that the instruction is erroneous in both particulars indicated and pointed out.

2. The next insistence of counsel for appellant regards the amount of the verdict, which was for the sum of \$8,500. If respondent was injured in the manner claimed by him, and that his condition as described by his witnesses was the result of that injury, then we would not feel justified in holding that the verdict of the jury was excessive, for the reason his evidence tended to show that his injuries were severe and serious; but, if upon the other hand, he was simulating, of which there was much convincing evidence introduced, then he was not entitled to recover any sum whatever.

Those matters, however, can be watched and guarded against on the next trial.

The judgment is reversed and the cause remanded for a new trial. All concur. GRAVES, J., in separate opinion. LAMM, P. J., in result.

GRAVES, J. I concur in the result reached by my Brother WOODSON in this cause, but not in all the reasoning and language used.

I. I think instruction No. 1 for the plaintiff is broader than the allegations of the petition, and in that is erroneous. However broad a scope the evidence in a case may take, and however proper an instruction would be (considered from the standpoint of the evidence introduced) as to having sufficient evidence to support it, yet, if such instruction goes beyond the purview of the pleadings, it is nevertheless erroneous. In other words, a correct and proper instruction must be (1) an instruction based upon and authorized by the evidence; and (2) an instruction in no wise going beyond the purview of the pleadings. If in the trial of a cause the court permits the evidence to assume a broader scope than indicated by the petition, such does not authorize an instruction broader in terms than is the petition. "A court does not possess the power to change by instruction the issues which the pleadings permit." *Bank v. Murdock et al.*, 62 Mo., loc. cit. 73. And an instruction is equally erroneous whether it enlarges or restricts the issues made by the pleadings. *Mansur v. Botts*, 80 Mo., loc. cit. 658. Of course, the petition might be amended so as to conform to the facts shown, and thus plaintiff would be able to reap the full benefit of his evidence, but such was not done in this case. The petition should have been amended to conform to the state of facts proven. *Budd v. Hoffheimer*, 52 Mo., loc. cit. 303. There was no necessity of the plaintiff, being a passenger, going into details as to the exact manner in which he was hurt, but, having done so, he is bound by the statements of his petition. *Hamilton v. Crowe*, 175 Mo. 635, 75 S. W. 389. By the petition he not only charges certain negligent acts of the defendant, but he avers that such negligence caused him to be injured in a certain specific place and manner duly pointed out in the petition. No claim that he was injured at any other place or manner than is thus stated. By his own act he prescribes the issues. Why plaintiffs persist in specific allegations, both as to acts of negligence and other matters, in cases where the doctrine *res ipsa loquitur* applies, is a matter we do not understand. They will do so, however, and, when they do, must take their chances upon the increased opportunities for errors to creep into the record. When this instruction went beyond the terms of the petition as pointed out by my Brother, it became faulty, and because plaintiff by his pe-

tion has voluntarily limited the issues. By the petition he not only presented the issue of defendant's negligence, but he has seen fit to limit the additional issue as to the place whereat, and the manner in which, that negligence brought about his injury. He need not have thus limited the latter issue, but, having done so, he is bound by it so long as he does not by leave of court amend his pleading. *Hamilton v. Crowe*, supra. *Budd v. Hoffheimer*, supra.

2. I concur in the result for an additional and very potent reason. To my mind this judgment is grossly excessive. If all other questions were out of the case, it should be reversed and remanded for retrial that the ends of justice may be subserved. Whether the jury was inflamed by the proof (unobjected to, it is true, but incompetent nevertheless under the pleadings) of the alleged loss of sexual powers we cannot say, but it does remain a fact that the verdict is much in excess of what should have been awarded. Carriers who negligently injure passengers should be held in substantial damages for all such injuries, but not for inflamed verdicts.

For these reasons, I think the cause should be reversed and remanded.

#### BUXTON v. KROEGER et al.

(Supreme Court of Missouri. March 9, 1900.)

##### 1. DEEDS (§ 133\*)—CONSTRUCTION AND OPERATION—ESTATES CREATED—VESTED OR CONTINGENT REMAINDERS.

A husband and wife conveyed real property to a trustee for the benefit of the wife during her life, giving her power, jointly with her husband, to direct the trustee to dispose of the real estate, the wife to receive for her separate use the proceeds of any sale and all rents and profits. The deed further provided that, if the husband survived the wife and the real estate had not been disposed of, it was to be held in trust for the husband during his life, with power to direct a sale or incumbrance thereof, and that after the death of both grantors the trustee should hold the real estate for the benefit of the grantors' children and divide among the children the net income, after they attained their majority, semiannually or quarterly, in his discretion. Ten years after the youngest of the children reached majority the trustee was directed to make a final settlement with each of said children, paying over to each of them living, and to the heirs at law of such as may have died, their respective shares, whereupon the trust should cease, and the title to the real estate not disposed of should vest in fee simple in the children living and in the heirs of children who had died. *Held*, that the estate taken by the children living and the heirs of those deceased was a contingent remainder, and that the legal title was in the trustee until the time for the termination of the trust.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 368-371; Dec. Dig. § 133.\*]

##### 2. APPEAL AND ERROR (§ 171\*)—PRESENTATION IN LOWER COURT OF GROUNDS OF OBJECTION—CHANGING GROUNDS OF OBJECTION.

Where, in the trial of a case involving the construction of a deed, the validity of the deed

was not questioned, the parties cannot on appeal question its validity.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1053-1066; Dec. Dig. § 171.\*]

##### 3. REMAINDERS (§ 1\*)—"VESTED REMAINDERS" OR "CONTINGENT REMAINDERS"—DISTINCTION.

A remainder is vested where there is a present capacity to convey an absolute title to the remainder, and, where the remainder is limited to a person not ascertained by the terms of the instrument, the remainder is contingent.

[Ed. Note.—For other cases, see *Remainders*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1503-1506; vol. 8, pp. 7615, 7305, 7828-7829.]

##### 4. CONTRACTS (§ 147\*)—CONSTRUCTION AND OPERATION—CONSTRUING ENTIRE INSTRUMENT.

The meaning of a contract must be arrived at by considering all parts of the contract, and not any particular portion thereof.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 743; Dec. Dig. § 147.\*]

##### 5. ESTATES (§ 1\*)—CONSTRUCTION AND OPERATION—ESTATES CREATED—VESTED OR CONTINGENT REMAINDERS.

An estate may be created by deed to commence in the future without any intervening estate to support the same.

[Ed. Note.—For other cases, see *Estates*, Dec. Dig. § 1.\*]

##### 6. DEEDS (§ 120\*)—CONSTRUCTION AS TO PARTIES—GRANTEES.

A trust deed directed that the property after the death of the grantors should be held in trust for the grantors' children, and that 10 years after the youngest of said children reached majority, the trust should cease and the title to the property vest in fee simple "in said children then living and in the heirs at law of such of said children as may then be dead." *Held*, that the heirs at law of the deceased children take as purchasers under the deed, and not by descent.

[Ed. Note.—For other cases, see *Deeds*, Dec. Dig. § 120.\*]

Valliant, C. J., and Gantt and Woodson, JJ., dissenting.

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by Christina S. Buxton against Catherina M. A. Kroeger and others. Judgment for defendants, and plaintiff appeals. Affirmed.

This cause is now pending in this court upon appeal by the plaintiff from a judgment of the circuit court of the city of St. Louis.

There is no dispute about the facts developed upon the trial of this cause and we deem it unnecessary to set out in detail the agreed statement of facts or other testimony upon which this cause was submitted to the trial court. It is conceded both in the briefs of learned counsel for appellants and respondents that the rights of the parties to this litigation rest upon the proper interpretation of the deed, which was embraced in the agreed statement of facts. With this view, to fully appreciate the legal propositions in-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied May 7, 1909.

volved in the record before us, it is essential that the deed, which is the basis of this legal controversy, be reproduced. It was as follows:

"This deed made and entered into this twentieth day of November, eighteen hundred and seventy-seven, by and between John F. Lauman and Catherina Lauman, his wife, of the city of St. Louis, state of Missouri, parties of the first part, and William F. Lauman, of the county of St. Charles and state of Missouri, party of the second part, and said Catherina Lauman, party of the third part, witnesseth:

"That the said parties of the first part, for and in consideration of the sum of one hundred dollars to them in hand paid by the said party of the third part, the receipt of which is hereby acknowledged, and the further sum of one dollar to them paid by said party of the second part, the receipt of which is also hereby acknowledged, do by these presents, grant, bargain and sell, convey and confirm unto the said party of the second part, his heirs and assigns and his successors in trust, forever, the following described real estate, situated in the city of St. Louis, to-wit: [Here follows description of the various parcels of real estate involved in this suit, besides other parcels.]

"To have and to hold the same, together with all and singular, the privileges and appurtenances thereunto belonging or in any wise appertaining, unto the said party of the second part, his heirs and assigns, and to his successors in trust and their heirs and assigns forever. In trust, however, as follows:

"First: For the sole and separate use, benefit, enjoyment and behoof of the said Catherina Lauman, for and during the term of her natural life, entirely free from all control, restraint or interference on the part of her husband, the said John F. Lauman; the said Catherina Lauman, during the said term of her natural life, to have, hold, use, occupy and enjoy, the exclusive use and undisturbed possession of said real estate and the appurtenances thereunto belonging, with full power, jointly with her said husband, to direct the said William F. Lauman, trustee, and his successors in trust, to sell and convey, mortgage, encumber by deed of trust, lease, or make any other disposal of said real estate, or any part or portion thereof, at their will and pleasure; the said Catherina Lauman to receive to her own separate use and benefit, the proceeds of such sale and encumbrance, and all rents and profits arising or accruing from the leasing or other disposal of said property; the said party of the second part and his successors in trust to hold said real estate during the lifetime of said Catherina Lauman and her husband John F. Lauman, subject at all times to the joint direction of the said Catherina Lauman and her said husband, as to the disposal of said real estate or any part or portion thereof, whether by lease, conveyance in fee, mort-

gage, deed of trust, transfer or assignment of this trust or otherwise, the said direction in writing to be evidenced by their joining with said trustee, or his successors in trust, in the execution of said lease, conveyance in fee, mortgage, deed of trust, or other instrument, and by this acknowledgment of the same, in due form of law.

"Second: Should the said John F. Lauman survive the said Catherina Lauman, and said real estate has not then been disposed of as above provided, then the said party of the second part and his successors in trust shall hold said real estate to the use, benefit and behoof of said John F. Lauman, during the term of his natural life, with full power and authority vested in the said John F. Lauman, to receive and appropriate to his use the rents, issues and profits of said real estate; also at his will and pleasure to direct the sale, encumbrance or mortgage or deed of trust, lease, or any other disposition of said real estate as to him seem meet and proper. Also to appropriate to his own use, the proceeds of such sale, encumbrance or other disposition of said property, without being accountable for said rents, issues or profits, or the proceeds of such sale, or other disposition of said real estate, to any person whomsoever.

"Third: From and after the death of said Catherina Lauman and the said John F. Lauman, the said party of the second part and his successors in trust, shall hold the real estate above described, to the use, benefit and behoof, share and share alike of the children born or to be born of the marriage of said John F. Lauman and Catherina Lauman, the children now living, being named as follows, to-wit: John Henry Lauman, born May 30th, 1854; Catherina Maria Alvina Lauman, born November 25th, 1863; John Frederick William Lauman, born November 11, 1867; Catherina Carolina Wilhelmina Lauman, born September 13th, 1869; and the said party of the second part, or his successors in trust, shall collect and receive all the rents, issues and profits arising or accruing from said real estate, out of which he or they shall pay the taxes levied or assessed upon said real estate. Also whatever sum may be necessary or requisite for keeping the buildings upon said real estate in good repair, and in tenantable condition, also the costs and expenses of collecting the rents and income arising or accruing from said property, together with a reasonable compensation for his or their services as trustee, and the balance or residue of the rents or income from said real estate, after deducting the taxes, cost of repairs, expenses of collecting and compensation of trustee as aforesaid, shall be divided equally between the said children, and shall be regularly paid to such of them as shall have attained their majority at the end of every six months in each year, or if the said trustee or his successors in trust, in his or their discretion, shall deem

it more advantageous, and for the best interests of said children so to do, he or they may make such payments at the end of every three months in each year.

"During the minority of any of said children, the said trustee or his successor in trust, shall disburse the share of said rents and profits to which each minor child may be entitled, in such manner, for the support, maintenance and education of such minor, as he or they, in the exercise of their best judgment and discretion, may think proper and most conducive to the welfare and happiness of such minor.

"At the expiration of ten years and after the date when the youngest of said children shall have attained lawful age, the said trustee or his successor in trust, shall make a final settlement with each of said children, paying over to each of them then living, and to the heirs at law of such of them as may have departed this life, their respective equal shares as aforesaid, of the said rents and profits, and thereupon this trust shall cease and be determined, and the title to said real estate and every part and portion thereof, not disposed of as hereinbefore provided, shall without any act to be done or performed by said trustee or his successor in trust, pass to and become fully vested in fee simple in said children then living, and in the heirs at law of such of said children as may then be dead, to be held by them as tenants in common, according to their respective equal shares as aforesaid, and their inheritance from such of said children as may then be dead.

"And the said Catherina Lauman and John F. Lauman, or the survivor of them, at any time hereafter, whenever from any cause whatsoever, they shall deem it necessary or expedient, shall have full power by an instrument in writing under their hand and seal, made by them, acknowledged in due form of law, to nominate and appoint a trustee or trustees in the place and stead of the party of the second part above named, which trustee or trustees, or the survivor of them, or the heirs of such survivor, shall hold the said real estate upon the same trusts, and with the same powers and duties as above recited; and upon the nomination and appointment of such trustee or trustees, the estate in trust hereby vested in said party of the second part, shall thereby be fully transferred and vested in the trustee or trustees so appointed by the said Catherina Lauman and John F. Lauman, or by the survivor of them.

"And the said parties of the first part covenant to warrant and defend the title to said real estate and every part and parcel thereof, against the claim of all persons whomsoever.

"And the said party of the second part accepts and covenants faithfully to perform and fulfill the trust herein created.

"In testimony whereof, the said parties

have hereunto set their hands and seals, the day and year first above written."

It is conceded by counsel on both sides of this controversy that the judgment of the trial court must stand or fall upon the correct interpretation of the deed as heretofore indicated, and if, at the time of the execution and delivery of such deed, its provisions created a vested remainder in the children designated, that the plaintiff is entitled to recover, and the judgment in this cause should be reversed. On the other hand, if the provisions of such deed created simply a contingent remainder in such children, then the judgment rendered by the trial court was proper and should be affirmed. In view of these concessions by both parties to this litigation, we see no necessity for burdening this opinion with a detailed statement of all the facts developed at the trial.

As before stated, the judgment rendered by the trial court was for the defendants. A timely motion for new trial was filed, and by the court taken up and overruled, and from the judgment rendered the plaintiff prosecuted this appeal, and the record is now before us for consideration.

Rassieur, Schnurmacher & Rassieur, for appellant. Kehr & Tittmann and Klein & Hough, for appellees.

FOX, J. (after stating the facts as above). At the very threshold of the consideration of the questions involved in this proceeding, it is well to keep in mind the legal propositions, the correct solution of which are sought by the respective parties to this controversy. They rest within a very narrow compass, and can be stated in a few short sentences. On the one hand, it is earnestly insisted that, by the terms employed in the deed indicated in the statement of this cause, there was created a vested remainder in the children of the grantors then born or thereafter to be born, and that the intention of the grantors gathered from the whole deed was to give his children such vested remainder. On the other hand, it is with equal earnestness insisted that the deed upon which the rights of the parties to this controversy must rest simply created a contingent remainder in the children of the grantors, and that, by giving due consideration to the entire deed and each and every provision in it, the intention of the grantors to create such contingent remainder is clearly made manifest by the terms employed in the instrument. In other words, it is contended upon the one side that upon the execution and delivery of this deed by the grantors the interests of the children in the remainder were vested at the date of the execution and delivery of such deed. On the other side, it is contended that under the express provisions of the deed the title to the remainder in such real estate would not vest until ten years after the youngest child reached his or her majority,

and that it was to vest in those of the children living at that period and the heirs at law of such of them as may then be dead. In harmony with such provisions, it is earnestly insisted on the part of the respondents that under the terms of the deed the persons in whom the title would vest at the termination of the 10-year period could not be ascertained, hence the terms employed in the instrument created a contingent remainder.

It may also be added concerning the controversy in this proceeding that when this cause was first presented to this court, in fact upon the last oral argument upon the legal propositions involved, there was no dispute at that time between learned counsel for appellant and respondents as to the validity of the conveyance now before us for interpretation. It was frankly conceded by counsel for appellant as well as respondents that the deed involved in this controversy was valid and formed the basis upon which both parties predicated their rights so earnestly contended for in this suit. However, since the oral argument learned counsel for appellant have presented a supplemental brief in which numerous authorities are collated upon the subject of the rule of perpetuities. In this brief by counsel for appellant it is insisted that this deed created a vested remainder and is valid, but if the court construed the deed as creating a contingent remainder it is void on the ground that it violates the rule of perpetuities.

We shall not undertake to discuss this proposition, for the reason that the record before us does not warrant the consideration of it. The record plainly discloses that the parties to this suit tried the cause and sought the judgment of the lower court upon the theory that this deed was entirely valid, and the main controversy which arose was upon the force and effect of the deed; that is, whether or not it created in the children a vested or contingent remainder. It is sufficient to say upon that proposition that under the well-settled rules of this court parties will not be permitted to try causes upon one theory in the lower court and present them upon an entirely different theory in the appellate court. We are unwilling to convict in this proceeding the trial court of error upon a theory with which it was not confronted in the trial and disposition of the cause. This is an action in ejectment, and upon the pleadings in this cause the judgment rendered would not be held *res adjudicata* upon any subsequent suit in ejectment for the real estate involved in this proceeding; hence if the appellant should institute another suit in ejectment, and insist upon the trial of that cause that this deed is void for the reason that it violates the rule of perpetuities, and the cause should again reach this court, it will be time enough to then treat of the proposition. Doubtless when the trial court is called upon to deal

with that litigation upon the theory that this deed violates the rule of perpetuities, it will be confronted with many reasons why such rule does not and should not apply to the deed now under consideration; however, we repeat that the record does not disclose any such case before us. Upon the present state of the record confronting us, we must decline to pass upon or even discuss the proposition as to the bearing that the rule of perpetuities has upon the cause now pending before us. Manifestly the plaintiff based her right of recovery upon the deed as heretofore indicated, and the trial proceeded upon that theory. Clearly, if that deed is void, the plaintiff was not entitled to recover in the trial court.

1. The text-writers, as well as the numerous adjudications, in treating of the subject of remainders, seem to have no trouble in clearly pointing out in a general way the distinction between vested and contingent remainders. The difficulty, however, has manifested itself in many of the adjudications in the courts of this country in the application of the rules of law which mark the distinction between vested and contingent remainders to the terms employed in the particular instruments in judgment before such courts. One of the marked characteristics of a vested remainder—and it is suggested by Mr. Tiedeman in his treatise upon Real Property, in the footnote to section 397, as a reliable test to determine whether the remainder is vested or contingent, that is, “the present capacity to convey an absolute title to the remainder”—and, on the other hand, the marked feature of the class of contingent remainders with which we are dealing, is whether, from the terms employed in the instrument of conveyance, there is manifestly an uncertainty of the person or persons who are to take the remainder. In other words, as expressed by Mr. Fearne on Contingent Remainders, 217, “where the contingency depends upon the uncertainty of the person who is to take the remainder”—that is, where the remainder is limited to a person not ascertained by the terms of the instrument—the remainder is contingent.

Mr. Tiedeman on Real Property (2d Ed.) § 403, points out instances where the remainder would be a contingent one. He says: “If the remainder is limited to children living at the death of the life tenant, the remainder is contingent until the death of the life tenant. That is so, although it may be provided that, in the event of the prior death of any of the children, the share of such child or children should vest in his or their issue. The issue would, in that case, take as purchasers and not as heirs, unaffected by any attempted conveyance of the remainder by the deceased parent.”

In *Emison et al. v. Whittlesey et al.*, 55 Mo. 254, the conveyance in judgment before the court was made to A., in trust for the

sole and separate use of B., a married woman, for life, and upon her death the remainder to vest in her children and the children of such of her children as were dead at her death. This court, in treating of that proposition, very clearly and correctly stated that "at the time of the deed it was impossible to say that any one was in existence who could take the remainder. No one could tell that any of the children would survive the mother. It was therefore a contingent remainder."

*De Lassus v. Gatewood*, 71 Mo. 371, was where the testator had devised all of his property to his wife for life or widowhood. It was provided that at her death the property was to be equally divided between the children of the testator that were alive, or their bodily children, naming them in the instrument. This court in that case, on page 381 of 71 Mo., thus stated the law as applicable to the provisions in the will as suggested: "Until the death or marriage of the tenant of the particular estate, it was impossible to ascertain who of the children of the testator or their bodily children would be alive to take in remainder." The remainder in that case was held to be contingent, and that the heirs of one of the children named, who died before the mother, had no interest in the estate.

Vested or contingent remainders are determined, not by the uncertainty of enjoying the remainder, but by the uncertainty of the vesting of the estate. It is this uncertainty of the persons who are to take in remainder which creates one class of contingent remainders. *Rodney v. Landau*, 104 Mo., loc. cit. 257, 258, 15 S. W. 962; *Emmerson v. Hughes*, 110 Mo., loc. cit. 630, 19 S. W. 979.

*Preston on Estates*, vol. 1, p. 74, in treating of this subject, uses this language: "Not the uncertainty of enjoyment in future, but the uncertainty of the right to that enjoyment, makes the difference between an interest which is vested and one which is contingent."

In *Taylor v. Adams*, 93 Mo. App. 277, the conveyance disclosed by the record in that case was to Mrs. Taylor for her sole and separate use for life, with power to dispose of the fee by sale, and in case she failed to direct the sale, then the same was to be equally divided between her children or their descendants, the children of any that were dead to take the place of their parents. The appellate court in that case held that the conveyance created a contingent and not a vested remainder.

The appellate courts of numerous other states have treated of the subject of remainders, and have pointed out very clearly the distinction between vested and contingent remainders. The authorities from such other jurisdictions have been fully collated and cited by counsel for respondent in their briefs, and it is sufficient to say of them that they

are in harmony with the views of the text-writers herein indicated, as well as the supreme and appellate courts of this state.

2. Directing our attention to the provisions of this deed, it will be observed that there is only one clause in the deed which undertakes by express provisions to designate the time when the title to the remainder of the estate shall vest. That provision of the deed is as follows: "At the expiration of the ten years from and after the date when the youngest of said children shall have attained lawful age, the trustee shall make final settlement with each of said children, paying over to each of them then living, and to the heirs of such of them as may have died, their respective equal shares of the rents and profits; and thereupon the trust shall cease and be determined, and the title to said real estate and every part and portion thereof, not disposed of as hereinabove provided, shall without any act to be done or performed by said trustee, pass to and become fully vested in fee simple in said children then living, and in the heirs at law of such of them as may then be dead."

It is insisted by learned counsel for appellant that this clause in the deed did not create a contingent remainder, and it is suggested that "if in this case the deed had said that the remainder should go to those children of the grantors living at the time of the death of their mother, the life tenant, then the right of either child to have any part of it would be contingent on his or her surviving the mother, and, if that were the fact in this case, this would be a contingent remainder." Now, while it may be conceded that a recitation in the instrument of the facts suggested would create, as is insisted by the appellant, a contingent remainder, however it is manifest that the basis upon which the case as suggested is a contingent remainder is predicated upon the uncertainty of whether or not the children or any of them would be alive at the time of the death of the mother; but it will certainly not be seriously contended that there are not other uncertainties as to when the estate in remainder should vest that would make the remainder a contingent one. It is by no means essential, in order to create a contingent remainder, that the uncertainty in the deed now under consideration should be of the precise nature and character suggested by counsel for appellant. In the clause of the deed to which particular attention has been directed, which expressly provides that "at the expiration of ten years from and after the date when the youngest of such children shall attain lawful age that the title in fee to the real estate shall vest in the children of the grantors then living, and in the heirs at law of such of them as may then be dead," we have an uncertainty as plainly manifest as is made by the facts suggested by appellant. The contingency suggested that

the remainder should vest in the children at the death of the mother is of no greater force and does not manifest any greater uncertainty than the provision which vests the remainder in the children living at the expiration of the 10-year period. There is absolutely no distinction to be drawn between the character of the remainder in the supposed case and in the character of the remainder expressly provided for by this deed. The essential elements of uncertainty necessary to create a contingent remainder in the supposed case suggested and the uncertainty which appears upon the face of the deed now in judgment before us, in contemplation of law, stand upon the same footing.

3. It is next insisted by learned counsel for appellant that the clause fixing the time when the title should vest, and expressly providing that at such time, without any act to be done or performed by the trustee, the fee-simple title should pass and become fully vested in said children then living, and in the heirs at law of such of them as may then be dead, were unnecessary words, without force or vitality, and should not be considered in reaching a correct conclusion of the true interpretation of the instrument now under consideration. With the highest respect and consideration for the views entertained by learned counsel for appellant, we are unable to give our assent to this insistence. It is apparent that, if the grantors in this deed intended to create a vested remainder, the clause which is now under discussion was unnecessary; but if, on the other hand, the grantors saw proper to embrace in such deed an express provision designating the time when the title in fee simple should pass, as well as the persons in whom such remainder should vest, and if under the terms of the deed it was uncertain as to the persons who would take the remainder, we are unable to comprehend upon what rule, either in law or equity, such clause can be ignored in the interpretation of the instrument now in judgment before us. To ignore the provisions of this deed, as suggested by appellant, would certainly be doing violence to the terms employed in the conveyance, and would fall far short of being in harmony with the plainly manifest intentions of the grantors in such instrument.

The rule is well settled in this state—in fact it is no longer an open question—that in the interpretation of contracts, whether it be deed or any other instrument of writing, the proper construction of the instrument must be sought from the entire deed, and not merely from any particular part of it. In the early case of *Gibson v. Bogy*, 28 Mo. 478, this court, in discussing that proposition, thus laid down the rule, which has never been departed from: "In the construction of deeds, the intention of the parties must govern as in other cases of contract. If the language is free from ambiguity, the instrument must be construed according to the

plain, common meaning of the words, but the construction must be on the entire deed, and not merely on any particular part of it; and it is the duty of the courts to endeavor to find out such a meaning in the words as will best answer the intention of the parties." In *Orr v. Rode*, 101 Mo., loc. cit. 396, 13 S. W. 1067, this court used this language: "In the construction of such an instrument as the deed" in question, "the first and best rule of interpretation is to gather from the entire document, as best we may, the intention of the parties to it, and give effect to such intent when manifest."

It is fundamental that all parts of an instrument are to be construed as consistent with each other, if such construction be possible. *McCulloch v. Holmes*, 111 Mo., loc. cit. 447, 19 S. W. 1096. In *Meyer v. Christopher*, 176 Mo., loc. cit. 594, 75 S. W. 754, the uniform rules, as announced by this court, treating of this proposition, were strictly adhered to, and it was there stated: "Courts construe contracts and ascertain their meaning from all of the provisions of the contract, and not from single words or phrases or sentences, and, when the intention of the contracting parties is thus ascertained, that intention will be effectuated, unless it violates some inexorable rule of law." In *Williamson v. Brown*, 195 Mo., loc. cit. 336, 337, 93 S. W. 798, this court, speaking through Lamm, J., very clearly and correctly pointed out the well-recognized rule for the interpretation of written instruments. In commenting upon the case of *Utter v. Sidman*, 170 Mo. 284, 70 S. W. 702, it was said that: "The doctrine of that case is, in a nutshell, that the old cast-iron general rule, that, if there be repugnancy, the first words in a deed and the last words in a will shall prevail, no longer obtains in Missouri." In that case the rule as announced in the *Utter Case* was quoted approvingly, and attention was specially directed to that quotation, which is as follows: "In short (under the old rule), a grantor might convey as he pleased, and his intention and wishes would be observed by the courts, but with this qualification: That he must express his intention in set and technical language, and at the proper places, and in the right order and clause of the deed. Failing to do so, the courts did not feel called on to bother about his intention, but took what he said first as expressing conclusively his intention, and disregarded everything else as void for repugnancy. Such a rule of construction made it almost impossible for any one except a very expert conveyancer to draw an instrument that would stand the test of the rule, and likewise made it very easy for the courts in construing complicated instruments; but it is not clear that the real intention of the grantor was ascertained or effectuated. The modern rule, which prevails in this state, is much simpler and much more calculated to carry out the wishes of the grantor. The intention of the grantor, as



gathered from the four corners of the instrument, is now the polar star of construction. That intention may be expressed anywhere in the instrument, and in any words, the simpler, the plainer, the better, that will impart it, and the court will enforce it, no matter in what part of the instrument it is found."

4. It is next maintained that the trustee in executing the provisions embraced in the deed, which directed him to collect the rents and pay them over to the children, was not acting as a mere agent or as one controlling the mere power, but it is insisted that he was acting as trustee holding the title in trust, and the persons to whom he was to pay the money collected were not mere donees of the money, but were equitable owners of the land, and the money was theirs because it was the fruit of the land. We are unable to give our assent to the correctness of this contention. The grantors in this deed expressly created this trust, and the powers delegated to the trustee were not left to mere conjecture or surmise, to be exercised upon the theory that, as he was holding the land in trust, hence by legal presumption followed the right to collect the rents and pay them over to the children, but the grantors in this deed not only expressly created the use of the rents for the children, but expressly designated and plainly pointed out the manner in which such use should be executed and carried out by the trustee; hence it must logically follow that under the provisions of this deed the right to collect the rents and disburse them emanates from the deed itself. The children were not entitled to the money arising from the rents by reason of any title or interest in the land, but they were only entitled to such money because the deed directed the trustee to pay the money over to them, and we are unwilling to sanction the doctrine that, because the trustee is directed to pay the income derived from the property to the children, such fact had the force and effect of a conveyance of any title to the land itself. Manifestly, had this deed provided that after the 10-year period had elapsed the legal title to the real estate involved in this proceeding should be conveyed by the trustee or become fully vested in some person other than those named as the children of the grantors, the right of the children to receive money in the interval of the time between the expiration of the life estate and the expiration of the trust could not have depended upon any title to the real estate being vested in them. We repeat, that the rights of the children to the money arising from this property held by the trustee can only be predicated upon the express provisions of the deed and the plain directions given to the trustee to pay such money over to them.

5. The provision of this deed upon which appellant chiefly relies for support of the

insistence that this deed created a vested remainder is that, after the death of said Catherina Lauman and said John F. Lauman, the said trustee shall hold the real estate involved, or so much thereof as shall not have been disposed of by the life tenants, to the use, benefit, and behoof of the children born or to be born of the marriage of said John F. Lauman and said Catherina Lauman, the children living at the time of the execution of the deed being named in the instrument.

Directing our attention to this provision, it will be observed that there is an entire absence of any power, either in the trustee or the children named, of disposition of any portion of the property that was left at the death of the life tenants; and it will be further observed that in the creation of this use it is not provided that this land shall be held in trust for the children and their heirs or assigns, but simply creates a use and limits it for the benefit of the children, and such use created is fully pointed out and explained by the terms which follow its creation.

In treating of the provision which creates the use for the benefit of the children, the intention of the grantors should not be interpreted from simply some portions of the recitals in this provision. In arriving at the true intention of the grantors, the provisions of the entire instrument must be looked to, and with the observance of this rule, when we consider, following the creation of this use for the benefit of these children, the particular and detailed directions given the trustee as to the execution of this use, which was applicable alone to the keeping of the property in repair, collecting the rents and paying it at stated times to the children, there is no difficulty in arriving at the conclusion, when the deed is considered in its entirety, that by that provision it was not intended to vest any title to the real estate in such children at the date of the execution of the deed now under consideration. No one can analyze the provisions of this deed without fully recognizing the well-settled purpose of the grantors in this conveyance to keep the property in the family and withhold the title and control of such property until such period (which is designated in the deed) as it appeared to such grantors the judgment of such children might be sufficiently matured to take the title to the real estate and deal with it as their own. This settled purpose of the grantors, which is made so plainly manifest by the provisions in this deed, very clearly negatives any intention on their part to create a vested remainder at the date of the execution and delivery of such deed.

While it is true that, whether the remainder was vested or contingent, the children upon arriving at their majority might barter, sell, give away, or devise their interests

in such estate, it is common knowledge that there is a marked difference between dealing with vested and contingent remainders in estates, and this difference is more intensely marked in the opportunities for deals concerning such interests; hence, if this deed created a vested remainder in the children at its date, and was so intended by the grantors, it is significant that there is an entire absence of any provisions to meet the conditions should any of the children, after reaching their majority, give away or convey for a consideration their title to the estate in remainder prior to the expiration of the 10-year period.

A careful analysis of the provisions of this deed most clearly indicates that the grantors therein, in each and every provision of the deed, were extremely watchful as to where the title to this land should vest. Emphasizing the correctness of the conclusion that the grantors never contemplated in the execution of this deed the creation of a vested remainder, it will be observed by a careful analysis of the language employed in it that the grantors never recognized any power either in the trustee, the children, or any one else to convey or dispose of the title or any part of this property except in the manner pointed out by the deed, which was applicable alone to conveyances made upon directions of the life tenants. If the grantor, as is insisted upon by appellants in this case, intended to create a vested remainder, he must have known that the children that were of age at the time of the execution and delivery of the deed, and the other children upon reaching their majority, would have the right, by appropriate instruments, to either give away or convey in any other manner recognized by law such vested estate; hence it is significant, when the deed was executed, the grantors expressly provided that after the death of the life tenants the trustee should take charge of all portions of the property that had not been conveyed by the life tenants in the method pointed out by the deed. Then follow the express directions of the trustee that his dealing with such property, so far as the rents are concerned, shall be with the children, and manifestly the thought seems to have never entered the minds of the grantors that by this deed a vested remainder was created. If so, it clearly follows that the children upon reaching their majority possessed full power to convey the title to the interest in the estate remaining upon the death of the life tenants. Those of the children who were of age at the date of the execution and delivery of this deed were authorized to pass the title to their interests in such estate. The same may be said as to the other children as they reached their majority. This clearly would be in direct conflict with the express provisions of this deed, which designates the time when the title to the remainder of this estate shall vest and in whom it shall vest.

It is not a sufficient answer to this question that it may be said that, if the remainder was a contingent one, the children would also have the right to convey such interests prior to the death of the life tenants and prior to the expiration of the 10-year period. That may be conceded to be true, yet, as heretofore stated, there is a marked difference between a vested and a contingent remainder. If the remainder is vested and the children should undertake to convey it, they deal with the title to whatever estate is left upon the death of the life tenants. On the other hand, the children, in undertaking to convey their interests in a contingent remainder, would be dealing with a mere contingency. Their interests would not be vested. Their conveyance would not pass any title to a vested interest. The title does not vest until the expiration of the 10-year period, and then it passes to the children living at that period and the heirs of those who have died; hence a conveyance by any of the children prior to the expiration of the 10-year period and the termination of the trust would simply be dealing with a mere contingency, and it would not, nor could not, be known to the parties to that transaction, at the date of the consummation of it, as to whether or not any title to the remainder of such estate had passed by such conveyance. Manifestly the grantors in this deed never contemplated that they were executing an instrument by which the title to the estate remaining after their death might be conveyed to entire strangers prior to the period designated by the express provisions of the deed, and even prior to the death of either of the life tenants. If this be the nature and character of this instrument, then we are unable to comprehend the great concern the grantors manifest in the provisions of this deed about the children.

As before stated, the grantors in this deed, in the first use created, retained the absolute control of the property. This deed retained in the grantors, John F. Lauman and Catherina Lauman, absolute power to control and dispose of the title until the death of the survivor of them, and gives them unconditionally all the rents and the entire proceeds of the sale of the property. By the provisions of this instrument they have power to control and convey the property in fee, and the right to take the proceeds as absolutely their own. This in effect constituted the entire ownership of the property. It will be noted that the life tenants, the grantors, retained absolute power to direct the sale, and the right to retain as owners the entire proceeds of such sale. It must not be overlooked that in order to hold that the remainder was vested, as contended for by the appellants, it must be found that the children did take a vested interest in the property from the execution and delivery of the deed on November 20, 1877. In our opinion, the strong terms employed in this deed to safe-

guard the absolute control, and in fact the entire ownership, of this property, indicates, at least in some degree, the intention of the grantors to exclude the possibility during their lives of a vested right in any one else.

6. Again, recurring to the consideration of the clause in this deed (which appellant insists was unnecessary and without any force or effect), after a most careful and thorough analysis of each and every clause embraced in the instrument now under consideration, we have reached the conclusion that this final clause is the most vital of any contained in it. In the first place, it is the only provision in the deed which, after the vesting of the title in the trustee, undertakes to further deal with the title to this property, and divest the title out of the trustee and invest it in those designated by the grantors in the deed. This clause, it will be noted, was the final provision of this instrument which undertook to deal with the disposition of this property, and doubtless was inserted with a full recognition of the provisions of the deed which preceded it. There is no uncertainty or ambiguity in the terms employed in this clause. They are plain, and clearly manifest the purpose and intention of the grantors so far as the time at which the title shall vest, and the persons who are to take such title. It is expressly provided in this clause that, "at the expiration of ten years from and after the date when the youngest of said children shall have attained lawful age, the said trustee or his successor in trust shall make a final settlement with each of said children, paying over to each of them then living, and to the heirs at law of such of them as may have departed this life, their respective equal shares as aforesaid, of the rents and profits, and thereupon this trust shall cease and be determined and the title to said real estate and every part and portion thereof, not disposed of as hereinbefore provided, shall without any act to be done or performed by said trustee or his successor in trust, pass to and become fully vested in fee simple in said children then living, and in the heirs at law of such of said children as may then be dead."

The grantors in this clause in no uncertain or doubtful terms designated the exact time when the title to this real estate should vest, and in the language employed in that clause they have manifested very clearly that they did not recognize that the title to the real estate remaining after their death, or any part of it, was vested, nor was it their intention to do so by any of the other provisions embraced in this instrument. This deed provides that at the date, which was 10 years after the youngest child becomes of age, "the title to said real estate and every part and portion thereof, not disposed of as hereinbefore provided, shall pass to and become fully vested in fee simple in said children then living and in the heirs at law of

such of said children as may then be dead."

It will be noted that the only method provided for the conveyance of this property by this provision of the deed, preceding the clause now under consideration, was by direction of the life tenants or the survivor of them. This being true, the provision in the deed which fixed the date when the title should pass and vest, with the express provision that the title which the grantors sought to pass and vest by this clause, being the title to every portion of the real estate which had not been previously conveyed under their direction during their life tenancy, we see no escape from the conclusion that the title which passed and vested under the provisions of that clause, and expressed to be the title to every part and portion of the real estate which had not been disposed of by the grantors in the method pointed out by the deed, is an absolute exclusion of the theory that any title in remainder was vested in any person at the date of the execution and delivery of this deed. In other words, when these grantors say in this clause of this deed that the title to every part and portion of the real estate remaining after their death, which was not disposed of by their directions by the trustee during their lives, this is an absolute exclusion that any title to an estate in remainder vested at the date of the execution of the deed, and clearly negatives any intention upon the part of the grantors by the provisions of this deed to create such vested remainder. In our opinion, this clause in the deed is a very vital one, and we are unable to concur in the views expressed by counsel for appellant, which in effect maintains that the provisions of this clause were of no force or vitality.

We have herein indicated the long and unbroken line of decisions applicable to the rule for the interpretation of written instruments, which have with such uniformity held that, in the interpretation of such instruments, the proper construction must be sought from a consideration of the entire writing. If these cases are to be longer followed and regarded as a guide to this court, we are unable to see how the provisions of this clause in the deed can be ignored. With the plain and unambiguous terms of this clause, there is no necessity for surmises or speculations as to the time when the title passed to this real estate. It is the only one in which the title to the remainder of this real estate is dealt with, and it expressly provides that after the expiration of 10 years from the time the youngest child becomes of age the title shall pass to and become fully vested in fee simple in the children of the grantors then living, and in the heirs at law of such of said children as may then be dead.

The inquiry is further made on the part of the appellant that if the equitable estate in fee did not vest until 10 years after the youngest child became of age, where was it between the termination of the life estate

In 1893 and the expiration of the 10-year period in 1897? It is a sufficient answer to that inquiry to say that under the provisions of section 4596, Rev. St. 1899 (Ann. St. 1906, p. 2498), it was not necessary that there should be any estate created between the end of the life estate and the vesting of the estate in remainder. It was expressly ruled by this court in *O'Day v. Meadows*, 194 Mo. 588, 92 S. W. 637, 112 Am. St. Rep. 542, that an estate may be created by deed to commence in the future without any intervening estate to support the same. But aside from all this, in our opinion, under the provisions of this deed the legal title to the real estate embraced in such deed was vested in the trustee, and he held the same until the period fixed for the termination of the trust, which was 10 years after the youngest child reached its majority.

7. Our attention is next directed to the final provisions of this deed, in which it is provided that at the expiration of the trust the title to all of the real estate and every portion thereof which had not been disposed of by the life tenants in the manner provided in the deed should pass to and become fully vested in fee simple in said children then living and in the heirs at law of such of said children as may then be dead. It is sufficient to say concerning that provision of the deed that if the conclusion reached as to the interpretation of it is the correct one, then it is only necessary to suggest that the term in the deed, "heirs at law of such children as may then be dead," does not mean that the heirs at law were to take by descent the interest of such children as may then be dead, but, under the well-recognized rules applicable to such provisions in instruments passing title to real estate, such heirs at law will take as purchasers under and by virtue of the deed. In other words, those terms indicate the person or persons to whom the grantors give the estate in remainder by way of substitution for the deceased children, and those terms by no means should be construed that the heirs at law were to take the estate by descent through the deceased.

We see no necessity for pursuing this subject further. We have given expression to our views upon the main propositions disclosed by the record, which results in the conclusion that the judgment of the trial court should be affirmed, and it is so ordered.

BURGESS, LAMM, and GRAVES, JJ., concur. VALLIANT, C. J., and GANTT and WOODSON, JJ., dissent.

VALLIANT, C. J. (dissenting). This is an action in ejectment in which the plaintiff claims an undivided one-fourth of a certain lot in the city of St. Louis. There is no dispute about the facts. John F. Lauman was the owner of the land November 20, 1877. On that day he made a deed, which was duly acknowledged and recorded, whereby he con-

veyed the land to William F. Lauman in trust for certain purposes, to wit: First, for the sole use and benefit of the grantor's wife, Catherina, during her life, with power of disposition; second, for the sole use and benefit of the grantor after the death of his wife if he should survive her, with power of disposal; third, "from and after the death of said Catherina Lauman and said John F. Lauman, the said party of the second part and his successors in trust, shall hold the real estate above described, or so much thereof as shall not have been disposed of as above provided, to the use, benefit and behoof, share and share alike, of the children born or to be born of the marriage of said John F. Lauman and Catherina Lauman, the children now living being named as follows." Then follow the names of their four children living, and directions to the trustee to collect the rents, pay the taxes, make repairs, etc., and divide the net income equally between the children, paying to those who are of age their shares at periods named, and applying the shares of the minors to their education and maintenance, after which comes the following clause in the deed, out of the conflicting interpretations of which this lawsuit has arisen: "At the expiration of ten years from and after the date when the youngest of said children shall have attained lawful age, the said trustee or his successor in trust, shall make a final settlement with each of said children, paying over to each of them then living, and to the heirs at law of such of them as may have departed this life, their respective equal shares as aforesaid, of the said rents and profits, and thereupon this trust shall cease and be determined and the title to said real estate and every part and portion thereof, not disposed of as hereinbefore provided, shall without any act to be done or performed by said trustee or his successor in trust, pass to and become fully vested in fee simple in said children then living, and in the heirs at law of such of said children as may then be dead, to be held by them as tenants in common, according to their respective equal shares as aforesaid, and their inheritance from such of said children as may then be dead."

The defendants interpret that clause to mean that the estate in remainder was contingent, and was not to vest until 10 years after the youngest child came of age, and then to vest in the children then living and in the heirs of those then dead. The plaintiff contends that, taking that clause in connection with the whole deed, the estate in remainder was vested on the execution of the deed. There were no other children born to John F. Lauman and his wife than the four named in the deed, viz., John Henry, Catharina Maria Alvina, John Frederick William, and Catharina Carolina Wilhelmina. John F. Lauman, the grantor, died in 1879;

Catherina, his wife, survived him, and died 1898; John Henry, the oldest child, died before his mother in 1892, leaving his widow, who is the plaintiff in this suit, but no child. He left a will by which he devised all his estate to his widow the plaintiff, and she now claims title to an undivided fourth of the land by virtue of that will. The youngest child, Catharina Carolina Wilhelmina, came of age September 13, 1887; therefore the date appointed for the termination of the trust came September 13, 1897. At that date all the children except John Henry were living; they are still living, and in possession of the property in question, and are the defendants in this suit. John Henry's widow and devisee has married again, and is now Mrs. Buxton.

There is but one question in the case; that is, did the deed create an equitable vested remainder in the children of the grantor? If yea, the plaintiff is entitled to recover; otherwise not. The court rendered judgment for the defendants, and the plaintiff appealed.

We do not discover much difference in the opinions of the counsel in this case concerning the law of remainders or the rules by which vested are to be distinguished from contingent remainders, but the difficulty lies in the application of the rules to the facts of the case. The fact that the share of the estate the remaindermen may take, when the time specified for its enjoyment comes, may depend on a contingency, does not constitute it a contingent remainder. The remainder may be given to a class liable to be increased in number. In Tiedeman R. P. (3d Ed.) § 302, it is said: "The general rule is that a remainder is contingent if the persons who are to take are not in esse or not definitely ascertained. But where the remainder is limited to a class, some of whom are not in esse, the remainder has repeatedly been held to be vested, \* \* \* liable, however, to open and let in those who are afterwards born during the continuance of the particular estate." This court so held in *Gates v. Seibert*, 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625. Therefore the fact that this grant was to the children born and to be born does not militate against the proposition that it was a vested remainder.

Nor does the fact that the body of the property is liable to be diminished by the life tenant by exercise of the power of disposal affect the character of the remainder. The general rule of law is that where there is an absolute power of disposal in the first taker it will be construed to mean that an absolute estate in fee is granted, and therefore there is no remainder left unless there are words in the will or deed clearly showing that it was the intention of the grantor to convey to the first taker an estate less than a fee and to reserve or otherwise dispose of the remainder. But where, as in this case,

express words are used limiting the grant to the first taker to a life estate and disposing of the remainder in fee, the remainder passes burdened with the power. Tiedeman, R. P. (3d Ed.) § 298. That rule is recognized by this court in *Cornwell v. Wulff*, 148 Mo. 542, 50 S. W. 439, 45 L. R. A. 53.

In one of the briefs for respondent it is argued that if John F. Lauman had survived his wife he would have had the disposal of the property and it would have been subject to execution on a judgment against him, and that that condition was inconsistent with the power of the remaindermen to sell. Of course, under the terms of our statute (section 3397, Rev. St. 1899 [Ann. St. 1906, p. 1902]), the deed in trust for the benefit of the grantor was void as to creditors, and the property was liable to be taken for his debts; but there is no creditor in this case, the deed is good between the parties, and if there were creditors, then the remaindermen would take subject to their rights; the estate would vest with the burden.

It is an essential element to an estate of vested remainder that there be a present right of future enjoyment; but if that element is present the time appointed for the enjoyment to begin may depend on a contingency, and the degree of enjoyment may be affected by a contingency that would burden the property, yet the estate would vest in present. The author above quoted, in section 301, says: "No uncertainty of enjoyment will render the remainder contingent. The contingent or vested character of the remainder is only determined by the uncertainty which attends the vesting of the right to the estate." And afterwards in the same section the author says: "Wherever there is a doubt as to whether a remainder is vested or contingent, the courts always incline to construe it a vested estate." Therefore, when we are construing an instrument which creates a remainder, and we find in it an element of contingency, we must determine whether the contingency refers to the estate granted or to the time when the grantee may go into possession. If it refers to the estate granted, then the estate is a contingent remainder; but if it refers only to the period of enjoyment, the estate is vested.

In a note to the text, Tiedeman, R. P. (3d Ed.) § 297, several tests to determine whether the remainder is vested or contingent are discussed, and the test there suggested is "the present capacity to convey an absolute title to the remainder." But the author continuing, says: "This test would, however, give rise to the qualification, where the remainder is to a class and some of the class are not yet in esse. The remainder, so far as those in esse are concerned, is held to be vested (see post, 302), while such remaindermen could not convey an absolute title, thus excluding the after-

born members of the class from their right in the remainder, although they can convey an absolute title to their own interest in it." Under that rule, if this is a vested remainder, either of the four children named could, at any time after the execution of the deed, have conveyed his or her interest subject to diminution of the share by the birth of another of the class.

Where the contingency named is such as to render it uncertain what person or persons will take the remainder when the time comes, then it is a contingent remainder. If in this case the deed had said that the remainder should go to those children of the grantor living at the time of the death of their mother, the life tenant, then the right of either child to have any part of it would be contingent on his or her surviving their mother, and, if that were the fact in this case, this would be a contingent remainder, but it is not the fact.

In the briefs we are referred to decisions of this court bearing on this question, but they all recognize the principles above stated, and the only difference between them grows out of the difference in the facts. In *Emlison v. Whittlesey*, 55 Mo. 234, the deed was to A., in trust for the sole use of B., a married woman, for life, remainder in fee to the children of herself and her husband living at the time of her death, and the children of any of their deceased children living at the time of her death. The court said: "At the time of the deed, it was impossible to say that any one was in existence who would take the remainder. No one could tell that any of the children would survive the mother. It was therefore a contingent remainder."

In *De Lassus v. Gatewood*, 71 Mo. 371, the remainder was to the children or their bodily heirs living at the death of the life tenant. It was held that that was a contingent remainder, because, although there were several children living when the will was made, it was impossible to say that one of them would survive the life tenant, their mother.

*Emmerson v. Hughes*, 110 Mo. 627, 19 S. W. 979. The deed was to "Mary R. Goodman for and during her natural life and with remainder to the heirs of her body." At the date of the deed she had six children living. She and her six children executed a deed conveying the land to defendant's grantor. One of the children, after executing the deed, died during the lifetime of the life tenant, leaving an heir, who, after the death of the life tenant, brought suit for his share of the land, and recovered judgment, which this court affirmed. In that case it was contended by the defendant that the deed conveyed a life estate to Mrs. Goodman with a vested remainder to her children, but the court held that it was no remainder to the children, as children, at all, but the remainder was "to the heirs of her body,"

and who would be such heirs could not be known until her death.

In contrast with those cases is *Jones v. Waters*, 17 Mo. 589, where the devise was to the testator's wife "for and during her natural life and after her death to descend to her children by me, equally share and share alike." There it was held the children took a vested remainder; they did not have to wait until they filled the description of the word "heirs"; their right did not depend on their surviving their mother. Without consuming the more time and space that would be required to review the other decisions of this court cited in the briefs, we are content to say that they all announce the governing principles above stated, and therefore we will proceed to their application to the facts of this case.

By the first clause of the deed the grantor conveyed to "the party of the second part, his heirs and assigns and his successors in this trust, forever, the following described real estate situated in the city of St. Louis, to wit," etc. The grantor thereby parted with the whole estate; he reserved no part of it; it all went to the grantee for the uses and purposes thereafter specified. The deed created a legal and an equitable estate. The legal estate vested in the trustee; the equitable estate vested, or was to vest, in the beneficiaries named. The intention to pass the whole legal estate to the trustee was no more clear than was the intention to pass the whole equitable estate to his wife and children. The equitable estate he divided into an estate for life and an estate in fee in remainder. There is no doubt as to who was to be the beneficiary of the one or who the beneficiaries of the other, for they are all named or described in the deed, and the remaindermen are described as children, not as heirs, and there are no words to indicate that their right is to depend on their surviving the life tenant. Between the life estate given to his wife (and the fragment thereof extended for himself in case he should survive her) on the one hand, and the remainder to his children on the other, there is no estate created—there is nothing between them. If, therefore, the equitable estate in fee did not vest until 10 years after the youngest child came of age, as respondents contend, where was it between the termination of the life estate in 1893 and the expiration of the 10-year period in 1897? It was either in the trustee or it was in the children named, and, if it was in them then, it had been in them since the execution of the deed. It was specified in the deed that in that interval of time the trustee should collect the rents and pay them over or apply them as directed. In doing so he was not acting as a mere agent or as one executing a mere power; he was acting as trustee holding the title in trust, and the persons to whom he was to pay the money collected were not

mere donees of money but they were equitable owners of the land, and the money was theirs because it was the fruit of their land. To the extent, therefore, at least of enjoying the rents arising from the land, their proprietary use of the property began immediately on the termination of the life estate. The language of the deed is that after the death of the life tenant the trustee "shall hold the real estate above described or so much thereof as shall not have been disposed of as above provided to the use, benefit and behoof share and share alike of the children born or to be born," etc. He was to hold the title for them; they were therefore the cestui que trust of the title which he held, and he was to collect and pay over to them the rents arising from their property. This he was to continue to do until the expiration of 10 years after the youngest child should have attained lawful age, and then he was to "make a final settlement with each of said children, paying over to each of them then living, and to the heirs at law of such of them as may have departed this life, their respective shares as aforesaid of the said rents and profits." The language there used shows that the grantor understood that he had given the title to his children, and the intervention of the trustee was only to put that much restriction on the use or enjoyment of the estate; he doubtless thought it would be better for them to have the estate managed by a trustee until the youngest child should reach a comparatively mature age. When the trustee should make his final settlement he was to pay to the children then living their respective shares, and if any of them had died he was to pay it, not to the survivors of the class, but to the heirs of the deceased; that is he was to pay it to those who had inherited the interest which the deceased children of the grantor had owned. But if the equitable title had not vested in the deceased children in their lifetime, how could there be any heirs to such title?

So far, there is nothing obscure in the meaning of the deed, and if the clause in question had ended with the words above quoted there would have been no room for controversy as to its meaning. The words preceding were all-sufficient to convey the whole title to the trustee for the use of the grantor's wife for life and his children in remainder in fee; but defendants are advised that the words following give a significance to the whole instrument, and have the effect to qualify all that had gone before in the granting clause and to designate a time, not alone when the free and unrestricted enjoyment of the estate was to begin, but when the estate was for the first time to vest. The language is "and thereupon (that is upon the final settlement of the trusteeship) this trust shall cease and be determined, and the title to said real estate and every part and por-

tion thereof, not disposed of as herein provided, shall without any act to be done or performed by said trustee or his successor in trust pass to and become fully vested in fee simple in said children then living and in the heirs at law of such of said children as may then be dead, to be held by them as tenants in common according to their respective equal shares as aforesaid and their inheritance from such of said children as may then be dead." The office of the trustee would have ended, and the title which the grantor's children up to that time had held would have changed its character from an equitable to a legal estate by force of the deed without any relinquishment of title from the trustee, even if the words last quoted had not been added to what had preceded; therefore those words were unnecessary, but they did not alter the effect of all that had gone before. The conveyancer may have thought that unless such words were used the legal title would remain in the trustee after he had settled his accounts and descend to his heirs, leaving only the equitable title in the testator's children, and, in order to put that trouble out of the way and avoid the consequence of a possible disinclination or accidental incapacity on the part of the trustee to execute a deed of relinquishment, the words were used to render such a deed unnecessary. But whatever may have been the idea of the conveyancer, we are satisfied that the intention of the grantor gathered from the whole deed was to give his children a vested fee in remainder, and the office of the trustee was continued to the period named only to secure what the grantor deemed a judicious management of the property until his children were old enough to have mature judgment; in other words, it was a restriction on the use and a postponement of the time for full enjoyment of the estate, but not a postponement of the time of the vesting of the title.

There is no question but that the whole title which the grantors had before the execution of the deed passed out of them by its execution, and whatever title they thereafter had in the property was derived from the deed itself. That deed conveyed the whole legal title to the trustee, and divided the equitable title into a life estate and remainder in fee. But for the active duties the trustee was given to perform, the deed would have fallen within the terms of the statute of uses and trusts, with the result that the equitable title would have drawn to it the legal title, and the trustee would have been discharged. The active duties, however, suspended the merger of the title, and, while those duties remained to be performed, the legal title was left in the trustee, while the equitable titles were in those for whom they were created. The active trust separated the legal from the equitable titles, as well in the life estate as in the remainder, but rendered the one no more contingent than the other.

The contingencies which might have resulted in postponing the enjoyment, or in diminishing the quantity of the property to pass to the remaindermen, resulted, not from the fact that the legal title was withheld from them, but by the possibility of the numerical enlargement of the class or the exercise of the power of disposal by the life tenant, neither of which affected the character of the remainder. In the period of time between the termination of the life estate and the specified 10 years after the youngest child came of age, where was the equitable title? It was in those for whose use and benefit the trustee held the legal title; and to whom he was required to pay the rents. Then, when the period of his active duties expired, the statute of uses took the case in hand, and he was discharged without being required to execute a deed transferring his legal title; the only thing required by him was to settle his accounts. That is in conformity to the language of the deed, and also to the language of the statute.

We hold, therefore, that title in fee in remainder to an undivided one-fourth of the land was vested in John Henry Lauman in his lifetime, and he had a right to dispose of it by will as he did, and the plaintiff as his devisee is entitled to recover. The judgment ought to be reversed, and the cause remanded to be retried according to the law as herein expressed.

GANTT and WOODSON, JJ., concur in the views herein expressed. WOODSON, J., expresses his views on another point in a separate dissenting opinion.

WOODSON, J. I concur in all that has been said by Judge VALLIANT in the opinion filed by him in this cause; but in the view I take of the case it is wholly immaterial whether the grantees in the deed take a vested or a contingent remainder thereunder. In either event, in my opinion, the judgment should be reversed and the cause remanded, with permission granted to the parties interested to take such legal action as in their judgment they may deem proper, in order to secure or protect their rights to the real estate involved.

In my judgment, the deed in question is clearly, upon its face, violative of the statute of perpetuities, and is consequently absolutely null and void for all purposes whatsoever. If that is true, then the deed conveyed no estate of any character to any of the grantees mentioned therein, but, upon the contrary, the grantors in the deed died the owners of the land described therein, and it should be divided between their heirs at law according to the statutes of descent and distribution.

2. The third paragraph of the deed in question, in so far as it is material to the point I wish to suggest, reads as follows:

"Third: From and after the death of said

Catherina Lauman and the said John F. Lauman, the said party of the second part and his successors in trust, shall hold the real estate above described, or so much thereof as shall not have been disposed of as above provided, to the use, benefit and behoof, share and share alike, of the children born or to be born of the marriage of said John F. Lauman and Catherina Lauman, the children now living, being named as follows, to-wit: John Henry Lauman, born May 30th, 1854, Catharina Maria Alvina Lauman, born November 25th, 1863, John Frederick William Lauman, born November 11, 1867, Catharina Carolina Wilhelmina Lauman, born September 13th, 1869; and the said party of the second part, or his successors in trust, shall collect and receive all the rents, issues and profits arising or accruing from said real estate, out of which he or they shall pay the taxes levied or assessed upon said real estate. \* \* \*

"At the expiration of ten years from and after the date when the youngest of said children shall have attained lawful age, the said trustee or his successor in trust, shall make a final settlement with each of said children, paying over to each of them then living, and to the heirs at law of such of them as may have departed this life, their respective equal shares as aforesaid, of the said rents and profits, and thereupon this trust shall cease and be determined, and the title to said real estate and every part and portion thereof, not disposed of as hereinbefore provided, shall without any act to be done or performed by said trustee or his successor in trust, pass to and become fully vested in fee simple in said children then living, and in the heirs at law of said children as may then be dead."

By reading the third clause of said deed, it is seen that it expressly provides that the unborn children of the unborn grantees mentioned in the deed should take an interest in the real estate conveyed, provided a child should be born unto the grantors prior to their death, and provided further that said child had died leaving a child or other heirs surviving him at the time distribution was made of the real estate, described in the deed by the trustees, under the terms of the deed. That being true, and it appearing upon the face of the deed, it is clearly seen, without a shadow of doubt, that it was not only possible but highly probable that an unborn child of an unborn child might have taken an interest in said deed. In other words, if after the execution of the deed there had been born unto John F. Lauman and Catherina Lauman, his wife, the grantors in the deed, a child (whom for convenience we will call James Lauman), and if prior to said distribution James Lauman had died leaving surviving him a child or children (whom for convenience we will call Charles and Alfred Lauman), then in that case James, Charles, and Alfred Lauman would have tak-



en an interest in said real estate under the deed of the grantors, who were the parents of James and the grandparents of Charles and Alfred Lauman, notwithstanding the fact that none of them were born at the time the deed was executed. Consequently, as before stated, the unborn child of an unborn child might have taken the title to the real estate in question under the deed we are asked to construe. That being unquestionably true, then the deed is void and inoperative for any purpose, for the reason that it plainly and diametrically contravenes and does violence to both the letter and the spirit of the statute of perpetuities, which declares all instruments void which purport to convey real estate to the unborn child of an unborn child, or for a period of time beyond a life or lives in being, and 21 years thereafter, allowing the period of gestation, in addition, of a child en ventre sa mere, who is to take under such a limitation.

This question came before division No. 1 of this court in the recent case of *Shepperd v. Fisher*, 206 Mo. 208, 103 S. W. 989, and, after a most exhaustive research and mature deliberation, the court said:

"Mr. Washburn lays down the rule of law against perpetuities in the following language: 'Still the policy of the law is against clogging the free alienation of estates, and, as will be shown hereafter, it has become an imperative, unyielding rule of law, first, that no estate can be given to the unborn child of an unborn child; and, second, that lands cannot be limited in any mode so as to be locked up from alienation beyond the period of a life or lives in being and 21 years after, allowing the period of gestation, in addition, of a child en ventre sa mere, who is to take under such a limitation.' 1 Washburn on Real Prop. (4th Ed.) p. 110, § 57. Sherwood, J., quotes, with approval, the foregoing language of Mr. Washburn in the case of *Lockridge v. Mace*, 109 Mo., loc. cit. 166, 18 S. W. 1145. In discussing this same question, another eminent authority says: 'Perpetuities are grants of property, where the vesting of an estate or interest is unlawfully postponed; and they are called perpetuities, not because the grant, as written, would make them perpetual, but because they transgress the limits which the law has set in restraint of grants that tend to a perpetual suspense of the title, or of its vesting, or, as is sometimes with less accuracy, expressed, to a perpetual prevention of alienation. It is any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being, and 21 years beyond; and, in case of a posthumous child, a few months more, allowing for the term of gestation; or it is such a limitation of property as renders it unalienable beyond the period allowed by law. The particular feature in limitations of future interests, with which the rule against perpetuities is connected, is the time of their vesting, or, in other words, of their becom-

ing interests transmissible to the representatives of the grantee, devisee, or legatee, and disposable by him.' Rice on Modern Law of Real Property, p. 755, § 270; *Miffin's Appeal*, 121 Pa. 206, 15 Atl. 525, 1 L. R. A. 453, 6 Am. St. Rep. 781. Continuing, the same author, in the following section, says: 'It was always easy to determine where an executory devise contravenes the rule against perpetuities by this single inquiry, viz.: Is it possible that the event or contingency upon which the estate must vest may not occur or happen within the prescribed period limited by the rule? For if, by any possibility, the event might not happen within the time, the devise is obnoxious to the rule, and hence invalid. In all instances, under all circumstances, the contingency upon which the vesting of the estate hinges must be of such a character that it will infallibly occur some time within the limit.' Mr. Rice lays down the true test of the legality of such limitations in the following language: 'In the application of this rule, in order to test the legality of a limitation, it is not sufficient that it be capable of taking effect within the prescribed period; it must be so framed as ex necessitate to take effect, if at all, within that time. If, therefore, a limitation is made to depend upon an event which may happen immediately after the death of the testator, but which may not occur until after the lapse of the prescribed period, the limitation is void. The object of the rule is to prevent any limitation which may restrain the alienation of property beyond the precise period within which it must by law take effect. \* \* \* The true test by which to ascertain whether a limitation over is void for remoteness is very simple. It does not depend upon the character or nature of the contingency or event upon which it is to take effect. These may be varied to any extent. But it turns on the single question, whether the prescribed contingency or event may not arise until after the time allowed by law within which the gift over must take effect.' Rice on Modern Law of Real Property, p. 762, § 275.

"The rule of law against perpetuities is not complicated nor difficult of understanding, but is like most rules of universal application—it is often found difficult in applying it to the facts of a particular case. But if the object of the rule is constantly borne in mind, and the kind of interests or estates which come under its operation, the proper application of the rule is very much simplified. The object of the rule, as before stated, is to leave the alienation or circulation of property free from all entanglements and other obstructions, so that it will freely pass and circulate in the channels of commerce, and the kind of the estates to which the rule applies are contingent remainders, conditional limitations, executory devises, and springing and shifting uses. These interests or estates at common law were in-

alienable, because of their contingent nature. 2 Washburn on Real Property (4th Ed.) p. 591, § 6. Such estates withdrew the landed property from the ordinary channels of commerce, its disposal and acquisition was rendered difficult, its improvement was greatly retarded, the development of the country was stayed, and the capital of the country was gradually withdrawn from trade and circulation. In order to escape from that condition of things, the courts originated and developed and put in force the rule against perpetuities. It is a pure and simple judge-made law of extensive application, and in force in one form or other in every civilized nation on the globe, and stands inexorably against all efforts tending to impede or clog the channels of commerce. In the absence of statutes to the contrary, this rule never applies to vested remainders, because at common law they were always alienable, and for that reason they never fall under the bane of the courts or the displeasure of the lawmakers, except in recent years a few of the states have enacted statutes prohibiting the sale of vested remainders. In the states where those statutes exist, of course, the rule of perpetuities applies with equal reason and force to vested as it does to contingent remainders. Rice on Modern Law of Real Property, pp. 755 to 764, §§ 270 to 276; Gray on Rule Against Perpetuities, p. 167, § 205; Washburn on Real Property (4th Ed.) p. 705, § 4."

In the Shepperd Case, just quoted from, one clause of the deed there under consideration contained the identical vice pointed out in the deed involved in the case at bar, and, in passing upon that identical question, the court used this language: "Such births are not only possible but highly probable; in fact, such a child has been born unto Susan Ellen Shepperd since the death of the testator. It is thus seen that the estate under the fifth clause of the will may not vest until the birth of an unborn child of an unborn child; and that under the sixth paragraph it cannot vest in fee in the child born since the death of the testator unto the said Susan Ellen Shepperd until it also has issue born, which will be beyond the allotted time prescribed by the rule, because such issue would be the unborn issue of the unborn bodily heirs of said Susan Ellen Shepperd. 1 Washburn on Real Property (4th Ed.) p. 110, § 57; Rice on Modern Law of Real Property, pp. 761, 762, § 274; Lockridge v. Mace, 109 Mo., loc. cit. 166, 18 S. W. 1145." The fact that no child was born unto the grantors in the deed in question does not change the legal effect of the deed, for the reason that, if it is possible for an unborn child of an unborn child to take under the deed, it is just as void as if such child had in fact been born, as was the fact in the Shepperd Case.

The same question was presented to this court in the case of Bradford v. Blossom, 190 Mo. 110, 88 S. W. 721. The opinion in that

case was written by Burgess, J., and the court there held that a will which offended against the statute of perpetuities was void. The same case came before the court in banc, and by a unanimous court the same doctrine was again announced therein. Bradford v. Blossom, 207 Mo. 177, 105 S. W. 239. Also, to the same effect, see: Heald v. Heald, 56 Md. 300; Donohue v. McNichol, 61 Pa. 73; Barnum v. Barnum, 26 Md. 119, 90 Am. Dec. 88; Gray on Perpetuities (2d Ed.) §§ 369 to 382; Coggin's Appeal, 124 Pa. 10, 16 Atl. 579, 10 Am. St. Rep. 569; In re Walkerly, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 136, 137. In fact, all of the text-writers and adjudications of this country and of England enunciate the rule to be as stated in the case of Shepperd v. Fisher, supra, and I have been unable to find a single authority holding to the contrary on either side of the waters.

I am, therefore, clearly of the opinion that the deed in question is absolutely void upon its face, and that it conveyed no title whatever to any one.

3. It is contended that the validity of the deed is not questioned in this case. That is true, and the opinion of FOX, J., filed herein so states; but, as I view the case, that is wholly immaterial, for the reason that the vice of the deed appears upon its face, and, should we hold it to be a valid deed, the clear effect of that ruling would be to overrule a long line of cases heretofore decided by this court, and wipe from the jurisprudence of this state the law against perpetuities, which is conceded by all to be one of the best and wisest laws extant, and which is in force in every civilized country on the globe. Not only that, but it would also set a bad example for conveyancers of real estate in the future, and invite the execution of deeds and wills which cannot stand the legal test.

I am, therefore, of the opinion that the judgment should be reversed, and the cause remanded for the purposes heretofore stated in paragraph 1 one of this opinion.

#### BUXTON v. LAUMAN et al. (two cases).

(Supreme Court of Missouri. March 9, 1909.  
Rehearing Denied April 13, 1909.)

Appeals from St. Louis Circuit Court; O'Neil Ryan, Judge.

Actions by Christina S. Buxton against John F. W. Lauman and others. Judgments for defendants, and plaintiff appeals. Affirmed.

Rassieur, Schnurmacher & Rassieur, for appellant. Kehr & Tittmann and Klein & Hough, for respondents.

FOX, J. These causes are brought to this court by appeal on the part of the plaintiff from the judgment of the circuit court of the city of St. Louis in ejectment proceedings finding the issues for the defendants.

It is sufficient to say of these causes that the same propositions are involved as in the case of Buxton v. Kroeger et al. (in which the opinion was handed down at the present sitting of

this court) 117 S. W. 1147. The conclusions reached in the Kroeger Case must be held decisive of the cases at bar, and the judgments of the circuit court should be affirmed, and it is so ordered.

BURGESS, LAMM, and GRAVES, JJ., concur. VALLIANT, C. J., and GANTT and WOODSON, JJ., dissent.

#### BUXTON v. DUNN et al.

(Supreme Court of Missouri. March 9, 1909. Rehearing Denied April 13, 1909.)

Appeal from St. Louis Circuit Court; O'Neil Ryan, Judge.

Action by Christina S. Buxton against Thomas Dunn and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Rassieur, Schnurmacher & Rassieur, for appellant. Kehr & Tittmann and Klein & Hough, for respondents.

FOX, J. This cause is brought to this court by appeal on the part of the plaintiff from the judgment of the circuit court of the city of St. Louis in an ejectment proceeding finding the issues for the defendants.

It is sufficient to say of this cause that the same propositions are involved in the case of Buxton v. Kroeger et al. (in which the opinion was handed down at the present sitting of this court) 117 S. W. 1147. The conclusions reached in the Kroeger Case must be held decisive of the case at bar, and the judgment of the circuit court should be affirmed, and it is so ordered.

BURGESS, LAMM, and GRAVES, JJ., concur. VALLIANT, C. J., and GANTT and WOODSON, JJ., dissent.

#### GORDON et al. v. PARK et al.

(Supreme Court of Missouri, Division No. 1. March 31, 1909. Rehearing Denied April 13, 1909.)

#### 1. APPEAL AND ERROR (§ 1127\*)—AFFIRMANCE—MOTION TO AFFIRM.

Where a motion to affirm on the ground that appellant did not file the transcript within the required time was not accompanied by the usual docket fee, the motion will not be considered, not having been properly filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1127.\*]

#### 2. MINES AND MINERALS (§ 49\*) — TITLE — ADVERSE POSSESSION — ELEMENTS.

In order to claim minerals under the statute of limitations, after a severance from the surface ownership, the surface owner must show actual, notorious, exclusive, continuous, peaceable, and hostile possession of the mine, independently of his possession of the surface, in the same manner as a stranger, actual possession being shown by opening and operating the mine, and the possession is continuous if the operation is carried on at such seasons as the nature of the work permits or the custom of the neighborhood requires, if there is some evidence of possession in the interval to connect the operations, when resumed, with the prior operations.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 135; Dec. Dig. § 49.\*]

#### 3. MINES AND MINERALS (§ 49\*)—RECOVERY OF POSSESSION—INSTRUCTIONS—CONTINUED POSSESSION.

In ejectment for a coal mine, where the court instructed that defendant must have had

actual, exclusive, continued, and peaceable possession of the coal for 10 years to claim by limitations, if requested, an instruction should have been given explaining what would constitute "continued" possession.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 135; Dec. Dig. § 49.\*]

#### 4. APPEAL AND ERROR (§ 216\*)—OBJECTIONS BELOW — INSTRUCTIONS — REQUESTS — NECESSITY.

In ejectment for a coal mine, where the court instructed that, to claim by limitations, defendant must show actual, exclusive, continued possession, etc., for the statutory period, defendant cannot complain on appeal that the court did not instruct as to what constituted "continued" possession, where he did not ask such an instruction; the instructions for plaintiff being proper in their general outline.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 627, 628; Dec. Dig. § 216.\*]

#### 5. APPEAL AND ERROR (§ 882\*)—REVIEW—IN-VITED ERROR—INSTRUCTIONS.

In ejectment for a coal mine, defendant cannot complain on appeal of an instruction that, to claim by limitations, he must show actual, exclusive, and continued possession, without explaining the meaning of "continued," where he used the same word without explanation in an instruction given for him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. § 882.\*]

#### 6. TRIAL (§ 143\*)—QUESTION FOR JURY—CONFLICTING EVIDENCE.

Where the evidence was conflicting as to whether defendant's possession of a coal mine, which he claimed by limitations, was continuous, the question was for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 342; Dec. Dig. § 143.\*]

#### 7. MINES AND MINERALS (§ 50\*)—RECOVERY OF POSSESSION—JUDGMENT—DESCRIPTION OF PROPERTY—"PREMISES."

In ejectment for a coal mine, the judgment was not objectionable for adjudging that plaintiff recover possession of the "following described premises, to-wit: two-fifths of one-half of the coal situated under the surface," etc.; the word "premises" only referring to the mineral estate.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 50.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5509, 5513; vol. 8, p. 7761.]

#### 8. MINES AND MINERALS (§ 55\*) — CONVEYANCES — ESTATE IN MINERALS.

A separate estate may be created in minerals, either by grant or exception.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153, 158; Dec. Dig. § 55.\*]

#### 9. MINES AND MINERALS (§ 55\*)—CONVEYANCES—APPURTENANCES.

The grant of coal under the surface carries with it the use of the surface so far as necessary for mining operations.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 159, 163; Dec. Dig. § 55.\*]

Appeal from Circuit Court, Boone County; W. N. Evans, Special Judge.

Action by James Gordon and others against Allen Park and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

N. T. Gentry and Boyle G. Clark, for appellants. Webster Gordon (E. W. Hinton, of counsel), for respondents.

**GRAVES, J.** This is the second appeal in this case. The former appeal was by the plaintiffs, and was heard by division 2 of this court. 202 Mo. 236, 100 S. W. 621, 119 Am. St. Rep. 802. The cause was reversed for errors in defendants' instructions, pointed out in the opinion. Upon a retrial the plaintiffs, by a verdict of nine jurors, recovered the possession of the property sued for, without damages or rents and profits, and judgment went accordingly.

In the former case, Burgess, J., first states certain undisputed facts and certain facts proven by the records, which statement is applicable here, and is as follows:

"This is an action in ejectment, instituted by plaintiff in the circuit court of Boone county, to recover possession of an undivided two-tenths of all the coal underlying certain land in said county owned by defendant Allen Park, which land and coal mine thereon he had leased to defendant George Melloway. The petition is in the usual form. The defendants filed separate answers, that of defendant Melloway being simply a general denial; but defendant Park's answer, in addition to denying each and every allegation in the petition, set up and pleaded the statute of limitations. \* \* \*

"There is no dispute as to the ownership of the land, but only as to the coal underlying the same. Berkeley Estes was the common source of title. It appears from the evidence that on February 25, 1859, he conveyed to Boyle Gordon an undivided half interest in the coal mine in controversy, reciting in the deed that the other half had previously been conveyed to John B. Gordon. By deed, dated March 5, 1859, Boyle Gordon conveyed his undivided interest in the mine to George W. Gordon, the father of the plaintiffs. This deed was recorded in the recorder's office of Boone county, March 7, 1859. George W. Gordon died in 1860, and by the terms of his will, which was probated July 24, 1860, all of his real and personal estate was given to his widow, Ann Eliza Gordon, during her lifetime, and at her death to her children, Irvin Gordon, Irene Gordon, Jennie Gordon, Webster Gordon, and James Gordon, the two last named being the plaintiffs in this action. An inventory of all the real and personal estate of said George W. Gordon was made by the executors, Ann Eliza Gordon and James M. Gordon, but there was no mention in said inventory of any interest of the testator in said coal mine, nor was there any evidence that said George W. Gordon ever used or claimed any interest therein.

"The land upon which the coal mine in question is situated was conveyed by Berkeley Estes to his son-in-law, William A. Park, by deed executed June 1, 1868, which deed contained no reservation as to the said coal

mine. William A. Park died on May 20, 1874, leaving a widow, a daughter, and an infant son, the latter being Allen Park, defendant in this suit. By his last will and testament, William A. Park gave this land to his widow during her lifetime and to his children at her death. His widow died in 1875, and his daughter died intestate a few years later, never having married. Defendant Allen Park, being a child three years old at the time of his mother's death, was taken to the home of his uncle, William B. Estes. Mr. Estes qualified as executor of the estate of William A. Park, deceased, and also qualified as guardian and curator of defendant Allen Park, and acted as such guardian and curator until February, 1894. On December 27, 1893, defendant Allen Park became of age, having married a short time prior thereto, and moved to this land, living thereon till March 16, 1901, when he sold it to Sarah E. Hayes. Mrs. Hayes and her husband had this mine worked till they sold the place to defendant George Melloway on February 2, 1903. The next day Melloway conveyed the land back to Allen Park. In neither of the deeds of conveyance was there mention of any reservation as to the said coal mine. On the day of the last-named conveyance, defendant Park executed a mining lease to said Melloway authorizing him to mine on said land."

Judge Burgess likewise makes a statement of the facts pro and con upon the question of adverse possession, but, as the case was retried, these facts we will state as they appear in this record.

The evidence upon the part of the plaintiffs upon the question of adverse possession of the coal mine tended to show that, whilst coal was taken therefrom at intervals, beginning at a time before the death of William A. Park, up to the time of suit, yet such acts were not continuous, but, on the other hand, coal would be taken out for a season or two (that is, during the winters) at a time, and then operations would cease for one or more years, then again be resumed for awhile, and again discontinued as above stated. The evidence for plaintiffs also tended to show that there was no period of 10 consecutive years during all this time when coal was mined or taken from the premises described in the petition. For the defendant, the evidence tended to show that there was a period of 10 consecutive years during which, in proper season (winter months), coal was taken from the mine on the land in question, and that William A. Park and his successors in title openly claimed title, not only to the surface, but to the coal as well. It also tends to show that no claim was made by plaintiffs until the bringing of this suit. Plaintiffs also showed by two witnesses that William A. Park admitted in his lifetime that the coal belonged to the Gordons. And plaintiffs' evidence further tended to show that the mining first done by William A.

Park was in connection with one of the John B. Gordon heirs, mentioned in the statement made by Judge Burgess. That by some agreement they jointly operated the mine. This sufficiently states the facts for a review of the legal questions presented.

The court refused a peremptory instruction to find for plaintiffs, but at their request gave the following:

"(1) The court instructs the jury, as plaintiffs and defendant Allen Park claim title from and through Berkeley Estes, deceased, to all the coal under the surface of the land described in plaintiffs' petition, it was sufficient for plaintiffs to show a derivative title from him to said coal, without proving their title further back.

"(2) The court instructs the jury that plaintiffs have proved a perfect paper title to two-tenths of all the coal under the surface of the land described in plaintiffs' petition, to wit, all that part of the east half of the southwest quarter of section 16, township 48, and range 12 in Boone county, Mo., north of the Columbia and Cedar Creek gravel road, back to Berkeley Estes, deceased, and your finding and verdict must be for the plaintiffs for the undivided two-tenths of said coal, unless the jury believe from the evidence that defendants, or one of them, has had such possession of said coal as is hereinafter explained in the instructions given for plaintiff.

"(3) The court instructs the jury before they can find for the defendants, or either of them, on account of having possession of the said coal, they must believe from the evidence that defendants, or one of them, or those under whom he or they claim title to said coal, has had the actual, exclusive, continued, peaceable, and hostile possession of said coal for 10 or more consecutive years prior to the institution of this suit.

"(4) The court instructs the jury that the actual, exclusive, continued, peaceable, and hostile possession of the surface of the land by the defendants, or either of them, described in the foregoing instructions, will not carry with it the possession of the coal under the surface of said land, and you should not find for the defendants, or either of them, on that account."

For the defendants, the court instructed thus:

"(1) The court instructs the jury that if the jury believe from the evidence in the case that the defendants Allen Park and those under whom he claims title and ownership have been constantly in the open, notorious, adverse, exclusive, and continued possession of the coal mine under the land described in the petition for the period of 10 years or more prior to the institution of this suit, and that the defendant Park, and those under whom he claims title, have continually claimed to be the owners of said mine and coal during said 10 years or more, then the jury must find for the defendants.

"(2) The court instructs the jury that evidence of statements said to have been made many years ago by persons now deceased ought to be received by the jury with care and caution, taking into consideration the length of time that has elapsed, the liability of the witness to forget or misquote the language used, as well as the failure of the witness to have understood the language that was used by the deceased.

"(3) The jury are the sole judges of the credibility of the witnesses and of the weight and value to be given their testimony. In determining such credibility and weight, the jury may take into consideration the character of the witness, his or her manner on the stand, his or her interest, if any, in the result of the case, his or her feelings toward the plaintiffs or toward the defendants, the reasonableness of unreasonableness of the testimony given, as well as the facts and circumstances given in evidence. And if the jury believe that any witness has willfully sworn falsely to any material matter in issue, then the jury may disregard any part or all of the testimony of such witness."

No instruction asked by defendant was refused. One as to form of verdict given for defendant, and a formal one as to number of jurors required to return a verdict, given by the court of its own motion, are omitted. The court refused one for plaintiffs, which is likewise omitted.

1. In the brief of plaintiffs (respondents) it is suggested that they filed a motion to affirm the judgment under section 813, Rev. St. 1899 (Ann. St. 1906, p. 783); and our rule 28 (73 S. W. viii), for the reason that the transcript to this court was not filed by the defendant within the time prescribed by the statute and rule. An examination of our record fails to show a filing of this motion. Such document, after search, was found in the clerk's office, but not marked "Filed," for the reason, as stated by our clerk, that the same was not accompanied by the usual docket fee of \$10. It has been the uniform practice to require such fee before filing such motions, and the motion is not therefore before us for consideration. Such motions are usually filed before the appellant files his case, and it has been the uniform practice to require the fee before filing and docketing such motion. There being no motion on file, this matter will not be further noticed.

2. Defendant complains of instructions 2 and 3, supra, given for the plaintiffs. As we gather the contention of defendant, it is the unqualified and unexplained use of the word "continued" in said instruction of which he complains. He says in brief: "With such instructions given to the jury, learned counsel could well argue, and the jury could well believe, that, as the defendants (appellants) had not worked said mines every day for a period of 10 years, the stat-

ute of limitations had not run in their behalf." We are of opinion that the law was well declared upon the former appeal. This court then approved the following from Baringer and Adams on the Laws of Mines and Mining, p. 569: "The surface owner setting up the statute must establish a possession of the mine, as such, independently of his possession of the surface. Such a possession must be actual, notorious, exclusive, continuous, peaceable, and hostile for the statutory period. And in these respects the surface owner is in no better position than a stranger. \* \* \* Actual possession is taken by the opening of mines and carrying on of mining operations. That possession is continuous if the operations are continuous, or are carried on continuously at such seasons as the nature of the business and the customs of the country permit or require. A cessation of operations in accordance with the customs of the neighborhood, or from necessity occasioned by some natural agency, would not be an interruption of the possession. But there must be something evidencing possession in the interval which connects the operations when resumed with those which have gone before, and to distinguish such possession from a series of repeated acts of trespass."

And, discussing the question of continuity of possession, the court further said: "It was not necessary, however, in order to give defendants the benefit of the statute of limitations, that work in the mine should have been done every day, or that such work by defendants should have been done within the view of the public. 'All the authorities agree that the acts of possession must be visible and continuous for the requisite period in order to create the bar.' Sedgwick and Wait on Trial of Title to Land, §§ 735, 737. It is not required that an act of ownership should be done every day or month or at any definite intervals, but they should be of such frequency and character as would at all times apprise the owner 'that his seisin was interrupted and that his title may be endangered.' *Goltermann v. Schlermeyer*, 125 Mo., loc. cit. 302, 28 S. W. 620. To prevent a break in the possession of those claiming possession of the mine, they should have continued to exercise acts of possession and ownership over it, as by keeping off trespassers, giving permission to persons to take coal therefrom, paying taxes thereon, mining the coal when practicable or advantageous, or leasing the mine to others, from all of which plaintiffs must have known or inferred that defendants were claiming the coal as their own."

The question of adverse possession of the mine is tried just as would be the question of the adverse possession of the surface. The instruction objected to is one frequently given in cases where the statute of limitations is invoked as to the surface. But there

are two reasons why defendant cannot now complain of these instructions:

First, if the defendant wanted the word "continued," as used in the instruction, defined or explained, he should have offered an instruction to that effect; failing to do so, he cannot now complain. Had he asked such an instruction, it should have been given, and no doubt would have been given. There may be cessations in the operation of mines which would not break the continuity of the adverse possession, and such matter could have been appropriately set forth in a proper instruction; but in this case the trial court gave all that defendant asked. The instructions given for plaintiffs in their general outlines are proper, and defendant failed to ask one embodying the ideas he suggests to this court. Under such circumstances, he cannot be heard here. *Smith v. Fordyce*, 190 Mo., loc. cit. 30, 88 S. W. 679; *Montgomery v. Railroad*, 181 Mo., loc. cit. 498, 79 S. W. 930; *Wheeler v. Bowles*, 163 Mo., loc. cit. 409, 63 S. W. 675; *Christian v. Insurance Co.*, 143 Mo., loc. cit. 467, 45 S. W. 268; *Dysart-Cook Mule Co. v. Reed*, 114 Mo. App., loc. cit. 303, 89 S. W. 591.

In the last case, supra, one of the complaints lodged against the instruction was that some of the words used therein were not explained or defined. Such is the complaint in the case at bar. In that case, *Bland, P. J.*, well said: "There is nothing vague or uncertain in the language of the instruction. If there are terms used which plaintiff thought should be explained to the jury, why did it not ask an instruction properly defining such terms? Why lie by and wait the chances of a favorable verdict before making complaint, if it be apprehended that the jury would not understand the meaning of terms used in the instructions as given, which is not erroneous? In these circumstances, plaintiff must abide the result."

Secondly, the defendant cannot complain, because if the court, nisi, was in error in not explaining the word "continued" in instruction No. 3 for plaintiff, he was perhaps led into the error, if such it was, which we do not admit, by the conduct of defendant, for in his instruction No. 1, asked and given, he uses the expression, "have been constantly in the open, notorious, adverse, exclusive, and continued possession of the coal mine," etc., and this, too, without explanation or definition or either the word "constantly" or "continued." In other words, he uses the word just as strongly as do the plaintiffs. He cannot now be heard to complain. *Phelps v. City of Salisbury*, 161 Mo., loc. cit. 14, 61 S. W. 582; *Johnson-Brinkman Co. v. Bank*, 116 Mo., loc. cit. 559, 22 S. W. 813, 38 Am. St. Rep. 615; *Christian v. Ins. Co.*, 143 Mo., loc. cit. 467, 45 S. W. 268; *Reilly v. Railroad*, 94 Mo., loc. cit. 611, 7 S. W. 407.

In this case both the instructions for the plaintiffs and the defendants use the word

"continued" in the same way and manner. In the *Relly Case*, supra, we said: "It is too late for defendant, after having thus invited the court to give such instructions, to insist that the court erred in complying with the request. It is settled in the following cases that one party cannot be allowed to complain of another's instructions where his own announced the same doctrine, although it be erroneous. *Thorpe v. Railroad*, 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120; *Holmes v. Braidwood*, 82 Mo. 610; *McGonigle v. Daugherty*, 71 Mo. 259; *Smith v. Culligan*, 74 Mo. 388; *Davis v. Brown*, 67 Mo. 315." And again, in the *Christian Case*, supra, it was said: "A party is not at liberty to complain of an instruction on the part of his adversary where his own exhibits the same fault." So, also, in a much stronger case, *Phelps v. City of Salisbury*, we thus stated the rule: "This instruction was therefore unwarranted by both the pleadings and the evidence, and, but for the fact that the defendant by its fifth and sixth instructions in substance adopted the same theory, the judgment would have to be reversed, but a party will not be heard to complain of an error which he invites or adopts."

We therefore hold that defendant is in no position to urge as error the two instructions by him criticised, and this contention will be overruled.

3. We are asked to reverse the judgment because the verdict is so palpably against the weight of the evidence as to indicate passion and prejudice upon the part of the jury. This insistence we cannot sustain. The evidence in behalf of the plaintiffs tended to show many and lengthy breaks in the continuity of the alleged adverse possession. Of course, that of defendant was contra. The question was then one for the jury, and we cannot upon this record say there is evinced passion or prejudice in the action of the jury. This contention is therefore disallowed.

4. The conclusion reached in what precedes results in an affirmance of the judgment, unless it should be modified, and this we are asked to do. The judgment, after formal recitals of the verdict and other matters, concludes: "It is therefore ordered and adjudged by the court that the plaintiffs have and recover of and from defendants Allen Park and George Melloway the possession of the following described premises, to wit, two-fifths of one equal undivided half of all the coal situated under the surface of all that part of the east half of the southwest quarter of section 16, township 48, and range 12, lying north of the Columbia and Cedar Creek gravel road in Boone county, Missouri, they have and recover of and from the defendant all the costs of its cause, and that a writ of restitution issue for the possession of said premises." The objection urged is in the use

of the word "premises" in the last sentence. As said by Black, J., in *Snoddy v. Bolen*, 122 Mo., loc. cit. 487, 25 S. W. 933 (24 L. R. A. 507): "Coal, mineral and stone under the surface of the earth are subjects of grant and exception, and, when excepted in a deed, become a separate and distinct inheritance. They may be conveyed separate from the surface. *Wardell v. Watson*, 93 Mo. 108, 5 S. W. 605; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760; *Lillibridge v. Coal Co.*, 143 Pa. 293, 22 Atl. 1035, 13 L. R. A. 627, 24 Am. St. Rep. 544; *Coal Co. v. Mellon*, 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645."

In this case the separate inheritances were created by deed of grant, whilst in the *Snoddy Case* they were created by exception in the deed. But whether created by a deed directly granting the mineral estate, or by an exception in a deed granting the surface estate, there are created two separate and distinct estates. To the same effect is *Wardell v. Watson*, 93 Mo., loc. cit. 111, 5 S. W. 605. To our minds the words "said premises" used in the judgment simply refer to what precedes, and only mean that restitution go for two-tenths of the separate mineral estate; in other words, it means the mineral premises, as distinguished from the surface premises. The grant of the coal carries with it the use of the surface so far as is necessary to carry on mining operations. *Wardell v. Watson*, 93 Mo., loc. cit. 111, 5 S. W. 605, and cases cited. The word "premises" as used in the judgment only goes to the mineral estate and things appurtenant thereto, and in this sense it is correct.

The judgment will be affirmed, and it is so ordered. All concur.

#### GROVES et al. v. TERRY et al.

(Supreme Court of Missouri, Division No. 1.

March 31, 1909. Rehearing Denied

April 13, 1909.)

#### 1. PARTIES (§ 88\*)—MISJOINDER—WAIVER OF OBJECTIONS.

The objection of misjoinder of parties plaintiff is waived by the failure to demur to the petition.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 145; Dec. Dig. § 88.\*]

#### 2. APPEAL AND ERROR (§ 605\*)—RECORD—EFFECT OF FAILURE TO PRINT.

The Supreme Court will not search through a typewritten full transcript of record to determine what is record proper, record entries, and the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 605.\*]

#### 3. APPEAL AND ERROR (§ 501\*)—SAVING EXCEPTIONS—SUFFICIENCY OF BILL OF EXCEPTIONS.

A bill of exceptions to an order sustaining a motion for a new trial is insufficient where it fails to show that an exception was saved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2300; Dec. Dig. § 501.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

#### 4. NEW TRIAL (§ 6\*)—DISCRETION OF COURT.

The granting of a new trial for "misunderstanding and misconstruction of the agreed statement of facts" by the court is a proper exercise of the trial court's discretion.

[Ed. Note.—For other cases, see *New Trial*, Dec. Dig. § 6.\*]

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

Action by Leonard D. Groves and others against Albert T. Terry and others. From an order granting plaintiffs a new trial after findings for defendants, defendants appeal. Affirmed.

J. C. Kliskaddon & R. L. Shackelford, for appellants. Randolph Laughlin, for respondents.

LAMM, P. J. The suit is under section 650, Rev. St. 1899 (Ann. St. 1906, p. 667), to try and determine title. It was tried on an amended petition which does not describe the real estate claimed by the plaintiffs in common or separately, but alleges that the lots owned by them in fee simple are "contained in and are a part of" a certain larger tract, in turn described by metes and bounds, but whether the owners of this larger tract in its entirety are in court we cannot make out. Why the aggregation of plaintiffs was joined in the action does not appear. There is no averment they own any lots as tenants in common. We take it they do not. It is alleged that plaintiffs are in possession of the (undescribed) lots owned by them, and that defendants have or claim to have an interest "in the tract of ground above set out"—that is, in the larger tract, which contains the lots in controversy—and "that said interest, if any there be, is undetermined, and is a cloud on the title of these plaintiffs."

No demurrer was filed, hence, if the petition states a cause of action at all, no question can now be made here over a misjoinder of parties, if any. *Gardner v. Robertson*, 208 Mo. 605, 106 S. W. 645.

By answer defendants admit plaintiffs were in possession "of divers and sundry lots of ground contained within the real estate so described in said petition." They deny that plaintiffs are owners in fee. They aver that plaintiffs hold under color of title conferred by divers and sundry deeds from the Overland Real Estate Company. The answer then sets up a claim of title in defendants, and avers that it is a fee-simple title derived under the will of Albert Todd and by the death of their mother (his daughter), mentioned in said will as Elizabeth Helen, wife of John H. Terry, and by virtue of the death of the wife of said Albert Todd, naming her. Wherefore they join in the prayer of the petition that the court determine the estate, title, and interest of the respective parties in said real estate and

adjudge that the defendants are owners in fee simple.

The case was tried as in chancery under an agreed statement of facts. It appears therefrom that the Terrys, husband and wife, once owned the land; that they mortgaged it; that they then sold it to Albert Todd, who assumed to pay the mortgage debt; that subsequently Todd died testate, leaving an intricate will devising his real estate in part to his widow for life, with remainder over; that the premises were sold under the Terry mortgage; that Mrs. Terry purchased at that sale; and that plaintiffs hold through mesne conveyances from her and her husband, their title originating in the 80's. The claim of defendants is sufficiently indicated by the answer. In a nutshell, for our present purposes, it may be said that the agreed facts show plaintiffs have a legal title, and that defendants, as the children of Elizabeth Helen Terry, born Todd, claim as alleged beneficiaries under an alleged resulting trust; that is, their title, if any, rests in equity.

The judgment, oddly enough, finds and determines that defendants have title in fee simple "to the real estate described in plaintiffs' petition," and that plaintiffs have no interest in it. The decree then describes the larger tract mentioned in the petition, and adjudges that defendants have title in fee simple in said larger tract. It says nothing about a resulting trust or any equities that might arise in favor of plaintiffs in executing such trust. In due time a motion for new trial was filed by plaintiffs, and was sustained. From that order, defendants appeal.

The case comes here on a full transcript in typewriting. We have uniformly held that we will not go to such transcript, in the first instance, to search out what is record proper or record entries, and what is contained in a bill of exceptions. The statutes and rules of this court require copies of a printed abstract of the record to be filed for our use. We have uniformly ruled that abstracts import verity unless challenged in a proper way, or unless additional and counter abstracts are filed, hence should be sufficient. We have also held that abstracts should in some sensible way differentiate between record proper, including in that term record entries, and matter of mere exception. *Gilchrist v. Bryant*, 213 Mo. 442, 111 S. W. 1128; *Thompson v. Ruddick*, 213 Mo. 561, 111 S. W. 1131; *Stark v. Zehnder*, 204 Mo., loc. cit. 444, 445, 102 S. W. 992. Under the ruling in those cases there is no exception in this case to the order sustaining the motion for a new trial earmarked as preserved in a bill of exceptions. Maybe it is there found, in the typewritten, full transcript, if we go there to find it, but this we should not do in this case, unless we cast aside our rules and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



go there in every case and for everything. There is an abstracted exception to the order sustaining that motion, but there is nothing in the abstract even faintly telling us that the exception was saved, where it could alone be effectually saved, to wit, in a bill of exceptions. The same may be said of the motion itself. It is in the abstract, but whether it was preserved in a bill of exceptions or whether there was a call for it in the bill is not expressly shown or by necessary implication. *Hendricks v. Callo-way*, 211 Mo., loc. cit. 555, 111 S. W. 60 et seq. There is nothing before us except the pleadings, the judgment, and the order granting a new trial, and we see no error on the face of any of them, hence the order granting a new trial will be affirmed.

We make this ruling without regret. This, because we have looked into the merits of the motion, and have concluded (even if we ignored the imperfection of the abstract) that it would be unwise to interfere with the discretion of the learned trial judge in granting a new trial. Among other reasons spread of record in his order granting one, he states that his judgment in the first instance was "based upon a misunderstanding and misconstruction of the agreed statement of facts." Who should be better able to judge of that than he? Should we, in reviewing his large discretion—a discretion we have time and time again encouraged trial judges to exercise—say that he misjudged or did not understand his own mind? The case was tried on an agreed statement of facts, long, ambiguous in vital particulars, silent on others, and alleged to be untrue in others. We need not cumber the record by setting it forth, but we accept as true what the trial judge says on his conscience and under the sanction of his oath of office, viz., that he did not understand it. We owe so much as that to judges who labor to mete out justice below, having as their chief reward an abiding sense of doing right between man and man. When one of them tells us that he did not understand a case, and sets aside his own judgment in order that he may, we believe him and commend him.

We have deemed it wise to let the case go down and take its own course without ruling on questions on the merits discussed by counsel; among others, whether affirmative relief could go to the extent prayed by defendants on their form of answer without getting beyond the scope of section 650. *Powell v. Crow*, 204 Mo., loc. cit. 485, 102 S. W. 1024. We prefer to pass on vital questions when they come here, if ever, on an appeal from a judgment meeting the approval of a trial chancellor on a hearing in which all the facts are developed, and not by way of anticipation on a scant or ambiguous agreed statement of facts.

Let the order granting a new trial be affirmed, and the cause be proceeded with below *de novo*. It is so ordered. All concur.

**STATE ex rel. KELLY, Revenue Collector, v. SHEPPERD.**

(Supreme Court of Missouri, Division No. 1.  
March 31, 1909.)

**1. TAXATION (§ 260\*)—PLACE OF TAXATION—PERSONAL PROPERTY.**

Personal property is taxable at the owner's domicile and in the school district in which he resides, and, if a person is taxed in the wrong district or county, the tax is illegal, and its collection cannot be enforced.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 433; Dec. Dig. § 260.\*]

**2. DOMICILE (§ 2\*) — DISTINCTION BETWEEN "RESIDENCE" AND "DOMICILE."**

At common law the words "residence" and "domicile" were used interchangeably and had practically the same meaning; a domicile being a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time; and a residence being the abode of a person or incumbent or his benefice—opposed to nonresidence.

[Ed. Note.—For other cases, see *Domicile*, Cent. Dig. § 2; Dec. Dig. § 2.\*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2168-2179; vol. 8, pp. 7641-7642; vol. 7, pp. 6151-6161; vol. 8, p. 7788.]

**3. DOMICILE (§ 4\*)—CHANGE—TEMPORARY ABSENCE.**

When a person has once acquired a residence or domicile, it is not lost by reason of his temporary absence therefrom on pleasure or business.

[Ed. Note.—For other cases, see *Domicile*, Cent. Dig. § 9; Dec. Dig. § 4.\*]

**4. STATUTES (§ 179\*)—CONSTRUCTION—RULES FOR CONSTRUCTION.**

The intent of the Legislature in enacting Rev. St. 1899, § 4160 (Ann. St. 1906, p. 2252), relating to the construction of statutes, and providing that the construction of all statutes "shall be by the following additional rules unless such construction be plainly repugnant to the intent of the Legislature or of the context of the same statute. \* \* \* Seventeenth, \* \* \* the place where any person having no family shall generally lodge shall be deemed the place of his residence"—was simply to furnish additional rules of construction which the court might or might not use as the case might require, and the intent was not to construe all statutes itself by defining the word "residence."

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 258; Dec. Dig. § 179.\*]

**5. TAXATION (§ 253\*)—PLACE OF TAXATION—STATUTES.**

Rev. St. 1899, § 4160 (Ann. St. 1902, p. 2252), provides that the construction of all statutes "shall be by the following additional rules unless such construction be plainly repugnant to the intention of the legislature or of the context of the same statute. \* \* \* Seventeenth, \* \* \* the place where the family of any person shall permanently reside \* \* \* and the place where any person having no family shall generally lodge shall be deemed the place of residence of such person or persons respectively." The revenue statute (Rev. St. 1899, c. 149 [Ann. St. 1906, pp. 4198-4322]), provides that all personal property shall be assessed in the county and district in which the owners reside. *Held*

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
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that, as chapter 149 makes no distinction as to the place where property of persons who have families and those who have none shall be assessed, the rule of construction under section 4160 is not applicable, as it would be repugnant to the intention of the Legislature.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 417; Dec. Dig. § 253.\*]

**6. TAXATION (§ 254\*)—PLACE OF TAXATION—“PLACE OF RESIDENCE.”**

Where a person worked a farm, keeping a furnished room in the house thereon, which he occupied when there, and claimed his residence there, but generally and continuously lodged with his parents in another school district because they were old and helpless and he considered it his duty to stay with them at night, returning to his farm every morning, the district where his farm was situated was the district of his residence, within Rev. St. 1899, c. 149 (Ann. St. 1906, pp. 4198-4322), providing that all personal property shall be assessed in the county and district where the owners reside.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 419, 420; Dec. Dig. § 254.\*]

For other definitions, see *Words and Phrases*, vol. 6, p. 5394.]

**Case Certified from Kansas City Court of Appeals.**

Action by the State, on the relation of L. A. Kelly, Collector of Revenue, against George Alexander Shepperd. Judgment for plaintiff, and defendant appealed to the Kansas City Court of Appeals, which certified the case to the Supreme Court. Reversed.

This suit was instituted by the collector of revenue of Clinton county, in the circuit court thereof, to recover of defendant the sum of \$131.56, taxes, together with interest and costs, alleged to be due the Plattsburg school district, assessed against his personal property for the years 1901 and 1902. The answer was a general denial, and a plea that the defendant was not a resident of the Plattsburg school district during said time, but was a resident of school district No. 14, and has been for many years prior thereto. The plaintiff introduced in evidence the tax bill sued on, and rested; then the defendant introduced testimony tending to prove the allegations of the answer.

At the request of the defendant, the trial court made and filed in the cause the following special finding of facts:

“After a full hearing of the evidence in the above-entitled cause, the court finds the facts in controversy therein as follows: That Geo. A. Shepperd resided at the time of the assessment of the taxes herein sued for on a farm and farm residence lying wholly outside of the limits of the school district of the city of Plattsburg. That he kept a furnished room in said farmhouse. That his mother and father removed to the city of Plattsburg, inside the limits of the school district of the city of Plattsburg, and that at the same time of the assessment of the taxes herein sued for, and for a number of years prior thereto, the defendant had generally and continuously lodged with his parents at their home in

Plattsburg. That at the time of the assessment of the taxes herein sued for, and prior to that time, defendant had never considered the home of his parents in Plattsburg as his home, but intended and considered his farmhouse as his home, where he occasionally took a meal with his tenant, who occupied a portion of said farmhouse.”

While the evidence conclusively shows, yet the court omitted to find, the following facts, to wit: That defendant was single and had no family; that the sole reason why he lodged with his parents at night was because they were very old, sickly, and helpless, and needed his care and attention; and that every morning, after staying with his parents, he would return to his farm for the purpose of looking after it and caring for his stock.

The appellant duly excepted to the finding of facts because of the court's omission to find and include therein the facts above stated. Whereupon the plaintiff offered the following declaration of law: No. 1. “The court declares the law to be that if the defendant occupied a room at the residence of his father and mother in Plattsburg, Mo., and that he was a man without any family, and that he usually boarded and lodged at such residence of his father and mother, then the defendant was a resident of said Plattsburg school district, and his property is subject to taxation in said district; and if the court so find, then the judgment must be for the plaintiff for the taxes sued for.” Which declaration of law the court gave; and to the giving of which declaration on the part of the plaintiff the defendant, by his counsel, then and there at the time excepted.

The defendant thereupon asked the court to instruct the jury as follows: “That the domicile of a person, when once fixed by his living at a place with the fixed intention of making it his home, is not changed by his removal to another place or location under comforts and surroundings of a home, until he has a fixed intention of abandoning his former domicile and home, and of acquiring or fixing a domicile at the place to which he has removed.” Which instruction the court refused, at the refusal of which the defendant, by his counsel, then and there at the time excepted.

The court then found for the plaintiff for the amount of the taxes due, together with the interest and costs, and rendered judgment against the defendant therefor. In due time defendant filed his motion for a new trial, which was by the court overruled, to which action of the court defendant duly excepted. He then appealed the case to the Kansas City Court of Appeals, and that court certified the same to this court under the provisions of the Constitution, because the case involves the construction of the revenue laws.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Appellant's assignments of errors are as follows:

"First. The court erred in giving instruction No. 1 on the part of the plaintiff, for the reason that said instruction does not take into consideration a man's intention in as having anything to do with fixing his domicile, and is not the law.

"Second. The court erred in refusing defendant's instruction No. 2, which correctly declares the law.

"Third. The court erred in its holding that a man's residence is determined wholly by his lodging place, which may be even temporary and without any intention of making such place his home or domicile or residence.

"Fourth. The court erred in its finding of facts in not further finding that defendant's sole reason for being in and lodging in the Plattsburg school district was for the purpose of caring for his parents in their old age, that his previous residence had been outside said district, and that he had no intention of changing it up to the time of the assessment of the taxes sued for."

Frost & Frost, for appellant. F. B. Ellis, for respondent.

WOODSON, J. (after stating the facts as above). It is conceded by counsel for both appellant and respondent that personal property is taxable at the domicile of the owner and in the school district in which he resides. *Stephens v. Mayor of Boonville*, 34 Mo. 323; *State ex rel. v. McCausland*, 154 Mo. 185, 55 S. W. 218; *State ex rel. v. Brown*, 172 Mo. 374, 72 S. W. 640. And it is equally well settled that if a person is taxed in the wrong district or county, then it is illegal, and its collection cannot be enforced. *State ex rel. v. Brown*, 172 Mo., loc. cit. 380, 72 S. W. 640; *State ex rel. v. Hannibal Ry. Co.*, 135 Mo., loc. cit. 630, 37 S. W. 532; *State ex rel. v. Hannibal Ry. Co.*, 110 Mo. 265, 19 S. W. 816.

2. This brings us to the consideration of the main legal proposition presented by this appeal. The uncontradicted evidence in the case shows, and the court found, that, at the time of the assessment of taxes in question was made, the appellant was a resident of school district 14, and not of Plattsburg school district, the one in which the assessment was made, and that during the years 1901 and 1902, and for many years prior thereto, appellant had kept a furnished room in his house on his farm, situate in said district No. 14, which he occupied whenever there, but that during the greater part of those years he generally and continuously lodged at night with his parents at their home in the city of Plattsburg, which constitutes the Plattsburg school district. The evidence also conclusively shows that the sole reason for appellant's lodging with his parents was because they were old, sickly, and helpless, both of whom died during those years, and he considered it his duty to stay

with them at night in order to minister unto their wants and necessities, but always returned every morning to his farm in said district 14 for the purpose of looking after his farm and caring for his stock. The evidence also shows that during said years he always considered and claimed his residence to be in said district 14, and voted there, and never claimed Plattsburg to be his home. Upon this state of facts the court gave the instruction asked by respondent, which entirely ignores the intention with which appellant lodged at the home of his parents, and what place he intended and claimed to be his residence during those years, and declared as a matter of law that if he generally lodged at the residence of his parents, then his personal property was taxable in said Plattsburg school district, notwithstanding the evidence showed and the court found that he was a resident of district 14.

Counsel for appellant contends that his legal residence was upon his farm in district 14, and that his intention in that regard is controlling and conclusive upon that question, and that his residence was not affected by his temporary stay with his parents. It seems that counsel for respondent would concede the soundness of appellant's contention in that regard were it not for the language used in the seventeenth subdivision of section 4180 of the Revised Statutes of 1899 (Ann. St. 1906, p. 2252). That section is found in chapter 45, Rev. St. 1899, entitled "Construction of Statutes," and reads as follows: "Additional rules for constructing statutes.—The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the Legislature or the context of the same statute. \* \* \* Seventeenth, the place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge shall be deemed the place of residence of such person or persons respectively." It is the contention of counsel for respondent, and the trial court adopted his views, that this statute fixes the residence of a person without a family for the purpose of taxation only at the place where he generally lodges, regardless of his intention in the matter. These respective contentions, as before stated, sharply present the chief legal proposition to be decided in this case.

We have been cited to no statute embraced within the revenue laws of the state which attempts to define or fixes the residence of any person for the purposes of taxation, and we have searched those laws in vain for such a statute, and consequently feel satisfied that no such exists. In the absence of any such statute, we must look to the common law and to other statutes in determining the meaning of the words "residence" and "domicile" as they are used by the Legislature in the revenue statutes. At common law, all of the authorities agree that those words are used in-

terchangeably and have practically the same meaning. The latter seems to have been more generally used by the text-writers and in the adjudicated cases, but our statutes more frequently use the word "residence." The word "domicile" is defined by Mr. Burrill in the following words: "A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time;" and Mr. Blackstone defines the word "residence" to be "the abode of a person or incumbent or his benefice—opposed to nonresidence." While this court has not attempted to give a technical definition of either of said words, yet it has in numerous cases used them in the sense before mentioned. *Lankford v. Gebhart*, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585; *Hall v. Schoenecke*, 128 Mo. 661, 31 S. W. 97; *Hope v. Flentge*, 140 Mo. 390, 41 S. W. 1002, 47 L. R. A. 806; *Morgan v. Brace*, 140 Mo. 415, 41 S. W. 1101; *State ex rel. v. Brown*, 172 Mo., loc. cit. 384, 72 S. W. 640; *State ex rel. v. McCausland*, 154 Mo., loc. cit. 189, 55 S. W. 218; *State ex rel. v. Banta*, 71 Mo. App. 32; *State ex rel. v. Renshaw*, 166 Mo. 682, 66 S. W. 953.

In this state we have many statutes which employ the words "resident," "citizen," "domicile," "place of residence," etc., which relate to exemptions, elections, officers, taxation, attachments, place of bringing suits, etc., but none of those statutes seem to have undertaken to define any of those words, and, in all of the cases which our attention has been called to, the courts, in construing their meaning, have been controlled very largely by the intention of the person whose residence or domicile was in question. That was the sole controlling fact in the case of *State ex rel. v. Renshaw*, supra, which involves the question as to where his personal property should be taxed. The authorities are also uniform in holding that when a person has once acquired a residence or domicile, then such residence or domicile is not lost by reason of his temporary absence therefrom on pleasure or business. *Cooley on Taxation*, p. 369; *State ex rel. v. Dayton*, 77 Mo. 682; *Taylor v. Abernathy*, 37 Mo. 196; *Greene v. Beckwith*, 38 Mo. 385; *Venuci v. Cademartori*, 59 Mo. 352; *Chariton Co. v. Moberly*, 59 Mo. 238; *Lankford v. Gebhart*, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585; *Hall v. Schoenecke*, 128 Mo. 661, 31 S. W. 97; *State v. Sanders*, 106 Mo. 188, 17 S. W. 223.

So, under this view of the law, we would be compelled to hold that appellant was a resident of district 14, and not of Plattsburg district, unless, as contended by counsel for respondent, said section 4160 has changed the meaning of the word "residence" from its ordinary and generally accepted meaning to that of place of lodgment. By reading said section it will be seen that it does not undertake to declare in unqualified terms that the place where a person without a family generally lodges shall be taken to be his place of residence, but, upon the con-

trary, the enacting clause of that section in express terms provides that "the construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intention of the Legislature or the context of the same statute." Clearly, it was not the intention of the Legislature by enacting that statute to compel the courts to hold as a matter of law that the residence of a person without a family was the place where he generally lodges, for had that been the intention it would have said so in so many words, without having qualified the section by stating that the rules stated therein, 22 in number, should be considered as "additional rules" of construction of all statutes of the state. The Legislature intended thereby to assist the courts in properly construing "all statutes of the state" by providing those additional rules of construction, and it did not thereby undertake itself to construe all of the statutes of the state. This is made clear by the clause thereof which in express terms provides that said rules should never be employed in construing any statute where their use would lead to a construction which was repugnant to the plain meaning of the statute under consideration. So, in our judgment, we do not think it was the intention of the Legislature to absolutely command the court to resort to those "additional rules" of construction where the court could ascertain the clear meaning of a statute without resorting to them. In other words, the Legislature simply meant thereby to furnish additional rules of construction to those already existing for the construction of all statutes of the state, which the court might or might not bring to its assistance in the construction of a particular statute, in the same manner that it would employ or reject any and all other rules of statutory construction. All such rules rest upon the same footing, and may or may not be resorted to as the particular case under consideration may require. Under that view of section 4160, if the court can ascertain the plain meaning of the words "residence" and "domicile" as used by the Legislature in the revenue statutes of the state, without resorting to the "additional rules" of construction stated in said section, then we are not required to do so in construing those words as they appear in the various sections of chapter 149, Rev. St. 1899 (Ann. St. 1906, pp. 4198-4322), regarding the assessment and collection of the revenues.

Having reached the conclusions that the Legislature did not define the words "residence" and "domicile" by enacting said section 4160, and that this court is no more bound to consider the rules of construction therein stated than it is to consider any other rule of statutory construction, we will, therefore, return to the inquiry, what is the place of residence of a taxpayer who has no family within the meaning of said chapter 149? If this was a new question presented

to this court for the first time, we would have no hesitancy in saying that the word "residence" as used in the revenue statutes means the place where the taxpayer lives and which he claims to be his home or domicile. If the contention of counsel for respondent is correct, then all personal property, of whatsoever nature or character, would not be assessed in the county and district where the owner resides, as provided by statute, but would, in all cases where the owner had no family, be assessed in the county and district where he generally lodges, as provided by section 4160. If that is the meaning of the statute, then the personal property of all persons who have a family would be taxable in the county and district in which they reside, while that belonging to all persons who have no family would be taxed in the district where they generally lodge, although temporary in point of time, regardless of their real residence, and of their real intentions and purposes in being temporarily absent therefrom. The revenue statutes make no such distinction as to the place where the property of persons who have families and those who have none shall be assessed. And to make that distinction by placing respondent's construction upon section 4160, we would thereby do violence to the statute, which provides that all such property shall be assessed in the county and district in which the owners reside. That being clearly true, then according to the express terms of section 4160, as before shown, it has no application, for the reason it would be "repugnant to the intention of the Legislature, or to the context of the statute under consideration." While that statute has never been considered by this court in any of the cases I have read, yet, as before shown, the result would not have been changed had it been considered.

We are, therefore, of the opinion that appellant was a resident of school district No. 14, and that his personal property was taxable in that district, and not in the Plattsburg district. The action of the court, therefore, in giving instruction No. 1 for respondent, and in refusing No. 2, requested by appellant, was erroneous.

The judgment is reversed. All concur.

#### STATE v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. April 13, 1909.)

#### 1. INDICTMENT AND INFORMATION (§ 176\*) — ISSUES AND EVIDENCE — TIME OF OFFENSE.

One charged with violation of law on a certain day may be convicted on proof that he committed the act on any day within the period of limitation prescribed for prosecution.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 548; Dec. Dig. § 176.\*]

#### 2. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

Where defendant is charged with the violation of law on a certain day and the evidence shows a violation on that day, the prosecution cannot then show a similar act on other days.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 822; Dec. Dig. § 369.\*]

#### 3. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

In the prosecution of a railroad company under Laws 1907, p. 180, for failure to run a passenger train over a certain portion of its road on a certain day, where the evidence clearly identified the train operated by defendant with the day specified, it was error to admit evidence of the kind of trains defendant ran over that road and their delay in arrival and departure on other days.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 822; Dec. Dig. § 369.\*]

#### 4. STATUTES (§ 192\*)—CONSTRUCTION—MEANING OF WORDS.

Rev. St. 1899, § 4160 (Ann. St. 1906, p. 2252), requires courts in construing statutes to interpret "words and phrases in their ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." Held, that the words "passenger train" and "regular passenger train" have no technical meaning in law, and are therefore to be construed in their ordinary sense.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 270; Dec. Dig. § 192.\*]

#### 5. STATUTES (§ 208\*)—CONSTRUCTION—WORDS OF DOUBTFUL MEANING.

Words in a statute of doubtful meaning are to be interpreted by their context and in view of the purposes of the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 285; Dec. Dig. § 208.\*]

#### 6. RAILROADS (§ 227\*)—OPERATION—STATUTORY REGULATION—"TRAIN"—"PASSENGER TRAIN"—"REGULAR."

The word "train," as used in reference to railroad traffic, means all kinds of trains, freight trains, passenger train, mail train, construction train, etc., and the character of the train is designated by another word. In the term "passenger train" the word "passenger" is used as an adjective to qualify the noun "train." The two words "passenger train" combine to form the name of the thing to which it is applied. Neither word used alone would designate the object intended, but together they constitute the name. The word "regular" is designated to express the character of the train to which it is attributed. It signifies that it is a regular train, whether freight or passenger (citing Words and Phrases, vol. 6, p. 5227).

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6035; vol. 8, pp. 7056-7057.]

#### 7. RAILROADS (§ 227\*)—OPERATION—"REGULAR" TRAIN.

The word "regular," when used to designate a railroad train, applies to the operation of the train whether it be a freight train or a passenger train, but if it has its designated place on the published schedule, and if it ordinarily arrives and leaves as designated in that place, it is a regular train. Thus there may be two passenger trains, one regular and the other irregular, one that is scheduled on the timetable and the other not; yet the irregular train is as much a passenger train as the regular one.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.\*]

**8. RAILROADS (§ 227\*) — OPERATION — "PASSENGER TRAIN" — "REGULAR PASSENGER TRAIN."**

The term "passenger train" includes all passenger trains, regular and irregular, not only trains that move every day on scheduled time, but excursion trains, special trains, extra trains, etc.; whereas, the term "regular passenger train" means a passenger train on the regular published schedule (citing Words and Phrases, vol. 7, p. 6038).

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.\*]

**9. RAILROADS (§ 227\*) — OPERATION — STATUTORY REGULATION — "PASSENGER TRAIN."**

A railroad train composed of an engine and tender, two or more freight cars, combined baggage mail and passenger car, and a passenger coach, is a "passenger train" within Laws 1907, p. 180, requiring railroad carriers to run at least one passenger train over its road each way every day.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.\*]

**10. RAILROADS (§ 227\*)—"LOCAL FREIGHT."**

The term "local freight" means a train of freight cars receiving and delivering goods within a limited distance, and carrying at the rear end a caboose for the accommodation of the train crew, and, incidentally, a few passengers.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4206.]

In Banc. Appeal from Circuit Court, Benton County; C. A. Denton, Judge.

The Missouri Pacific Railway Company was convicted of violation of law with respect to the operation of its passenger trains, and appeals. Reversed.

C. D. Corwin, Roy D. Williams, and Sam B. Jeffries, for appellant. Elliott W. Major, Atty. Gen., W. S. Jackson, and C. C. Barrett, for the State.

VALLIANT, C. J. Defendant was convicted and fined \$100 as if for failure to obey the requirement of an act of the General Assembly approved March 19, 1907 (Laws 1907, p. 180), entitled "An act to compel all railroad corporations or persons operating a railroad or part of a railroad in this state to run at least one passenger train over said railroad each way every day, and fixing penalties for violation thereof." The first section of that act is as follows: "Section 1. That all persons, copartnerships, companies or corporations operating any railroad or part of a railroad in this state shall, unless hindered by wrecks or providential hindrance, run at least one regular passenger train each way every day over all lines, or part of a line, of railroad so operated by such person, copartnership, company or corporation in this state, which train shall stop at all regular stations along the line of such railroad for the purpose of receiving and discharging passengers." Section 2 prescribes the penalty of not less than \$100 nor more than \$500 for each violation. The information charges that defendant owned and oper-

ated a railroad extending from Sedalia to Warsaw, connecting at Sedalia with its main line; that on February 14, 1908, there being no wreck or providential hindrance, defendant did "fail and refuse to operate a regular passenger train each way over" that railroad. Defendant filed a motion to quash the information on the ground that it charged no offense against the law because the act of the General Assembly above mentioned on which the information was based was unconstitutional in several particulars, specifying in the motion certain clauses in the state and in the federal Constitution which defendant thought were violated. The same points were also presented in the motions for a new trial and in arrest of judgment. It was the constitutional question that brought the appeal to this court, but, unless we find in the record evidence sufficient to sustain the court's finding of guilty as charged in the information, we will have to decide the case before we reach the constitutional question.

The information charged the defendant with failure to run a regular passenger train each way on the 14th February, 1908. One indicted for committing an act in violation of law on a certain day may be convicted if it be proven that he committed the act specified in the indictment on any day within the period of limitation prescribed for prosecution of the act; but, if he is indicted for committing a certain act on a certain day and the state's proof is to the effect that he did the act specified on the day specified, the state would have no right to go back over the period of the statute of limitations, and prove that he did similar acts on other days. The day specified in the indictment, if it be within the statutory period, is ordinarily not a vital point to be proven, but the act which it is charged the defendant committed is vital, and, where that act is identified by the state's proof, it is the act on which the state must rely for conviction, and, unless the facts proven are sufficient to constitute the criminal act charged, the state cannot go back or forward over the statutory period, and prove other facts that have no connection with the particular act for which the defendant is indicted in order to supply what may be lacking to render the particular act specified a violation of the law.

The evidence in this case wandered farther than it should. The defendant was charged with having failed to run a regular passenger train both ways on this road on the 14th February, 1908, in violation of the statute, and, to sustain that charge, the state proved that on the 14th February, 1908, the defendant ran both ways on the road a train composed of an engine, tender, two or more freight cars, a combined baggage, mail and passenger car, and a passenger coach, and that no other train was run on that day. That proof was a complete identification of the act specified in the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

information and a complete identification of the day specified on which it was committed. Therefore there was no occasion to go over a period of six months, as the state was allowed to do, to prove what kind of trains defendant ran on other days during that period and the delay in the arrival and departure of some of those trains. It was shown in evidence for the state that there was a schedule for the arrival and departure of the trains, and there was no evidence that this train on this day did not arrive and depart on the schedule time. Defendant was called into court to answer for its conduct in running that train, not to answer why another train six months before was delayed. Here, then, we have a train equipped with an ordinary passenger coach and also a car divided into compartments, designed to carry baggage in one compartment, mails in another, and passengers in another, and the train running on a published schedule as to time, but, in addition to those cars, the train contained two or more freight cars, and that fact alone is what the state relies on to prove that this was not a regular passenger train. The question, therefore, is: Does that train fill the requirements of the act of 1907, is it a regular passenger train, or, reducing the question to its simplest form, is it a passenger train? The title to the act does not use the term "regular passenger train," but says it is "an act to compel all railroad corporations \* \* \* to run at least one passenger train over said railroad each way every day," etc. In the body of the act it says "one regular passenger train." We have no right to presume that the Legislature by using the term "regular passenger train" in the body of the act intended to call for a train of a different construction or composition from that mentioned in the title under the term "passenger train"; because, if we did, we would have to say that they intended to express a different purpose in the body than that indicated in the title, which the Constitution forbids. Our task now is to find what the Legislature meant by the use of those terms in the title and in the body of the act. What is a passenger train? What is a regular passenger train? What is the difference in meaning between the two terms, "a passenger train" and "a regular passenger train"? The General Assembly has used those terms, but has not undertaken to define them, and it has used them in a criminal statute, rendering the violator of the statute liable, if he misunderstands its purport or misinterprets its meaning, to a penalty of \$100 to \$500 a day, and he is liable to indictment for his conduct each and every day in which he acts upon his erroneous (though it may be perfectly honest and not altogether unreasonable) interpretation of the words used in the statute, and thus in the course of a few months, at the rate of \$100 to \$500 a day, the penalties might amount to a considerable sum. If the General Assembly had intended

to require the railroad company under a heavy penalty to run each way every day a train composed exclusively of cars designed for the accommodation of passengers, it would have required no great skill in the use of language to have said so, and, if that was its purpose, it no doubt would have said so. Our statute requires us in construing statutes to interpret "words and phrases in their ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law, shall be understood according to their technical import. \* \* \*" Section 4160, Rev. St. 1899 (Ann. St. 1906, p. 2252). The words we are now discussing have no technical meaning in law, and are therefore to be construed in their ordinary sense, but the difficulty is that there is room for honest and intelligent differences in opinions as to their ordinary meaning, and the record and briefs in this case show that there are in fact such differences of opinions. If the term "passenger train" has any well-established technical meaning in the parlance of railroad men, no proof of that fact was offered. Some of the state's witnesses called this "a mixed train," but they did not profess to speak with authority. It was only the opinion of individuals, and that too of individuals not especially qualified to instruct on that subject. The Attorney General in his brief says that we must take judicial cognizance of the meaning of the phrase "regular passenger train." But there is no such universal acceptance of a definition of that term as will justify us in saying that such is the law. Perhaps the term "local freight" is in such common use in this state that we might safely say that it means a train of freight cars receiving and delivering goods within a limited distance, and carrying at the rear end a caboose for the accommodation of the train crew, and, incidentally, a few passengers. But, if that is correct, the train in question in this case was not a "local freight," for it was equipped with an ordinary passenger coach, and a combined baggage, mail, and passenger car. Nor can we avoid the question by saying this was a "mixed train," because, conceding that it was a mixed train, as in a certain sense it was, can we say that a train having cars designed and used only for the carrying of passengers and their baggage is not a passenger train because it also has cars designed for freight only? To try to get rid of it by calling it a mixed train would be begging the question.

Words of doubtful meaning in a statute are to be interpreted by their context in view of the purpose of the lawmaker. The words we are now considering have been interpreted by courts of other states when used in a statute having reference to a particular purpose. In 6 Words & Phrases, p. 5227, reference is made to a case in Minnesota in which the defendant, being under contract to furnish the plaintiff railroad company de-

pot facilities for its "passenger trains," refused to allow the plaintiff to use the passenger depot for its mixed trains—that is, trains composed of freight cars and passenger cars—but the court held that such a train was a "passenger train" within the meaning of the contract. *Chicago G. W. Ry. Co. v. St. Paul Union Depot Co.*, 68 Minn. 220, loc. cit. 223, 224, 71 N. W. 23. And the same author (volume 7, p. 6038) takes up the phrase "regular passenger train," and refers to some Illinois cases in which that phrase is considered in reference to the purpose of the statute in which it is used, the most recent one of which is *C. & C. Ry. v. People*, 175 Ill. 359, 51 N. E. 842, construing a statute that required railroad companies to stop "all regular passenger trains" at county seats to receive and discharge passengers. The railroad company ran a train called the "Knickerbocker Special," which it is said "is not a regular passenger train carrying passengers from one point to another in Illinois, but is a special train engaged exclusively in interstate travel from points wholly without to points wholly without the state of Illinois, that no tickets are sold or passengers received on the train from points in Illinois to points in Illinois, and that it makes no stops except such as are necessary for fuel, water, and railway crossings," etc. It was not questioned that that was a passenger train, but the question came on the meaning of the word "regular." It was not claimed by the able counsel for the railroad company in that case that the term "regular passenger train" had any well-established peculiar meaning in the parlance of railroad men, but it was earnestly insisted that the train then in question was a train put on to meet a certain interstate traffic demand, limited alone to interstate business, and in that sense was essentially a special, and not a regular, train. But the court turned to the statute, and considered the purpose the lawmakers had in view in requiring trains to stop at county seats, and concluded that that train came within the meaning of the phrase "regular passenger trains" for that purpose.

Since, therefore, there is no recognized technical definition of the phrase "regular passenger train," we must go to our statute, and ascertain, if we can, what our General Assembly meant by it in the act of 1907, and, if we cannot with reasonable certainty determine what it means, we cannot convict a person or corporation of violating it. The word "train" is used in reference to railroad traffic to mean all kinds of trains, freight trains, passenger train, mail train, construction train, and the character of the train is designated by a word. In the term "passenger train" the word "passenger" is used as an adjective to qualify the noun "train." The two words "passenger train" combine to form the name of the thing to which it is

applied. Neither word used alone would designate the object intended, but together they constitute the name. The word "regular" is designed to express the character of the train to which it is attributed. It signifies that it is a regular train, whether freight or passenger. Regular in what? The state contends that it means regular in its makeup—uniform in its composition. The defendant, contra, contends that it means a train running regularly on a prescribed published schedule, not an excursion train, not a special train for a single trip, not a wild train, but one that goes by the published card. We think the defendant's interpretation of the word is correct. The meaning of the word "regular" in this connection would be more apparent if we would use it in contrast with its opposite—"irregular." When we hear a particular train spoken of and called an irregular train, we have no difficulty in understanding what is meant by the term. It is a train that is not down on the regular list. It runs not on a published schedule. It gives the public no notice of its coming or of its purpose, or of whether it is going. We are satisfied that the word "regular," when used to designate a train, applies to the operation of the train. It may be a freight train, or it may be a passenger train; but if it has its designated place on the published schedule, and if it ordinarily comes and goes in that place, it is a regular train. Thus there may be two passenger trains one regular and the other irregular—one that is down on the published time-table and the other not—yet the irregular train is as much a passenger train as the regular one. The answer to a question we have in this opinion above suggested, to wit, what is the difference in the significance of the terms "passenger train" and "regular passenger train," is this: The term "passenger train" includes all passenger trains, regular and irregular, not only trains that move every day on schedule time, but excursion trains, special trains, extra trains, etc., whereas, the term "regular passenger train" means a passenger train on the regular schedule list. We have in another section of our statutes express recognition by the General Assembly that a passenger train may carry freight cars. Section 1101, Rev. St. 1899 (Ann. St. 1906, p. 938). "In forming a passenger train, baggage, freight, merchandise or lumber cars shall not be placed in rear of passenger cars." In the train in question in this case the freight cars were not placed in rear of the passenger cars. That it was the running and the operating of the train that the General Assembly had in mind when it used the word "regular" in this connection is indicated also in the closing sentence of the first section of the act: "Which train shall stop at all regular stations along the line of such railroad for the purpose of receiving and discharging passengers." This train complied with that re-



quirement. The purpose of the act was to afford the traveling public railroad facilities at least once a day at regular times and at all the regular stations, not leaving the public to the whim or caprice of the railroad company whether it would send a train over its road on a particular day. If the General Assembly had seen fit to say that, in order to render the passenger service more agreeable and expeditious, the railroad company should carry no freight cars in the train, it would have said so, or, if it had seen fit to define what it meant by a passenger train, we would have had no trouble with construing the act as we now have it; but it has been satisfied to say that the defendant must run "a passenger train," and we do not feel justified in saying that the defendant did not run a passenger train as the statute requires when the evidence shows that it furnished a train equipped as this was with an ordinary passenger coach furnishing facilities for the carrying of all the passengers (so far as the evidence shows to the contrary) that desired to be carried and their baggage in the usual way; nor can we say that it was not a regular passenger train when the evidence shows that it was run on regular schedule time, and, so far as the evidence shows to the contrary, it stopped at all the regular stations to receive and discharge passengers. We hold that there was no evidence tending to show that the defendant violated the statute.

All the evidence in the case being the state's evidence, the court should have found the defendant not guilty as charged in the information. This conclusion disposes of the case before we reach the constitutional question concerning which much learning and ability has been shown in the briefs and in the oral arguments. But, before this corporation can have our judgment on the question of the impairment of its religious liberty, it will have to take off its Sunday train on that branch of its road and incur the wrath of the state for so doing.

The judgment is reversed, and the defendant is discharged. All concur.

# JONES v. THOMAS et al.

(Supreme Court of Missouri, Division No. 1.  
March 31, 1909.)

## 1. DEEDS (§ 196\*)—SUIT TO SET ASIDE—MENTAL INCAPACITY—UNDUE INFLUENCE—BURDEN OF PROOF.

Where a confidential relation existed between grantor and grantee, the burden of proving that grantor's mental capacity to make a deed, and that the deed was his free act, uninfluenced by any improper conduct, rested on grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593; Dec. Dig. § 196.\* Cancellation of Instruments, Cent. Dig. §§ 100, 101.]

## 2. DEEDS (§ 72\*)—SUIT TO SET ASIDE—CONFIDENTIAL RELATIONS.

To prove confidential relations between a father and son so as to require the son obtaining a deed from the father to show that the father possessed mental capacity to make a deed, and that it was made by his free act, it must appear that the son had charge and control of his father, and that he administered to his health, wants, and necessities, or that he had charge of and conducted his business, or that the father actually reposed trust and confidence in his son, in consequence of the relations existing between them.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 190-199; Dec. Dig. § 72.\*]

## 3. DEEDS (§ 68\*)—MENTAL CAPACITY OF GRANTOR.

One has the mental capacity to execute a deed as a gift to a child in consideration of love and affection, where he has the intelligence to understand his ordinary business and what disposition he is making of his property, though, to have sufficient capacity to execute a deed for a valuable consideration, one must possess sufficient mental strength to judge of values, and successfully oppose fraud and undue influence whenever brought to bear on him in the negotiations for a contract.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 149-155; Dec. Dig. § 68.\*]

## 4. APPEAL AND ERROR (§ 1009\*)—FINDINGS—REVIEW.

The Supreme Court, in reviewing an equity case, will defer largely to the findings of the trial court on all issues of fact, and will not disturb a judgment of the trial court on the ground that the findings are against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

## 5. DEEDS (§ 211\*)—MENTAL CAPACITY OF GRANTOR—EVIDENCE.

Evidence held to justify a finding that a grantor possessed sufficient mental capacity to execute a deed of gift to a child.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 211.\*]

## 6. EVIDENCE (§ 568\*)—OPINION EVIDENCE—EFFECT—MENTAL CAPACITY OF GRANTOR.

Witnesses bearing close family, social, or business relations to a grantor possess the most favorable opportunity for observing and knowing his mental condition, and their testimony as to his mental condition is entitled to great weight.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2393; Dec. Dig. § 568.\*]

## 7. DEEDS (§ 196\*)—MENTAL CAPACITY OF GRANTOR—PRESUMPTIONS—BURDEN OF PROOF.

The law presumes that a grantor was of sound mind at the time he made the deed, and the burden of disproving that fact rests on the one asserting the contrary.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593; Dec. Dig. § 196.\*]

## 8. DEEDS (§ 211\*)—UNDUE INFLUENCE—EVIDENCE.

Evidence held to justify a finding that a deed was not procured by the undue influence of the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.\*]

## 9. DEEDS (§ 203\*)—SUIT TO SET ASIDE—UNDUE INFLUENCE—EVIDENCE.

In a suit by an heir to set aside his ancestor's deed to another heir on the ground of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mental incapacity and undue influence, declarations of the ancestor, made prior to the execution of the deed, and extending back several years, that he intended to give to the grantee the land conveyed to him were admissible to show a definite purpose of the ancestor to convey the property to the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 606; Dec. Dig. § 203.\*]

**10. DEEDS (§ 203\*)—SUIT TO SET ASIDE—MENTAL INCAPACITY—EVIDENCE—ADMISSIBILITY.**

In a suit by an heir to set aside a deed of his ancestor to another heir on the ground of mental incapacity, declarations of the ancestor showing improper acts on the part of the grantee and of members of his family are admissible to show the mental condition of the ancestor and the state of his affections.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 606; Dec. Dig. § 203.\*]

**11. DEEDS (§ 203\*)—SUIT TO SET ASIDE—UNDUE INFLUENCE—EVIDENCE—ADMISSIBILITY.**

In a suit by an heir to set aside a deed of his ancestor to another heir, declarations of the ancestor showing improper acts on the part of the grantee and of members of his family are inadmissible to establish undue influence.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 203.\*]

**12. APPEAL AND ERROR (§ 837\*)—REVIEW—RENDITION OF PROPER JUDGMENT.**

The court, on appeal in an equity case, may admit and consider all testimony preserved in the record which was improperly excluded by the trial court, and render such judgment as the court may deem proper under the pleadings and evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3276; Dec. Dig. § 837.\*]

**13. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.**

Where the Supreme Court, on appeal in an equity case, could not disturb the findings of the chancellor, though it considered testimony improperly excluded by the chancellor, the error in excluding the evidence was not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.\*]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by Mary Jones against Alma Thomas and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Mary Jones, the plaintiff, a daughter of William O. Thomas, deceased, brought this suit in the circuit court of the city of St. Louis to set aside two deeds conveying certain real estate, situated in said city, to his two sons, Thomas and Alma Thomas, executed March 16, 1901. A trial was had before the court, which resulted in a finding of facts and a rendition of judgment in favor of the defendants. The court having refused to grant a new trial, the plaintiff duly appealed the cause to this court. The trial consumed several days, during which time many witnesses were introduced and examined by both plaintiff and defendants. Their testimony covers more than 550 printed pages.

There are no close or complicated legal propositions involved in the case, but it turns almost exclusively upon questions of fact; and, as the testimony introduced by the respective parties is so sharply contradictory, it will require a somewhat extensive statement of the substance thereof in order that we may properly determine with which party the preponderance of the evidence abides. Counsel for both plaintiff and defendants have presented a most excellent abstract of the record, and a statement of their respective theories of the case, which greatly shortens and facilitates the work of this court; and, as there is no material difference in the substance of the two, we will copy largely from both in making up this statement, and thereby present a full statement of the substance of the testimony which we are requested to review.

William O. Thomas, the father of plaintiff and defendants, was in his eighty-second year at the time he executed the deeds in question, which was on March 16, 1901. His wife, his third, was accidentally killed in the month of September, 1899, and his next of kin were the plaintiff and defendants, and William, David, John Arthur, Lillie, and Daisy, children of a deceased son, John Thomas. His property consisted chiefly of a tract of land fronting on Manchester avenue, in Cheltenham, a subdivision of the city of St. Louis, upon which was located his residence and several other small buildings, which he rented to various tenants for \$7 or \$8 a month, aggregating about \$160 per month. On March 16, 1901, William O. Thomas executed the deeds before mentioned to his sons, Alma and Thomas. On the 28th of the same month he executed his will, wherein he devised part of his remaining property to plaintiff for life, with remainder to her children, a small tract to the bishop of his church, and all of the remainder to his grandchildren above named. The will also contained a residuary clause, making his children and grandchildren residuary legatees, the grandchildren to take per stirpes. William O. Thomas departed this life September 6, 1901, and this suit was instituted July 3, 1903.

The plaintiff contends that her father was of unsound mind at the time of the execution of the deeds in question, and that he was incapable of understanding or knowing what he was doing; also that defendants, knowing their father was of weak mind and easily influenced, conspired together and through fraud and undue influence induced him to make the conveyances, to the injury and loss to plaintiff and the other heirs of said William O. Thomas, to a large portion of his estate. The defense is a general denial, and the questions of fact presented are: First. Was William O. Thomas of un-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sound mind on March 16, 1901, at the time of the execution and delivery of said deeds? Second. Was the execution of the deeds the result of fraud and undue influence perpetrated upon him by the defendants? As before stated, the evidence disclosed by this record tending to prove and disprove those issues comes from the mouths of many witnesses, and is voluminous and conflicting, and is substantially as hereinafter stated, as appears from appellant's abstract and the statements of the parties. At that time William O. Thomas owned the following lots of land in the city of St. Louis, of the values stated, to wit: (a) Lot fronting 179 feet on north side Manchester avenue, city block 4007, value \$8,675 (deeded to Alma Thomas March 16, 1901). (b) Lot fronting 632 feet 6 inches on north side Manchester avenue, city block 4007 (deeded to Thomas Thomas March 16, 1901), value \$12,496. The value of these lots is \$21,600, exclusive of the buildings thereon, which are worth \$10,700. (c) House No. 5729 Manchester avenue, lot 47 by 100 feet (devised to Reorganized Church of Jesus Christ or Latter Day Saints), value \$2,350. (d) House No. 5725 Manchester avenue, lot 18 by 100 feet, value \$1,500 (devised to Lillie Mason, his granddaughter). (e) House No. 5723 Manchester avenue, lot 27 by 100 feet, value \$1,500 (devised to Arthur Thomas, his grandson). (f) House No. 5719 Manchester avenue, lot 30 feet 9 inches by 100 feet, value \$4,500 (devised to John Thomas, his grandson). (g) Houses Nos. 5713 and 5715 Manchester avenue, lot 54 by 100, value \$4,700 (devised to Daisy Thomas, his granddaughter). (h) House in rear of property devised to Daisy Thomas, lots 16 and 166, value — (devised to William Thomas, his grandson). (i) House in rear of property devised to Daisy Thomas, lot 30 by 166 feet, value — (devised to David Thomas, his grandson). (j) Lots 5 and 6 in Crabster's subdivision, fronting 144 feet on Manchester avenue, value \$4,527 (devised to Mary Jones, his daughter). This latter property is subject to leases to H. W. Beck Feed & Seed Company, and H. W. Beck, the first covering 46 feet, rental \$115 per annum until June 1, 1933, and \$138 per annum until May 31, 1953, and the other covering 80 feet, rental \$150 per annum until 1912, and \$225 per annum thereafter until March 1, 1952; the lessor to pay the taxes assessed against the land, and the lessee those assessed against the improvements. His personal property consisted of three worthless notes, aggregating \$337.50, goods and chattels worth \$133.75, and cash \$1,315, all of which was consumed in the administration of the estate. On March 16, 1901, W. O. Thomas deeded the two parcels, numbered "a" and "b" aforesaid, having an aggregate front of 811 feet and 6 inches, and of the value of \$21,600, exclusive of the improvements thereon (worth \$10,700), to his two sons,

Alma Thomas and Thomas Thomas, the expressed consideration being love and affection and \$10 from each. Immediately after the death of William Thomas' wife, on September 26, 1899, Thomas Thomas, with his family, moved into his father's house, and took possession of it, and continued to occupy and run it, and has done so ever since, and made his father pay \$8.50 per week board for himself and his granddaughter, Daisy Thomas, and later he paid all the expenses of the house. He also agreed to pay Tommie \$100 a month to take care of him.

W. O. Thomas, before he began to fail, was an intelligent, educated, and strong-minded man, knew what he was doing, a good instructor, treasurer of the church, was very close in money matters, "had a head of his own," and could not be easily influenced, and had accumulated considerable property. After his wife's death "you could do whatever you wanted to do with him." About a year before his wife's death he began to fail. He was very much affected by his wife's death, and developed the following symptoms, and was guilty of the following acts: Acted like a man that had lost his mind—more and more each day; did not recognize his daughter, the plaintiff, when she went to see him, from about March, 1900, up to his death; thought he was not in his own house, and continually wanted to go away, so much so that the defendants Thomas Thomas, Annie Thomas, and Daisy Thomas kept him locked in the house, hid his clothes, and let him have only his drawers, undershirt, and cap; escaped from the house; stopped people on the street, and asked them to help him; ran into the fields and up into the weeds, and hollered for help; crawled on his hands and knees; thought he was in Wales, where he had not been for 50 years, and had seen his mother and his relatives; thought he had been in Kirkwood, and had seen "very funny people there," when he had not been in Kirkwood. His mind wandered, and he could not carry on a connected conversation on any subject, talked foolishly; did not know his children, grandchildren, or relatives or friends when he saw them; could not understand or attend to business for a year before his death; could not count money; would not take the rents amounting to \$500 when they were paid to him; said he had no money, and asked others for a penny or a nickel, when he had money in bank; after November 14, 1900, he could not sign rent receipts, and even before that Daisy generally signed them; had a piece of newspaper hid in the band of his drawers, and thought it was a hundred dollars; thought the defendant Thomas Thomas and his family were going to kill him; wanted to get away from his house and live somewhere else; thought he was in prison, and that the window screens were prison bars; said they (meaning the defendants) had robbed him; and "they

bothered me, and done wrong with me"; after his wife's death, said he was going to change his will, and when reminded that he had promised his wife not to do so, replied, "Yes, but Tommie [meaning defendant Thomas Thomas] makes me," and when advised not to do so, said, "Might he kill me if I didn't do it?" wanted to marry his granddaughter Daisy Thomas, and asked her mother's consent; also wanted to marry Mrs. Remington and Mrs. Schenten and Mrs. Hamilton; when asked why he made the deeds (in controversy here) said "he had to"; that the boys made him do it; that he asked his son to give the property back to him, and he refused; wanted his son-in-law David Jones to go to court with him, and he would give him everything he had; had been a regular attendant at church, and was the treasurer, but for the last year of his life only went to church twice, and had to be assisted in doing so. The defendants kept him in a room with the doors and windows locked and fastened, and, prior to the execution of the deeds in question here, would not allow any one to see him unless some of them were present.

Dr. Dixon testified: For over a year prior to, and at the time of, executing the deeds in controversy he was suffering with senile dementia, and was wholly unable to understand what he was doing, or what property he owned, or the nature of a business transaction. He grew worse all the time, and was not rational in January or February, 1901. He was suffering with "an atrophic condition of the brain." When one has senile dementia, he has no lucid intervals of sufficient duration to enable him to transact any extended business.

Testimony of Dr. Edward F. Brady: Senile dementia means "mental degradation, the lowering of the powers of the mind until they become practically abolished." If W. O. Thomas went out on the street hollering for help, undressed himself in public, and did the other acts described by plaintiff's witnesses, "he was undoubtedly in a condition which was commonly termed the 'third degree' of dementia, incomprehensible," and was incapable of attending to any business. In the final degree of dementia "the powers keep dwindling and growing less and less, until even conscience and power is lost, and the individual then exists as such of the vegetable organism." That he had been suffering with chronic nephritis (a kidney disease) for several years, and had been treated for it four or five years. The immediate cause of his death was uremia.

Testimony of Mary Jones: W. O. Thomas thought his daughter-in-law, the defendant Annie Thomas, was a Mrs. Miner. W. O. Thomas said, "Thomas Thomas and his wife wants me to go down to the basement to live." He said he was only a boarder in the house. The defendants declared him of unsound mind prior to the execution of the

deeds. Annie Thomas said to plaintiff: "Oh, my; we can't do nothing with your father. We tried to convince him to go into the parlor to show him his wife's picture, and he didn't know—he wanted to go—he thought he wasn't at home; he wanted to be going." When plaintiff asked them why they kept the doors locked, they answered, "Well, you know your father ain't right, and we have to keep the place locked." They put a piece of paper about 18 inches square, with a black spot in the middle of it, like a target, on the door of his room, and Annie Thomas said it was so that Mr. Thomas "could find his location" when he sat up in bed. The defendant Annie Thomas said they had to hide his clothes to keep him in the house. Alma asked Mrs. Remington to take Mr. Thomas and give him a home for a few days, saying, "Them people over there just treat him terrible." Thomas Thomas said, "I think it is time you were getting a new treasurer for the church." He was treasurer until February 25, 1901. Thomas Thomas said: "Everybody knows Father isn't able to run his own business." "I am running his business now." Annie Thomas took the rent which Mrs. Remington paid and got the change, and when asked why she did not let Mr. Thomas make the change, she said, "He ain't responsible—he can't." When Mr. Thomas wanted to go to Mrs. Fairfax's house, Annie Thomas (and Daisy) said: "Don't notice what he says; he don't know what he is talking about." When Annie and Daisy Thomas were sitting in the front hall sewing, Mr. Thomas came out of his room, with only his night drawers on, crawling on his hands and knees. Daisy was barefooted, and "she stuck her big toe in his mouth." When he was locked in the house, Annie Thomas, said "he had not been right all that year."

#### Defendants' testimony:

Luther Babcock testified that he had been in business in St. Louis for many years as an abstractor of titles and conveyancer; that he had known W. O. Thomas for 20 years, and had attended to business for him more or less every year during that entire period. He drew the leases to the Becks, and the renewal lease. He drew the deeds and the will of March, 1901. He had never transacted any business for Thomas Thomas prior to the services in connection with administration upon his father's estate. When the leases were drawn, and when the renewal leases were drawn, Mr. Babcock got his instructions from Mr. W. O. Thomas, and from him alone. He did not get to see Mr. Beck until the leases were ready for execution, when he came to the office with Mr. Thomas. When the will of October, 1900, was drawn, Mr. W. O. Thomas came to his office, and gave him the instructions in regard to the same—one else. About March 14, 1901, Thomas Thomas came to his office, and informed him that his father wanted to make him a deed

for part of the Cheltenham property, and Alma a deed for another part, and he explained what parcels he wanted to convey. Mr. Babcock said he would prepare the deeds, and be out the next day. With this explanation, and referring to plat books in his office, he made up the description and prepared the deeds, and called on the old gentleman at his residence on March 15th. While Mr. Thomas was engaged in reading the deeds, Mr. Babcock examined a plat of a survey of the property, hanging on the wall of the room. He noticed that this survey was somewhat different from the plat at his office, and that his descriptions in the deeds were not accurate, and he explained the matter to Mr. Thomas, and promised to call the next day with the corrected deeds. Mr. Thomas told him that this property which he was deeding to the boys was the same which he had given them in his will. He said he wanted to give them the property now, so that they will not be hindered in any way during administration. The next day Mr. Babcock called with the corrected deeds, and explained the corrections, and Mr. Thomas read the deeds and executed them, and Mr. Babcock, as a notary public, took his acknowledgment, and left the deeds with him. At this time Mr. Thomas turned over the old will to him, and said he wanted him to change it so as to cut out the property which had been conveyed to Alma and Tommie. He even told him he wanted it typewritten, so that he could better read it. Mr. Babcock took it along, and rewrote the will as directed. On March 28, 1901, he called there to have it executed. Thomas Thomas was there, and he was sent out to get a witness, and soon thereafter returned with Dr. Murphy. Mr. Thomas read the will, and then the will was signed by him and attested by the subscribing witnesses, with the usual ceremony accompanying attestation. This will was precisely the same as the previous will, the will of October, 1900, except that the old will devised to the boys the property which the father had just conveyed to them by deed. Witness never conversed with Thomas Thomas regarding the deeds, except on the occasion above stated, and he never conversed with Alma. Mr. Thomas paid Mr. Babcock for the deeds on the day when they were executed, and for the will on the day when it was executed. He had the money about his person. Mr. Babcock further testified that Mr. Thomas was of sound mind on March 28, 1901, when the will was executed, and on all previous occasions when he saw him.

Dr. Robert Brent Murphy testified that he has been engaged in the practice of medicine since 1889. His office is located about four blocks from the Thomas residence, and he knew Mr. Thomas for about 10 years, and was his family physician during that period. Mr. Thomas' particular trouble was nephritis, a kidney disease. He was also bothered

with indigestion and a chronic constipation. He used to get attacks of paroxysms in his abdomen. He would have a severe attack; then it would pass off, and he might not have another for a month or longer. These attacks were symptoms of the nephritis; they were not in any way indicative of senile dementia. Mr. Thomas never had senile dementia, or any of the symptoms of that disease. Witness saw him and prescribed for him, in 1900 on January 5th, April 28th, May 2d, August 2d, November 26th, December 14th; in 1901 on January 26th, March 14th, 15th, 16th, 18th, 28th, April 1st, 2d, 3d, 4th, 5th, 6th, 7th, 26th, May 21st, 26th, 29th, 31st, June 4th, 7th, 28th, July 15th, and September 1st, 5th, and 6th. On July 15th he noticed for the first time that the nephritis had progressed to such an extent that uremia had begun to manifest itself. He began to show the signs of a poisoning of the system, caused by the improper action of the kidneys. His mind was not as active as it had been; he was drowsy, but he was still capable of transacting his business and of appreciating his affairs. The witness did not see him again until September 1st, and again on the 5th and 6th. On September 1st the uremia had progressed to such an extent that he would not have been able to transact business. Prior to the September visits the witness was always able to carry on conversations with Mr. Thomas. He would get from him the information as to his condition, the character of the pains, the effect of the medicine, etc. Mr. Thomas usually paid him for each visit, unless he knew he was to come back, and then he would pay him for the several visits at one time. On cross-examination he was asked what he would think of William O. Thomas if he had been found out in the fields, crying for help; if he crawled around on his hands and knees; if he imagined he was in Wales, or in Kirkwood, and imagined he saw "funny" people; if he was unable to recognize his own children; if he wanted to marry his granddaughter, etc.—and he answered that any man guilty of such irrational acts was certainly crazy. He also stated that when a man suffers from uremia he is apt to do irrational acts, but he stated there was no indication of uremia as late as June 28th. He first observed manifestations of uremia upon his next visit, July 15th, but there was never any indication of senile dementia or other mental derangement. He was also asked on cross-examination whether a man could not have nephritis and senile dementia at the same time, and he answered that he might have, just as he might have pneumonia, smallpox, and other diseases at the same time, but Mr. Thomas was not so afflicted. Dr. Murphy also testified that on March 28th, while he was on his way down to the Thomas residence, he met Tommie Thomas, who said that he was wanted at

the house. There Mr. William O. Thomas explained that he wanted him to witness his will, and that Mr. Babcock had drawn it for him. Mr. Thomas signed it, and then the witness and Mr. Babcock signed it. Mr. Thomas requested that he sign it. Then Mr. Babcock put the old will into the stove and burned it up.

C. M. Davis testified that he saw W. O. Thomas at Beck's store on June 20, 1901, and talked to him, and he said he was born the same year as Queen Victoria, and had lived longer than she did.

James E. Cowan testified that he saw Mr. Thomas about March 8, 1901; renewed a policy of insurance for him. He called at witness' office and paid premium. He complained at the rate being higher. The policy was changed to Thomas Thomas on March 27, 1901. My recollection is that both W. O. Thomas and Thomas Thomas came to my office about that date, and asked to have the policy changed.

George L. Welsh testified that he knew Mr. Thomas for 13 years. He owned seven houses; spoke to him the last time in February, 1901; transacted business with him. He paid my bill. He understood the work done and the reasonableness of the charges; never knew of his doing a foolish or irrational act. In the fall of 1900 witness made a mistake of a nickel or a dime in making change, and he detected it.

Thomas Hughes testified that he knew Mr. Thomas for 18 months before his death. Witness lives in Granite City, Ill.; saw Mr. Thomas on St. Patrick's day, 1901, at his house; went to pay him \$10 he had loaned me. He asked when I had heard from mother. Mr. Thomas did nothing that day that made me think he was not in his right mind.

Lizzie Hughes, daughter of last witness, testified that she lives in Granite City, Ill., and went with her father to see Mr. Thomas on March 17, 1901; did not talk with Mr. Thomas. He was up, walking around, and dressed; spent a week at his house. He went out to be shaved, and to attend to his business; did not see him locked up; saw nothing to indicate that he was not in his right mind.

Thomas John Williams testified that he lived in Granite City, Ill.; met Mr. Thomas for the first time on March 17, 1901, at his house; spent the afternoon there. He asked me whose boy I was; did not recognize my father's right name, but knew him by his nickname; talked about Wales. He spoke about religion and the Good Templar's button I wear. He went to church with us; said he was going to give Tommie \$15,000 worth of property, and \$10,000 to Alma; that he was going to provide for the church.

W. R. Hallis testified that he was book-keeper for Laclede Fire Brick Company—graduate of law and admitted to the bar—prepared a lease for Mr. Thomas in November, 1900, at the request of Tommie

Thomas; lease was to Tommie to sink a shaft. He pointed out the property on a plat; stated terms and duration of lease; saw nothing to indicate that Mr. Thomas was not in his right mind. Tommie paid me for my services.

W. H. Reynolds rented house from Mr. Thomas; did carpenter work for him for four or five years before his death; built three houses for him, the last one about the time his wife died; think last work done for him was repairing some steps in May, 1901. Daisy Thomas gave me the order. He paid for it. Prior to that time he had not noticed that Mr. Thomas was unable to attend to business; never noticed that he was not in his right mind until 10 days or two weeks before his death.

Thomas Morgens testified that he lived and was employed in the neighborhood of William O. Thomas; got to see him nearly every day, and conversed with him as late as July, 1901; thought he was a man of sound mind.

James H. Rhea testified that he was in charge of the safe deposit vaults; saw him frequently down at the safe deposit company, always unaccompanied, except on two or three occasions, and conversed with him. He said Mr. Thomas was of sound mind.

Dr. J. H. Moore, an aurist, who treated Mr. Thomas for his defective hearing, saw him 10 or 12 times during the two months prior to December 11, 1900. Mr. Thomas would come to his office downtown in the Century Building. He always came unaccompanied. Dr. Moore says Mr. Thomas was of sound mind.

Henry Roberts had a grocery store in the neighborhood, and he was in charge of the church. He testified that he had known Mr. Thomas intimately for 40 years; that he saw him at least once a week down to the date of his death; that he always attended church regularly until the last month or two before his death. Mr. Roberts occupied a lot leased from Mr. Thomas, and Mr. Roberts wanted to buy the lot. At first Mr. Thomas asked \$30 per foot, but later offered it to him at \$25 a foot. Mr. Roberts did not buy the lot because that was more than he was willing to pay for it. That was about eight months before Mr. Thomas' death. The witness also testified that Mr. Thomas was well able to take care of his affairs down to about a month or two before his death. This witness also testified that in 1891—about 10 years before Mr. Thomas' death—when the witness wanted to lease lot from Mr. Thomas, Mr. Thomas explained to him where the dividing line would be between the land which he would leave to Alma and that which he would leave to Tommie, and told the witness he could select the lot from the land which is to go to Alma or from the land going to Tommie, or both, and witness preferred to lease a lot which would go to Tommie.

J. W. Beck, of the H. W. Beck Feed & Seed Company, testified that they had been at 5701 Manchester avenue since they leased the property from Mr. Thomas in 1892, and he knew Mr. Thomas since that date. He had nothing to do with the making of the leases; his father arranged that. Witness said he got to see Mr. Thomas almost daily. He used to come to their office nearly every day; would converse with them; read the papers, etc. They would converse about business, politics, religion, or any matter that might be mentioned. Witness always paid the rent to Mr. Thomas in person and Mr. Thomas would give him the receipt. They paid the rent quarterly. He paid Mr. Thomas the March rent on March 7, 1901, and the check, which was produced, and which bore only Mr. Thomas' indorsement, showed that he must have cashed it downtown at the bank. On June 4th witness learned that Mr. Thomas was laid up, and he called on Mr. Thomas and paid him the June rent, and Mr. Thomas (who was lying in the bed at the time) said he would send him the receipts. Mr. Thomas frequently told him (even as late as March 7, 1901) what disposition he was going to make of his property. From the point (the end of the wedge) up to and including Roberts' place to Tommie; from there up to Schwenker's to Alma; and from Schwenker's up to the church to the grandchildren, and the Beck property to Mary. Mr. Beck also testified that their rental was on the basis of about \$2 per front foot per annum, and that this is about the same rental that other property in that neighborhood was paying. The rental under the renewal leases is higher. Mr. Beck also testified that from the date of Mr. Thomas' death, in September, 1901, down to March 1, 1904, they paid the rents every quarter to Mrs. Jones for the property leased by them, and which had been devised to Mrs. Jones by the last will of March 28, 1901. Thomas Thomas also testified that Mrs. Jones never offered to divide these rents with the other heirs, but retained them as hers under the will. Mr. Welsh also testified that this was the usual rental, and that he was paying that for his property.

Alma Thomas testified that he knew nothing about the deeds of March 16th, or the will of March 28th, until the 8th or 9th of April, when the father gave him the deed, which had already been recorded, and from that day on Alma was permitted to collect the rents. His father had for years assisted him with money as he needed it, and when he gave him the deed he advised him to take good care of it, or he might some day go to the poorhouse. Alma visited his father regularly once or twice a week. In April, during his spell of sickness, Alma remained with him at night for a couple of weeks, commencing April 1st, but there never was a time when his father was not perfectly rational,

or was unable to understand fully what he was doing.

Daisy Thomas, a granddaughter of the deceased son John, testified that she went to live with her grandparents about 1897—about four years before her grandfather's death. She went there to help the old folks—run errands, etc. She was about 12 years old. She continued at school for about 2 years while with them. After the old lady's death she continued at the house, helping her grandfather until his death, and she remained there a month or two longer, and then returned to her mother's home. At first her grandfather paid her \$4 then \$6, and later \$8 per month for her services. There was no agreement about it, but he paid her punctually on a day certain, just as if he were paying her wages. After the grandmother's death her grandfather got Tommie and his family to come over and keep house for them, and he paid them board for himself and Daisy, \$6 a week for both of them. This he also paid punctually every week. Her grandfather had some 18 or 20 tenants besides the Beck Feed Company, lessee. The Beck rents he always got himself. The rent from the other tenants would sometimes be brought to the house, sometimes he would go, and sometimes he would send her to collect, and if he sent her, she would turn it over to him, and either he or she, at his direction, would sign the receipts. He kept the accounts in a book. He looked after and took care of the property. He gave orders for the repairs when necessary. He paid the bills, and he would take the surplus money downtown to his safe deposit box. He was punctual about the collections and the payment of his bills, and understood as well as anybody the counting of money and the value of money. He was also the church treasurer, and received all moneys and paid all bills, and kept the accounts in a book. He held this office until the end of February, 1901. He was also the bishop's collector, and received the moneys contributed in his district, and he paid them over to the bishop's agent. His own contribution, on December 31, 1900, was \$110. In the fall of 1900 he went with her to Iowa to attend a church conference. He attended church regularly down within a few weeks before his death, and she usually went to church with him, but frequently he was ready before she was, and he would go over to the church first, and she would come later. He attended the church festival on the evening of February 22, 1901. She went along to church with the Granite City visitors on March 17, 1901. She went downtown with him on April 18th, when he went to the safe deposit company, and then bought fruit for his birthday party, which was to take place the next day. She was taken along to bring home the fruit. There was a birthday party the next day, and many of his friends and Mrs. Thomas' friends were there and spent the afternoon in conversa-

tion with him, including the plaintiff, Mrs. Cook, and Mrs. Remington. He attended a funeral in April, 1901. He hired the carriage, and Mrs. Remington and Mrs. Cook went along with him. He was neat about his person, careful and tidy about his dress. She would lay out his things for him, and he would dress himself. He would also buy all of his own clothing. He was clean-shaven, and would regularly go out to get shaved. He would visit the neighbors every day, take a walk, and attend to business in the neighborhood. He would go downtown to the safe deposit company and other places, always unaccompanied. He would read the daily newspapers every day, and was also a subscriber to several monthly papers—a Welsh paper and church papers. She would converse with him on any subject, the same as she would with others. He was always in his right mind, and always knew how to conduct his own business, and always managed his own affairs until about a month before his death. During the last months he was delirious at times. He never had an attendant or anybody to watch him. During sick spells some one would be with him at night, once Mrs. Richard, once Alma, and at other times David James and Richard Hughes. He never was locked in, and he was never violent. He never had delusions, and never committed the irrational acts about which plaintiff's witnesses gave testimony, nor did he ever express a desire to marry her or anybody else, so far as she ever learned. Dr. Dixon called at the house only twice. Dr. Murphy was his regular physician. He always complained of a pain in his side. She saw Mr. Babcock there twice, once when he came in connection with those deeds, and once when he called with the will. She saw the will executed. Mr. Thomas then, as well as on all other occasions, was able to recognize everybody.

Mrs. Annie Thomas, the wife of Thomas Thomas, testified to many of the matters as to which Daisy testified, and corroborated Daisy's testimony in all essential particulars. They were both of the household of the old gentleman from September, 1899, until his death. In addition to these matters she explained how they came to go over to the old gentleman to keep house for him after his wife's death. Daisy was only 14 years old. They came over under an arrangement that the old gentleman would bear the expense of maintaining the house. He kept this up for a few months, until January, 1900, and then he wanted to change the arrangement and only pay board for himself and Daisy, and it was agreed that he should pay \$6 per week, \$4 for himself, and \$2 for Daisy, and this he always paid down punctually to July, 1901. At that time he said: "Now, when they bring the rents in it worries me. You and Daisy—let Daisy go out and collect the rents that they don't bring in—you and Daisy attend to that part of it, and you keep everything paid up, and don't accumulate

any debts whatever." She was present when Mr. Babcock came out the first time in regard to the deeds, but she was not present when the deeds were signed up, nor when the will was signed. She explained how they came to send for Mr. Babcock. The old gentleman was engaged in reading the newspaper, and he asked for Tommie. Tommie was not in, and he had them send for him. When Tommie came, he explained that he had just been reading an account of where some man had deeded his property to his son, and he wanted to do the same for him and Alma, and he told Tommie to go down and ask Mr. Babcock to call. There never was a time, except during the last few weeks of his life, when the old gentleman was not entirely rational. He never did any of the irrational acts attributed to him by plaintiff's witnesses, and he was at no time violent.

Thomas Thomas testified that his father sent for him. That he had seen in the newspaper where some man had turned over something like \$100,000 to his son. The headline of the article was "Robbed the Court." He said "I am going to deed to you and Alma what property is coming to you. The reason I do this is because your brother [meaning Alma] cannot live two years without anything." Mr. Thomas explained that he went down to Mr. Babcock and asked him to come out. Thomas Thomas testified: "Well, to the best of my knowledge he came out one day to find out what he wanted, and then he came out the next day, I think. My father told me what he wanted Babcock for, and I told him that." At any rate Babcock came to the house on March 15th. There was some mistake about the description. He came back the next day with the deeds, which the father signed—one to Alma and one to Thomas. The father also gave Mr. Babcock the old will, with direction to change it. Babcock came back on March 23th, with the new will drawn by him, and it was executed and attested by the witnesses. Then Mr. Babcock put the old will in the stove, and it was burned up. When the deeds were executed, the father gave them to Tommie, to be recorded. He recorded them on March 18th. The father continued to collect the rents from Thomas' property down to July, at which time he told Mrs. Thomas to collect the rents. Prior to July he had nothing to do with the collection of moneys for his father, with the ordering of repairs or payment of bills, payment of taxes, or deposit of moneys. Although he had access to his safe deposit box, he was never at the box alone, except in February, 1901, when his father sent him down to get that \$400 in gold, which he wished to divide amongst the children. And he was at the safe deposit company only once with his father, and that was on March 27, 1901, when he went down with his father to have the insurance on the property transferred. He also explained how his father came to go to Dr. Dixon, that Dr. Mur-



phy was his regular physician, and that Dr. Dixon saw him only on three occasions. That it was for years a matter of common knowledge in the family that the father intended to leave to the boys the property, which he deeded to them in March, and that Mrs. Jones was to get the property which he devised to her by the will. The will of October, 1900, also so provided. When the old gentleman died, he had \$1,350 in cash laid by in his safe deposit box. The property leased to the Becks had been in the possession of Mrs. Jones and her husband for 30 years, and it never realized a dollar of income for her father. He even paid the taxes on it himself. He succeeded in leasing it to the Becks, and figures that this property paid him better net rent than any of his other property.

Plaintiff's expert, R. H. Cornell, testified that Mrs. Jones' property was worth \$4,527; defendants' expert, Albert J. Aiple, testified that it was worth \$5,040. Plaintiff's expert testified that the property deeded to Thomas and Alma was worth \$21,600, and improvements \$10,700; total \$32,300 (he did not state separately the value of each parcel); defendants' expert testified that Tommie's was worth \$12,490 and Alma \$8,675—together \$21,171.

Joseph Winkle knew Mr. Thomas since 1874; saw him last June, 1901, after his wife's death; talked to him about his own ailments and family affairs; and his wife; never observed anything irrational about him.

Thomas L. Mitchell knew Mr. Thomas for 20 to 25 years; "had a neighborly and ordinary speaking acquaintance with him; would speak to him about once a week, as he passed my place, or I met him on the street; spoke of the weather or current events, nothing of a prolonged nature; may not have seen him for four, six, or eight months before his death; never noticed anything irrational about him. As far as I know his mental condition was normal."

Rebuttal:

Patience C. Remington testified that the funeral of Marcy V. Mullino was in April, 1901. "Mr. Thomas did not go with me, my mother and Mrs. Cook. He went to John Hancock's funeral in September, 1900. Mr. Thomas did not collect the bishop's money in the church; my husband did so. Daisy told me a policeman had to help her put Mr. Thomas on the car at the Sarah street junction. Daisy told me in 1900 and in 1901 that Mr. Thomas wanted to marry her. Daisy told me in the spring of 1901 that Tom Morgens brought the old man off the road at 6 o'clock in the morning. Daisy told me in the spring of 1901 that he would get out and run away even when they had so many things against the screen door. Daisy told me in the spring of 1901, on several occasions, that 'Grandpa must understand we are boss.' On New Year's eve, 1901, a party of boys went to

Mr. Thomas' house, and could not get in. Annie Thomas told me the next morning that the reason they didn't let them in was 'because Grandpa was too sick for them to come in.'"

David James knew Mr. Thomas for 26 or 27 years; was at his house in May. "He did not know me. I went to take care of him on June 29, 1901. Tommie told me that Alma had taken care of him prior to that time, and it was too much work to sit up day and night. After I had been there a couple of nights I told Tommie it ought to take some one else to take care of him; that he slapped me, and he was violent. He was violent sometimes. Tommie told me Mr. Thomas was conquered. I stayed until August. They paid me \$1.25 a night. He was not out of the house while I was there on July 4, 1901, and I was there all the time except from 5 or 6 to 10 or 11 o'clock in the morning. He tore up newspapers, and thought they were greenbacks; kept them in his clothes. Tommie saw him doing it, and took them from him. I had to make him some more to satisfy him. He stood before the mirror and preached, and when he got through he thanked me for my hospitality, and said I was the man he was staying with, and thought he was a missionary.

Mrs. Mary Jones testified: "My husband and I did not live on Mr. Thomas' property for 30 years without paying rent. We had let him have \$1,000, and when I wanted to buy the lot and build a house, he said he would build the house out of the money he owed us, and would use what was left over to apply on the land. The first payment on the land was \$500, and my money paid for building the house."

Mrs. Eleanor Richard: "Daisy told Mrs. Remington that when she took Mr. Thomas downtown, he became so violent that she had to get a policeman to help her to get him on the car."

John Jones: "On New Year's eve, 1901, quite a number of boys went to Mr. Thomas' house, and Tommie came out and told them they could not see the old man; 'that he was too bad to be seen.'"

W. P. Doran: "Babcock told me, when I went to see him about why the leases and deeds were made, that he could not reason with Mr. Thomas, and when I asked him why he could not do so, 'he stated that the old man was childish.'"

Chris Griebler rented from Mr. Thomas; for the last years Tommie wrote the receipts for the rent.

Over the objection and exception of the plaintiff the trial court permitted the defendants to examine their witness Henry Roberts as to a conversation he had with W. O. Thomas, and to statements made by the latter, in 1891, 10 years before the deeds were made, in which Mr. Thomas told him what pieces of his property he intended leav-

ing to his son Thomas Thomas, and what pieces he intended leaving to his son Alma Thomas. Upon this evidence the court, as before stated, found the issues for the defendants, and dismissed the plaintiff's bill; and she duly appealed.

**Assignment of errors:**

(1) There is no evidence to support the judgment; (2) the finding and judgment of the trial court is against the evidence, and the great weight of the evidence; (3) the judgment is against the law; (4) all of the disinterested testimony in the case shows that the grantor was of unsound mind when the deeds were made, and was incapable of making a legal contract, or of understanding what he was doing; (5) the trial court erred in admitting incompetent evidence offered by defendants; (6) the deeds were procured by the defendants by undue influence, and by taking advantage of the sickness, delusions, and mental incapacity of the grantor, W. O. Thomas.

Bond, Marshall & Bond, Charles H. Walton, and L. Frank Ottoby, for appellant. Rassieur, Schnurmacher & Rassieur, for respondents.

WOODSON, J. (after stating the facts as above.) 1. The first insistence of counsel for appellant is that there existed such a relation of trust and confidence between William O. Thomas and respondents, at the time of the execution of the deeds in question, as to shift the burden of proof from the former to the latter, which required them to show that the grantor was of sound mind, capable of making a deed, and that the deeds in question were made by him as his free act, uninfluenced by any improper conduct upon their part. If this record disclosed the fact that such relation existed, then, under an ancient and well-settled principle of law of evidence, the burden of proof would have shifted from appellant to respondents, as contended for by her counsel. *Ennis v. Burnham*, 159 Mo., loc. cit. 518, 80 S. W. 1103; *Martin v. Baker*, 135 Mo., loc. cit. 504, 36 S. W. 369; *Kirschner v. Kirschner*, 113 Mo., loc. cit. 297, 20 S. W. 791. The only testimony relied upon which tends to establish that relation is that which shows the age and condition of the grantor, the unequal division of his property among his children, and the fact that he resided with his son Thomas from and after the death of his wife in the year 1899 down to the time of his own death. That alone is not sufficient. The evidence should have gone further, and should have shown that Thomas had charge and control of his father, and that he cared for and administered unto his health, comfort, wants, and necessities, or that he had charge of and conducted his father's business, or that some such relation existed between them, showing that the father actually reposed trust and confidence in his son. The bestowment of

such love and kindness upon the father that a son owes to his parents is not sufficient evidence from which the court can draw the conclusion that such a confidential relation exists between them that the law will presume a conveyance made by the latter to the former was the result of fraud or undue influence. *Studybaker v. Cofield*, 159 Mo. 596, 61 S. W. 246; *Campbell v. Carlisle*, 162 Mo. 634, 63 S. W. 701; *Doherty v. Gilmore*, 136 Mo. 414, 37 S. W. 1127; *Huffman v. Huffman* (decided by this court, but not yet reported) 117 S. W. 1. While it is true appellant testified that her brother Thomas Thomas, one of the respondents, told her one day that he had charge and managed his father's business, yet he squarely contradicts that testimony, and the evidence totally fails to show that he did have charge of or managed his father's business. So we are of the opinion that the court correctly found that statement to be untrue. And as to his son Alma there is no claim whatever of the existence of any evidence which tends to show there was a confidential or trust relation whatever existing between him and his father. We, therefore, hold that the evidence herein fails to show such a confidential relation existed between respondents and their father, William O. Thomas, at the time of the execution of the deeds in question, from which the law will raise a presumption that the deeds were procured through the means of fraud or undue influence exercised over the mind and will of the grantor by the respondents, or that would justify the court in holding that the burden should shift from appellant to respondents to show that he was of sound mind, and that the deeds were executed without fraud or undue influence on their part.

2. We now come to the consideration of the question: Did William O. Thomas possess sufficient mental capacity to understand and know what he was doing when he executed the deeds in question? While this court has never attempted to lay down a rule or prescribe a standard by which the mental capacity of a person to make a deed can be tested, yet at an early day in the history of our jurisprudence the court did promulgate a rule by which the degree of mentality required to make a valid will must be tested. That rule is as follows: "A disposing mind and memory may be said to be one which is capable of presenting to the testator all of his property, and all the persons who come reasonably within the range of his bounty; and, if a person has sufficient understanding and intelligence to understand his ordinary business, and to understand what disposition he is making of his property, then he has sufficient capacity to make a will." *Benolst v. Murrin*, 58 Mo., loc. cit. 322. That rule has never been questioned by this court, but it has met with universal approval whenever presented for consideration. It is true, as contended by counsel for appellant, the law ordinarily requires a higher degree of men-

tality to execute a deed than it does to make a will. *Ennis v. Burnham*, 159 Mo., loc. cit. 518, 60 S. W. 1108; *Kirschner v. Kirschner*, 113 Mo., loc. cit. 297, 20 S. W. 791; *Weston v. Hanson*, 212 Mo. 248, 111 S. W. 44. The reason why the law makes that distinction is that in the case of a deed ordinarily the contract evidenced thereby is dual in character, operating in the exchange of values, which requires knowledge and judgment of properties, and the mental capacity to compete with the other party to the contract in the intellectual struggle that takes place in its negotiation and consummation. This is not required in the same degree in the making of a will. The latter springs from love and affection, duty or philanthropy, while the former is born of, and based upon, the love of gain. Contract may give rise to fraud, deception, and undue influence, and for the circumvention of which a sound mind and mental activity is necessary, which is not so imperative in degree in the deviser who wishes to give his property away by will as it is in a grantor who wishes to sell his property for a valuable consideration. The law in each case protects the weak mind from the strong; but in the case of a will no such conflicting interests or mental struggle takes place, as before suggested. The deviser in disposing of his property by will simply gives expression of his wishes in the premises, untrammelled and without opposition; and, if he possesses sufficient mentality to do the things enumerated in the rule before stated, then he is as competent to make a will as if he possessed a Platonic intellect. But not so in case of a contract. He must be of sound mind and possess sufficient mental strength to judge of values and successfully oppose fraud, deceit, and undue influence whenever brought to bear upon him in the negotiation of a contract. But in the case at bar that difference in the degree of intelligence required of a party in order to execute a valid deed and to make a valid will is of no practical importance, for the reason that the deeds in this case were not for the exchange of values, within the ordinary meaning of conveyances of real estate, but were intended as gifts of the land by the grantor to his sons in consideration of love and affection, which is the basis of most wills. In other words, it requires no more mental strength, on the part of the grantor, to give his property to his children by deed than it does for a deviser to give it to them by will—both stand upon the same foundation. *Chadwell v. Reed*, 198 Mo. 359, 95 S. W. 227; *Richardson v. Smart*, 152 Mo. 623, 54 S. W. 542, 75 Am. St. Rep. 488.

A great many witnesses were examined upon this question by both appellant and respondents, who composed the members of the family of the interested parties, and many of their neighbors and business associates. If the testimony of appellant's witnesses is true, then William O. Thomas was

a man not only of unsound mind, but he was almost an imbecile, scarcely conscious of his own existence, and of course, was not capable of making a valid deed. If, upon the other hand, the witnesses for respondents told the truth, then the grantor was perfectly sound in mind, and fully comprehended and understood what he was doing when he executed the deeds. It would be difficult to perceive how the testimony could be more conflicting and contradictory. Where the evidence introduced by the respective parties is contradictory and conflicting, this court has repeatedly held that, where the circuit court has the witnesses before it, the opportunity of observing their demeanor upon the witness stand, and their manner of testifying, places it in a much better position to judge of the credibility of the witnesses, and the weight to be given to their testimony, than this court can have. And in equity cases, where this court has the right to review and weigh anew the evidence, the usual practice is to defer largely to the findings of the trial court on all issues of fact, and will refuse to disturb the judgment of the trial court on the ground that the findings are against the weight of the evidence. *Brecker v. Fillingham*, 209 Mo., loc. cit. 583, 108 S. W. 41; *Tinker v. Kier*, 195 Mo. 183, 94 S. W. 501; *Huffman v. Huffman* (decided by this court, but not yet reported) 117 S. W. 1. This last case has drawn the rule much harder than any previous case to which my attention has been called, and in fact much stronger than I ever understood the rule to be; but, as it has the support of the court in banc, it must be accepted as binding authority in this case. But, independent of this rule, after a careful reading of this voluminous record, we are perfectly satisfied the trial court reached the proper conclusions as to the facts of the case. We are satisfied that, if William O. Thomas had been a man of such unsound mind, or so near being an imbecile as several of appellant's witnesses would have us believe, then no intelligent observing man or woman could have failed to have noticed the condition of his mind, yet a majority of his kin, business associates, and practically all of his neighbors testified that he was a man of strong will power, and was of sound mind at the time he executed the deeds in question, and that he understood perfectly what he was doing at the time, and that they noticed nothing out of the ordinary or wrong with his mind until about 10 days or two weeks just prior to his death. Witnesses who bear close family, social, or business relations to the grantor in a deed possess the most favorable opportunities for observing and knowing his mental condition, and usually their testimony as to his mental condition and capacity is entitled to great weight. *Holton v. Cochran*, 208 Mo. 314, 106 S. W. 1035. Surely it cannot be true that this large number of witnesses who saw and conversed with him every few

days, and some of them every day, could have done so without having detected his unsound mental condition had he reached that stage of imbecility described by some four or five of appellant's witnesses. If he was of unsound mind, then they either failed to discover his true condition, or, if they did, then they falsified regarding that matter. The great weight of the disinterested testimony was in favor of the respondents; and, in our judgment, as before stated, the findings of the trial court are supported by the greater weight of the evidence. In addition to this the law presumes William O. Thomas was of sound mind at the time he made the deeds, and the burden of disproving that fact rests upon the appellant, which she has wholly failed to do. *Chadwell v. Reed*, 198 Mo. 359, 95 S. W. 227; *Richardson v. Smart*, 152 Mo. 623, 54 S. W. 542, 75 Am. St. Rep. 488.

3. It is next contended by counsel for appellant that the record in this case discloses the fact that the execution of the deeds by William O. Thomas to the respondents was procured by undue influence, exerted by them over the mind and will of the latter. As to Alma the evidence is uncontradicted that he did not know his father's intention to make the deeds, except as to some general expressions made by his father extending over a considerable period of time, until some days after the deed was executed and recorded. The first he knew of its existence was when his father handed it to him after it had been recorded. While as to the execution of the other deed to his son Thomas there is some evidence tending to show that it was procured by undue influence exercised over the mind of the grantor, yet that evidence, like that regarding the unsound condition of his father's mind, is outweighed and completely overcome by the other testimony in the case. If there had been no other testimony introduced contradicting and overcoming the testimony introduced by appellant touching that question, then the authorities cited and quoted from by her learned counsel would entitle her to a recovery; but, unfortunately for her, as before stated, her case is completely overthrown and destroyed by the greater weight of the evidence in the case. We are also of the opinion that the findings of the trial court upon that issue were also for the right party.

4. One of the grounds stated in the petition for having the deeds in question set aside is that they were procured through fraud and deception, perpetrated upon the grantor by the respondents. We suppose that claim has been abandoned by counsel for appellant, as it was not urged upon our attention in brief or argument. However that may be, we have failed to discover any evidence whatever tending to show either of the respondents were guilty of any fraud perpetrated in connection with the execution of the deeds.

5. It is next contended by appellant that the action of the trial court in admitting the testimony of the witness Roberts as to a conversation he had with William O. Thomas as to a statement made by the latter in the year 1891, in which he told witness that he intended to give to respondents certain pieces of property, was erroneous. There were three or four other witnesses who testified to similar conversations had with him, but not extending as far back as the year 1891. In our judgment that testimony was proper, for the reason that it showed a fixed and definite purpose, on the part of the grantor, of long standing to convey this property to the respondents. *Teichenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46; *Thompson v. Ish*, 99 Mo., loc. cit. 171, 12 S. W. 510, 17 Am. St. Rep. 552.

6. It is finally insisted by counsel for appellant that the court below erred in excluding the testimony of certain witnesses as to certain alleged declarations of the grantor, tending to show improper acts and conduct on the part of his son Thomas, and of certain members of his family. That testimony was admissible only for the purpose of showing the mental condition of the grantor and the state of his affections. All such declarations have no probative force to establish undue influence. *Teichenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46; *Crowson v. Crowson*, 172 Mo. 702, 72 S. W. 1065; *Seibert v. Hatcher*, 205 Mo. 83, 102 S. W. 962. Under these authorities that testimony was clearly admissible for the purposes above stated; but, this being an equity case, this court may admit and consider all testimony preserved in the record which was improperly excluded by the trial court, and render here such judgment or decree as the court may deem just and proper under the pleadings and evidence. In discussing this same question in the case of *Gibbs v. Haughwout*, 207 Mo., loc. cit. 391, 105 S. W. 1067, this court said: "This court has many times held that on appeal in equity cases it would consider evidence which was improperly excluded by the trial court, or reject evidence improperly admitted when preserved in the bill of exceptions, without reversing the judgment for that reason. *State ex rel. v. Jarrott*, 183 Mo., loc. cit. 218, 81 S. W. 876. And it has also been uniformly held that in equity cases this court would on appeal proceed de novo to hear and determine the cause, deferring somewhat to the findings of the trial court; but, if its findings and judgment were not sustained by the evidence and law, then this court would proceed to make its own finding and enter judgment as equity and justice might require. *Blount v. Spratt*, 113 Mo. 48, 20 S. W. 967; *Courtney v. Blackwell*, 150 Mo. 267, 51 S. W. 668; *State ex rel. v. Jarrott*, 183 Mo. 204, 81 S. W. 876. According to the doctrine announced in these cases it is the duty of this court to exclude

the evidence of Gibbs, and to affirm the judgment, if it is not for the right party. After excluding the testimony of Gibbs, we are still of the opinion that this court would not be justified in disturbing the judgment canceling the deed in question." By considering the excluded testimony the results reached by the circuit court would not, and should not, be altered, for the reason that it could not overcome the great weight of the evidence which preponderates in favor of the respondents.

Finding no reversible error in the record, we are of the opinion that the judgment should be affirmed. It is so ordered. All concur.

#### WHITTAKER v. ST. LUKE'S HOSPITAL.

(St. Louis Court of Appeals. Missouri. Dec. 29, 1908. Rehearing Denied April 20, 1909.)

#### CHARITIES (§ 45\*)—LIABILITY FOR TORTS—INJURY TO EMPLOYÉ.

A charitable institution, whether public or private, is not liable for its torts, though the person injured is its employé.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 103; Dec. Dig. § 45.\*]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Action by Annie Whittaker against St. Luke's Hospital. Judgment for defendant. Plaintiff appeals. Affirmed.

W. H. & Davis Briggs, for appellant. F. J. McMaster, for respondent.

GOODE, J. This action was instituted against the respondent, a hospital in the city of St. Louis, to recover damages for an injury suffered by appellant, while an employé in the institution, in working with an ironing machine or mangle, which was operated by steam power. It is alleged the machine was out of order, in that a guard, designed to prevent the operator of the machine from getting a hand caught between two revolving cylinders, was not in its proper place, and did not protect the operator, and, further, because the lever designed to stop the machine when in motion was out of repair and would not work. It is alleged, further, these conditions were known to respondent, or could have been known to it by the exercise of reasonable care, and in consequence of them appellant, while working with the machine, got her hand caught between the two cylinders and badly injured. We need not state the facts more fully. The appeal comes here from an order overruling a motion filed by appellant to strike out portions of the answer which, in effect, set up the defense that respondent is a charity, and not answerable in damages for injuries caused by the negligence of its trustees or servants. Appellant's brief says: "The sole question on

this appeal is whether a charitable institution is liable for its torts to an injured employé." This concession relieves us of the duty to inquire whether or not respondent is a charity, though we apprehend there would be no difficulty in holding it is on the facts stated in the answer. After reading numerous decisions on the question thus propounded by appellant, we conclude that, according to the weight of authority, respondent ought not to be held liable. The question is one on which the courts have been fertile in drawing subtle distinctions, many of them irrelevant to the point for decision, or, at least, leading to no principle by which the diverse conclusions reached can be reconciled.

It is conceded by appellant's counsel that, if she had been hurt while receiving the benefit of the charity as a patient in the institution, respondent would not be liable; but, as she was a servant, it is asserted a different rule should obtain, and the corporation should be made to respond for the negligence of its officers or servants in permitting the machine with which she worked to be out of repair. A precedent for this contention is *Bruce v. Church*, 147 Mich. 246, 110 N. W. 951, 10 L. R. A. (N. S.) 74, a case weakened as authority by the difference of opinion among the judges regarding the ground of liability, and not easy to reconcile with prior decisions of the same court. The adjudications of the question have been exhaustively reviewed in most of the opinions dealing with it, and it would serve no useful purpose for us to go over them again. They will be cited, however, for the convenience of the reader. In some instances charitable institutions have been exonerated from liability for the negligence of their officers, trustees, and servants because they were agencies of the government, and in other instances because their funds were donated for use, in ways of charity, by individuals, and to take them to pay damages would be a diversion of the trust. Of the former class of cases we cite *Williamson v. Industrial School*, 95 Ky. 251, 24 S. W. 1065, 23 L. R. A. 200, 44 Am. St. Rep. 243; *Benton v. Hospital*, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436; *Murtaugh v. St. Louis*, 44 Mo. 479; *Mala v. Eastern State Hospital*, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577; *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745. It will be seen, on reading the opinions in cases where the defendants were instrumentalities of the government, that the principle on which they were held not liable was, at bottom, much the same as the principle on which private charitable institutions, in some of the best-considered cases, were exonerated; i. e., that their funds, whether donated by the government or by individuals, were intended to be dispensed for the general good in designated charitable ways. Hence, though some courts incline against holding

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

private charities exempt from liability for damages, and attempt to draw a distinction between them and institutions which are made by law public instrumentalities, it is doubtful if this distinction is sound.

In *Murtaugh v. St. Louis*, which was an action brought for injuries suffered by the plaintiff from the negligence of the officials and servants of a municipal hospital, the Supreme Court said the general result of the adjudications seemed to be that, where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from his negligence or misfeasance, the corporation is liable, as in the case of private corporations or parties; "but, when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions on the part of its officers and servants." It is evident from the quoted passage the Supreme Court considered the exemption of a governmental charity from liability for the negligence of its officials and employes rested on the fact that its corporate franchise and the funds which kept it alive were conferred on the corporation by the sovereignty for the public welfare, and ought not to be diverted to pay claims for damages. That is like the principle on which private institutions of a charitable character privately endowed ought to be exempted, and in several authoritative decisions were, though different reasons have been assigned by other courts.

Two rules of law, both founded on motives of public policy, come into conflict here: The rule of respondeat superior (or if not technically that, akin to it), and the rule exempting charitable funds from executions for damages on account of the misconduct of trustees and servants. As both rules rest on the same foundation of public policy, the question is whether, on the facts in hand, the public interest will best be subserved by applying the doctrine of respondeat superior to the charity, or the doctrine of immunity; and we decide this cause for respondent because in our opinion it will be more useful, on the whole, not to allow charitable funds to be diverted to pay damages in such a case, and, moreover, the weight of authority is in favor of this view, as expressed not only in cases where the parties seeking damages were patients in the institution, but where they were not. We will go no further than the facts before us require, and do not say instances of negligence of officials and servants could not arise (e. g., in the public streets; *Kellog v. Church Foundation*, 128 App. Div. 214, 112 N. Y. Supp. 566) in which it would be proper to make a charitable cor-

poration responsible. We think the better rule of decision in the present case is that the respondent is not liable. Some of the cases cited *infra* were brought by parties other than patients in hospitals, or persons who were receiving charity when injured, and the corporation was exonerated. The *Feoffees of Heriot's Hospital v. Ross*, 12 Clark & F. 507; *Benton v. Hospital*, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436; *Farrigan v. Pevear*, 193 Mass. 147, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484; *Fordyce v. Internl. Library Assn.*, 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (N. S.) 485; *Downes v. Hospital*, 101 Mich. 555, 60 N. W. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427; *Williamson v. Industrial School*, 95 Ky. 251, 24 S. W. 1065, 23 L. R. A. 200, 44 Am. St. Rep. 243; *Haas v. Missionary Society*, 6 Misc. Rep. 281, 26 N. Y. Supp. 868; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Abston v. Waldon Academy*, 118 Tenn. 24, 102 S. W. 351, 11 L. R. A. (N. S.) 1179; *Hearns v. Hospital*, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556.

The judgment is affirmed. All concur.

#### BEECHAM v. EVANS.

(Kansas City Court of Appeals. Missouri.  
March 29, 1909.)

#### 1. COSTS (§ 214\*)—NEW TRIAL (§ 24\*)—REMEDIES FOR ERRONEOUS TAXATION—MOTION TO VACATE JUDGMENT.

Error in adjudging costs against prevailing party in the judgment can only be corrected by a motion for a new trial made within four days after rendition of judgment; it not being properly a motion to retax costs, but to correct the judgment itself.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 798; *Dec. Dig.* § 214;\* *New Trial*, *Dec. Dig.* § 24.\*]

#### 2. COSTS (§ 214\*)—TAXATION—MOTION FOR RETAXATION.

A motion to retax costs applies only to ministerial taxation of costs by the clerk after entry of judgment, and costs adjudged against a party in the judgment cannot be corrected in that manner.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 798; *Dec. Dig.* § 214.\*]

#### 3. JUDGMENT (§ 386\*)—VACATION—TIME OF FILING MOTION.

While the trial court of its own motion may set aside its judgment at any time during the term, a party moving to set it aside must file his motion within four days after its rendition.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 735-744; *Dec. Dig.* § 386.\*]

Error to Circuit Court, Jasper County.

Action by Isaac Beecham, administrator, against W. H. Evans. From an order denying plaintiff's motion to correct the judgment and retax costs, he brings error. Affirmed.

\*For other cases see same topic and section NUMBER in *Dec. & Am. Digs.* 1907 to date, & *Reporter Indexes*

R. A. Mooneyham and Harry Phelps, for plaintiff in error. C. H. Montgomery, for defendant in error.

**BROADDUS, P. J.** The plaintiff sued in replevin to recover the possession of "300 chickens, 1 two-months old calf, 2 cows, 2 wagons, old, 32 hogs (extra large), one barn, 2 sets buggy harness, 4 outhouses plunder, 1 five room house, 1 sideboard, 1 ice box, 1 dining room table, 1 cooking stove, 1 heating stove, dishes, pans, cooking utensils, 8 iron beds, 10 chairs, 1 two seated surrey (rubber tire), 1 single buggy, 1 bay mare, 1 bay horse, barb wire, fence posts, 1 mule (iron gray), 1 black horse, 1 wagon and harness." Hon. Joseph D. Perkins was appointed referee to hear the testimony and make a finding as to the law and facts of the case. In due time the referee heard the case and filed his report. According to the report, a part of the property was found to belong to the plaintiff and a part thereof to the defendant. Both parties filed exceptions to the report. On 27th day of January, 1908, it being on the nineteenth judicial day of said term, the court overruled the said exceptions, and rendered judgment for plaintiff for the property shown by the referee's report to belong to him, and rendered judgment for defendant for that part said report said belonged to him, and divided the costs equally between the parties. On the 7th day of February, 1908, plaintiff filed a motion to correct the judgment and retax the costs. On the 8th day of February, 1908, it being the twenty-ninth judicial day of the term, plaintiff's motion was overruled, from which action of the court in overruling his motion the plaintiff appealed.

Without expressing any opinion as to the propriety of the action of the court in taxing a part of the costs in a suit in replevin against the plaintiff when the plaintiff recovers any part of the property replevined, we are constrained to hold that the error, if one, cannot be corrected by a motion not filed within four days after the rendition of the judgment. This is not properly a motion to retax costs, but is a motion to correct the judgment itself. "When items of costs are specifically allowed by the trial court and adjudged against a party, such allowance and judgment cannot be reached by the ordinary motion to retax, which is applicable only to the ministerial taxation of costs by the clerk after entry of judgment. A motion for a new trial within the proper time is the only way for obtaining revision of a specific judgment for costs." *Bosley v. Parle*, 35 Mo. App. 232; *Paul v. Threshing Machine Co.*, 87 Mo. App. 647. Plaintiff in error has cited authorities to the effect that "a judgment remains in the breast of the court during the entire term at which it is rendered and may be set aside or vacated

at any time during such term." *Harkness v. Jarvis*, 182 Mo. 231, 81 S. W. 446. While such is the law, it will not avail plaintiff. While the judge at his own instigation may exercise such right, the law imposes the duty upon a party to the cause, if he thinks there has been any injustice done him, to file his motion within four days from the day of the rendition of the judgment.

Affirmed. All concur.

### ACHOR v. SULLENGER.

(St. Louis Court of Appeals. Missouri. April 6, 1908.)

**EXECUTORS AND ADMINISTRATORS (§ 22\*) — CONTEST OF WILL — ADMINISTRATOR PENDENTE LITE.**

Rev. St. 1899, § 13 (Ann. St. 1906, p. 342), provides that, if the validity of a will is contested, letters of administration shall be granted pending the contest. *Held*, that though in an action to contest a will the original petition named as defendants only the named legatees, instead of all the heirs of deceased, the appointment of a temporary administrator was not prejudicial to the executor, who was also a legatee; an amended petition making all the heirs parties being subsequently filed.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 119; Dec. Dig. § 22.\*]

Appeal from Circuit Court, Lincoln County; Jas. D. Barnett, Judge.

Action by Hooker Achor against Mary S. Sullenger. From the judgment, defendant appeals. Affirmed.

Charles Martin, for appellant. R. L. Sutton, for respondent.

**GOODE, J.** This is an appeal from a judgment of the circuit court of Lincoln county in a proceeding appointing an administrator pendente lite to act in lieu of appellant, who is executrix of the will of Jefferson Sullenger, her deceased husband. Said deceased had bequeathed to appellant all his personal estate, had directed his lands to be sold by her, out of the proceeds of the sale had bequeathed to James Wicher \$500, and had divided the remainder of the proceeds between appellant and the brother of deceased, James Sullenger. The will was admitted to probate July 18, 1904. On September 21, 1904, respondent, Hooker Achor, instituted an action in the circuit court of the county against appellant and the other legatees named in the will, alleging that he was one of the heirs of deceased, that the paper purporting to be the will of the deceased was not, in truth, his will for these reasons: It was not signed and attested as the law required, the testator was of unsound mind at the date of it, was unduly influenced by appellant and James Sullenger, and, being weak from disease, was taken advantage of by said parties. The action in the circuit court was under

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the statute to contest and set aside the will. On the next day, September 22d, notice was served on appellant that respondent, Achor, would present a motion to the probate court on September 23d to suspend her from the office of executrix pending the contest of the will. This motion was presented, and on the hearing appellant's functions as executrix were suspended during the contest, and William S. Bragg was appointed administrator of the estate during said period. An appeal was taken from the order to the circuit court, where, on a hearing, the same result was reached. An appeal was then taken to the Supreme Court, whence it was transferred to this court.

Since the judgment below the will of Jefferson Sullenger as originally probated has been established by a judgment of the Supreme Court, and we suppose appellant will resume her functions and the estate be turned over to her by the special administrator. *Robards v. Lamb*, 89 Mo. 303, 1 S. W. 222. Be that as it may, her temporary suspension was proper. The statutes say if the validity of a will is contested letters of administration shall be granted during the time of the contest to some other person than the executor, the other person shall take charge of the property, administer the same according to law and under the direction of the court, and account for, deliver, and pay all the money of the estate to the regular executor of the estate when qualified to act. Rev. St. 1899, § 13 (Ann. St. 1906, p. 342). The right to displace appellant is not denied, but it is contended the appointment of Bragg was premature because when it was made all the parties interested in the estate had not been made parties defendant to the action instituted in the circuit court to contest the will. The original petition in said action named as defendants only the three persons who were legatees, instead of all the heirs of Jefferson Sullenger, deceased, and this was the posture of the cause when Bragg was appointed by the probate court. Shortly afterwards, in October, 1904, an amended petition was filed in the case in the circuit court in which all the heirs were made parties and process issued for them. The position of appellant's counsel is that there was no contest until all the heirs were parties, and the probate court could not appoint an administrator in lieu of appellant because the power to do so was only conferred in case there was a contest. This is a strained and technical view of the matter and devoid of importance in the present case. It is true all the parties interested in an estate are perhaps necessary parties to an action to contest a will (*Eddie v. Parke's Adm'r*, 31 Mo. 513) but it does not follow that, until every person interested is made a party to the action, there is no contest in such sense that an order of the probate court substituting an administrator pen-

dente lite in lieu of the executor or executrix will be erroneous.

There may have been some irregularities in the procedure, but, the circumstances considered, the action of the probate court was substantially right, and, as no error prejudicial to appellant occurred, the judgment will be affirmed. All concur.

#### STATE v. STAMPER.

(Kansas City Court of Appeals. Missouri.  
March 29, 1909.)

#### 1. CRIMINAL LAW (§ 875\*)—TRIAL—VERDICT—SUFFICIENCY.

A verdict, in a prosecution for the illegal sale of liquor, that the jury "find the defendant guilty as charged, and assess his fine at the sum of \$100," while somewhat informal for omitting the word "punishment," being certain, is sufficient.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2089; Dec. Dig. § 875.\*]

#### 2. INTOXICATING LIQUORS (§ 239\*)—PROSECUTIONS—INSTRUCTIONS—BURDEN OF PROOF.

In a prosecution of a druggist for illegally selling intoxicants, an instruction that, if accused's clerk sold intoxicants in less quantity than four gallons, the jury should find accused guilty, unless the sale was contrary to his order and without his knowledge and consent, "and" that he had a prescription from a practicing physician, was erroneous in using the conjunctive, by which accused was required to prove, not only that the sale was contrary to his order, but that he had a physician's prescription authorizing the sale.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 343; Dec. Dig. § 239.\*]

#### 3. CRIMINAL LAW (§ 1172\*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS—PREJUDICIAL EFFECT.

The error was calculated to mislead the jury to accused's prejudice; there being no other instruction given correcting it.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3154; Dec. Dig. § 1172.\*]

Appeal from Circuit Court, Ray County; Francis H. Trimble, Judge.

James A. Stamper was convicted of illegally selling intoxicants, and he appeals. Reversed and remanded.

Geo. W. Crowley, for appellant. Maurice G. Roberts, for the State.

**BROADDUS, P. J.** The defendant, the proprietor of a drug store in Lawson, Ray county, Mo., was indicted for the illegal sale of liquor. A witness testified that he bought whisky at defendant's store, in the summer of 1907, from Henry Gordon, a clerk in defendant's employ. The defendant testified that he had given his clerk instructions not to sell liquor without the written prescription of a physician. The jury returned the following verdict: "We, the jury, find the defendant guilty as charged in the first count, and assess his fine at the sum of (\$100.00) one hundred dollars."

The defendant contends, first, that the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



verdict is too informal and insufficient to sustain the judgment. The verdict is somewhat informal, for omission to use the word "punishment" after the words "assess his"; but we believe it is substantially sufficient. The verdict sets forth that they find him guilty and assess his fine at \$100. It being certain, it was sufficient. *Plymouth Cordage Co. v. Yeargain*, 87 Mo. App. 561; *State v. Robb*, 90 Mo. 80, 2 S. W. 1.

The court gave a number of instructions on each side. Defendant complains of instruction numbered 3 given for the state, which reads as follows: "If you find from the evidence that any person, while in the employ of the defendant as clerk in his drug store, sold at said drug store intoxicating liquors in less quantity than four gallons, you should find the defendant guilty, unless you further find that such sale was made contrary to the order of defendant, and without his knowledge and consent, and that he had a prescription from a regularly practicing physician. The burden of proving, however," etc. The objection is to the use of the conjunctive word "and," instead of the disjunctive word "or," which cast upon defendant the burden of proving the sale was not only contrary to his order, but also that he had the prescription of a physician authorizing him to make the sale. We think the objection is well taken. It was a substantial error, calculated to mislead the jury to the defendant's prejudice; and there is no other instruction, given on the part of the state or of the defendant, correcting the error.

The case of *State v. Price*, 115 Mo. App. 656, 92 S. W. 174, cited by the state to show that the error was harmless, has no application to this case, because of a wholly different state of facts appearing in this case.

For the error noted, the cause is reversed and remanded. All concur.

## THOMPSON v. QUINCY, O. & K. C. R. CO.

(Kansas City Court of Appeals. Missouri.  
March 29, 1909.)

### 1. CARRIERS (§ 213\*) — CARRIAGE OF LIVE STOCK—LIABILITY.

A carrier of live stock must safely carry the stock and deliver the same at the point of destination within a reasonable time, unless prevented by an act of God or the public enemy, or by unavoidable accident.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 920-922; Dec. Dig. § 213.\*]

### 2. CARRIERS (§ 99\*)—NONPERFORMANCE OF OBLIGATION—EXCUSE.

Results attributed to a defective roadbed and defective equipment afford no excuse for the nonperformance of a carrier's duty to safely deliver a shipment at its destination within a reasonable time.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 415; Dec. Dig. § 99.\*]

### 3. CARRIERS (§ 228\*)—DELAY IN TRANSPORTATION—NEGLIGENCE—EVIDENCE—BURDEN OF PROOF.

Proof that the delay in the transportation of a shipment of live stock was caused by a wreck of the train established a prima facie case of negligence; and the carrier, to escape liability, had the burden of proving that the wreck was the result of unavoidable accident.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 958; Dec. Dig. § 228.\*]

### 4. CARRIERS (§ 230\*)—NEGLIGENCE—QUESTION FOR JURY.

Whether a carrier, guilty of delay in a shipment of live stock in consequence of a wreck of the train, showed that the wreck was the result of unavoidable accident, and was therefore not liable for the delay, *held*, under the evidence for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 962; Dec. Dig. § 230.\*]

Appeal from Circuit Court, Clinton County; Alonzo D. Burnes, Judge.

Action by Samuel L. Thompson against the Quincy, Omaha & Kansas City Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. T. Herndon and J. G. Trimble, for appellant. F. B. Ellis, for respondent.

BROADDUS, P. J. This is an action for damages caused by negligence. On the 21st day of November, 1906, the defendant as a common carrier received from the plaintiff at Mecca, on the line of its railroad, two car loads of hogs, consisting of 198 head, for transportation to market at St. Joseph, Mo. The hogs were loaded at about 4:40 o'clock p. m. of the day, in accordance with the directions of defendant's agent. The hogs were to be transported to Osborn, and then to be delivered to the Chicago, Burlington & Quincy Railroad, over which they were to be carried to their destination. The train that was expected to carry the shipment was derailed before it reached Mecca and did not arrive, and the hogs remained loaded on the cars until about 3:38 p. m. of the next day, when they were carried to Osborn, where they were received by the connecting carrier and by it were delivered at St. Joseph, but arrived many hours behind the usual time that hogs should arrive in order to get on the day's market.

The evidence tended to show that in consequence of the delay the plaintiff suffered a loss in a decline of the market, that some of the hogs were crippled, and some of them suffocated. The defendant, in order to show that the delay was caused by an unavoidable accident, introduced in evidence the testimony of the employees in charge of the train, which was to the effect that they examined the track at the place of derailment, and that there was nothing wrong with its condition, and that they could discover nothing, in their opinion, that caused the derailment. The persons in charge of the track were also introduced to prove the good condition of the

tracks; and the car inspector was introduced, whose testimony was that the cars were in good condition. It was a mixed train, and the evidence was that the derailment was caused by the front wheels of the baggage car leaving the track. The court by appropriate instruction submitted the issues to the jury, which returned a verdict for plaintiff, upon which judgment was rendered, and defendant appealed.

The defendant contends that under the evidence the plaintiff was not entitled to recover, and that, therefore, the court committed error in not sustaining its demurrer to plaintiff's evidence. It is conceded that it was the duty of defendant as a common carrier to have safely delivered plaintiff's hogs at their destination within a reasonable time, and that the only causes that would justify a breach of duty in that respect are those which could not be reasonably anticipated, such as the act of God, that of the public enemy, unavoidable accident, etc.

Results, attributed to a defective roadbed or tracks and defective equipments, afford no excuse for the nonperformance of the carrier's duty to safely deliver the goods of the shipper to their destination within a reasonable time. *McFall v. Railway Co.*, 117 Mo. App. 477, 94 S. W. 570; *Vencill v. Railroad Co.*, 132 Mo. App. 722, 112 S. W. 1031.

When it was shown that the delay was caused by a wreck of the train which it was intended should carry plaintiff's hogs, prima facie a case of negligence was made out, which shifted the burden of proof upon defendant to show that it was the result of unavoidable accident. *McFall v. Railway Co.*, supra; *Vencill v. Railway Co.*, supra; *Keyes-Marshall Bros. Livery Co. v. Railroad*, 105 Mo. App. 556, 80 S. W. 53. This defendant undertook to do by evidence as to the good condition of its track and its cars. But it was still a question for the jury, and not for the court to say whether defendant had made good its defense in that respect, and that question was properly submitted to the jury.

**Affirmed. All concur.**

### FROGGE v. BULLOCK et al.

(Kansas City Court of Appeals. Missouri.  
March 29, 1909.)

#### 1. APPEAL AND ERROR (§ 1073\*)—HARMLESS ERROR.

Where the unpaid stock subscription of a stockholder is largely in excess of a judgment against the corporation, no harm can result from a failure to limit a judgment rendered against the stockholder, on a return of the execution against the corporation "No property found," to the amount of his unpaid subscription.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.\*]

#### 2. CORPORATIONS (§ 268\*) — STOCKHOLDER'S LIABILITY—MOTIONS—SUFFICIENCY.

An allegation, on a motion for a judgment against a stockholder on his unpaid subscription on a return of an execution against the corporation "No property found," that the stockholder had never paid anything for his stock and still owed for it, wherefore plaintiff prayed an order of the court for execution, was a sufficient allegation of ownership of stock prior to and at the time execution was asked against him.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 268.\*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

W. R. Frogge obtained a judgment against the Big Joe Mining & Milling Company, and, an execution thereon having been returned "No property found," moved for an execution against E. H. Bullock, alleging him to be a stockholder and that his subscription had not been paid. Judgment was rendered against Bullock, and he appeals. **Affirmed.**

Vinton Pike, for appellant. Allen, Gabbert & Mitchell, for respondents.

ELLISON, J. This proceeding was begun against defendant Bullock as a stockholder in the defendant corporation who had not paid his stock subscription. It is prosecuted under section 985, Rev. St. 1899 (Ann. St. 1906, p. 870), and resulted in a judgment for the plaintiff. Plaintiff obtained judgment against the defendant corporation for \$451, upon which he had an execution issued. The execution was returned "No property found," whereupon he filed his motion in the circuit court where the judgment had been rendered for an execution against defendant Bullock, alleging the latter to be a stockholder in the corporation and that his subscribed stock to the amount of \$40,000 had never been paid. A trial was had on this motion, and it was found by the court that defendant Bullock had not paid \$20,000 of his subscription, and judgment was rendered against him for the amount of the judgment against the corporation, and an execution ordered.

The complaint made by defendant Bullock is that the judgment or order on the motion against him is a general one, and that, his liability being special, the judgment or order and execution should have been special. The objection is not well made. Bullock is liable up to the amount of his unpaid stock, and, as that is largely in excess of the judgment, no possible harm can result from a failure to limit the judgment and execution to the amount of such stock. The execution against a stockholder is not limited to any specific property. In that respect it is general. It is a general execution, limited in amount to the sum of the unpaid stock, and where the judgment against the corporation is for a greater amount than the unpaid subscription it would be important for the protection of the stock-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

holder that the execution be limited to the amount of his unpaid subscription. But when, as in this case, such unpaid subscription is much greater than the judgment, no harm can result from an omission to so limit it.

It is claimed that this proceeding can only be had against those who were stockholders when the execution was issued (*McClaren v. Franciscus*, 43 Mo. 452), and that there was no showing that defendant Bullock had not transferred his stock. The motion charges that Bullock was a stockholder prior to September 1, 1906, the day suit was filed against the corporation. The record shows execution was not issued until August, 1907. The record further shows that "evidence was introduced by the respective parties sustaining and controverting the allegations of the motion." The idea advanced by defendant is that the proof could not have been beyond the allegations of the motion, and therefore there was no evidence that Bullock owned the stock when execution was issued. Putting aside any question whether defendant should not have shown, in defense, that he had transferred his stock, we find that the motion itself contains more allegations than defendant has noticed. It alleges that he has never paid any of his stock, and that he still owes for it; "that is to say, E. H. Bullock yet owes \$20,000 upon his shares of stock. \* \* \* Wherefore plaintiff prays an order of this court for execution," etc. We regard this as sufficient allegation of present ownership prior to and at the time execution was asked.

We find no error, and the judgment was for the right party, and should be affirmed. All concur.

#### RABICH v. STONE et al.

(St. Louis Court of Appeals. Missouri. April 6, 1909. Rehearing Denied April 20, 1909.)

#### EASEMENTS (§ 61\*) — OBSTRUCTION — INJUNCTION.

Across the rear of the lots of plaintiff and defendants, where they were several feet below the street level, was a private alley. The entrance thereto for teams was obstructed by defendant building across it a curbed and guttered sidewalk, on the level of the rest of the sidewalk. *Held*, that plaintiff was entitled to an injunction abating the nuisance, so as to leave the entrance open, and in a condition allowing him to drive in and out as easily as before, though defendants laid the walk on the established grade, where they were directed by the city engineer to lay it, and this, though plaintiff by mistake had encroached on the alley with his barn; he having turned into the alley more land on the other side of it.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 134; Dec. Dig. § 61.\*]

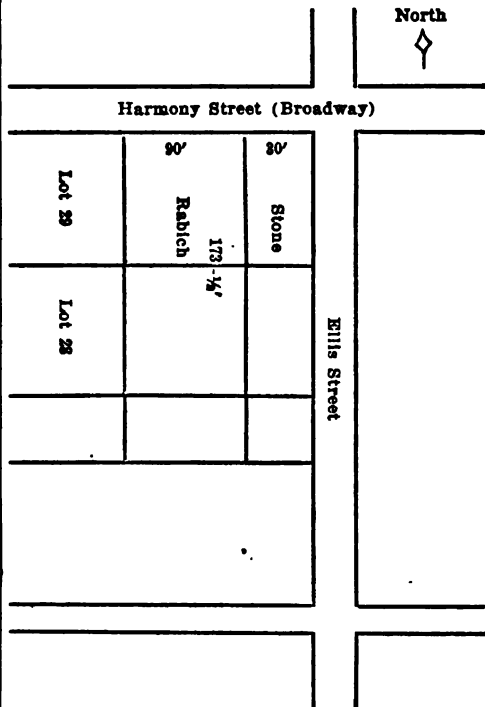
Reynolds, P. J., dissenting.

Appeal from Circuit Court, Cape Girardeau County; Henry C. Riley, Judge.

Action by Herman Rabich against J. C. Stone and others. Judgment for plaintiff. Defendants appeal. Affirmed.

John A. Hope, for appellants. Wilson Cramer, for respondent.

GOODE, J. These defendants own a lot in the city of Cape Girardeau, fronting 30 feet on Harmony street or Broadway, and extending back 173½ feet on Ellis street. It lies at the southwest corner of the intersection of the two streets. Plaintiff owns a lot fronting 90 feet on Harmony street, and extending the same depth, immediately west of the lot of defendants. This diagram will show the situation of the properties:



John P. Hitt is the common source of title, and the parties hold under a series of conveyances, all of which contain a reservation of 10½ feet of land off the south ends of the lots conveyed, to be used as an alley for the benefit of the respective grantees and their heirs and assigns. This alley opens into Ellis street on the east, and runs thence west along the south side of the respective lots which face north on Harmony street. Plaintiff conducts a lumber yard on his property, and the access to his premises for wagons and teams is through said alley. His business of buying and selling lumber requires a good deal of hauling to and from his premises, which would be done most conveniently through the alley. Defendants erected a brick store on the front of their

30-foot corner lot, and a stable on the rear, leaving 10½ feet for the alley. The lots to the west of Ellis street, and abutting on the alley, are depressed 4 or 5 feet below the level of the adjacent streets. Nevertheless, until the incident to be related, the alley afforded ready access to plaintiff's premises. In the spring of 1906 defendants laid a granitoid sidewalk along the east side of their lot, extending it across the alley. This sidewalk was curbed and guttered, and, according to the weight of the evidence and the finding of the court below, obstructed the entrance of the alley for teams, thus depriving plaintiff of the use of it in connection with his business, forcing him to drive in and out of his premises by way of Harmony street, cutting off his enjoyment of the easement reserved in the various conveyances under which the parties hold title to the respective lots, and constituting a permanent nuisance. There was testimony that plaintiff notified defendants when they were building the walk not to obstruct the alley so as to render it unusable for teams, but this notice was disregarded and, indeed, defendants deny it was given. Shortly after the sidewalk was laid, the present action was instituted to have it removed, or a driveway constructed across it so the alley can be used again by plaintiff, and a decree to that effect was given, from which the present appeal was prosecuted.

Defendants insist they laid the walk on the established grades, and where they were directed to lay it by the city engineer. This is no defense. They have no right, either with or without the consent of the city officials, to deprive plaintiff of the use of the alley by placing an insuperable obstacle in it. A driveway could easily have been made over the line of the walk at the mouth of the alley, as is customary under such circumstances. The act of defendants was a violation of the rights of plaintiff, and of the kind which not only warrants, but loudly calls for, an abatement by a mandatory injunction. *Downing v. Dinwiddie*, 132 Mo. 92, 33 S. W. 470, 575; *Fitzpatrick v. Mik*, 24 Mo. App. 435; *St. Louis, etc., Co. v. Kennett's Est.*, 101 Mo. App. 370, 74 S. W. 474; *Scheurich v. Light Co.*, 109 Mo. App. 406, 84 S. W. 1008; *Sultzman v. Branham*, 128 Mo. App. 696, 108 S. W. 1074.

Much is said about plaintiff having placed his barn some 2½ feet over the line of the alley, and it appears he did so by inadvertence, not knowing just where the line was; but he owned the property immediately south of the

barn, on the other side of the alley, and left a space 13 feet wide for driving purposes, instead of 10½ feet, as called for in the deeds. His encroachment by mistake affords no defense to defendants, nor have they any. We do not understand the circuit court adjudged the whole sidewalk, or necessarily any part of it, should be torn up, but only the abatement of the nuisance defendants have created, namely, that they should leave the mouth of the alley open, and in a condition that will allow plaintiff to drive in and out as easily as he did before.

The judgment is affirmed.

NORTONI, J., concurs.

REYNOLDS, P. J. (dissenting). I am unable to concur in this opinion. I think the judgment should be reversed, and the cause remanded, with directions to defendant not to tear up the whole sidewalk along this 10½-foot strip, as I understand the judgment orders, but merely to remove the curbing from the strip and put in an incline from the inner line of the sidewalk to the level of his lot, so as to enable plaintiff to drive up and across the walk. That is all that I think, under the facts in the case and the law of the case, defendant should be required to do. It is very obvious to me, from a reading of the testimony in the case, that the rear of these lots is from 4 to 6 feet below the street grade, and by the action of the trial court, instead of requiring the adjoining property owners to fill up the rear of their lots to grade, as they should do, it continues this depression, which must ultimately become a nuisance. I see no right whatever in the court to compel the defendant to leave a hole in the sidewalk the width of this 10½-foot strip merely to save the plaintiff from filling up the rear of his lot to grade. Before constructing the sidewalk the defendant obtained the sanction of the chairman of the proper committee of the council of the city of Cape Girardeau. He was given the grade by the city engineer of that city. He told the plaintiff what he was going to do. Plaintiff made no suggestions about the matter. When plaintiff saw the contractor in the act of construction, he indulged in the use of profane expressions to the contractor, but never entered any complaint or protest to the defendants, who were in their store within a few feet of the place, easily accessible to him. I think the cause should be reversed.

## MEMORANDUM DECISIONS.

**FORTENBERRY v. STATE.** (Court of Criminal Appeals of Texas. March 10, 1909.) Appeal from Baylor County Court; B. F. Bowman, Judge. Tom T. Fortenberry was convicted of crime, and he appeals. Affirmed. F. J. McCord, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** This conviction was for adultery; the punishment assessed being a fine of \$100. The record is before us without a statement of facts or bill of exceptions. In this condition of the record, there is no question suggested for revision that can be discussed. The judgment is affirmed.

**SCOTT v. STATE.** (Court of Criminal Appeals of Texas. Feb. 24, 1909.) Appeal from Haskell County Court; Joe Irby, Judge. Dick Scott appeals from a conviction. Affirmed. F. J. McCord, Asst. Atty. Gen., for the state.

**DAVIDSON, P. J.** This record is before us without a statement of facts or bills of exceptions. None of the matters suggested for revision in the motion for new trial can be considered, in the absence of the statement of facts. The judgment is affirmed.

**Ex parte WILSON.** (Court of Criminal Appeals of Texas. March 17, 1909. Rehearing Denied April 14, 1909.) Appeal from Dallas County Court at Law; W. M. Holland, Judge. Habeas corpus by Ed Wilson. From a judgment remanding petitioner to custody, he appeals. Affirmed. Parks & Scott and W. B. Thornton, for appellant. Jas. J. Collins and Jno. C. Robertson, for City of Dallas. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** Appellant was arrested for violating an ordinance, entitled "An ordinance regulating the standing of move wagons, express wagons, hacks, and other vehicles let for hire upon the public streets of the city of Dallas, providing for a license, and prescribing a penalty." Complaint was filed against appellant, charging that he unlawfully used and occupied a portion of a public street as a public stand within certain bounds, namely, Akard street, between Commerce street and Main street, between the hours of 8 o'clock a. m. and 7 o'clock p. m., by having and keeping thereon a vehicle for hire, to wit, a public hack and vehicle, and further charged him with having used said portion of said street for said purpose and appropriated the same, etc. Appellant sued out a writ of habeas corpus before the honorable county court of Dallas county, and upon hearing of said writ of habeas corpus before the county court he was remanded to custody, from which judgment he appeals to this court. This case in all of its bearings is an exact counterpart of the case that was decided by the Court of Civil Appeals of this state in the opinion rendered in the case of *Kissinger et al. v. Hay et al.*, 113 S. W. 1005. There, in a very exhaustive, accurate, and proper decision of all of the questions here raised, the court held against all of appellant's contentions. We adopt said decision as the opinion of this court on the questions herein raised, and appellant is therefore remanded to the custody of the officer. The judgment is in all things affirmed.

**HAYWORTH v. WILLIAMS et al.** (Court of Civil Appeals of Texas. June 27, 1908. On Rehearing, April 3, 1909.) Appeal from District

Court, Cooke County; Clem B. Potter, Judge. Action by J. E. Hayworth, temporary administrator of the estate of Thomas Jefferson, deceased, against Margreth Williams and another. From a judgment for defendant Williams, plaintiff appeals. Reversed and remanded for further proceedings, in accordance with opinion of Supreme Court (116 S. W. 43) on certified questions. Stuart & Bell, for appellant. Potter & Culp and Green & Blanton, for appellees.

**PRESLER, J.** This suit was brought in the district court of Cooke county on September 9, 1906, by Thomas Jefferson, as plaintiff, in form of trespass to try title against Margreth Williams, hereinafter styled appellee, to recover 169 $\frac{1}{2}$  acres of land in the said county, conveyed to Thomas Jefferson by N. W. Wheeler on April 10, 1880. On October 30, 1907, appellant was allowed to make himself a party plaintiff and to prosecute the suit as temporary administrator of the estate of Thomas Jefferson, deceased; Thomas Jefferson having died, and appellant having been lawfully appointed temporary administrator of his estate, and as such temporary administrator authorized and empowered to prosecute this suit for the estate of said Thomas Jefferson. On October 30, 1907, appellant filed his first amended original petition in trespass to try title and to recover said land and rent thereon at the rate of \$300 per year from January 1, 1905. Appellee filed a plea of not guilty on November 4, 1907, and on the same date Mrs. Nettie Maloy entered her appearance in said suit, claiming an interest in said land, and asking that she be allowed to make herself a party defendant. On the same date appellant filed his supplemental petition and answer to the answer of Mrs. Nettie Maloy, claiming same relief against Mrs. Maloy as asked for against appellee. The trial commenced on the 4th day of November, 1907, and on November 8, 1907, appellee filed a plea in a trial amendment claiming title to the land in controversy under the 10-year statute of limitation. On the same date appellant filed his trial amendment and supplemental petition in response to said plea in limitation, claiming that said plea was insufficient because any limitation claimed by appellee Margreth Williams was claimed by her as the wife of Thomas Jefferson, and that the law does not allow such a claim, and that her possession held and claimed as wife of Thomas Jefferson was insufficient to sustain said plea. The case was submitted to the jury on special issues on November 6, 1907, and on the same date the jury returned a verdict on said issues, upon which the court rendered judgment in favor of appellee, on the ground that her plea of limitation of 10 years had been sustained by the finding of the jury, and entered judgment in her favor against appellant and Mrs. Nettie Maloy, from which judgment appellant has duly appealed to this court, and here assigns error and seeks revision of said judgment.

Appellant by various assignments of error presents two questions as decisive of this appeal. First, appellant contends that as the defendant Margreth Williams claimed to be the wife of Thomas Jefferson at the time Thomas Jefferson bought the land in controversy, and at all times since Thomas Jefferson bought said land, and whatever claim she has asserted to the land in controversy has been asserted as the wife of Thomas Jefferson, and that as she entered on said land as the wife of Thomas Jefferson, the answer of the jury to question No. 5, that said defendant has had peaceable and

adverse possession of the land sued for for more than 10 years prior to the institution of this suit, cultivating, using, and enjoying the same to the exclusion of Thomas Jefferson, is contrary to the undisputed evidence and to the law, and that judgment should be rendered in favor of appellant for the land in controversy under the other findings of fact of the jury. Appellant's other material contention is that the court erred in instructing the jury in effect that the burden of proof on the issue of limitation was on appellant. It appears from the evidence in this case that Thomas Jefferson in 1859 abandoned his wife, to whom he had been previously married, and with whom he was living at that time in the state of Pennsylvania, and entered into the pretended and fraudulent marriage with the appellee Margreth Williams, and from said year and from the time of said pretended marriage lived with appellee as his wife, residing first in St. Louis, afterwards for 12 or 15 years in Iowa, and later in New Orleans; that at the time of contracting said pretended marriage appellee had been working for the family of said Thomas Jefferson, and was a comparatively ignorant country girl of about 20 years of age; that in the year 1880 the said Thomas Jefferson bought the land in controversy in Cooke county, Tex., and placed appellee and the children of himself and appellee thereon; that during the time referred to, from 1859 to 1880, and during their residence at the various places before named, appellee had discharged to said Thomas Jefferson the relation of wife, and that what property he was possessed of in 1880 was property acquired by their joint effort, to which she had contributed, not only in the way that a wife ordinarily does in building up a community estate, but did work, such as doing sewing for the public, and materially contributed to the support of their children and to the creation of the joint property belonging to them held by Thomas Jefferson. The jury found that Thomas Jefferson and appellee were married, but that appellee did not in good faith believe she was the lawful wife of Thomas Jefferson, having also found that the testimony showed that Sarah Jefferson was still living at the time of the alleged marriage between Thomas Jefferson and appellee, and that the marriage between her and Thomas Jefferson had never been dissolved by divorce or otherwise. It is shown, however, by the evidence, that from 1859 until the filing of this suit on the 9th day of September, 1906, Thomas Jefferson, in all the various places that he had lived with appellee and their children, had held them out to be his wife and children, and had never anywhere disclaimed that such was the case. After placing appellee and her children on the land in controversy in 1880, Thomas Jefferson, after remaining with appellee a short while, went back to New Orleans, and for several years thereafter was only occasionally on the farm in Cooke county for short periods of time. For more than 10 years prior to the filing of this suit he had only been on the place in Cooke county once, and then remained only about half an hour. It appears from the evidence that from about the time appellee and her children were placed on the farm she and the children largely provided for and took care of themselves, entirely so for the last 10 years, without aid or assistance from Thomas Jefferson. A majority of this court are unable to agree with the contention of appellant that the jury is not sustained by the evidence in finding for appellee on her plea of title to the property in controversy under the 10-year statute of limitation. It should be borne in mind that the findings of the jury in reply to special issues submitted to them conclusively establish that appellee was not the legal wife of Thomas Jefferson, and that the doctrine laid down in the case of *Cervantes v. Cervantes* (Tex. Civ. App.) 76 S. W. 790, cannot apply in this case. The

question of limitation herein must necessarily be considered with reference to the findings of the jury on the question of marriage, and but for the marriage of the parties in the *Cervantes* Case there is no doubt but the holding would have been in favor of the claim of the wife under her plea of limitation. The conclusion reached in that case was impelled by our laws in reference to husband and wife, making the property acquired by either after marriage (with certain exceptions) the property of both the husband and wife, however it may have been acquired. When the wife acquires land by limitation, the husband acquires the same title. If the wife should acquire the land of another by limitation, it would be the land of the community estate, though the husband may have never entered on or set up any claim to it. We have no such trouble in this case. There was no legal marriage, and consequently no relation of husband and wife, and there is no reason in law why the appellee could not acquire the land by limitation against Thomas Jefferson, the same as she could against any one else, if she held it a sufficient length of time adversely to him.

But it is contended by appellant that appellee's having based her right to claim the land upon the fact that she was married to Thomas Jefferson shows that her claim must necessarily have been subordinate to the title of Thomas Jefferson. We do not think this contention sound. If she denied Thomas Jefferson's right to the land, and claimed it as her own, and used it and occupied it as such, it does not make any difference whether she claimed it as pre-emptor, as a purchaser, as an heir, or as a wife. The question is not what character of title she asserted. She must have asserted some title. But the question is, Did she hold the possession hostile to Thomas Jefferson? A party who goes on land, thinking it public domain, intending to acquire the title by pre-emption or purchase from the state, if he occupies it long enough, can hold it by limitation against the real owner, though the land turned out to be not vacant. In such case the occupant has made a mistake in the right by which he claims the land; but there is no doubt about his claiming it and asserting a title or right in himself to the land, and such right will be protected by limitation, notwithstanding his mistake. See *Price v. Eardley*, 34 Tex. Civ. App. 60, 77 S. W. 416; *Village Mills Co. v. Manley*, 42 Tex. Civ. App. 420, 94 S. W. 102. In this case the appellee thought, or claimed to think, that she was the lawful wife of Thomas Jefferson; but she held possession of the land against him, denied his right to sell it, and denied his right to occupy it with her. Not being the wife of Thomas Jefferson, she had no rights growing out of that relation; but as she actually occupied the land, actually claiming it as hers, the statute runs in her favor. Thomas Jefferson was advised of the appellee's adverse claim as far back as in 1884, when he filed a divorce suit and therein conceded her right and ownership of one-half of the land, and asked that it be set apart to her, but denied such right and ownership to the whole of the land in controversy. It thus appears that under the formal admissions of appellant's decedent thus made there could be no question about appellee's right to hold one-half of it by limitation, and we conclude that the evidence warranted the jury in holding that she was entitled to the whole of it. Thomas Jefferson testified: "In 1880 she made things so uncomfortable for me that I sent her to Texas with her children, and placed them on the farm, and told them to support themselves. \* \* \* I made several demands on her (meaning appellee) to sell it (meaning the home), but she claimed it as a homestead." Thomas Jefferson further testified: "The defendant began occupying the land in controversy as a home in 1880, and up to the present time."

This witness further testified: "I presume all the time I lived on the land aggregates about 3 years." The appellee testified by deposition: "I claim interest in the place I am now occupying because I am the wife of Thomas Jefferson. I do not claim that Thomas Jefferson gave me the place. I claim that I am married to Thomas Jefferson, and that I am entitled to the place because I am his wife. I claim the place against Thomas Jefferson and everybody else, because I am his wife. I have full possession of the same, and have been using and occupying the same for more than 20 years." She also testified that she had not seen Thomas Jefferson for more than 10 years, until 3 or 4 months before this suit was instituted, when he came to the place and stayed about a half hour. She also testified that since he went away they had built a barn on the place and also put it all under good fence, and that her son, Will Jefferson, furnished the money, and that she took part of the rent money and built the fence, and that she paid the taxes on the land all but one time, and that was the first time after the place was bought, that she paid the taxes ever since, and that the land was rendered for taxes in her name. Will Jefferson, son of Thomas Jefferson and appellee, testified that his father left Texas in 1889 or 1890, and that he had lived in New Orleans ever since he left; that he died on the 10th of February, 1907.

Associate Justice SPEER expresses no opinion on the facts, in view of the reversal of the judgment for the error in the charge. We are all of the opinion, however, that the burden of proof was on the appellee to sustain her plea of limitation and that the court should have so instructed the jury, and that in the absence of such instruction the ninth paragraph of the court's charge, to wit: "The burden of proof is on the plaintiff to prove his contentions by a preponderance of the evidence, by which is meant the greater degree and weight of credible evidence; and unless he has done so you will make an answer in favor of the defendant's contention"—had the effect to place the burden of proof on the issue of limitation on appellant, and was such error as requires that this case be reversed and remanded. We are sustained in this conclusion by an unbroken line of decisions in this state, following an opinion by Chief Justice Wheeler, to the effect that the burden of proof is on the party who relies on the defense of limitation, in the case of *Smith v. Power*, 23 Tex. 30. See, also, *Beall v. Evans*, 1 Tex. Civ. App. 443, 20 S. W. 945; *Cunningham v. Frandtzen*, 28 Tex. 39; *Clark v. Hills*, 67 Tex. 149, 2 S. W. 856; 1 Cyc. p. 1134. In view of another trial of the case we feel it incumbent upon us to pass upon the two cross-assignments of error filed by appellees, and are of opinion that the court erred in excluding the evidence of the defendant Mrs. Nettie Maloy on the issue of her homestead interest in the property in controversy, and upon another trial of the case the evidence excluded should be admitted, as we

are inclined to the opinion that, in the event appellant should recover the whole of the land, the defendant Mrs. Maloy would have a right to the homestead use of the property, notwithstanding it appears from the record that the said Mrs. Nettie Maloy was the illegitimate daughter of Thomas Jefferson and appellee. In any event we are of the opinion that the evidence excluded should have been admitted, and the issue with reference to the homestead character of the property under proper instructions from the court should have been submitted to the jury. We are further inclined to the opinion that upon another trial of the case the jury should be instructed in substance that, if they should find from the evidence against the appellee's plea of title by limitation, they should then determine the further issue as to whether or not, upon the evidence, the property was acquired by money accumulated and earned by the joint efforts of appellee Margreth Williams and Thomas Jefferson, and that, if the jury find from the evidence that the acquisition of the property in controversy was the result of the joint effort of said appellee and Thomas Jefferson, the court should then and in that event render judgment vesting title to half of the property in controversy in appellant and appellee respectively. As hereinbefore indicated, we are of the opinion that the case should be here reversed and remanded for a new trial, which is accordingly done.

#### On Rehearing.

PER CURIAM. Remanded for further proceedings, in accordance with opinion of Supreme Court (116 S. W. 43) on certified questions.

SPEER v. ALLEN. (Court of Civil Appeals of Texas. Feb. 27, 1909. Rehearing Denied March 20, 1909.) Appeal from Johnson County Court; F. B. Adams, Judge. Action by R. M. Speer against Eva Allen. Judgment for defendant, and plaintiff appeals. Affirmed. A. S. Bledsoe and N. P. Brown, for appellant. Davis & Davis and R. S. Phillips, for appellee.

RAINEY, C. J. Appellant brought suit to recover on a note and account against appellee for goods sold and delivered, and to foreclose a mortgage, and sued out a writ of sequestration, and seized the goods covered by the mortgage. Appellee answered by exceptions and motion to quash, general denial, and plea in reconvention for actual and exemplary damages for the wrongful and malicious suing out of the sequestration, etc. A trial before the court without a jury resulted in a judgment over against the appellant for the sum of \$187.65. The trial court filed his conclusions of fact and law, in which we find no error, and the same are adopted as the findings of this court. The appellant's assignments of error relate to errors in said findings; but we are of the opinion that said findings are fully justified by the evidence. The judgment is affirmed.





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Injuries from operation of street railroads, see Street Railroads, §§ 114-117.

Injuries to animals on or near railroad tracks, see Railroads, §§ 435-443.

Injuries to passenger, see Carriers, §§ 316-321.  
Injuries to servant, see Master and Servant, §§ 262-296.

Loss of or injury to shipment, see Carriers, § 131.

Obstruction of surface waters, see Waters and Water Courses, § 125.

Price of land, see Vendor and Purchaser, §§ 308-316.

Protection of easement, see Easements, § 61.  
Recovery of land sold by vendor, see Vendor and Purchaser, §§ 257-276.

Recovery of price paid for land, see Vendor and Purchaser, § 334.

Recovery of tax paid, see Taxation, § 543.

Rent, see Landlord and Tenant, § 233.

Slander of title, see Libel and Slander, § 139.

Subscription to corporate stock, see Corporations, § 90.

Taking of or injury to property in exercise of power of eminent domain, see Eminent Domain, § 307.

**Particular forms of action.**

See Ejectment; Trespass, §§ 20, 44; Trespass to Try Title; Trover and Conversion.

**Particular forms of special relief.**

See Divorce; Injunction; Performance; Quietening Title.

Alimony, see Divorce, §§ 222, 249.

Cancellation of written instrument, see Cancellation of Instruments.

Confirmation of tax title, see Taxation, § 810.

Construction of will, see Wills, § 699.

Determination of adverse claims to real property, see Quietening Title.

Enforcement of vendor's lien, see Vendor and Purchaser, §§ 269-276.

Establishment and enforcement of right of homestead, see Homestead, § 196.

Establishment and enforcement of trust, see Trusts, § 377.

Establishment of boundaries, see Boundaries, §§ 35-48.

Establishment of will, see Wills, §§ 324, 386.

Foreclosure of mortgage, see Mortgages, § 534.

Reformation of written instrument, see Reformation of Instruments.

Removal of cloud on title, see Quietening Title.

Setting aside municipal assessments, see Municipal Corporations, § 513.

Setting aside will, see Wills, §§ 324, 386.

Trial of tax title, see Taxation, § 810.

**Particular proceedings in actions.**

See Appearance; Continuance; Costs; Damages; Depositions; Dismissal and Nonsuit; Evidence; Execution; Judgment; Jury; Parties; Pleading; Process; Reference; Trial; Venue.

Default, see Judgment, §§ 107-145.

Notice of action, see Process, §§ 85-109.

Revival, see Abatement and Revival, § 72.

**Particular remedies in or incident to actions.**

See Attachment; Garnishment; Injunction; Receivers; Set-Off and Counterclaim.

**Proceedings in exercise of special or limited jurisdictions.**

Courts of limited jurisdiction in general, see Courts, § 170.

Criminal prosecutions, see Criminal Law.

Suits in equity, see Equity.

Suits in justices' courts, see Justices of the Peace, § 106.

*Review of proceedings.*

See Appeal and Error; Audita Querela; Certiorari; Exceptions, Bill of; Judgment, §§ 336, 386; Justices of the Peace, § 162; New Trial.

**II. NATURE AND FORM.**

§ 25. An action to recover land at law is turned into a suit in equity by the pleading of equitable matter in the answer, entitling defendants to affirmative equitable relief.—Hubbard v. Slavens (Mo.) 1104; Waters v. Hubbard (Mo.) 1112; Hall v. Same, Id.; Devoe v. Same, Id.

§ 27. An action against a carrier for negligent delay in transporting live stock *held* to be in tort for defendant's violation of its common-law duty.—Brown v. St. Louis & S. F. Ry. Co. (Mo. App.) 112.

§ 27. A shipper may sue the carrier either in tort or on the contract of carriage.—Libby v. St. Louis, I. M. & S. Ry. Co. (Mo. App.) 659.

**III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.**

Waiver of misjoinder, see Pleading, § 406.

§ 50. Strictly speaking, misjoinder of parties plaintiff is not "multifariousness."—Braumeyer v. Star Bottling Co. (Mo. App.) 119.

**ACTION ON THE CASE.**

See Trespass, §§ 20, 44.

**ADJOINING LANDOWNERS.**

See Boundaries; Fences.

§ 7. A petition for damages caused by excavating for a building *held* to warrant the reception of testimony as to blasting below a depth to which the petition charged the excavation was made and submission of the question to the jury.—Probst v. Hinesley (Ky.) 389; Hinesley v. Beattie, Id.

§ 7. In an action for damages to adjoining property by blasting, the court properly left to the jury the question whether the natural and probable result was to injure plaintiff's property.—Probst v. Hinesley (Ky.) 389; Hinesley v. Beattie, Id.

§ 7. In view of the evidence and instructions in an action for damages caused by blasting in excavating for a building, *held*, that no error as to the defendant principal contractor could be predicated on a failure to hold as a matter of law that the defendant who did the blasting for it was an independent contractor, or in not submitting the question to the jury.—Probst v. Hinesley (Ky.) 389; Hinesley v. Beattie, Id.

§ 7. Evidence *held* to present a question for the jury as to whether damage was done to adjoining property by blasting in excavating for a building.—Probst v. Hinesley (Ky.) 389; Hinesley v. Beattie, Id.

**ADJUDICATION.**

Of courts in general, see Courts, §§ 80-97.  
Operation and effect of former adjudication, see Judgment, §§ 554, 604, 713-747.

**ADMINISTRATION.**

Of charity, see Charities, § 45.  
Of estate of decedent, see Executors and Administrators.  
Of trust property, see Trusts, § 219.

**ADMISSIONS.**

As evidence in civil actions, see Evidence, §§ 208-265.

As evidence in criminal prosecutions, see Criminal Law, §§ 406-419.

To prevent continuance, see Criminal Law, § 600.

**ADOPTION.**

Specific performance of contract to adopt children and make them heirs, see Specific Performance, §§ 10, 86.

**ADULTERATION.**

Concurrent and conflicting exercise of power by state and municipality, see Municipal Corporations, § 592.

§ 3. Pure Food Law (Gen. Laws 1907, pp. 71, 72, c. 89) §§ 37, 43, *held* valid and not in conflict.—Mantel v. State (Tex. Cr. App.) 855; Sue Lung v. Same (Tex. Cr. App.) 857.

**ADVERSE CLAIM.**

To real property, see Quieting Title.

**ADVERSE POSSESSION.**

See Limitation of Actions.

By tenant in common, see Tenancy in Common, § 15.

**I. NATURE AND REQUISITES.**

**(A) ACQUISITION OF RIGHTS BY PRESCRIPTION IN GENERAL.**

§ 13. In a suit to recover land against one in adverse possession, defendant's claim under an equitable title was not barred by limitations, but grew stronger instead of weaker with the lapse of time.—Hubbard v. Slavens (Mo.) 1104; Waters v. Hubbard (Mo.) 1112; Hall v. Same, Id.; Devol v. Same, Id.

**(B) ACTUAL POSSESSION.**

§ 23. Payment of taxes and cutting timber did not constitute adverse possession, but were mere acts tending to show a claim of ownership.—Stone v. Perkins (Mo.) 717.

**(E) DURATION AND CONTINUITY OF POSSESSION.**

§ 40. Eight years' actual possession of land is insufficient to give title by adverse possession.—Hamilton v. Steele (Ky.) 878; Brown v. Same, Id.; Crouch v. Same, Id.

§ 44. Occupancy under color of title for three months *held* not sufficient after the expiration of the time required to acquire title by adverse possession.—Stone v. Perkins (Mo.) 717.

§ 52. A purchase of an outstanding claim by one in adverse possession *held* not to stop his adverse possession.—Bryant v. Prewitt (Ky.) 343.

**(F) HOSTILE CHARACTER OF POSSESSION.**

Of mine, see Mines and Minerals, § 49.

§ 63. The rights of the grantee in a deed given in consideration of an agreement to support the grantor and wife during life *held* extinguished by abandonment and by resumption of possession, continued by the grantor and others.—Bishop v. Van Winkle (Ky.) 845.

§ 70. A husband cannot, as against his wife and those claiming through her, claim the benefits of a deed to her as color of title.—Poole v. Oliver (Ark.) 747.

§ 73. Plaintiff in trespass *held* entitled by adverse possession to recover as against defendant claiming under the senior patent, but without possession.—*Charleroi Timber & Canal Coal Co. v. Spaulding* (Ky.) 291.

#### (G) PAYMENT OF TAXES.

§ 88. Payment of taxes and cutting timber did not constitute adverse possession, but were mere acts tending to show a claim of ownership.—*Stone v. Perkins* (Mo.) 717.

### II. OPERATION AND EFFECT.

#### (A) EXTENT OF POSSESSION.

§ 97. Actual occupancy of the inclosed portion of a tract of land without color of title is not possession of the uninclosed portion, so as to vest title to the latter by limitation.—*Poole v. Oliver* (Ark.) 747.

§ 100. The possession of one claiming under a deed conveying land by a definite boundary *held* extended by construction of law to the limits of the described boundary, whether the claim or defense, as the case may be, is made either under the first or second section of the act of 1819 (2 Laws 1715-1820, p. 483, c. 25).—*Kittel v. Steger* (Tenn.) 500.

§ 100. Where a party claiming under a deed conveying land by definite boundaries entered into possession of land within the boundaries, and inclosed a few acres, and maintained such inclosure adversely and openly for more than seven years, his adverse possession extended to the limits of the boundaries in the deed.—*Kittel v. Steger* (Tenn.) 500.

#### (B) TITLE OR RIGHT ACQUIRED.

§ 104. While an adverse holding for 15 years will authorize the conclusive presumption of a grant, adverse possession for less than that period, when aided by other circumstances, may warrant a similar presumption.—*East Jellico Coal Co. v. Hays* (Ky.) 307.

§ 104. Evidence, in an action to quiet title, *held* to justify a presumption that the land was conveyed by one holding the title to a predecessor of defendants.—*East Jellico Coal Co. v. Hays* (Ky.) 307.

### III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 114. Evidence *held* to show that the ancestor of a party's grantors had been in possession of the land conveyed, claiming it as his own, for over 30 years.—*Potter v. Long* (Mo.) 724.

### ADVERTISEMENT.

Publication of process, see Process, §§ 85-109.

### AFFIDAVITS.

See Depositions.

#### Particular proceedings or purposes.

Continuance in criminal prosecutions, see Criminal Law, § 608.

Disqualification of judge, see Judges, § 51.

Publication of process, see Process, § 96.

§ 18. The *ex parte* affidavit of one not called as a witness cannot be used as independent evidence.—*Western Union Telegraph Co. v. Gillis* (Ark.) 749.

### AGE.

Refreshing memory of witness on question of age, see Witnesses, § 255.

### AGENCY.

See Principal and Agent.

### AGREEMENT.

See Contracts.

### AIDER BY VERDICT.

In civil actions, see Pleading, §§ 433-434.

In criminal prosecutions, see Indictment and Information, § 202.

### AIDERS AND ABETTERS.

Criminal responsibility, see Criminal Law, §§ 59, 75.

### ALIBI.

Instructions as to, see Criminal Law, § 775.

### ALIENATION.

Condition against in deed, see Deeds, § 149.

### ALIENS.

#### IV. NATURALIZATION.

§ 69. A certified copy of an alleged record of the Court of Appeals showing the naturalization of "Miles O'Sullivan" *held* inadmissible to correct the court record showing the naturalization of "Mike O'Sullivan."—*In re O'Sullivan* (Mo. App.) 651.

§ 69. A naturalization record cannot be corrected as to the name of the alien where there was no entry or memorandum among the files of the court or in the office of the clerk showing the mistake.—*In re O'Sullivan* (Mo. App.) 651.

### ALIMONY.

See Divorce, §§ 222, 249.

### ALLOWANCE.

Of appeal or writ of error, see Appeal and Error, § 365.

### ALTERATION.

Of highways, see Highways, § 72.

### ALTERATION OF INSTRUMENTS.

See Reformation of Instruments.

§ 27. Where an alteration appears on the face of the instrument, the burden is on the party offering it to account for the alteration.—*Kalteyer v. Mitchell* (Tex.) 792.

### AMENDMENT.

In particular remedies or special jurisdictions. See Parties, §§ 75-96.

Of particular acts, instruments, or proceedings. See Depositions, § 81; Judgment, §§ 306, 334; Pleading, §§ 237, 258; Process, §§ 155, 166; Statutes, § 141.

By-laws of mutual benefit insurance association, see Insurance, § 719.

Pleading in equity, see Equity, § 296.

Record of naturalization, see Aliens, § 69.

### AMOUNT IN CONTROVERSY.

Jurisdictional amount, see Justices of the Peace, § 44.

### ANIMALS.

Applicability of instructions to evidence in action for killing animals, see Trial, § 252. Carriage of live stock, see Carriers, §§ 213-230. Evidence as to measure of damages for injuries from herding sheep on land, see Damages, § 174.

Fence laws, see Fences.

Increase of cattle given to married woman as community property, see Husband and Wife, § 257.

Injuries from operation of railroads, see Railroads, §§ 411-443.

Judicial notice of propensities of, see Evidence, § 13.

Jurisdiction of action for injuries by as dependent on amount in controversy, see Courts, § 122.

Liability of city for injuries caused by animals taking fright at obstructions in street, see Municipal Corporations, §§ 781, 821.

Power of municipality to impound animals running at large, see Municipal Corporations, § 604.

§ 50. The fact that a city, in fixing stock limits, included territory outside the corporate limits, would not render the stock limits void in so far as the district was within the city.—*McKenzie v. Newlon* (Ark.) 553.

§ 50. The designation of stock limits by a city held sufficient.—*McKenzie v. Newlon* (Ark.) 553.

§ 50. Under Kirby's Dig. § 5450, animals are "running at large," if they are within the corporate limits of the city without being under the control of any one, regardless of whether or not the owner was at fault in permitting their escape, or in not making diligent search for them.—*McKenzie v. Newlon* (Ark.) 553.

§ 51. Right of owner of animal impounded under ordinance passed in pursuance of Kirby's Dig. §§ 5450, 5451, as to recovery of animal, stated.—*McKenzie v. Newlon* (Ark.) 553.

§ 71. It is contributory negligence to go behind a mule without warning to the mule.—*Tolin v. Terrell* (Ky.) 290.

§ 95. In an action to recover hogs taken up and impounded by defendant for trespass, plaintiff held entitled to judgment, subject to defendant's lien for the damages found by the court.—*Whitaker v. Miller* (Tex. Civ. App.) 882.

§ 100. In an action for damages to grazing lands, a charge held not contrary to the evidence.—*Tippett v. Corder* (Tex. Civ. App.) 186.

## ANNULMENT.

Of wills, see Wills, §§ 324, 336.

## ANSWER.

In pleading, see Pleading, §§ 79-107.

## APPEAL AND ERROR.

See *Audita Querela*; *Certiorari*; *Exceptions*, Bill of; *New Trial*.

Appellate jurisdiction of particular courts, see Courts, §§ 207-231.

Costs, see Costs, § 256.

### *Review in special proceedings.*

See *Mandamus*, §§ 4, 187.

Appointment of administrator, see *Executors and Administrators*, § 20.

Appointment of guardian, see *Guardian and Ward*, § 13.

Establishment of highway, see *Highways*, § 58.

Probate proceedings, see *Wills*, § 386.

### *Review of criminal prosecutions.*

See *Criminal Law*, §§ 1017-1182.

Homicide, §§ 338-348.

### *Review of proceedings of justices of the peace.*

See *Justices of the Peace*, § 162.

### *Review of proceedings of nonjudicial officers or bodies.*

Assessment of taxes, see *Taxation*, § 493.

## III. DECISIONS REVIEWABLE.

### (B) NATURE OF SUBJECT-MATTER AND CHARACTER OF PARTIES.

Proceedings for appointment of administrator, see *Executors and Administrators*, § 20.

### (D) FINALITY OF DETERMINATION.

§ 78. A judgment holding the petition insufficient on the court's own motion, without demurrer thereto, and dismissing the action, held not a final, appealable judgment.—*Bick v. Umstattd* (Mo. App.) 642.

### (E) NATURE, SCOPE, AND EFFECT OF DECISION.

§ 112. An appeal lies from an order overruling a motion to set aside a void judgment.—*Baldrige v. Baldrige* (Ky.) 253.

## V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

### (A) ISSUES AND QUESTIONS IN LOWER COURT.

§ 170. A constitutional question held raised too late by motion for new trial to give the Supreme Court jurisdiction.—*Hartzler v. Metropolitan St. Ry. Co.* (Mo.) 1124.

§ 171. A case must be tried on appeal on the same theory on which it was tried in the lower court.—*Buxton v. Kroeger* (Mo.) 1147; *Same v. Lauman* (Mo.) 1162; *Same v. Dunn* (Mo.) 1163.

§ 173. In an action for breach of a covenant of warranty, brought after a judgment for the grantee against a claimant had been reversed on appeal, an objection that the mandate misdescribed the land will not be considered for the first time on appeal.—*Beach v. Nordman* (Ark.) 785.

### (B) OBJECTIONS AND MOTIONS, AND RULINGS THEREON.

§ 193. The objection that the petition does not state a cause of action may be raised on appeal for the first time.—*McQuitty v. Wilhite* (Mo.) 730.

§ 200. The objection that talesmen were drawn by the sheriff before exhausting the regular panel of jurors cannot be raised first on review.—*Houston Electric Co. v. Seegar* (Tex. Civ. App.) 900.

§ 203. An appellant, who does not object to the failure of the court to pass upon an exception to a deposition, for failure to comply with Civ. Code Prac. § 583, before the trial on the merits, cannot raise the point on appeal.—*Sealy v. Williston* (Ky.) 959.

§ 204. One cannot on appeal urge an objection to evidence not raised in the trial court.—*Missouri, K. & T. Ry. Co. of Texas v. Pettit* (Tex. Civ. App.) 894.

§ 207. Rule governing review of objections to improper argument by counsel stated.—*Galveston, H. & S. A. Ry. Co. v. Powers* (Tex. Civ. App.) 459.

§ 216. In ejectment for a coal mine, defendant cannot complain on appeal that the court did not instruct as to what constituted the "continued" possession, referred to in another charge, where he did not ask such an instruction.—*Gordon v. Park* (Mo.) 1163.

§ 221. An error appearing on the face of the record in allowing compound interest where plaintiff only asked for interest held reviewable on appeal, although objection was not made in the court below.—*Pullis v. Somerville* (Mo.) 736.

§ 232. Under a rule stated, the admission of evidence partly irrelevant and partly admissible held not reversible error.—*Adams v. Gary Lumber Co.* (Tex. Civ. App.) 1017.

§ 238. Under Civ. Code Prac. §§ 516, 517, 763, no appeal lies from the judgment rendered before the case stood for trial or from a void judgment prior to the overruling of a motion to set it aside.—*Baldrige v. Baldrige* (Ky.) 253.

§ 238. Before appeal lies from a void judgment or a clerical misprision, motion to correct the judgment must be first presented to the lower court.—*Duff v. Combs* (Ky.) 259; *Combs v. Duff*, Id.

### (C) EXCEPTIONS.

§ 260. An appellant, who does not except to the failure of the court to pass upon exceptions to a deposition for failure to comply with Civ. Code Prac. § 583, before entering the trial, cannot raise the point on appeal.—*Sealy v. Williston* (Ky.) 959.

§ 260. A losing party cannot object that the trial court failed or refused to rule on objections to evidence, where the record shows that his counsel did not insist on or wait for a ruling, and no exception was saved on failure to make one.—*Sims v. Hall* (Mo. App.) 103.

§ 274. An objection to the theory on which a case is tried is saved by exception to instructions given.—*People's Bank v. Stewart* (Mo. App.) 99.

### (D) MOTIONS FOR NEW TRIAL.

§ 292. The fact that the error in a charge was not called to the attention of the court held not to defeat the right of appellant to have it reviewed on appeal.—*Young v. State Bank of Marshall* (Tex. Civ. App.) 476.

§ 300. A constitutional question arising for the first time on motion after judgment held presented in time in motions for new trial and in arrest.—*Wabash R. Co. v. Flannigan* (Mo.) 722.

## VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

### (A) TIME OF TAKING PROCEEDINGS.

Appeals from judgments against infants, see *Infants*, § 115.

§ 345. The time within which to appeal held to be the term during which the judge who was called in to try the cause overruled the motion for a new trial.—*State ex rel. American Nat. Bank of Louisville, Ky., v. Fidelity & Deposit Co.* (Mo. App.) 618.

### (B) PETITION OR PRAYER, ALLOWANCE, AND CERTIFICATE OF AFFIDAVIT.

§ 365. An appeal held to have been granted to defendants, and not to their attorney, though the order for the appeal recited that it was granted to attorney.—*Johnson v. West* (Ark.) 770.

## X. RECORD AND PROCEEDINGS NOT IN RECORD.

### (A) MATTERS TO BE SHOWN BY RECORD.

§ 501. Under a skeleton bill of exceptions, exceptions saved to the overruling of motions in arrest and for a new trial are not reviewable.—*Hubbard v. Slavens* (Mo.) 1104; *Waters v. Hubbard* (Mo.) 1112; *Hall v. Same, Id.*; *Devol v. Same, Id.*

§ 501. Under Rev. St. 1899, § 864 (Ann. St. 1906, p. 808) only such exceptions as are saved in the bill will be considered on appeal.—*Hub-*

*bard v. Slavens* (Mo.) 1104; *Waters v. Hubbard* (Mo.) 1112; *Hall v. Same, Id.*; *Devol v. Same, Id.*

§ 501. A bill of exceptions to an order sustaining a motion for a new trial is insufficient where it fails to show that an exception was saved.—*Groves v. Terry* (Mo.) 1167.

§ 511. Where the abstract contained what purported to be a bill of exceptions, but did not show that the bill of exceptions was actually filed or contained any record entry of the filing, the abstract was insufficient to permit consideration of the bill of exceptions.—*Hanks v. Hanks* (Mo.) 1101.

§ 511. That a bill of exceptions was made a part of the record must be shown by the record entry, and cannot be shown by recitals in the bill itself.—*Hanks v. Hanks* (Mo.) 1101.

§ 511. A bill of exceptions cannot be proven by a recital in itself.—*Breimeyer v. Star Bottling Co.* (Mo. App.) 119.

### (B) SCOPE AND CONTENTS OF RECORD.

§ 518. A demurrer to the petition is part of the record proper.—*Breimeyer v. Star Bottling Co.* (Mo. App.) 119.

§ 528. A motion for a new trial is not a part of the record proper.—*Booth v. St. Louis, I. M. & S. Ry. Co.* (Mo.) 1094.

§§ 529, 534. Neither the judgment nor the order granting the appeal belong in the bill of exceptions contained in the abstract of record, they being part of the record proper.—*Hanks v. Hanks* (Mo.) 1101.

### (C) NECESSITY OF BILL OF EXCEPTIONS, CASE, OR STATEMENT OF FACTS.

In mandamus proceedings, see *Mandamus*, § 187.

§ 554. On appeal on a short transcript, where a certified copy of the judgment and order of appeal is on file and all the pleadings are properly abstracted, the appeal will not be dismissed because the abstract does not contain a sufficient bill of exceptions, but judgment will be reversed or affirmed on the pleadings and judgment.—*Hanks v. Hanks* (Mo.) 1101.

§ 554. Where the record does not contain a sufficient bill of exceptions, the judgment will be affirmed if it is proper under the pleadings.—*Hanks v. Hanks* (Mo.) 1101.

### (D) CONTENTS, MAKING, AND SETTLEMENT OF CASE OR STATEMENT OF FACTS.

§ 561. A statement of facts on appeal, consisting of the stenographer's notes in question and answer form, in violation of Acts 30th Leg. 1907 (Called Sess.) p. 509, c. 24, § 5, was improper.—*Poitevent v. Scarborough* (Tex. Civ. App.) 443.

### (E) ABSTRACTS OF RECORD.

§ 581. Under Rev. St. 1899, § 813 (Ann. St. 1906, p. 783), held not ground for dismissal that the abstract did not contain the order granting the appeal, on an appeal in short form, where the transcript contained a certified copy of the judgment and of the order granting the appeal.—*Booth v. St. Louis, I. M. & S. Ry. Co.* (Mo.) 1094.

### (F) MAKING, FORM, AND REQUISITES OF TRANSCRIPT OR RETURN.

§ 597. The date of filing the petition, where material, should appear in the transcript.—*Milem v. Freeman* (Mo. App.) 644.

§ 597. Under Rev. St. 1895, arts. 1411, 1413, held, that in making up a transcript a clerk

must include all proceedings, unless the parties agree to an omission.—*Baum v. McAfee* (Tex. Civ. App.) 883.

§ 598. On appeal from the county court to the Court of Civil Appeals, the original statement of facts is not to be sent to the upper court, but must be copied into and made a part of the transcript, as required by Acts 30th Leg. 1907, p. 509, c. 24.—*Houston & T. C. Ry. Co. v. Rogers* (Tex. Civ. App.) 1053.

§ 601. The original statement of facts, and not a copy, must be filed in the appellate court.—*Wallace & Reed v. Reed Bros.* (Tex. Civ. App.) 1019.

§ 605. The Supreme Court will not search through a typewritten full transcript of record to determine what is record proper, record entries, and the bill of exceptions.—*Groves v. Terry* (Mo.) 1167.

§ 609. Under Civ. Code Prac. § 741, an appellee is not entitled to file an incomplete transcript of the record and then supplement it by subsequently filing the bill of exceptions.—*Louisville Home Telephone Co. v. Gordon* (Ky.) 315; *City of Louisville v. Louisville Home Telephone Co.*, Id.

#### (I) DEFECTS, OBJECTIONS, AMENDMENT, AND CORRECTION.

§ 635. Where the abstract of the record filed in the appellate court fails to show a motion for new trial, the judgment will be affirmed if the record proper is sufficient to support it.—*Rife v. Reynolds* (Mo. App.) 652.

§ 644. Where appellee failed to object, before the day of submission of the case to the Court of Civil Appeals, that the original statement of facts in the county court had been transmitted on appeal, instead of being copied into the transcript, he waived the defect.—*Houston & T. C. Ry. Co. v. Rogers* (Tex. Civ. App.) 1053.

#### (K) QUESTIONS PRESENTED FOR REVIEW.

§ 685. Demand for a jury *held* in the nature of a challenge to the jurisdiction of the trial judge to try the case on the facts, and therefore reviewable on appeal without the evidence.—*Hubbard v. Slavens* (Mo.) 1104; *Waters v. Hubbard* (Mo.) 1112; *Hall v. Same*, Id.; *Devol v. Same*, Id.

§ 699. Where the bill of exceptions does not show that the court modified instructions as claimed, error in the alleged modifications cannot be considered on appeal.—*People's Bank v. Stewart* (Mo. App.) 99.

§ 706. Where the bill of exceptions recited that appellant filed his "motion for new trial in said cause as follows," referring to a page of the record where it was set out in full, the appeal would not be dismissed on the ground that the bill of exceptions did not contain the motion for new trial.—*Booth v. St. Louis, I. M. & S. Ry. Co.* (Mo.) 1094.

#### (L) MATTERS NOT APPARENT OF RECORD.

§ 713. A motion for new trial overruled must be shown in the abstract filed in the appellate court as required by Rev. St. 1899, § 813 (Ann. St. 1906, p. 783), and its omission cannot be supplied by recitals in the bill of exceptions.—*Rife v. Reynolds* (Mo. App.) 652.

§ 714. Statements of facts contained in appellant's brief, which may probably be true, cannot be considered if they do not appear to have been given in evidence.—*State v. Muir* (Mo. App.) 620.

#### XL ASSIGNMENT OF ERRORS.

§ 719. Appellate courts confine their attention to the particular errors assigned, and to the reasons urged in the accompanying propositions and argument; and, where these are untenable, and no fundamental error is apparent, the assignment will be overruled.—*Young v. State Bank of Marshall* (Tex. Civ. App.) 476.

§ 719. The insufficiency of the petition on its face *held* fundamental error, and requires a reversal, though there is no assignment of error on that ground.—*Montgomery v. Peach River Lumber Co.* (Tex. Civ. App.) 1061.

§ 725. An assignment of error to an overruling of an exception to the answer *held* insufficient.—*Adams v. Gary Lumber Co.* (Tex. Civ. App.) 1017.

§ 730. Assignments of error complaining of ruling on instructions *held* too general.—*Briggs v. New South Lumber Co.* (Tex. Civ. App.) 885.

§ 730. An assignment of error complaining of a part of the charge *held* insufficient.—*Adams v. Gary Lumber Co.* (Tex. Civ. App.) 1017.

§ 730. An assignment of error in giving a charge *held* too incomplete for consideration on appeal.—*Walker v. International & G. N. Ry. Co.* (Tex. Civ. App.) 1020.

§ 739. A grouping of assignments of error on an appeal *held* to be a violation of the rules as to briefing.—*Scott v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 890.

§ 742. The court rules require assignments of error to be followed by distinct propositions, and simply designating an assignment a proposition does not make it one.—*International & G. N. R. Co. v. Garcia* (Tex. Civ. App.) 206.

§ 742. An abstract proposition *held* not reviewable by the Court of Civil Appeals.—*Galveston, H. & S. A. Ry. Co. v. Powers* (Tex. Civ. App.) 459.

§ 742. The appellate court need not consider assignments of error not briefed in accordance with the rules.—*Bartlett Oil Mill Co. v. Capps* (Tex. Civ. App.) 485.

§ 742. Assignments of error complaining of ruling on instructions *held* too general.—*Briggs v. New South Lumber Co.* (Tex. Civ. App.) 885.

§ 742. Where assignments of error are not followed by any statement, as required by the rules, they will not be considered on appeal.—*McCollum v. Buckner's Orphans' Home* (Tex. Civ. App.) 886.

§ 742. The statement accompanying an assignment of error *held* insufficient to justify a finding of error on the part of the trial court.—*Gray v. Fuller* (Tex. Civ. App.) 919.

§ 742. The statement accompanying an assignment of error *held* insufficient.—*Gray v. Fuller* (Tex. Civ. App.) 919.

§ 742. An assignment of error not supported by a sufficient statement will not be sustained on appeal.—*Walker v. International & G. N. Ry. Co.* (Tex. Civ. App.) 1020.

§ 742. A statement supporting an assignment that the evidence did not support the verdict *held* insufficient under Court of Civil Appeals Rule 31 (67 S. W. xvi).—*Walker v. International & G. N. Ry. Co.* (Tex. Civ. App.) 1020.

§ 742. A statement *held* insufficient under Court of Civil Appeals Rule 31 (67 S. W. xvi) to require consideration of an assignment of error in refusing instructions.—*Walker v. International & G. N. Ry. Co.* (Tex. Civ. App.) 1020.

§ 742. A proposition under an assignment of error *held* not to raise the question that a

charge was on the weight of evidence.—*Stubbs v. Marshall* (Tex. Civ. App.) 1030.

§ 747. Where one of several plaintiffs appealed, but neither defendant nor any of the co-plaintiffs appealed, cross-assignments of error having no reference to appellant, nor to that part of the judgment appealed from, will not be considered.—*Gilmer's Estate v. Veatch* (Tex.) 430.

## XII. BRIEFS.

§ 758. The burden is on an appellant, relying on the unconstitutionality of a statute, to specifically point out wherein it is unconstitutional.—*Hartzler v. Metropolitan St. Ry. Co.* (Mo.) 1124.

§ 766. Under Supreme Court Rule 38 (67 S. W. xvi), an amendment of a brief, incorporating an entirely new proposition, offered on the eve of submission, will not be permitted over objection.—*Stubbs v. Marshall* (Tex. Civ. App.) 1030.

## XVI. REVIEW.

### (A) SCOPE AND EXTENT IN GENERAL.

§ 837. In determining on appeal by an infant after he reaches majority the validity of a judgment establishing a lien against his land for taxes and ordering sale thereof, an amended petition in the case to which no appearance was entered, and on which no process was issued, should be ignored.—*Turner v. City of Middleboro* (Ky.) 422.

§ 837. The court, on appeal in an equity case, may admit and consider all testimony preserved in the record which is improperly excluded by the trial court, and render such judgment as the court deems proper under the pleadings and evidence.—*Jones v. Thomas* (Mo.) 1177.

§ 837. Allegations of the petition, under which plaintiff would not be entitled to recover, cannot be considered to supplement the findings of fact for the purpose of working a reversal of a judgment for plaintiff, warranted by the findings considered by themselves.—*Montgomery v. Peach River Lumber Co.* (Tex. Civ. App.) 1061.

§ 846. A finding not authorized by the pleading will be disregarded on appeal.—*Galvin v. McConnell* (Tex. Civ. App.) 211.

### (C) PARTIES ENTITLED TO ALLEGE ERROR.

§ 882. If error in instructions given for the prevailing party also went to the jury in instructions requested by the losing party, it cannot be deemed prejudicial to the latter.—*Louisville & E. R. Co. v. Hardin* (Ky.) 381.

§ 882. Defendant *held* not entitled to complain on appeal of giving an instruction for plaintiff without explaining a word used therein, where an instruction given for defendant used the same word without explanation.—*Gordon v. Park* (Mo.) 1163.

§ 882. A party cannot invite error by requesting an erroneous instruction and then complain of it.—*Potter v. St. Louis & S. F. R. Co.* (Mo. App.) 593.

§ 882. A party cannot object to evidence brought out in response to his questions on cross-examination.—*Texas & N. O. R. Co. v. McCoy* (Tex. Civ. App.) 446.

§ 882. A party who, on cross-examination of a witness after the overruling of an objection to his testimony, brings out all the evidence objected to cannot complain of the evidence.—*Texas & N. O. R. Co. v. McCoy* (Tex. Civ. App.) 446.

### (E) PRESUMPTIONS.

§ 907. It will not be presumed in favor of the judgment, where the bill of exceptions does

not purport to contain all the evidence, that there was evidence in conflict with facts agreed upon.—*Board of Directors of St. Francis Levee Dist. v. Powell* (Ark.) 753.

§ 907. Where the record does not contain all the evidence, it will be presumed on appeal from a judgment for plaintiff that the allegations of the complaint were sustained by the evidence.—*Board of Directors of St. Francis Levee Dist. v. Powell* (Ark.) 753.

§ 907. In an action for injuries by being knocked from a box car by a trolley wire strung over defendant's road, which the road for which plaintiff was employed was using at the time, *held* not permissible to assume that defendant's road was used illegally or under conditions that rendered it liable for the torts of the user.—*Booth v. St. Louis, I. M. & S. Ry. Co.* (Mo.) 1094.

§ 907. Where, in a divorce action, the answer alleged a prior judgment of divorce granted defendant in another state, and averred that plaintiff herein was duly and legally served in that action, the allegations were sufficient to sustain the judgment pleaded, in absence of a bill of exceptions showing the evidence.—*Hanks v. Hanks* (Mo.) 1101.

§ 907. Omission of the evidence from an appeal record constitutes an admission that respondents established every part of their case by competent and sufficient proof.—*Hubbard v. Slavens* (Mo.) 1104; *Waters v. Hubbard* (Mo.) 1112; *Hall v. Same, Id.*; *Devol v. Same, Id.*

§ 909. Where it was competent under the petition in an action on a fire policy to show waiver by insurer of notice of loss, it would be presumed in support of the judgment that a waiver was proved.—*Wiccarver v. Mercantile Town Mut. Ins. Co.* (Mo. App.) 693.

§ 909. Where judgment was rendered against a claimant seeking to establish a claim against an estate, the court on appeal could not presume that the claim, when presented to the administrator and by him rejected, was verified, as required by statute.—*Whitmire v. Powell* (Tex. Civ. App.) 433.

§ 911. The Court of Appeals cannot presume, in the absence of a recital in the record to the contrary, that the circuit court remained in session two days after a given date, so as to show that a motion for new trial was filed during the term at which the decree was entered.—*Breimeyer v. Star Bottling Co.* (Mo. App.) 119.

§ 914. On a direct appeal from the judgment, there is no presumption that process was served where no evidence of service appears in the record.—*Baldrige v. Baldrige* (Ky.) 253.

§ 916. The court, on appeal from a judgment disallowing a claim against an estate, *held* not entitled to presume that the original pleading demanded the allowance of the claim and was filed within 90 days after the rejection of the claim.—*Whitmire v. Powell* (Tex. Civ. App.) 433.

§ 927. The appellate court, in passing on the propriety of directing a verdict for one of the parties, must consider the evidence in the light most favorable to the adverse party.—*Jones v. Lewis* (Ark.) 561.

§ 927. The Supreme Court must consider the testimony in its most favorable aspect to plaintiff in reviewing the refusal of defendant's application for a peremptory instruction.—*Aluminum Co. of North America v. Ramsey* (Ark.) 568.

§ 928. One claiming there was no evidence on which to base an instruction *held* required to bring up by the record all the evidence.—*PHELPS v. CONQUEROR ZINC & LEAD CO.* (Mo.) 705.



§ 930. It cannot be assumed on appeal that the jury might have disregarded an instruction as to the measure of damages on which there was undisputed evidence, and followed one on which there was no evidence.—*Jonesboro, L. C. & E. Ry. Co. v. Cable* (Ark.) 550.

§ 932. Where no assignment attacks the verdict as excessive, the court will presume in support of the judgment that, if the jury found in plaintiff's favor on account of lessened earning capacity, they found only nominal damages shown by the evidence.—*St. Louis Southwestern Ry. Co. of Texas v. Niblack* (Tex. Civ. App.) 188.

§ 934. Service of summons is presumed as against collateral attack on judgment, but not on appeal.—*Duff v. Combs* (Ky.) 259; *Combs v. Duff*, *Id.*

#### (F) DISCRETION OF LOWER COURT.

§ 979. The appellate court will not interfere with the trial court's exercise of its discretion in granting a new trial on the ground that the verdict is against the evidence, unless that discretion is clearly abused.—*Morris v. Missouri Pac. Ry. Co.* (Mo. App.) 687.

§ 984. Taxation of costs against plaintiff, in trespass to try title, in rendering judgment for him on an alternative demand, and for defendant for possession of the land, *held* to be in the discretion of the court, and not reviewable.—*Patton v. Minor* (Tex. Civ. App.) 920.

#### (G) QUESTIONS OF FACT, VERDICTS, AND FINDINGS.

§ 997. The court, on review of the ruling on a demurrer to plaintiff's evidence, must consider the facts in their aspect most favorable to the cause of action asserted.—*Day v. Consolidated Light, Power & Ice Co.* (Mo. App.) 81.

§ 999. It is the province of the Court of Appeals to see that parties have a legal trial, but not to weigh the evidence, that duty belonging to the jury; and the court should only disturb a verdict in extreme cases, when no errors have been committed by the lower court.—*Southern Ry. Co. v. Adkins' Adm'r* (Ky.) 321.

§ 999. It is the jury's province to hear the evidence and determine its truth and weight.—*Southern Ry. Co. v. Adkins' Adm'r* (Ky.) 321.

§ 999. A verdict is conclusive on appeal.—*Ziehme v. Miller* (Tex. Civ. App.) 1010.

§ 1001. A verdict on conflicting evidence *held* conclusive on appeal, though against the numerical weight of testimony.—*W. H. White & Son v. Ballard County Bank* (Ky.) 294.

§ 1001. A verdict supported by substantial evidence will not be disturbed on appeal.—*Winfrey v. Ragan* (Mo. App.) 83.

§ 1001. There being no evidence to sustain the verdict, *held*, it is the duty of the Court of Appeals to reverse.—*Milem v. Freeman* (Mo. App.) 644.

§ 1001. Where there is evidence to support a verdict, the appellate court is not justified in setting it aside.—*Missouri, K. & T. Ry. Co. of Texas v. Jones* (Tex. Civ. App.) 1000.

§ 1002. A verdict on conflicting evidence will not be disturbed.—*Ayer & Lord Tie Co. v. Martin* (Ark.) 1081.

§ 1002. A finding of the jury on conflicting evidence as to the facts bearing on the question of negligence *held* binding on appeal.—*Phelps v. Conqueror Zinc & Lead Co.* (Mo.) 705.

§ 1002. Determination of question by jury as to cause of injuries received by passenger *held* conclusive on appeal.—*Freeman v. Davis* (Tex. Civ. App.) 186.

§ 1002. Where the evidence would authorize a finding either way as to a material fact, it is for the jury to decide, and the appellate court is not authorized to set aside the verdict.—*Mueller v. Bell* (Tex. Civ. App.) 983.

§ 1002. The truth of a finding of fact on conflicting evidence, involved in a general verdict, will be assumed on appeal.—*Texas Midland R. Co. v. Geraldton* (Tex. Civ. App.) 1004.

§ 1003. The court can reverse a judgment as against the weight of the evidence only where the verdict is flagrantly against the evidence or was superinduced by passion or prejudice.—*Supreme Lodge, K. P., v. Bradley* (Ky.) 275.

§ 1003. A verdict will not be disturbed on appeal unless it is flagrantly against the weight of the evidence.—*Bruner v. Seelbach Hotel Co.* (Ky.) 373.

§ 1003. Where a case was submitted on a single issue of fact, and the charge was favorable to the losing party, on error the judgment must stand affirmed, unless the evidence establishes the fact in his favor beyond a reasonable doubt.—*Grand Fraternity v. Melton* (Tex.) 788.

§ 1003. A verdict, objected to on the ground that it is contrary to the evidence as to a material fact, will not be disturbed on appeal, when there is contrary evidence sufficient to support it.—*Central City Loan & Investment Co. v. Vincent* (Tex. Civ. App.) 912.

§ 1004. The amount of damages in personal injury actions is largely in the jury's discretion, and the verdict will not be disturbed unless the amount awarded is so gross as to compel the inference that it must have resulted from passion, prejudice, or bias.—*Partello v. Missouri Pac. Ry. Co.* (Mo.) 1138.

§ 1005. A verdict which there is evidence to support and approved by the trial judge will not be disturbed.—*Stubbs v. Marshall* (Tex. Civ. App.) 1030.

§ 1008. On appeal a trial court's finding is entitled to the effect of a general or special verdict.—*Lieber v. Fourth Nat. Bank* (Mo. App.) 672.

§ 1009. In the absence of a clear preponderance of evidence against a finding of fact of a chancellor, it will not be reversed for insufficiency of evidence.—*Craig v. Craig* (Ark.) 765.

§ 1009. The findings of the chancellor on conflicting testimony of witnesses appearing before him will not be disturbed on appeal.—*Huffman v. Huffman* (Mo.) 1.

§ 1009. The Supreme Court may review findings of fact in chancery cases.—*Glascock v. Glascock* (Mo.) 67.

§ 1009. The Supreme Court, in reviewing an equity case, will defer largely to the findings of the trial court on all issues of fact, and will not disturb a judgment of the trial court on the ground that the findings are against the weight of the evidence.—*Jones v. Thomas* (Mo.) 1177.

§ 1010. A finding of the trial court *held* conclusive on appeal.—*Bean v. Bird* (Tex. Civ. App.) 177.

#### (H) HARMLESS ERROR.

§ 1029. Any error against one not entitled to recover is harmless.—*Ziehme v. Miller* (Tex. Civ. App.) 1010.

§ 1032. The improper admission of evidence is presumed to be prejudicial; the burden being on the party introducing it to show that no prejudice resulted.—*St. Louis, I. M. & S. Ry. Co. v. Walker* (Ark.) 534.

§ 1033. Railway companies, sued for death caused by an explosion of a car of dynamite,

held not entitled to complain of an instruction.—Southern Ry. Co. v. Adkins' Adm'r (Ky.) 321.

§ 1033. Appellants held not entitled to complain of error against respondent.—Seger v. Abington (Mo.) 704.

§ 1033. In an action against a railroad for injuries through being struck by a train, defendant held not entitled to complain of an erroneous instruction, where the error was in its favor.—Texas & P. Ry. Co. v. Crawford (Tex. Civ. App.) 193.

§ 1034. The action of the court in permitting a foreign guardian of a nonresident infant defendant to defend the action, instead of complying with Kirby's Dig. § 6023, held not to render the judgment against the infant void.—Martin v. Gwynn (Ark.) 754.

§ 1039. Defendant held not prejudiced by the court's refusal to compel plaintiff to elect between two inconsistent defenses to defendant's counterclaim.—Lankford v. Lankford (Ky.) 962.

§ 1039. In an action by the drawer of checks, paid on a forged indorsement, to recover the amount thereof, omission in the petition to allege demand held not reversible error.—Lieber v. Fourth Nat. Bank (Mo. App.) 872.

§ 1040. The error in not sustaining a demurrer of a defendant to the petition is rendered harmless by an instruction directing a verdict for him.—Young v. State Bank of Marshall (Tex. Civ. App.) 476.

§ 1042. Failure to strike out defendants' plea held not prejudicial, where action was barred by limitations.—Kalteyer v. Mitchell (Tex.) 792.

§ 1046. In an action for the purchase price of goods sold, a statement of the court held not prejudicial to plaintiff as indicating an opinion of the court as to the facts of the case.—American Standard Jewelry Co. v. R. J. Hill & Son (Ark.) 781.

§ 1046. The transfer of a common-law action to equity after a verdict for plaintiff, resulting in a decree for plaintiff for the same amount as the verdict, was not prejudicial to defendants.—L. & J. A. Stewart v. Blue Grass Canning Co. (Ky.) 401.

§ 1047. Defendant was not prejudiced by a ruling forbidding him to re-open his case in chief after he had put in his evidence and plaintiff had testified in rebuttal, where he was afterward virtually permitted to re-open his case in chief.—Wolfort v. Hochbaum (Ark.) 525; Modern Laundry v. Same, Id.

§ 1050. In view of undisputed evidence that a defect in a shaft existed, and the real issue of whether it made the shaft unsafe, held, any error in allowing evidence of how it was produced was harmless.—Phelps v. Conqueror Zinc & Lead Co. (Mo.) 705.

§ 1050. A defendant in a personal injury action held not entitled to complain of the admission of certain evidence in view of other evidence received without objection.—Texas & N. O. R. Co. v. McCoy (Tex. Civ. App.) 446.

§ 1050. Error in the admission of testimony is cured by the same evidence being permitted to go to the jury unobjected to at a different time.—Hudson v. Slate (Tex. Civ. App.) 469.

§ 1050. In a personal injury action, the admission of testimony that plaintiff's nervous condition if not cured "might" result in insanity held not prejudicial error.—Rapid Transit Ry. Co. v. Allen (Tex. Civ. App.) 486.

§ 1050. The admission of evidence in trespass to try title held harmless.—Beall v. Chat-ham (Tex. Civ. App.) 492.

§ 1050. The admission of irrelevant evidence is not reversible error unless prejudice is shown.

—Adams v. Gary Lumber Co. (Tex. Civ. App.) 1017.

§ 1051. Error under Civ. Code Prac. § 606, in allowing a wife to testify to a communication by her husband, held not cured by other testimony.—Wall's Ex'r v. Dimmitt (Ky.) 299.

§ 1051. No error can be predicated on the admission of evidence to prove a fact which was not disputed directly or indirectly by any witness testifying in the case.—Hudson v. Slate (Tex. Civ. App.) 469.

§ 1051. A party cannot object to testimony subsequently elicited by him on cross-examination of the witness.—Missouri, K. & T. Ry. Co. of Texas v. Pettit (Tex. Civ. App.) 894.

§ 1051. A party held not entitled to complain of the error in admitting certain evidence, because of his offering similar evidence.—Missouri, K. & T. Ry. Co. of Texas v. Pettit (Tex. Civ. App.) 894.

§ 1051. A party is estopped from asserting error to the overruling of his objection to evidence, where similar evidence was subsequently repeated by the witness without objection.—Missouri, K. & T. Ry. Co. of Texas v. Pettit (Tex. Civ. App.) 894.

§ 1051. The error, if any, in admitting the testimony of a witness, is harmless, where other witnesses were allowed to give similar testimony without objection.—Missouri, K. & T. Ry. Co. of Texas v. Williams (Tex. Civ. App.) 1043.

§ 1053. The admission of testimony as to the general reputation of one for truth and veracity, founded upon personal acquaintanceship and business transactions, held not prejudicial under the circumstances.—City of Covington v. Gates (Ky.) 342.

§ 1053. In an action by the transferee of a note, the error in admitting certain evidence held not cured by the instructions.—Young v. State Bank of Marshall (Tex. Civ. App.) 476.

§ 1053. Any error in the admission of evidence held harmless.—Stubbs v. Marshall (Tex. Civ. App.) 1030.

§ 1056. Where the Supreme Court, on appeal in an equity case, could not disturb the findings of the chancellor, though it admitted and considered testimony improperly excluded by the chancellor, the error in excluding the evidence was not ground for reversal.—Jones v. Thomas (Mo.) 1177.

§ 1056. In an action by a purchaser of land to recover the consideration, the exclusion of certain evidence held, at most, harmless error.—Hudson v. Slate (Tex. Civ. App.) 469.

§ 1057. The error in excluding evidence to establish a fact shown by other uncontroverted evidence is not prejudicial.—Western Union Telegraph Co. v. Gillis (Ark.) 749.

§ 1057. The exclusion of certain testimony held not prejudicial error.—City of Covington v. Gates (Ky.) 342.

§ 1060. Reversible error cannot be predicated on the words of an attorney in argument, where they were promptly withdrawn by him, and the amount of the verdict does not show reasonably that the jury could have been inflamed or impassioned thereby.—Texas Midland R. Co. v. Geraldton (Tex. Civ. App.) 1004.

§ 1062. In an action for damages to adjoining property caused by a subcontractor in blasting, held, in view of the evidence, that there was no prejudicial error in failing to submit the question whether the principal contractor had notice of the nuisance and took prompt and efficient means to suppress it.—Probat v. Hinesley (Ky.) 389; Hinesley v. Beattie, Id.

§ 1062. In a servant's action for injuries caused by a column of wire falling on him after he had called his foreman's attention to its leaning condition, error in leaving to the jury the question of the foreman's authority and duty to brace the columns was not prejudicial.—*Burkard v. A. Leschen & Sons Rope Co. (Mo.)* 35.

§ 1064. Giving of abstract instruction held prejudicial where it cannot be determined on what the verdict was based.—*Ayer & Lord Tie Co. v. Young (Ark.)* 1080.

§ 1066. Error in giving instruction on plea unsupported by the evidence held not harmless.—*Caldwell v. Lander (Tex. Civ. App.)* 198.

§ 1066. In an action by an employe for injuries, held, that whether the conclusion of the court in an instruction that other employes than the foreman who worked with defendant at the time of the injury were fellow servants was proper or not was not material.—*Scott v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.)* 890.

§ 1067. In an action for injuries to a servant, failure to charge on right of defendant to recover if injuries were caused by act of co-employe held not prejudicial.—*Swift & Co. v. Martine (Tex. Civ. App.)* 209.

§ 1068. Error in an abstract instruction as to the measure of damages to crops held not prejudicial.—*Jonesboro, L. O. & E. Ry. Co. v. Cable (Ark.)* 550.

§ 1068. Error in defining conversion held harmless.—*Crawford v. Thomason (Tex. Civ. App.)* 181.

§ 1068. Where the proper verdict was returned, and a correct judgment entered thereon, the case will not be reversed merely because of an erroneous instruction, which could not have affected the disposition of the case.—*Caldwell v. Houston & T. C. Ry. Co. (Tex. Civ. App.)* 488.

§ 1068. Any error, in an instruction to find against defendant "on the injunction sued out," was harmless, where the injunction theretofore issued was dissolved.—*Briggs v. New South Lumber Co. (Tex. Civ. App.)* 885.

§ 1071. Where a suit to quiet title was tried to the court so far as the issue of title was concerned, an objectionable instruction on such question was not prejudicial to defendants.—*Stone v. Perkins (Mo.)* 717.

§ 1071. In an action by one tenant against another for damages, in which the owners were also made defendants, any error in finding that there was no express covenant by the owners to repair held immaterial.—*Burkett & Barnes v. Difton (Tex. Civ. App.)* 917.

§ 1073. Where a stockholder's unpaid subscription is in excess of a judgment against the corporation, no harm can result from a failure to limit a judgment over against the stockholder to the amount of his unpaid subscription.—*Frogge v. Bullock (Mo. App.)* 1194.

#### (K) SUBSEQUENT APPEALS.

§ 1097. A former decision of the Court of Appeals in a will contest held to preclude proponents' right to a reversal of a subsequent judgment for contestants, with directions to probate the will.—*Wall's Ex'r v. Dimmitt (Ky.)* 299.

§ 1097. The determination of a question on a former appeal becomes the law of the case.—*Butz v. Murch Bros. Const. Co. (Mo. App.)* 635.

§ 1097. Assignments of error, which were passed upon by another Court of Civil Appeals, will not be considered, where their consideration is not essential to the disposition of the case.

—*Lantry-Sharpe Contracting Co. v. McCracken (Tex. Civ. App.)* 453.

### XVII. DETERMINATION AND DISPOSITION OF CAUSE.

#### (B) AFFIRMANCE.

§ 1127. Where a motion to affirm, on the ground that appellant did not file the transcript within the required time, was not accompanied by the usual docket fee, the motion will not be considered, not being properly filed.—*Gordon v. Park (Mo.)* 1163.

§ 1140. Where the exact amount improperly allowed by the jury in assessing damages is shown by the verdict, the error may be cured by a remittitur.—*St. Louis Southwestern Ry. Co. of Texas v. Allen (Tex. Civ. App.)* 923.

§ 1140. Practice as to remanding cause stated, where an improper element of damage is allowed.—*Houston & T. C. Ry. Co. v. Rogers (Tex. Civ. App.)* 1053.

#### (D) REVERSAL.

§ 1170. A judgment for the damages assessed in an action on an attachment bond, instead of a judgment for the penalty, is irregular; but the defect can be corrected by the appellate court under the authority conferred by Rev. St. 1899, §§ 865, 866 (Ann. St. 1903, pp. 812, 815).—*State ex rel. Rife v. Reynolds (Mo. App.)* 653.

§ 1173. Where, in an action against several joint tort-feasors, there was no pleading by one of defendants claiming contribution, and he asserted no right on appeal to relief, would be affirmed as to him, though reversed as to the other defendants.—*Wimple v. Patterson (Tex. Civ. App.)* 1034.

§ 1175. Where the object for which the court remanded a cause will be accomplished by rendering judgment as prayed for on rehearing, the court will grant the rehearing and render judgment.—*Wilkin v. Geo. W. Owens & Bros. (Tex.)* 425.

§ 1180. Where the cause must be reversed and remanded for a new trial on the original cause of action, the ancillary attachment proceeding must also be remanded with instruction to sustain it in case judgment is obtained by plaintiff on the new trial.—*Hogg v. Thurman (Ark.)* 1070.

### APPEARANCE.

§ 8. As a general rule, an answer to the merits operates as a voluntary appearance.—*Wicecarver v. Mercantile Town Mut. Ins. Co. (Mo. App.)* 698.

§ 20. A defendant who filed a demurrer to the complaint held to have sufficiently appeared, so as to make a decree binding on him until reversed or set aside.—*Greer v. Newbill (Ark.)* 531.

### APPLIANCES.

Liability of employer for defects, see Master and Servant, §§ 102, 105, 270.

### APPOINTMENT.

Of committee of insane person, see Insane Persons, § 36.

Of executor or administrator, see Executors and Administrators, §§ 20, 22.

Of guardian, see Guardian and Ward, §§ 8, 13.

Of receiver of corporation, see Corporations, §§ 553-559.

Of special judge, see Judges, § 16.

Of trustee, see Trusts, § 169.

### ARBITRATION AND AWARD.

See Reference.

**ARCHITECTS.**

Approval of performance of contract, see Contracts, § 284.

**ARGUMENT OF COUNSEL.**

In civil actions, see Trial, §§ 122-133.  
In criminal prosecutions, see Criminal Law, §§ 713-730.

**ARREST.**

Illegal arrest, see False Imprisonment.

**ARREST OF JUDGMENT.**

In criminal prosecutions, see Criminal Law, §§ 968, 974.

**ARSON.**

See Fires.

**ASSAULT AND BATTERY.****I. CIVIL LIABILITY.****(A) ACTS CONSTITUTING ASSAULT OR BATTERY AND LIABILITY THEREFOR.**

§ 15. When one's home is invaded, after a request to desist, he may resort to such means as are necessary in the exercise of a reasonable judgment to expel the intruder.—*Newcome v. Russell* (Ky.) 305.

§ 15. An instruction, in an action for assault and battery, *held* more favorable than defendant had the right to request.—*Newcome v. Russell* (Ky.) 305.

**(B) ACTIONS.**

§ 35. Evidence in an action for assault *held* not to sustain a verdict for defendant on the theory of self-defense.—*Vaughan v. McDaniel* (Ark.) 533.

**II. CRIMINAL RESPONSIBILITY.****(A) OFFENSES.**

§ 58. Burning a person with a hot stove-lid lifter, causing sores and lacerations, thereby constitutes a disfigurement within Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), the word "disfigure" being considered in its ordinary sense as meaning to mar the figure.—*State v. Nieuhaus* (Mo.) 73.

§ 58. Inflicting wounds on another by means of a rawhide whip and a hot stove-lid lifter constitutes a "wounding," within Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), though the whip and stove-lid lifter were not deadly or dangerous weapons.—*State v. Nieuhaus* (Mo.) 73.

**(B) PROSECUTION AND PUNISHMENT.**

Application of instructions to case, see Criminal Law, § 814.

Duplicity in indictment, see Indictment and Information, § 125.

§ 74. An indictment under Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), for maiming, disfiguring, or inflicting great bodily harm on another need not allege that the act was done willfully, intentionally, with malice, with a deadly or dangerous weapon, or under circumstances which, had death ensued, would have constituted murder or manslaughter.—*State v. Nieuhaus* (Mo.) 73.

§ 75. In a prosecution for wounding and disfiguring under Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), *held*, that it is not necessary to allege that the assault was made with intent to kill.—*State v. Nieuhaus* (Mo.) 73.

§ 86. In a prosecution for wounding and disfiguring under Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), where accused claimed that she whipped prosecutrix to cure her of lying, evidence as to prosecutrix's habit of lying previous to the punishment in question and of punishment which accused had inflicted upon her for that habit before that time was properly excluded as immaterial.—*State v. Nieuhaus* (Mo.) 73.

§ 96. In a prosecution under Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), for wounding and disfiguring a girl, accused *held* to have had the full benefit of her explanation as to the cause for administering the whipping.—*State v. Nieuhaus* (Mo.) 73.

**ASSESSMENT.**

Of damages, see Damages, §§ 206-222.

Of expenses of public improvements, see Municipal Corporations, §§ 407, 513, 538-532.

Of tax, see Taxation, §§ 363-493.

**ASSIGNMENT OF ERRORS.**

See Appeal and Error, §§ 719-747.

**ASSIGNMENTS.**

For benefit of creditors, see Assignments for Benefit of Creditors.

Fraud as to creditors, see Fraudulent Conveyances.

Of vendor's lien, see Vendor and Purchaser, § 261.

**I. REQUISITES AND VALIDITY.****(A) PROPERTY, ESTATES, AND RIGHTS ASSIGNABLE.**

§ 24. A common-law rule respecting assignment of rights of action for torts *held* relaxed.—*Remmers v. Remmers* (Mo.) 1117.

**IV. ACTIONS.**

§ 131. In an action by an indorsee of notes, the makers *held* not entitled to question the validity of the assignment, where no denial thereof under oath was filed as required by Kirby's Dig. § 517.—*Winer v. Bank of Blytheville* (Ark.) 232.

**ASSIGNMENTS FOR BENEFIT OF CREDITORS.**

See Bankruptcy, § 364.

Change of venue of proceedings under assignment, see Venue, § 36.

**I. REQUISITES AND VALIDITY.****(A) NATURE AND ESSENTIALS OF TRUSTS FOR CREDITORS.**

§ 19. Ky. St. 1909, § 1910 (*Russell's St.* § 2104), relating to preferences to creditors, does not apply to a transfer of notes in Ohio preferring Kentucky creditors; and, there being no similar provision in Ohio, the transaction is valid.—*Fawcett's Assignee v. Mitchell, Finch & Co.* (Ky.) 956.

**VII. ACCOUNTING, SETTLEMENT, AND DISCHARGE OF ASSIGNEE.**

§ 385. An assignee for benefit of creditors who purchases claims against the estate for less than their face should only be allowed the amount that he actually pays on the claims.—*In re T. S. Heath & Son* (Mo. App.) 125; *Heath v. Tucker*, Id.

§ 393. An assignee for the benefit of creditors should not be allowed compensation where he has purchased the equity of the assignor in

the estate.—In re T. S. Heath & Son (Mo. App.) 125; Heath v. Tucker, Id.

§ 395. On the hearing on exceptions to the final report of an assignee for creditors, the validity of a transfer by the assignor to the assignee cannot be attacked.—In re T. S. Heath & Son (Mo. App.) 125; Heath v. Tucker, Id.

## ASSOCIATIONS.

Mutual benefit insurance associations, see Insurance, §§ 719-793.

## ASSUMPSIT, ACTION OF.

See Account Stated; Money Lent.

## ASSUMPTION.

Of risk by employé, see Master and Servant, §§ 203-226, 262, 288, 295.

## ATTACHMENT.

See Execution; Garnishment.

Exemptions, see Exemptions; Homestead.

For costs in divorce suit, see Divorce, § 195.

### I. NATURE AND GROUNDS.

#### (A) NATURE OF REMEDY, CAUSES OF ACTION, AND PARTIES.

§ 5. Under the statute, contractual relations must exist between plaintiff in attachment and defendant or a contract be made for his benefit, and the character of the claim is not affected so as to preclude an attachment because tortious elements are involved.—L. & J. A. Stewart v. Blue Grass Canning Co. (Ky.) 401.

#### V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

§ 178. The levy of an attachment on the interest that defendant owned in land does not attach to title subsequently acquired by him and conveyed to another.—Sullivan v. Graham (Tex. Civ. App.) 171.

#### VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 207. In an action against two nonresidents, where one was served, even if an attachment of their joint property was void as to the interest of the other defendant, the whole of the joint property, on judgment against both defendants and the sustaining of the attachment, could be subjected to the judgment under Civ. Code Prac. § 209.—L. & J. A. Stewart v. Blue Grass Canning Co. (Ky.) 401.

#### VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

Reversal of judgment in main action with instructions as to sustaining or dissolving attachment, see Appeal and Error, § 1180.

#### X. LIABILITIES ON BONDS OR UNDERTAKINGS.

Aider of defects in pleading by verdict in action on attachment bond, see Pleading, § 433.

§ 349. A petition, in an action on an attachment bond conditioned as required by Rev. St. 1890, § 372 (Ann. St. 1906, p. 482), which fails to aver the nonpayment of damages sustained, is demurrable.—State ex rel. Rife v. Reynolds (Mo. App.) 653.

§ 353. The judgment in an action on an attachment bond should be for the penalty of the bond to be satisfied by the payment of the damages assessed, with interest from the date of

judgment and costs.—State ex rel. Rife v. Reynolds (Mo. App.) 653.

## ATTENDANCE.

Of juror, see Jury, §§ 58-67.

Of witness, see Witnesses, § 21.

## ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial in civil actions, see Trial, §§ 122-133.

Argument and conduct of counsel at trial in criminal prosecutions, see Criminal Law, §§ 713-730.

Attorneys in fact, see Principal and Agent.

Harmless error in argument and conduct, see Appeal and Error, § 1060.

Harmless error in argument and conduct of prosecuting attorney, see Criminal Law, § 1171.

Review of argument and conduct of counsel as dependent on presentation in lower court of grounds of review, see Appeal and Error, § 207; Criminal Law, § 1037.

### II. RETAINER AND AUTHORITY.

§ 70. Notice of motion served on an attorney as attorney for the adverse party is sufficient in the absence of a disclaimer of relations between them.—Duff v. Combs (Ky.) 259; Combs v. Duff, Id.

§ 88. Authority of counsel employed to secure the appointment of a new trustee in respect to conferring further powers on the court, stated.—State ex rel. McManus v. Muench (Mo.) 25.

### IV. COMPENSATION AND LIEN OF ATTORNEY.

#### (A) FEES AND OTHER REMUNERATION.

Recovery in action for malicious prosecution, see Malicious Prosecution, § 87.

## ATTORNEY GENERAL.

Appearance for state in general, see States, § 205.

## AUDITA QUERELA.

§ 1. The writ of audita querela lies to review a judgment on account of some matter occurring after judgment amounting to a discharge of its obligation.—Smith v. Young (Mo. App.) 628.

## AUTHORITY.

Of agent, see Principal and Agent, §§ 105, 123. Of attorney, see Attorney and Client, §§ 70, 88. Of corporate officers or agents, see Corporations, §§ 297, 298.

Of justice of the peace, see Justices of the Peace, § 44.

Of special judge, see Judges, § 25.

## AUTOPSY.

On body of decedent on trial of action for causing death, see Death, § 102½.

## BAILMENT.

Embezzlement or larceny by bailee, see Embezzlement.

Particular species of bailments, and bailments incident to particular occupations.

See Banks and Banking, §§ 119-154; Carriers, §§ 40-180; Pledges.

## BANKRUPTCY.

See Assignments for Benefit of Creditors.

### III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

#### (F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

§ 364. The fact that the assignee of one who conditionally sold a stock of goods filed a demand in bankruptcy proceedings against the buyer *held* not to preclude him from suing on a guaranty of performance of the contract of sale by the buyer.—*Vette v. J. S. Merrell Drug Co.* (Mo. App.) 666.

#### V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 390. A bankrupt cannot sue to recover stock or damages for its conversion or wrongful procurement, the trustee being the only proper party plaintiff.—*Remmers v. Remmers* (Mo.) 1117.

## BANKS AND BANKING.

### CONTROL AND REGULATION IN GENERAL.

False swearing in making official report, see Perjury, §§ 9, 26.

False swearing in making official report, evidence of other offenses, see Criminal Law, § 370.

False swearing in making official report, pleading matters judicially noticed, see Indictment and Information, § 61.

### III. FUNCTIONS AND DEALINGS.

#### (A) BANKING FRANCHISES AND POWERS, AND THEIR EXERCISE IN GENERAL.

§ 87. In the absence of any statute limiting its authority, a bank organized under the laws of this state may transact any business within the scope of its charter in other states.—*Fawcett's Assignee v. Mitchell, Finch & Co.* (Ky.) 956.

#### (C) DEPOSITS.

Receipt and retention of pass book by depositor as constituting accounts stated, see Account Stated, § 1.

§ 119. A transaction between a bank and a depositor arising from a check on the deposit is a debit and credit account.—*Lieber v. Fourth Nat. Bank* (Mo. App.) 672.

§ 129. A bank obtaining possession of funds by mistake, and not for value, has no equitable claim thereto, and no injustice is done in compelling it to surrender the same to the true owner.—*Mingus v. Bank of Ethel* (Mo. App.) 683.

§ 134. The rule that the funds of a depositor may be applied to the discharge of his indebtedness to the bank *held* to have no application where the bank acquired the funds through a mistake.—*Mingus v. Bank of Ethel* (Mo. App.) 683.

§ 148. Payment of a check by the drawee bank was an assurance to the drawer that the bank had assured itself of the genuineness of preceding indorsements.—*Lieber v. Fourth Nat. Bank* (Mo. App.) 672.

§ 148. A depositor *held* not negligent so as to preclude recovery from the bank of the amount of checks paid on forged indorsements.—*Lieber v. Fourth Nat. Bank* (Mo. App.) 672.

§ 148. The drawer of a check was not as much bound as the drawee bank to know that

the first of several indorsements was forged.—*Lieber v. Fourth Nat. Bank* (Mo. App.) 672.

§ 154. Variance in an action for money had and received *held* under the evidence not prejudicial to defendant.—*Mingus v. Bank of Ethel* (Mo. App.) 683.

#### (E) LOANS AND DISCOUNTS.

§§ 177, 179. Taking notes or other securities, whether for the purpose of discount or to secure a debt, is a part of the legitimate business of a banking corporation.—*Fawcett's Assignee v. Mitchell, Finch & Co.* (Ky.) 956.

§ 179. Where a Kentucky bank took a transfer in Ohio of notes to secure an Ohio debt, the transaction must be governed by the laws of Ohio.—*Fawcett's Assignee v. Mitchell, Finch & Co.* (Ky.) 956.

#### (H) ACTIONS.

§ 226. Where the only defense to an action on orders to pay money was a general denial of the execution of the orders and a plea of non est factum, *held* reversible error to admit evidence of and to charge on affirmative defenses of suretyship of defendant and his discharge as surety and of payment.—*People's Bank v. Stewart* (Mo. App.) 99.

### IV. NATIONAL BANKS.

§ 262. In absence of evidence that a national bank president and cashier acted as agents for a depositor in transferring to their account money they agreed to loan on real estate, and that the depositor knew that they were acting for her as such, the bank and its receiver are liable for her funds so transferred, though it could not loan on such security.—*Short v. Butler* (Mo. App.) 114.

### VI. LOAN, TRUST, AND INVESTMENT COMPANIES.

§ 310. St. 1909, § 593 (Russell's St. § 2182), requiring officers of banks to make quarterly reports to the Secretary of State, applies to institutions doing both a banking and a trust business.—*Anderson v. Commonwealth* (Ky.) 364.

## BAR.

Of action by former adjudication, see Judgment, §§ 554, 604.

Of action by limitation, see Limitation of Actions, § 176.

Of dower, see Dower, § 46.

## BARBERS.

Discrimination in statute imposing license tax on barbers, see Constitutional Law, § 208.

Exemption from occupation tax, see Licenses, § 19.

Imposition of license tax on barbers but exempting certain persons as grant of special privileges, see Constitutional Law, § 205.

## BATTERY.

See Assault and Battery.

## BENEFICIAL ASSOCIATIONS.

Mutual benefit insurance associations, see Insurance, §§ 719-793.

## BENEFITS.

Acceptance of, as ground of estoppel, see Estoppel, §§ 91, 94.

Acceptance of, as ground of ratification, see Principal and Agent, § 171.

## BEQUESTS.

See Wills.

**BEST AND SECONDARY EVIDENCE.**

In civil actions, see Evidence, §§ 157-178.

**BETTING.**

See Gaming.

**BIAS.**

Of juror, see Jury, §§ 90-131.  
Of witness, see Witnesses, § 363.

**BIDS.**

For public lands, see Public Lands, § 178.

**BILL OF EXCEPTIONS.**

See Exceptions, Bill of.

**BILL OF EXCHANGE.**

See Bills and Notes.

**BILLS AND NOTES.****I. REQUISITES AND VALIDITY.****(B) FORM AND CONTENTS OF PROMISSORY NOTES AND DUEBILLS.**

§ 30. The execution of a note "for value received" implies an obligation to pay.—*Bick v. Yates* (Mo. App.) 650.

**(E) CONSIDERATION.**

§ 92. Liability on a note given for inducing a third person to contract *held* not defeated on the theory that the contract did not bind such person to do anything.—*Price v. White* (Tex. Civ. App.) 484.

**(F) VALIDITY.**

§ 107. Under Rev. St. U. S. § 4886 (U. S. Comp. St. 1901, p. 3382), books and the right to sell the same are not patents or patent rights, and a note given therefor need not comply with Kirby's Dig. §§ 513, 514.—*Hogg v. Thurman* (Ark.) 1070.

**IV. NEGOTIABILITY AND TRANSFER.****(B) TRANSFER BY INDORSEMENT.**

§ 182. Generally, the maker of a note cannot question the authority or capacity of the payee to transfer it.—*Winer v. Bank of Blytheville* (Ark.) 232.

**V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.****(B) INDORSEMENT FOR TRANSFER.**

§ 296. Every indorser of commercial paper, including bank checks, guarantees the genuineness of preceding indorsements.—*Lieber v. Fourth Nat. Bank* (Mo. App.) 672.

**(D) BONA FIDE PURCHASERS.**

Ultra vires indorsement by corporation, see Corporations, § 487.

§ 337. "Bona fide holder of negotiable paper" defined.—*Hogg v. Thurman* (Ark.) 1070.

§ 353. Before one can claim to be an innocent purchaser of a negotiable paper for value and without notice, the consideration paid must be more than merely nominal, but any substantial consideration is sufficient.—*Hogg v. Thurman* (Ark.) 1070.

§ 365. A bona fide holder takes negotiable paper free from all equitable defenses not appearing on the face of the paper and for which

the statute does not declare the paper invalid.—*Hogg v. Thurman* (Ark.) 1070.

§ 370. Want of consideration is not available as a defense to a note, as against a bona fide purchaser for value, before maturity.—*National Bank of Rolla v. Romine* (Mo. App.) 104.

**VII. PAYMENT AND DISCHARGE.**

Implied authority of agent to receive payment, see Principal and Agent, § 105.

§ 427. A note must be paid to the rightful holder, and payment to one not in possession of it is at the payee's risk.—*Winer v. Bank of Blytheville* (Ark.) 232.

§ 432. Right to pay a note in coal *held* to end on its maturity in accordance with the plain letter of a contract by which the privilege was given.—*McFarlane v. York* (Ark.) 773.

**VIII. ACTIONS.**

Action by assignee, effect of failure to deny assignment under oath, see Assignments, § 131. Pleading different defenses together, see Pleading, § 90.

§ 462. It is not necessary in an action on a note to aver an express promise of defendant to pay.—*Bick v. Yates* (Mo. App.) 650.

§ 471. A holder of a note, stipulating for attorney's fees in case suit is instituted thereon, *held* required to allege and prove certain facts in order to recover attorney's fees.—*Young v. State Bank of Marshall* (Tex. Civ. App.) 476.

§ 475. In an action on a note, an unverified plea of non est factum admits the execution of the note as alleged.—*Bick v. Yates* (Mo. App.) 650.

§ 487. A defect in a petition on a note, and for attorney's fees stipulated therein, arising from failure to sufficiently plead the right to recover attorney's fees, may be cured by amendment.—*De Steaguer v. Pittman* (Tex. Civ. App.) 481.

§ 492. In a suit on notes the burden *held* on the makers to establish certain facts.—*Winfrey v. Ragan* (Mo. App.) 83.

§ 493. The presumption, under Rev. St. 1899, §§ 457, 894 (Ann. St. 1906, pp. 516, 830), of consideration of a note *held* not overcome by evidence.—*Glascock v. Glascock* (Mo.) 67.

§ 493. In a suit on notes the burden *held* on the makers to establish certain facts.—*Winfrey v. Ragan* (Mo. App.) 83.

§ 493. As against a purchaser of a note before maturity, the makers are bound to show want of consideration, as well as knowledge, on the purchaser's part before purchase.—*National Bank of Rolla v. Romine* (Mo. App.) 104.

§ 497. A maker of a note *held* entitled to show the grossly inadequate price paid by the purchaser of the note as creating a presumption that he knew the facts that would impeach its validity.—*Hogg v. Thurman* (Ark.) 1070.

§ 497. An instruction that the burden was on the purchaser of a note before maturity, fraudulent in its inception, to establish a purchase for a valuable consideration and without knowledge of fraud, *held* proper.—*National Bank of Rolla v. Romine* (Mo. App.) 104.

§ 509. The maker of a note when sued by a transferee who paid a grossly inadequate consideration therefor may show that the note was obtained by the payee by fraud and without consideration.—*Hogg v. Thurman* (Ark.) 1070.

§ 509. A maker of a note when sued by the transferee thereof *held* entitled to show by the transferee, testifying as a witness, that only a

nominal sum was paid by him for the note.—*Hogg v. Thurman* (Ark.) 1070.

§ 537. Whether the transferee of a note obtained it in good faith and without notice *held* for the jury.—*Hogg v. Thurman* (Ark.) 1070.

§ 538. An instruction that the word "knowledge," as used with reference to defenses of fraud and want of consideration against a purchaser of a note, meant information of the facts, and not merely information which would put a prudent man on inquiry, *held* misleading.—*National Bank of Rolla v. Romine* (Mo. App.) 104.

## BLASTING.

Injuries to adjoining property, see *Adjoining Landowners*, § 7.

## BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see *Bills and Notes*, §§ 337-370.

Of lands, see *Vendor and Purchaser*, §§ 224-244.

## BONDS.

Municipal bonds, see *Municipal Corporations*, § 918.

Of contractor for construction of school buildings, see *Schools and School Districts*, § 81. Sureties on bonds, see *Principal and Surety*.

*Bonds for performance of duties of trust or office.*

See *Officers*, § 129; *Sheriffs and Constables*, §§ 157, 168.

County officers, see *Counties*, § 99.

Municipal officers, see *Municipal Corporations*, § 173.

*Bonds in judicial proceedings.*

See *Attachment*, §§ 349, 353; *Injunction*, § 148. For sale of property of infant, see *Infants*, § 39.

## II. CONSTRUCTION AND OPERATION.

§ 52. Where a contract is made and bond executed for the benefit of third persons not named, to enable them to sue on the bond, it must clearly appear by the terms of the contract or bond that they are of the class covered by the conditions of the bond.—*Eau Claire-St. Louis Lumber Co. v. Banks* (Mo. App.) 611.

## BOOKS.

As patent rights within statute regulating execution of notes given for such rights, see *Bills and Notes*, § 107.

## BOUNDARIES.

See *Fences*.

Stock limits, see *Animals*, § 50.

### I. DESCRIPTION.

§ 8. Where two lines of a description have been ascertained, and the quantity can be obtained by connecting the termini by a straight line, the description will be so closed.—*Poitevent v. Scarborough* (Tex. Civ. App.) 443.

§ 15. The owner of land on a navigable river owns to low-water mark.—*Hobart-Lee Tie Co. v. Stone* (Mo. App.) 604.

### II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 35. In trespass to try title, evidence to aid description of deed *held* admissible.—*McCullum v. Buckner's Orphans' Home* (Tex. Civ. App.) 886.

§ 36. In trespass to try title, deeds of adjoining property *held* admissible in evidence to define location of land in question.—*McCullum v. Buckner's Orphans' Home* (Tex. Civ. App.) 886.

§ 40. The uncertainty of the location of a call in a survey raises a question which must be submitted to the jury.—*Sale v. Pulaski Stave Co.* (Ky.) 404.

§ 48. A division fence, constructed and maintained by adjoining landowners, to which they cultivated their respective lands, could properly be found to constitute the true boundary line.—*Nelson v. Alford* (Ky.) 250.

## BRAKEMAN.

Who are fellow servants of, see *Master and Servant*, § 198.

## BREACH.

Of condition, see *Insurance*, § 264.

Of contract, see *Contracts*, §§ 284-305; *Sales*, § 168; *Vendor and Purchaser*, § 140.

Of covenant, see *Covenants*, § 102.

Of warranty, see *Insurance*, § 264; *Sales*, §§ 238, 439-446.

## BREACH OF THE PEACE.

Joinder of counts for drunkenness and disturbing the peace, see *Indictment and Information*, § 129.

## BRIDGES.

Over navigable waters, see *Navigable Waters*, § 20.

### II. REGULATION AND USE FOR TRAVEL.

§ 42. A city, under the circumstances, *held* to have had actual notice of a defect in a bridge by which plaintiff was injured.—*City of Covington v. Gates* (Ky.) 342.

§ 46. In an action for injuries caused by defects in a bridge which was within the city limits, whether the city had reasonable time in which to repair the defect after actual notice thereof *held* for the jury.—*City of Covington v. Gates* (Ky.) 342.

## BRIEFS.

On appeal or writ of error, see *Appeal and Error*, §§ 758, 760.

## BROKERS.

See *Principal and Agent*.

### IV. COMPENSATION AND LIEN.

§ 40. One who is the procuring cause of a sale of real estate, but not himself the agent of the owner, is not entitled in his own right, as against the owner, to any of the commissions.—*Mueller v. Bell* (Tex. Civ. App.) 993.

§ 44. A broker's contract for the sale of real property *held* valid and irrevocable during the term for which it was executed.—*Novakovich v. Union Trust Co.* (Ark.) 246.

§ 46. The owner of land sold by himself alone in good faith is not liable for commissions to a broker who was not given an exclusive agency.—*English v. William George Realty Co.* (Tex. Civ. App.) 906.

§ 48. An action by a real estate broker for commissions will not lie till he has effected or procured a sale.—*Mueller v. Bell* (Tex. Civ. App.) 993.



§ 48. No matter how great the exertions of brokers may have been to effect a sale of land, they cannot recover for their services if the sale was made without their intervention.—*English v. William George Realty Co.* (Tex. Civ. App.) 996.

§ 49. Where a broker procures a buyer of land on terms not proposed by the owner, he is not entitled to commissions on a sale made by the owner, though on terms substantially the same.—*English v. William George Realty Co.* (Tex. Civ. App.) 996.

§ 53. That brokers, several months prior to a sale of land, introduced one of the purchasers without further negotiations *held* not to make them the procuring cause of the sale.—*English v. William George Realty Co.* (Tex. Civ. App.) 996.

§ 54. To render the owner liable for commissions in the sale of his land, the broker employed by him must have procured a purchaser, ready, able, and willing to buy on the terms fixed by him.—*English v. William George Realty Co.* (Tex. Civ. App.) 996.

§ 55. The employment of an agent to sell real estate does not preclude the employment of others, and the first to effect a sale is entitled to the commission.—*Mueller v. Bell* (Tex. Civ. App.) 993.

§ 55. Brokers effecting a sale of land through a subagent *held* entitled to their commission, and the right to demand it on notifying the owner of the subagency.—*Mueller v. Bell* (Tex. Civ. App.) 993.

§ 56. Though a sale of land by the owner himself to a firm would not have been made but for a broker's unsuccessful attempt to sell to a partner individually, it was not made to the broker's customer so as to entitle him to a commission.—*English v. William George Realty Co.* (Tex. Civ. App.) 996.

§ 56. To entitle a broker to recover for commissions on a sale of land, he must show, not only that he introduced the buyer, but affirmatively that he was induced to apply through the means employed by the broker.—*English v. William George Realty Co.* (Tex. Civ. App.) 996.

## V. ACTIONS FOR COMPENSATION.

§ 84. The burden is on brokers suing for commission on a sale of land to prove, not only that they were agents to effect it, but procured the sale which defendants consummated.—*English v. William George Realty Co.* (Tex. Civ. App.) 996.

## VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

Damages in action against broker for fraud inducing purchase of land, see *Fraud*, § 60.

Limitation of action against broker by third person for deceit, see *Limitation of Actions*, § 37.

Pleading in action against broker for fraud inducing purchase of land, see *Fraud*, § 47.

Venue of action against broker for fraud inducing purchase of land, see *Fraud*, § 37.

## BUILDING CONTRACTS.

Approval of performance by architect, see *Contracts*, § 264.

Construction in general, see *Contracts*, § 198.

Modification of, see *Contracts*, § 243.

## BURDEN OF PROOF.

In criminal prosecutions, see *Criminal Law*, § 331; *Homicide*, §§ 143, 147.

## BURGLARY.

### II. PROSECUTION AND PUNISHMENT.

Responsiveness of verdict to issues, see *Criminal Law*, § 881.

§ 21. An indictment for burglary of a private house *held* sufficiently to allege that the house was used by prosecuting witness as a private residence.—*Jones v. State* (Tex. Cr. App.) 127.

§ 41. Evidence *held* to justify a conviction of burglary notwithstanding accused's defense of insanity.—*Smith v. State* (Tex. Cr. App.) 966.

§ 41. Evidence in a prosecution for burglary with intent to commit rape *held* to sustain a conviction.—*Ballentine v. State* (Tex. Cr. App.) 972.

§ 46. Under an indictment charging burglary, with no reference as to whether it was committed in the daytime or nighttime, *held*, that the court need not limit the jury to a consideration of a daytime burglary.—*Walker v. State* (Tex. Cr. App.) 797.

§ 46. In a prosecution for burglary with intent to commit rape, *held* not error to refuse to charge on aggravated assault.—*Ballentine v. State* (Tex. Cr. App.) 972.

## BY-LAWS.

Of municipal corporation, see *Municipal Corporations*, § 111.

Of mutual benefit insurance association, see *Insurance*, § 719.

## CALENDARS.

Computation of time, see *Time*.

## CANCELLATION OF INSTRUMENTS.

See *Quieting Title*; *Reformation of Instruments*.

Rescission of contracts for sale of goods, see *Sales*, § 92.

Rescission of contracts for sale of realty, see *Vendor and Purchaser*, §§ 85, 123.

### II. PROCEEDINGS AND RELIEF.

§ 35. In a suit by the real owners of a vendor's lien, against persons who had enforced the lien against the lienees and obtained judgment, to obtain benefit of the judgment, *held*, that the lienees or their representatives were not necessary parties.—*Powell v. Powell* (Mo.) 1113.

§ 55. Where persons not entitled to a vendor's lien had enforced it against the lienees, *held*, that a court, at suit of the true owners of the lien, in setting aside a void deed to the land from the original lienor to those persons, could give the true owners the benefit of the judgment obtained against the lienees.—*Powell v. Powell* (Mo.) 1113.

## CARNAL KNOWLEDGE.

See *Rape*.

## CARRIERS.

Excessive damages for injuries to passenger, see *Damages*, § 130.

### I. CONTROL AND REGULATION OF COMMON CARRIERS.

#### (A) IN GENERAL

Partial invalidity of statute imposing penalty for failure to furnish cars, see *Statutes*, § 64.

§ 2. Laws 1907, Act No. 193, pp. 454, 463, §§ 1, 17, making it the duty of a railroad company absolutely to furnish cars on demand, *held* not to preclude the right to set up such defense as would excuse the failure.—*R. H. Oliver & Son v. Chicago, R. I. & P. Ry. Co. (Ark.)* 238.

§ 14. A lease by a railroad of its land between its tracks and depot and a river *held* a discrimination between shippers, in violation of Rev. St. 1899, § 1127 (Ann. St. 1906, p. 972).—*Hobart-Lee Tie Co. v. Stone (Mo. App.)* 604.

## (B) INTERSTATE AND INTERNATIONAL TRANSPORTATION.

Act of Congress relating to carriers as infringing state sovereignty, see Commerce, § 33. Validity of law prohibiting limitation of liability of carrier to its own line as denial of due process of law, see Constitutional Law, § 297.

§ 23. Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1907, p. 909), making a common carrier liable for interstate shipments, and providing that no contract shall relieve it of such liability, *held* constitutional.—*Galveston, H. & S. A. Ry. Co. v. Crow (Tex. Civ. App.)* 170.

## II. CARRIAGE OF GOODS.

### (A) DELIVERY TO CARRIER.

Partial invalidity of statute imposing penalty for failure to furnish cars, see Statutes, § 64.

§ 40. Duty of railroad companies as to furnishing cars stated.—*R. H. Oliver & Son v. Chicago, R. I. & P. Ry. Co. (Ark.)* 238.

### (D) TRANSPORTATION AND DELIVERY BY CARRIER.

§ 86. An initial carrier receiving goods for transportation to the consignee *held* required to deliver the consignor's property in such condition that it may be identified by the consignee.—*Galveston, H. & S. A. Ry. Co. v. Crow (Tex. Civ. App.)* 170.

§ 94. Evidence *held* not to show that a compress company, to which a carrier delivered a shipment of cotton, was the agent of the consignee, so that the carrier would not be liable for damages to the cotton while in the compress company's hands.—*Arkansas Midland Ry. Co. v. Moody (Ark.)* 757.

§ 94. Evidence *held* to show nondelivery of goods received for transportation to the consignee authorizing the consignor to recover the value thereof.—*Galveston, H. & S. A. Ry. Co. v. Crow (Tex. Civ. App.)* 170.

### (E) DELAY IN TRANSPORTATION OR DELIVERY.

§ 99. Results attributed to a defective road-bed and defective equipment afford no excuse for the nonperformance of a carrier's duty to safely deliver a shipment at its destination within a reasonable time.—*Thompson v. Quincy, O. & K. C. R. Co. (Mo. App.)* 1193.

### (F) LOSS OF OR INJURY TO GOODS.

§ 117. Where a carrier allowed a consignee to retain a refrigerator car for the storage of fruit, the carrier was not bound to repair defective drainpipes therein, unless it had knowledge of the defective conditions.—*Missouri, K. & T. Ry. Co. of Texas v. Tripis (Tex. Civ. App.)* 199.

§ 121. Where a carrier allowed a consignee to retain exclusive possession of a refrigerator car for the storage of fruit shipped, after the relations of carrier and warehouseman had ended by acceptance of goods and payment of freight, the duty did not devolve upon the consignee to repair the car to prevent damage to

the fruit.—*Missouri, K. & T. Ry. Co. of Texas v. Tripis (Tex. Civ. App.)* 199.

§ 121. In an action against a carrier for damage to fruit from a defective refrigerator car, plaintiff *held* not guilty of negligence in failing to remove the fruit.—*Missouri, K. & T. Ry. Co. of Texas v. Tripis (Tex. Civ. App.)* 199.

§ 131. In an action against a carrier for damages to fruit from defective drain pipes in a refrigerator car, a petition *held* sufficient to admit proof of certain facts.—*Missouri, K. & T. Ry. Co. of Texas v. Tripis (Tex. Civ. App.)* 199.

§ 136. In an action against a carrier for damages to fruit from a defective refrigerator car, the questions of the carrier's negligence and plaintiff's contributory negligence *held* for the jury.—*Missouri, K. & T. Ry. Co. of Texas v. Tripis (Tex. Civ. App.)* 199.

### (H) LIMITATION OF LIABILITY.

§ 150. A carrier cannot contract against its negligence.—*Libby v. St. Louis, I. M. & S. Ry. Co. (Mo. App.)* 659.

§ 154. Reduction in freight rate *held* a consideration for stipulation in a contract of carriage for notice within a certain time of claim of damages.—*St. Louis, I. M. & S. Ry. Co. v. Furlow (Ark.)* 517.

§ 154. A stipulation in a contract *held* to operate as a limitation on the common-law liability of the carrier, and to be valid it must be supported by a consideration.—*Libby v. St. Louis, I. M. & S. Ry. Co. (Mo. App.)* 659.

§ 159. Stipulation in a contract of carriage *held* to require actual notice within a day of claim of damages, so that notice by mail, unless received within the day, is insufficient.—*St. Louis, I. M. & S. Ry. Co. v. Furlow (Ark.)* 517.

§ 159. Where a contract of carriage stipulates that as a condition of recovery for injury to shipment notice of claim therefor be given within a day, the question is whether the time stipulated is reasonable, not whether notice given later was in a reasonable time.—*St. Louis, I. M. & S. Ry. Co. v. Furlow (Ark.)* 517.

§ 166. Whether a stipulation, in a contract of carriage, for notice, within one day, of a claim of damages for injury, was reasonable, *held* a question for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Furlow (Ark.)* 517.

### (I) CONNECTING CARRIERS.

Validity of law prohibiting limitation of liability of carrier to its own line as denial of due process of law, see Constitutional Law, § 297. Validity of regulations as denying equal protection of law, see Constitutional Law, § 241.

§ 177. By express provision of the Hepburn act (Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 909]), the initial carrier in an interstate shipment is liable for injury to the shipment by a connecting carrier.—*St. Louis, I. M. & S. Ry. Co. v. Furlow (Ark.)* 517.

§ 180. A stipulation in a contract of carriage for notice of claim for injury as a condition to recovery *held* not to exempt the carrier from liability, and so not to violate the Hepburn act (Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 909]).—*St. Louis, I. M. & S. Ry. Co. v. Furlow (Ark.)* 517.

§ 180. Where the bill of lading limits the liability of connecting carriers to the road inflicting the injury, the initial carrier is liable to the shipper for damages caused by its violation of his express directions given at the time of delivery.—*Atlantic Coast Line R. Co. v. Richardson (Tenn.)* 496.

**III. CARRIAGE OF LIVE STOCK.**

Action for injuries as in contract or tort, see Action, § 27.

Assumption of facts in instructions in action for injuries, see Trial, § 191.

Opinion evidence in action for injuries to shipment of live stock, see Evidence, §§ 474, 543½.

Right of shipper to sue in his own name for injuries to stock shipped under bill of lading issued to agent, see Principal and Agent, § 183.

§ 213. A shipper of live stock suffering loss by reason of the decline in the market and shrinkage of his cattle by the carrier's negligent delay in the transportation is entitled to recover the loss sustained.—*Libby v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 659.

§ 213. A carrier of live stock must safely carry the stock and deliver the same at the point of destination within a reasonable time, unless prevented by an act of God or the public enemy, or by unavoidable accident.—*Thompson v. Quincy, O. & K. C. R. Co.* (Mo. App.) 1193.

§ 218. Act of an engineer in refusing to work longer *held* not to excuse a carrier for delay in transporting live stock.—*Missouri, K. & T. Ry. Co. v. Woods* (Tex. Civ. App.) 196.

§ 215. A car stall, in which a race horse was transported by a carrier is reasonably safe when it is such as a person of ordinary prudence would provide.—*Southern Express Co. v. Fox & Logan* (Ky.) 270.

§ 215. A carrier of live stock *held* liable as an insurer against loss or injury.—*Libby v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 659.

§ 215. Liability of carriers of live stock, stated.—*Galveston, H. & S. A. Ry. Co. v. Powers* (Tex. Civ. App.) 459.

§ 218. A carrier inducing a shipper of live stock to believe strict compliance with the bill of lading respecting notice of claim for damages to the shipment cannot escape liability because of omission to comply strictly.—*Clubb v. St. Louis & S. F. R. Co.* (Mo. App.) 110.

§ 218. Delivery of written notice of a shipper's claim for damages to a shipment of live stock *held* to have been waived by the carrier's agent, who failed to object to a verbal notice.—*Clubb v. St. Louis & S. F. R. Co.* (Mo. App.) 110.

§ 218. Compliance with stipulation in contract for carriage of cattle requiring notice of claim for delay within a specified time *held* a condition precedent to recovery.—*Schonhoff v. St. Louis & S. F. Ry. Co.* (Mo. App.) 113; *Harris v. Same, Id.*

§ 218. A contract for the transportation of live stock *held* to require notice of loss or injury to the stock.—*Libby v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 659.

§ 218. A shipper of live stock suing the carrier in tort *held* to make out his case by proving certain facts, though the stock was shipped under a contract.—*Libby v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 659.

§ 218. The mere fact that the action against a carrier of live stock sounds in tort does not render the special contract of carriage incompetent as a defense if properly pleaded.—*Libby v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 659.

§ 227. Under Rev. St. 1899, § 604 (Ann. St. 1906, p. 631), a carrier, when sued in tort by a shipper of live stock, *held* required to specially plead the contract of shipment.—*Libby v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 659.

§ 227. A petition against a carrier for the loss of an animal shipped *held* sufficiently ex-

PLICIT to apprise the carrier of the evidence to be tendered.—*Galveston, H. & S. A. Ry. Co. v. Powers* (Tex. Civ. App.) 459.

§ 227. A petition, in an action for negligent delay and rough handling of a shipment of live stock, *held* not demurrable for incorrectly stating the measure of damages.—*St. Louis Southwestern Ry. Co. of Texas v. Allen* (Tex. Civ. App.) 923.

§ 228. In an action against a carrier for injuries to a horse, the carrier may show that the car stall was put up in the customary method of erecting stalls for the shipment of horses and was reasonably safe.—*Southern Express Co. v. Fox & Logan* (Ky.) 270.

§ 228. A shipper suing the carrier for breach of its common-law duty in respect to transportation of live stock need not prove performance of a stipulation in the bill of lading for notice of claim for damages.—*Brown v. St. Louis & S. F. Ry. Co.* (Mo. App.) 112.

§ 228. The cause of an injury to live stock during transportation may be established from collateral facts affording a reasonable inference of negligence, and it is not necessary to show the facts by positive testimony.—*Libby v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 659.

§ 228. A shipper of live stock *held* to have the burden of proving that an animal injured during transportation was injured through the negligence of the carrier.—*Libby v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 659.

§ 228. Evidence *held* to establish a prima facie case against a carrier of live stock authorizing the shipper to recover for the loss sustained.—*Libby v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 659.

§ 228. Proof that the delay in the transportation of a shipment of live stock was caused by a wreck of the train established a prima facie case of negligence; and the carrier, to escape liability, had the burden of proving that the wreck was the result of unavoidable accident.—*Thompson v. Quincy, O. & K. C. R. Co.* (Mo. App.) 1193.

§ 228. Rule governing the ascertainment of damages recoverable from a carrier for loss of live stock, stated.—*Galveston, H. & S. A. Ry. Co. v. Powers* (Tex. Civ. App.) 459.

§ 228. In an action against a carrier for loss of an animal, the shipper *held* entitled to show the animal's intrinsic or actual value.—*Galveston, H. & S. A. Ry. Co. v. Powers* (Tex. Civ. App.) 459.

§ 228. In an action against a carrier for negligent delay and rough handling of a shipment of cattle, a statement of the shipper, testifying as a witness, *held* properly received as a matter of inducement.—*Missouri, K. & T. Ry. Co. of Texas v. Pettit* (Tex. Civ. App.) 894.

§ 229. A shipper of cattle lost in transit could recover their actual value at the destination, where there was no market there.—*Missouri, K. & T. Ry. Co. v. Woods* (Tex. Civ. App.) 196.

§ 229. In an action for damages from delay in furnishing cars for shipment of stock, plaintiff *held* not entitled to recover for a part of the delay caused by himself.—*Chicago, R. I. & G. Ry. Co. v. Kapp* (Tex. Civ. App.) 904.

§ 229. A verdict, in an action against a carrier for injuries to a shipment of live stock, *held* excessive.—*Missouri, K. & T. Ry. Co. of Texas v. Light* (Tex. Civ. App.) 1053.

§ 229. A carrier of live stock negligently injuring the same during transportation *held* liable only for such difference between the market value in the condition in which they arrived and that in which they should have arrived as was

caused by its negligence.—*Missouri, K. & T. Ry. Co. of Texas v. Light* (Tex. Civ. App.) 1058.

§ 230. A carrier of live stock must transport the same within a reasonable time, and where unreasonable delays occur without just cause the question of the carrier's negligence is for the jury.—*Libby v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 659.

§ 230. Whether a carrier, guilty of delay in a shipment of live stock in consequence of a wreck of the train, showed that the wreck was the result of unavoidable accident, *held* for the jury.—*Thompson v. Quincy, O. & K. C. R. Co.* (Mo. App.) 1193.

§ 230. Under the pleadings, in an action against a carrier for cattle lost in transit, instructions *held* properly refused.—*Missouri, K. & T. Ry. Co. v. Woods* (Tex. Civ. App.) 196.

#### IV. CARRIAGE OF PASSENGERS.

##### (A) RELATION BETWEEN CARRIER AND PASSENGER.

§ 246. Evidence *held* to present a question for the jury whether plaintiff and his wife were passengers, against whom defendant railroad company was not entitled to close its depot and require them to leave at a particular time.—*Texas Midland R. Co. v. Geraldton* (Tex. Civ. App.) 1004.

##### (D) PERSONAL INJURIES.

Applicability of instructions to case in action for injuries, see Trial, § 252.

§ 282. A passenger in the colored coach who had paid his fare was entitled to the same degree of protection from injury as other passengers.—*Walker v. International & G. N. Ry. Co.* (Tex. Civ. App.) 1020.

§ 283. Whether a passenger is assaulted by a trainman in self-defense, the high degree of care applying in other cases where passengers are injured does not apply.—*International & G. N. R. Co. v. Washington* (Tex. Civ. App.) 992.

§ 286. It is a carrier's duty to exercise ordinary care to keep its waiting room in a safe condition.—*St. Louis, I. M. & S. Ry. Co. v. Grimsley* (Ark.) 1064.

§ 304. A carrier *held* bound to keep its waiting room in a safe condition for the benefit of persons accompanying or meeting passengers.—*St. Louis, I. M. & S. Ry. Co. v. Grimsley* (Ark.) 1064.

§ 316. Proof that the derailment of a car occurred from some unaccountable cause is insufficient to overcome the presumption of negligence arising from the fact of derailment.—*Sloan v. Little Rock Ry. & Electric Co.* (Ark.) 551.

§ 316. From the derailment of a car, a presumption of negligence arises, and the carrier has the burden of rebutting such presumption.—*Sloan v. Little Rock Ry. & Electric Co.* (Ark.) 551.

§ 316. In an action by a passenger for injuries by the derailment of the train, a presumption of negligence *held* to arise from such derailment.—*Arkansas Midland R. Co. v. Rambo* (Ark.) 784.

§ 316. Evidence of derailment of train and that passenger was thrown violently upon the floor of the car in which she was seated *held* to make out a prima facie case of negligence.—*Freeman v. Davis* (Tex. Civ. App.) 186.

§ 320. In an action for injuries to a passenger by the derailment of a car, where there is undisputed evidence that the car was in good order, and suitable for the purpose, and that the track where the derailment occurred was in a safe condition, it was proper for the court

to so instruct the jury.—*Sloan v. Little Rock Ry. & Electric Co.* (Ark.) 551.

§ 320. In a passenger's action for damages for permitting another passenger to insult and abuse plaintiff and his wife, whether defendant's employes were negligent *held* for the jury.—*Walker v. International & G. N. Ry. Co.* (Tex. Civ. App.) 1020.

§ 321. In an action for injuries sustained by falling through a seat in a railroad waiting room, instructions *held* to properly submit the question of negligence.—*St. Louis, I. M. & S. R. Co. v. Grimsley* (Ark.) 1064.

§ 321. In a street car passenger's action for injuries, an instruction as to the manner in which plaintiff was injured *held* erroneous as being broader than the allegations of the petition.—*Black v. Metropolitan St. Ry. Co.* (Mo.) 1142.

§ 321. In an action for an assault on a passenger, *held*, that a requested instruction presenting the law of self-defense more specifically than did the court's charge, should have been given.—*International & G. N. R. Co. v. Washington* (Tex. Civ. App.) 992.

##### (E) CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

§ 348. Contributory negligence, in an action for injuries sustained at a depot while waiting to see passengers off, must be pleaded.—*St. Louis, I. M. & S. Ry. Co. v. Grimsley* (Ark.) 1064.

§ 347. In an action for injuries sustained by falling through a defective seat in a depot while waiting to see passengers off, whether plaintiff was guilty of contributory negligence *held* for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Grimsley* (Ark.) 1064.

##### (F) EJECTION OF PASSENGERS AND INTRUDERS.

Burden of proof of damages in general in action for, see Damages, § 163.

Ejection of persons other than passengers from railroad station, see Railroads, § 274.

Instruction erroneous as authorizing double damages in action for, see Damages, § 216.

§ 372. An officer, called by a station agent merely to put persons out of the waiting room, would not be acting officially, so as to exempt the railroad company from responsibility for humiliation suffered in consequence thereof.—*Texas Midland R. Co. v. Geraldton* (Tex. Civ. App.) 1004.

§ 372. If the station agent wrongfully calls an officer to search a passenger and points him out as a violator of the law when he is not, the company would not be relieved from responsibility because he believed, or had been informed, that the passenger had a pistol.—*Texas Midland R. Co. v. Geraldton* (Tex. Civ. App.) 1004.

§ 383. Evidence, in an action for expulsion from the waiting room of a depot, *held* to require a submission to the jury whether the station agent caused plaintiff to be searched by an officer for a pistol.—*Texas Midland R. Co. v. Geraldton* (Tex. Civ. App.) 1004.

§ 383. In an action for expulsion from a waiting room of a depot, *held*, that on the evidence a peremptory instruction to find for defendant was properly refused.—*Texas Midland R. Co. v. Geraldton* (Tex. Civ. App.) 1004.

§ 384. In an action against a railroad company for expulsion of plaintiff and his wife from a depot waiting room, evidence *held* to warrant submission of an issue as to the wife being frightened.—*Texas Midland R. Co. v. Geraldton* (Tex. Civ. App.) 1004.

§ 384. A charge, in an action for injuries caused by being ejected from a depot waiting

room, *held* more favorable to defendant than was authorized by law under the facts.—Texas Midland R. Co. v. Geraldson (Tex. Civ. App.) 1004.

## CARRYING WEAPONS.

See Weapons.

## CASE ON APPEAL.

Making and settlement, see Appeal and Error, § 561.

## CATTLE.

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## CAUSE OF ACTION.

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## CERTIFICATE.

Of acknowledgment of written instrument, see Acknowledgment, § 25.

## CERTIORARI.

Review in action to establish highway, see Highways, § 60.

### I. NATURE AND GROUNDS.

§ 9. Certiorari is not a writ of right, and will only be granted in the sound discretion of the court.—Johnson v. West (Ark.) 770.

### II. PROCEEDINGS AND DETERMINATION.

§ 41. Certiorari will be refused where a petitioner fails to show that he proceeded expeditiously after the necessity of suing out the writ appeared, especially where great public inconvenience would result from issuing it, as where it is issued to review proceedings establishing a highway.—Johnson v. West (Ark.) 770.

## CHALLENGE.

To juror, see Jury, §§ 90-131.

## CHAMPERTY AND MAINTENANCE.

§ 7. A deed from trustee to cestui que trust pursuant to a judgment *held* not champertous.—Bryant v. Prewitt (Ky.) 343.

## CHANCERY.

See Equity.

## CHANGE.

Of domicile, see Domicile, § 5.

## CHANGE OF VENUE.

Of civil action, see Venue, § 36.

Of criminal prosecutions, see Criminal Law, § 126.

## CHARACTER.

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## CHARGE.

To jury in civil actions, see Trial, §§ 191-296.  
To jury, in criminal prosecutions, see Criminal Law, §§ 770-822.

## CHARITIES.

### I. CREATION, EXISTENCE, AND VALIDITY.

§ 19. A devise for a Masonic hall *held* void, because too vague and uncertain to be capable

of enforcement.—Ingraham v. Sutherland (Ark.) 748.

## II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

§ 45. A charitable institution, whether public or private, *held* not liable for its torts, though the person injured is its servant.—Whittaker v. St. Luke's Hospital (Mo. App.) 1189.

## CHattel MORTGAGES.

See Pledges.

## CHATELS.

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## CHEAT.

See Fraud.

## CHECKS.

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## CHILDREN.

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## CHOSE IN ACTION.

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## CIRCUMSTANTIAL EVIDENCE.

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## CITATION.

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## CITIZENS.

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Equal protection of laws, see Constitutional Law, §§ 220, 241.

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## CIVIL RIGHTS.

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## CLAIMS.

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## CLERICAL ERRORS.

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## CLERKS OF COURTS.

Duty to assist in selection of juries as between clerks of different courts, see Jury, § 66.

Issuance of order for publication of process in vacation, see Process, § 98.

## CLOUD ON TITLE.

See Quieting Title.

**CODICIL.**

See Wills, § 184.

**COLLATERAL AGREEMENT.**

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**COLLATERAL ATTACK.**

On appointment of guardian of insane person, see Insane Persons, § 36.  
On judgment, see Judgment, §§ 489-521.  
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**COLLATERAL SECURITY.**

See Pledges.

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**COLLECTION.**

Of estate of decedent, see Executors and Administrators, § 135.  
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**COLORED PERSONS.**

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**COLOR OF TITLE.**

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**II. SUBJECTS OF REGULATION.**

§ 33. Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1907, p. 909), relating to carriers, *held* not unconstitutional as infringing state sovereignty.—Galveston, H. & S. A. Ry. Co. v. Wallace (Tex. Civ. App.) 169.

**COMMERCIAL PAPER.**

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**COMMISSION.**

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**COMMISSIONS.**

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Guardianship of insane persons, see Insane Persons, § 36.

**COMMON CARRIERS.**

See Carriers.

**COMMON DRUNKARDS.**

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**COMMON SCHOOLS.**

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**COMMUNITY PROPERTY.**

See Husband and Wife, §§ 255-267.

**COMPENSATION.**

For property taken for public use, see Eminent Domain, § 155.

*Of particular classes of officers or other persons.*  
See Brokers, §§ 40-56; Sheriffs and Constables, § 29.

Drainage commissioners, see Drains, § 17.  
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**COMPETENCY.**

Of evidence in criminal prosecutions, see Criminal Law, §§ 385-396.  
Of experts as witnesses, see Evidence, §§ 539½, 543½.  
Of jurors, see Jury, §§ 90-131.  
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**COMPLAINT.**

In civil actions, see Pleading, §§ 49, 62.  
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**COMPOSITIONS WITH CREDITORS.**

See Compromise and Settlement.

**COMPROMISE AND SETTLEMENT.**

See Payment.

§ 6. In an action on a contract of settlement of a servant's claim for injuries, evidence *held* sufficient to show a consideration.—Bartlett Oil Mill Co. v. Capps (Tex. Civ. App.) 485.

§ 6. The compromise of a cause of action, made in good faith, is binding.—Bartlett Oil Mill Co. v. Capps (Tex. Civ. App.) 485.

§ 20. If a claim under an original contract was settled by another contract which one party only partly performed, the other party could not repudiate the contract of settlement and sue on the original contract, but would be confined to his remedy for breach of the contract of settlement.—Hill-Ingham Lumber Co. v. Neal (Ark.) 247.

**COMPULSION.**

Compelling plaintiff in personal injury action to submit to physical examination, see Damages, § 206.

**COMPUTATION.**

Of interest, see Interest, §§ 56-60.  
Of period of limitation, see Limitation of Actions, §§ 55-100.  
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**CONCEALED WEAPONS.**

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**CONCLUSION.**

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**CONDITIONAL SALES.**

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**CONDITIONS.**

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**CONNECTING CARRIERS.**

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**CONSPIRACY.**

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**I. CIVIL LIABILITY.**

(A) ACTS CONSTITUTING CONSPIRACY AND LIABILITY THEREFOR.

§ 5. Mere conspiracy without action thereunder is not actionable.—Remmers v. Remmers (Mo.) 1117.

**(B) ACTIONS.**

§ 18. Allegations held not to state a cause of action for a conspiracy to injure plaintiff's reputation.—Remmers v. Remmers (Mo.) 1117.

**CONSTABLES.**

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**CONSTITUTIONAL LAW.**

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See Jury, § 12; Licenses, § 7; Taxation, §§ 40-47.

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Subjects and titles of statutes, see Statutes, § 110½.

**II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.**

Jurisdiction to determine constitutional question, see Courts, § 231.

§ 46. In order to raise a constitutional question, the party complaining must point to the particular section of the Constitution on which he relies.—Wabash R. Co. v. Flannigan (Mo.) 722.

**III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.**

(A) LEGISLATIVE POWERS AND DELEGATION THEREOF.

§ 62. Under Const. §§ 60, 171, 180, 181, St. 1909, § 637 (Russell's St. § 4284), relating to discriminatory taxation of foreign insurance companies, held to be unconstitutional.—Western & Southern Life Ins. Co. v. Commonwealth (Ky.) 376.

(B) JUDICIAL POWERS AND FUNCTIONS.

§ 70. The power to amend a defect in a statute which is otherwise inoperative belongs exclusively to the legislative department.—Road Improvement Dist. No. 1 v. Glover (Ark.) 544.

**IV. POLICE POWER IN GENERAL.**

§ 81. The Legislature held without power to invade the privacy of a citizen's life and regulate his conduct in matters in which he alone is concerned.—Commonwealth v. Campbell (Ky.) 383.

**VII. OBLIGATION OF CONTRACTS.**

(B) CONTRACTS OF STATES AND MUNICIPALITIES.

§ 140. A county treasurer in office when Act March 7, 1907 (Acts 1907, p. 485), was enacted held not liable for penalties lawfully imposed thereunder, notwithstanding the provisions of Const. Ark. art. 2, § 17, and Const. U. S. art. 1, § 10.—Hunter State Bank v. Mills (Ark.) 760.

**IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.**

§ 205. Acts 30th Leg. 1907, p. 273, c. 141, imposing a license tax on barbers, held void, as granting special privileges to certain individuals, in violation of Bill of Rights, § 3.—Jackson v. State (Tex. Cr. App.) 818.

§ 208. Acts 30th Leg. 1907, p. 273, c. 141, imposing a license tax on barbers, held unconstitutional, as discriminating.—Jackson v. State (Tex. Cr. App.) 818.

**X. EQUAL PROTECTION OF LAWS.**

§ 220. Const. U. S. Amend. 14, *held* not violated by separate taxation of property of white people for support of schools for white children.—*Crosby v. City of Mayfield* (Ky.) 318.

§ 241. Act Cong. June 29, 1906, c. 3591, § 34 Stat. 593 (U. S. Comp. St. Supp. 1907, p. 909), relating to carriers, *held* not unconstitutional as denying equal protection of the laws.—*Galveston, H. & S. A. Ry. Co. v. Wallace* (Tex. Civ. App.) 169.

**XL DUE PROCESS OF LAW.**

§ 266. Acts 30th Leg. 1907, p. 447, c. 8, regulating local option election contests *held* not unconstitutional as a denial of due process of law to one accused of violating the local option law.—*Evans v. State* (Tex. Cr. App.) 167.

§ 297. Act Cong. June 29, 1906, c. 3591, § 34 Stat. 593 (U. S. Comp. St. Supp. 1907, p. 909), relating to carriers, *held* not unconstitutional as denying due process of law.—*Galveston, H. & S. A. Ry. Co. v. Wallace* (Tex. Civ. App.) 169.

**CONSTRUCTION.**

*Of contracts, instruments, or judicial acts and proceedings.*

See Contracts, §§ 147-198; Mortgages, §§ 154, 155; Statutes, §§ 179-208; Wills, §§ 449-699. Contract of sale, see Sales, §§ 62, 72, 85. Instructions to jury, see Trial, §§ 295-296. Insurance policy, see Insurance, §§ 146, 177. Municipal charter, see Municipal Corporations, § 58.

**CONTEMPT.**

Disobedience of witness to subpoena as contempt, see Witnesses, § 21.

**CONTEST.**

*Of election*, see Elections, § 269.

*Of local option election*, see Intoxicating Liquors, § 87.

**CONTINUANCE.**

In criminal prosecutions, see Criminal Law, §§ 575-614.

§ 19. Even without a strict showing in accordance with the statute, regulating continuances for the absence of witnesses, it is not error to postpone a case on account of unavoidable absence of one of the parties, especially where such party is a material witness; the matter being within the discretion of the court.—*American Standard Jewelry Co. v. R. J. Hill & Son* (Ark.) 781.

§ 20. A motion for a continuance on the ground of absence of counsel *held* not to show the exercise of diligence in preparing for trial, so that it was properly denied.—*El Dorado & B. Ry. Co. v. Knox* (Ark.) 779.

§ 22. It was within the trial court's discretion to deny a continuance to permit defendant to rebut evidence by plaintiff as to the value of his time.—*St. Louis, I. M. & S. Ry. Co. v. Grimsley* (Ark.) 1064.

**CONTRACTS.**

Agreements within statute of frauds, see Frauds, Statute of.

Alteration, see Alteration of Instruments.

Assignment, see Assignments.

Cancellation, see Cancellation of Instruments.

Damages for breach, see Damages, § 120.

Impairing obligation, see Constitutional Law, § 140.

Operation and effect of champerty, see Champerty and Maintenance.

Operation and effect of customs or usages, see Customs and Usages.

Parol or extrinsic evidence, see Evidence, §§ 393-460.

Reformation, see Reformation of Instruments.

Specific performance, see Specific Performance.

Subrogation to rights or remedies of creditors, see Subrogation.

**Contracts of particular classes of persons.**

See Corporations, § 487; Counties, § 113; Husband and Wife, § 48; Master and Servant; Municipal Corporations, § 330; Schools and School Districts, §§ 72, 81.

Foreign corporations, see Corporations, § 657.

**Contracts relating to particular subjects.**

See Interest.

Cutting of timber, see Logs and Logging, § 8.

**Particular classes of express contracts.**

See Bills and Notes; Bonds; Covenants; Guaranty; Indemnity; Insurance; Joint Adventures; Mortgages; Partnership; Sales.

Agency, see Principal and Agent.

Employment, see Master and Servant.

Leases, see Landlord and Tenant.

Mutual benefit insurance, see Insurance, §§ 719, 726.

Sales of realty, see Vendor and Purchaser.

Suretyship, see Principal and Surety.

**Particular classes of implied contracts.**

See Account Stated; Money Lent.

**Particular modes of discharging contracts.**

See Compromise and Settlement; Payment.

**I. REQUISITES AND VALIDITY.****(B) PARTIES, PROPOSALS, AND ACCEPTANCE.**

§ 15. Courts do not make contracts for parties, but merely construe and enforce them.—*McFarlane v. York* (Ark.) 773.

**(D) CONSIDERATION.**

§ 47. A consideration is an essential ingredient of a contract.—*Mueller v. Bell* (Tex. Civ. App.) 993.

§ 54. A devisee's agreement respecting a conveyance by her *held* supported by sufficient consideration.—*Columbia Trust Co. v. Christopher* (Ky.) 943.

§ 54. Payment of a consideration by each of several plaintiffs *held* not essential to recovery on a promise made by defendants.—*Elmer v. Campbell* (Mo. App.) 622.

§ 54. A promise to do, forbear or suffer given in return for a like promise is a consideration for an executory contract.—*Beauchamp v. Couch* (Tex. Civ. App.) 924.

**(E) VALIDITY OF ASSENT.**

§ 97. A party seeking rescission must act promptly, and if after discovery of fraud he ratifies the contract or affirmatively acquiesces in it by distinctly treating it as of continuing force, claiming its benefits, he cannot thereafter repudiate it.—*Minter v. Hawkins* (Tex. Civ. App.) 172.

**II. CONSTRUCTION AND OPERATION.****(A) GENERAL RULES OF CONSTRUCTION.**

§ 147. The meaning of a contract must be arrived at by considering all its parts.—*Burton v. Kroeger* (Mo.) 1147; *Same v. Lauman* (Mo.) 1162; *Same v. Dunn* (Mo.) 1163.

§ 155. A contract prepared by the parties for whose benefit it was executed merely as a



privilege to them must be construed as unfavorably against them as its terms will admit.—*McFarlane v. York* (Ark.) 773.

§ 176. Since an instrument, whereby plaintiff agreed to pay defendant a specified sum, if defendant sold plaintiff's land as mentioned in a deed, which was in fact only an offer to sell, when considered in connection with the deed, did not disclose the intention of the parties, the question of intent was for the jury.—*Jones v. Lewis* (Ark.) 581.

#### (B) PARTIES.

§ 187. A contract between two parties upon a valid consideration may be enforced by a third person, when entered into for his benefit, though he be not named in the contract and be not privy to the consideration.—*Eau Claire-St. Louis Lumber Co. v. Banks* (Mo. App.) 611.

#### (C) SUBJECT-MATTER.

§ 198. A stipulation in a building contract held to relieve the owner from liability for damages sustained by the contractor through the negligence of independent contractors of the owner.—*P. & M. J. Bannon v. Jackson* (Tenn.) 504.

### III. MODIFICATION AND MERGER.

§ 243. A stipulation in a building contract relating to extra work held not so modified that the owner will be bound by the architect's oral orders for extra work.—*P. & M. J. Bannon v. Jackson* (Tenn.) 504.

### V. PERFORMANCE OR BREACH.

§ 284. A stipulation in a building contract held to defeat a recovery for extra work unless the contractor first received the architect's written order therefor, unless the owner or his authorized agent waived written orders.—*P. & M. J. Bannon v. Jackson* (Tenn.) 504.

§ 284. A stipulation in a building contract held to make the obtaining of the architect's certificate a condition precedent to the maintenance of a suit by the contractor for compensation.—*P. & M. J. Bannon v. Jackson* (Tenn.) 504.

§ 303. One cannot, after breaching his own contract so as to justify an abrogation by the other party, either recover damages for a breach by the other party, or enforce the contract.—*T. Carrabine & Co. v. Cox* (Mo. App.) 616.

§ 305. Where a building contract stipulated that the owner should not be responsible for any damage which the contractor might sustain at the hand of any other contractor, a payment by the owner of a part of a claim of the contractor for damages through the negligence of another contractor was not a waiver of the contract provision.—*P. & M. J. Bannon v. Jackson* (Tenn.) 504.

§ 305. Requirement of contract that a well should be cased with three-inch casing held to have been waived.—*Hall v. Cook* (Tex. Civ. App.) 449.

### VI. ACTIONS FOR BREACH.

§ 350. In an action for the contract price of boring a well, evidence held to show that the well was cased as far as it was possible to do so on account of an obstruction caused by a broken drill rod.—*Hall v. Cook* (Tex. Civ. App.) 449.

§ 350. In an action for breach of a building contract, evidence held insufficient to show that one of defendants agreed to complete the building or to do more than furnish the lumber.—*Franks v. Harkness* (Tex. Civ. App.) 913.

### CONTRIBUTORY NEGLIGENCE.

See Negligence, §§ 83, 85.

Of owner of shipment, see Carriers, § 121.

Of passenger, see Carriers, §§ 343, 347.

Of person injured at railroad crossing, see Railroads, §§ 327, 350.

Of person injured by mule, see Animals, § 71.

Of person injured on or near railroad tracks, see Railroads, §§ 381, 387.

Of servant, see Master and Servant, §§ 228-248, 289, 296.

### CONVERSION.

Wrongful conversion of personal property, see Trover and Conversion.

### CONVEYANCES.

In fraud of creditors, see Fraudulent Conveyances.

In trust, see Trusts, §§ 41, 58.

#### *Conveyances by or to particular classes of persons.*

See Husband and Wife, § 48; Infants, §§ 39-41.

Heirs, see Descent and Distribution, § 82.

Tenant in common, see Tenancy in Common, § 43.

*Conveyances of particular species of, or estates or interests in, property.*

See Mines and Minerals, § 55.

#### *Particular classes of conveyances.*

See Assignments; Assignments for Benefit of Creditors; Deeds; Mortgages.

Partition deeds, see Partition, § 9.

### CORAM NOBIS.

Writ of error coram nobis to correct judgment, see Judgment, § 334.

### CORPORATIONS.

Taxation of corporations and corporate property, see Taxation, §§ 117-166, 365, 397.

#### *Particular classes of corporations.*

See Municipal Corporations; Railroads; Street Railroads.

Insurance companies, see Insurance.

Telegraph and telephone companies, see Telegraphs and Telephones.

Trust companies, see Banks and Banking, § 310.

### IV. CAPITAL, STOCK, AND DIVIDENDS.

#### (B) SUBSCRIPTION TO STOCK.

§ 81. A subscription by a corporation to the stock of another corporation which has been paid is not invalid because in violation of its articles of incorporation, and, the subscriber having waived that defense and paid the subscription, it cannot be said not to have been made in good faith.—*Stone v. Monticello Const. Co.* (Ky.) 369.

§ 81. In an action by a corporation on a subscription for stock, a charge on bona fide subscriptions held erroneous.—*Stone v. Monticello Const. Co.* (Ky.) 369.

§ 81. A subscriber to the stock of a corporation held by his acts to be precluded from contending, in an action against him for the subscription, that a condition in the contract of subscription had not been fulfilled.—*McConaghy v. Monticello Const. Co.* (Ky.) 372.

§ 90. Where persons agreed to subscribe for stock in a railroad construction company to be organized, the subscriptions to be binding only upon certain conditions, an action could be

maintained in the name of the corporation on the subscription agreement; the conditions having been complied with.—*Stone v. Monticello Const. Co. (Ky.)* 369.

#### (F) LIEN OF CORPORATION.

§ 169. In an action on a note given for stock, where the defense was that plaintiffs were indebted to the company, which indebtedness was a lien on the stock, the burden was on defendant to prove such defense.—*Wolfort v. Hochbaum (Ark.)* 525; *Modern Laundry v. Same, Id.*

§ 169. In an action on a note for stock, the defense being that plaintiff had failed to pay an indebtedness to the company, which indebtedness was a lien on the stock, and plaintiff claimed that the amount of the debt was fixed by agreement and that defendant assumed it, an instruction as to the rights of the parties held proper under the evidence.—*Wolfort v. Hochbaum (Ark.)* 525; *Modern Laundry v. Same, Id.*

§ 169. In an action on a note given for laundry stock an instruction held properly refused as misleading.—*Wolfort v. Hochbaum (Ark.)* 525; *Modern Laundry v. Same, Id.*

§ 169. In an action on a note given for laundry stock where defendant claimed that plaintiff had failed to pay an indebtedness due the laundry which was a lien on the stock, but plaintiff claimed that the amount of such indebtedness was fixed by agreement and defendant was to assume it, evidence held to sustain a verdict for plaintiff in the full amount of the note.—*Wolfort v. Hochbaum (Ark.)* 525; *Modern Laundry v. Same, Id.*

§ 169. In an action by a corporation to enjoin a transfer of its stock in order to enforce a lien thereon, evidence held to sustain a finding that the purchaser with the consent of the corporation agreed to satisfy the lien.—*Wolfort v. Hochbaum (Ark.)* 525; *Modern Laundry v. Same, Id.*

#### V. MEMBERS AND STOCKHOLDERS.

##### (D) LIABILITY FOR CORPORATE DEBTS AND ACTS.

§ 228. The balance due on unpaid stock subscriptions is a fund for the satisfaction of the corporate debts.—*Herr & Frerichs Chemical Co. v. Brewster (Tex. Civ. App.)* 880.

§ 250. By the direct provisions of Rev. St. 1895, art. 671, where execution has been issued against a corporation, with certain exceptions, and no property is found, execution may issue against any stockholder to the extent of his unpaid stock subscription.—*Galvin v. McConnell (Tex. Civ. App.)* 211.

§ 268. An allegation on a motion for judgment against a stockholder on his unpaid subscription held a sufficient allegation of ownership of stock prior to and when execution was asked.—*Frogge v. Bullock (Mo. App.)* 1194.

#### VI. OFFICERS AND AGENTS.

##### (B) AUTHORITY AND FUNCTIONS.

§ 297. The assets and affairs of a private business corporation are in the hands of its directors, and they have the full management and disposal thereof.—*Winer v. Bank of Blytheville (Ark.)* 232.

§ 298. Necessity for meetings of corporate directors to transact business held subject to waiver.—*Winer v. Bank of Blytheville (Ark.)* 232.

##### (D) LIABILITY FOR CORPORATE DEBTS AND ACTS.

§ 335. The president and director of a corporation held responsible for bringing about

a condition of affairs by which another was defrauded by the purchase of corporate bonds secured by a mortgage on property it did not own.—*Lynch v. Southern Mining Land & Lumber Co. (Mo. App.)* 624.

§ 340. The liability of the officers of a corporation for its debts imposed by Kirby's Dig. § 859, for the failure to file the annual statement required by section 848, held a primary liability, and the officers cannot postpone the enforcement thereof.—*Jones v. Harris (Ark.)* 1077.

#### VII. CORPORATE POWERS AND LIABILITIES.

##### (A) EXTENT AND EXERCISE OF POWERS IN GENERAL.

§ 387. That makers of notes given a corporation sued by a transferee were creditors of the corporation held not to entitle them to question the validity of the transfer.—*Winer v. Bank of Blytheville (Ark.)* 232.

§ 387. Makers of notes to a corporation held unable to defeat liability thereon in a suit by a transferee because of invalidity or want of power in the transfer.—*Winer v. Bank of Blytheville (Ark.)* 232.

§ 387. Rule respecting a corporation's creditor's interest in its property stated.—*Winer v. Bank of Blytheville (Ark.)* 232.

##### (B) REPRESENTATION OF CORPORATION BY OFFICERS AND AGENTS.

§ 423. A corporation held not liable for slander of title to property by its officers.—*Continental Realty Co. v. Little (Ky.)* 310.

§ 432. Rule respecting method of proving a corporate officer's authority stated.—*Winer v. Bank of Blytheville (Ark.)* 232.

§ 432. In the absence of a contrary regulation of a construction company, it will be presumed that its president was authorized to buy wire for construction work.—*Tuttle v. Bracey-Howard Const. Co. (Mo. App.)* 86.

§ 432. Evidence held to show that one placing an order for wire for a corporation had authority to do so.—*Tuttle v. Bracey-Howard Const. Co. (Mo. App.)* 86.

##### (D) CONTRACTS AND INDEBTEDNESS.

§ 487. Though a corporation's indorsement of negotiable paper be ultra vires, so that it incurs no liability thereby, yet title passes.—*Winer v. Bank of Blytheville (Ark.)* 232.

##### (F) CIVIL ACTIONS.

§ 507. A return on a summons against a corporation served on its secretary and treasurer, the president being absent, held insufficient as not showing on its face that it was served in the manner required by Rev. St. 1899, §§ 995, 996 (Ann. St. 1906, pp. 876, 878).—*Stanley v. Sedalia Transit Co. (Mo. App.)* 685.

§ 507. Under Rev. St. 1895, art. 1222, construed in view of article 1223, service of citation upon the manager of a corporation held not sufficient to sustain a default judgment against it.—*Latham Co. v. J. M. Radford Grocery Co. (Tex. Civ. App.)* 906.

#### VIII. INSOLVENCY AND RECEIVERS.

§ 553. In an action by general creditors of an insolvent corporation to subject land and other property on which a director had a lien to the payment of corporate debts, on the ground that its insolvency was caused by the director's negligence, the securities could be marshaled without the appointment of a receiver.—*Galvin v. McConnell (Tex. Civ. App.)* 211.

§ 553. Mere insolvency of a corporation is not sufficient in equity to authorize the appointment of a receiver.—*Galvin v. McConnell* (Tex. Civ. App.) 211.

§ 553. A creditor, having a valid debt against an insolvent corporation, secured by lien, is entitled to collect it in the legal way without the appointment of a receiver, unless the statute or equitable principles authorize a receivership under the circumstances; it not being presumed that the property will be needlessly sacrificed in enforcing the lien.—*Galvin v. McConnell* (Tex. Civ. App.) 211.

§ 553. In an action by the director of an insolvent corporation to foreclose a lien on land, in which corporate creditors intervened to have a receiver appointed, claiming that the corporation became insolvent because of the director's negligence and mismanagement, the circumstances held not to justify the appointment of a receiver for the corporation.—*Galvin v. McConnell* (Tex. Civ. App.) 211.

§ 559. The appointment of a receiver for an insolvent corporation on the intervention of creditors in a suit by a director thereof on notes owned by himself, secured by a lien, on the ground that the director had negligently permitted the corporation to become insolvent, would not destroy the director's lien.—*Galvin v. McConnell* (Tex. Civ. App.) 211.

§ 560. The rights and duties conferred on receivers of the property of insolvent corporations and trustees in bankruptcy in possession thereof are largely the same.—*Hurf & Frerichs Chemical Co. v. Brewster* (Tex. Civ. App.) 880.

§ 562. Title to property of an insolvent corporation is vested in the receiver or trustee in bankruptcy for the benefit of creditors, and, when interest requires it, he should compel delinquent subscribers to pay the balance due and pay the debts therewith.—*Hurf & Frerichs Chemical Co. v. Brewster* (Tex. Civ. App.) 880.

§ 562. So long as the estate of an insolvent corporation is being administered by the courts, the receiver or the trustee in bankruptcy alone may pursue the remedy provided for collecting stock subscriptions, and a creditor cannot sue therefor.—*Hurf & Frerichs Chemical Co. v. Brewster* (Tex. Civ. App.) 880.

§ 566. General creditors of an insolvent corporation only have a lien on its assets, if any, after the payment of debts having priority.—*Galvin v. McConnell* (Tex. Civ. App.) 211.

## XII. FOREIGN CORPORATIONS.

§ 642. Act May 23, 1901 (Acts 1901, p. 386), for the regulation of foreign corporations, construed.—*Simmons-Burks Clothing Co. v. Linton* (Ark.) 775.

§ 642. A foreign railroad company held not within the terms of Acts 1887, p. 386, c. 226, §§ 1, 2 (Shannon's Code, §§ 4543, 4544); and hence service of process upon its traveling agent, as provided by section 8 (Shannon's Code, § 4545), did not bring it within the jurisdiction of the court, so as to authorize a judgment for injuries to freight passing over its line.—*Atlantic Coast Line R. Co. v. Richardson* (Tenn.) 496.

§ 657. Act May 23, 1901 (Acts 1901, p. 386), held not to preclude a foreign corporation not having complied with its provisions, from taking notes and a trust deed in the state for goods sold by it and delivered in another state, nor from suing thereon in the state.—*Simmons-Burks Clothing Co. v. Linton* (Ark.) 775.

## CORPUS DELICTI.

Proof of, in prosecution for homicide, see Homicide, § 143.

## CORRECTION.

Of deposition, see Depositions, § 81.  
Of judgment, see Judgment, §§ 306-334.  
Of naturalization record, see Aliens, § 69.  
Of record on appeal or writ of error, see Appeal and Error, §§ 635, 644.

## CORROBORATION.

Of witness in general, see Witnesses, §§ 330-332.

## COSTS.

In action by or against trustee, see Trusts, § 377.

In action for breach of covenant, see Covenants, § 132.

## VI. TAXATION.

Review of discretionary rulings in taxation of, see Appeal and Error, § 984.

§ 214. Error in allowing costs can only be corrected by a motion for a new trial made within four days after judgment.—*Beecham v. Evans* (Mo. App.) 1190.

§ 214. A motion to retax costs applies only to ministerial taxation of costs by the clerk after entry of judgment.—*Beecham v. Evans* (Mo. App.) 1190.

## VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 256. Where the law requiring the original statement of facts to be filed in the appellate court was not complied with, held, that costs would be adjudged against appellants, though there was a reversal in their favor.—*Wallace & Reed v. Reed Bros.* (Tex. Civ. App.) 1019.

## CO-TENANCY.

See Tenancy in Common.

## COUNCIL.

See Municipal Corporations, § 111.

## COUNTERCLAIM.

See Set-Off and Counterclaim.

## COUNTERFEITING.

See Forgery.

## COUNTIES.

See Municipal Corporations.

## II. GOVERNMENT AND OFFICERS.

### (D) OFFICERS AND AGENTS.

Judicial notice affecting bond, see Evidence, § 48.

Statute impairing obligation of contracts, see Constitutional Law, § 140.

§ 99. Sureties on a county treasurer's bond executed in 1906 held not liable for penalties imposed by Act March 7, 1907 (Acts 1907, p. 485), for their principal's failure to make an immediate deposit of funds.—*Hunter State Bank v. Mills* (Ark.) 760.

§ 101. A petition, in an action against a county treasurer to recover a part of the school fund which he did not pay over to his successor, held insufficient.—*Connor v. Zackry* (Tex. Civ. App.) 177.

§ 101. In an action on a county treasurer's bond, begun in the district court, to recover a portion of the school fund which the treasurer did not pay over to his successor, the petition

should allege the amount of the bond sued on in order to show that the amount is within the jurisdiction of the trial court.—*Connor v. Zackry* (Tex. Civ. App.) 177.

§ 101. An action by the county treasurer for the use and benefit of the county cannot be maintained to recover a portion of the school fund.—*Connor v. Zackry* (Tex. Civ. App.) 177.

§ 101. Under Rev. St. 1895, arts. 920, 921, an action by a county treasurer to recover a part of the school fund which his predecessor has failed to pay over must be brought on the bond securing the payment of the school fund, and not on his general bond as county treasurer.—*Connor v. Zackry* (Tex. Civ. App.) 177.

### III. PROPERTY, CONTRACTS, AND LIABILITIES.

#### (A) PUBLIC BUILDINGS AND OTHER PROPERTY.

Prohibition to restrain county court from improving buildings and constructing vaults in courthouse, see Prohibition, § 6.

#### (B) CONTRACTS.

§ 113. Under Rev. St. 1899, § 6736 (Ann. St. 1906, p. 3322), a county court *held* to have authority to improve the courthouse.—*State ex rel. Carter v. Bollinger* (Mo.) 1132.

### IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 150. Under Const. §§ 137, 158, a county indebted up to the constitutional limit and having a courthouse *held* not authorized to incur further indebtedness for the construction of a new courthouse, notwithstanding Act Va. 1751.—*Fiscal Court of Franklin County v. Commonwealth* (Ky.) 801.

### VI. ACTIONS.

Right to use name of state in mandamus proceedings, see Mandamus, § 146.

## COURTS.

Judges, see Judges.

Judicial power, see Constitutional Law, § 70.

Justices' courts, see Justices of the Peace.

Mandamus to inferior courts, see Mandamus, § 57.

Province of court and jury, see Trial, §§ 191-194.

Review of decisions, see Appeal and Error.

Right to trial by jury, see Jury, § 12.

### I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 1. "Jurisdiction" defined.—*Robinson v. Levy* (Mo.) 577.

§ 21. In Missouri, jurisdiction of the subject-matter of a concrete case in equity or law is only acquired by a court through pleadings filed, process issued or appearance entered, and decrees entered within the lines of the issues framed by pleadings.—*State ex rel. McManus v. Muench* (Mo.) 25.

### II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

#### (B) TERMS, VACATIONS, PLACE AND TIME OF HOLDING COURT, COURTHOUSES, AND ACCOMMODATIONS.

Issuance of order for publication of process in vacation, see Process, § 98.

Limitation of county indebtedness as affecting construction of courthouse, see Counties, § 150.

### (D) RULES OF DECISION, ADJUDICATIONS, OPINIONS, AND RECORDS.

§ 89. The value of former adjudications *held* usually confined to the issue directly involved, and the enunciation of the legal principles by which it is determined.—*Young v. State Bank of Marshall* (Tex. Civ. App.) 476.

§ 90. The last expression of the court on a subject is controlling as against prior opinions conflicting with it.—*Martin v. City of St. Joseph* (Mo. App.) 94.

§ 91. The Court of Appeals cannot disregard defects in the record held by the Supreme Court to be fatal, where they are challenged.—*Breimeyer v. Star Bottling Co.* (Mo. App.) 119.

§ 91. The decision of the Supreme Court that a purported copy of a statement of facts accompanying the transcript will be considered on appeal, in the absence of timely objection by the adverse party, *held* binding on the Court of Civil Appeals.—*Bean v. Bird* (Tex. Civ. App.) 177.

§ 97. The decisions of the federal Supreme Court on the invalidity of the federal employer's liability act (Act Cong. June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]), in its application to the territories will be followed by the state Supreme Court.—*Gutierrez v. El Paso & N. E. R. Co.* (Tex.) 423.

### III. COURTS OF GENERAL ORIGINAL JURISDICTION.

#### (A) GROUNDS OF JURISDICTION IN GENERAL.

§ 122. A petition in a damage suit construed to show an amount at stake within the jurisdiction of the county court.—*Tippett v. Corder* (Tex. Civ. App.) 186.

### IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 170. Under Const. art. 5, § 16, and Sayles' Ann. Civ. St. 1897, arts. 1154, 1155, the county court *held* without jurisdiction of a cause of action asserted by petition praying for a judgment for over \$1,200.—*Parlin & Orendorff Implement Co. v. Clements* (Tex. Civ. App.) 495.

### VI. COURTS OF APPELLATE JURISDICTION.

#### (A) GROUNDS OF JURISDICTION IN GENERAL.

§ 207. The Supreme Court, on the application for a temporary injunction in aid of the appellate jurisdiction, and on the motion to dissolve the injunction, exercises a discretion as to whether or not the temporary injunction should be issued.—*Mahry v. Kettering* (Ark.) 746.

#### (B) COURTS OF PARTICULAR STATES.

§ 231. The review of a conviction, under Acts March 27, 1901 (Laws 1901, p. 219), as amended by Act March 24, 1903 (Laws 1903, p. 251 [Ann. St. 1906, §§ 9053-1 to 9053-3]), *held* to be within the jurisdiction of the Court of Appeals, rather than that of the Supreme Court.—*State v. Cook* (Mo.) 30.

§ 231. Where the record on review does not present any constitutional question so as to confer on the Supreme Court jurisdiction of the appeal, such question cannot be raised by statements of counsel in presenting the case.—*State v. Cook* (Mo.) 30.

§ 231. The mere statement, in a motion for a new trial, that the acts (specifying them) on which a prosecution is based "are unconstitutional and void" is insufficient to raise any constitutional question, so as to confer on the Supreme Court, rather than the Court of Appeals,

jurisdiction of the cause on review.—*State v. Cook* (Mo.) 80.

§ 231. Whether the party enjoined is, on a motion to assess damages on the injunction bond, entitled to recover his attorney's fees, or whether he actually employed an attorney, are not constitutional questions of which the Supreme Court has jurisdiction.—*Wabash R. Co. v. Flannigan* (Mo.) 722.

§ 231. Where a litigated point cannot be decided without construing a clause in the Constitution, a constitutional question is involved, and the appeal must come to the Supreme Court.—*Wabash R. Co. v. Flannigan* (Mo.) 722.

§ 231. Constitutional questions *held* duly raised in the reply, so as to give the Supreme Court jurisdiction.—*Hanks v. Hanks* (Mo.) 1101.

## VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

### (A) COURTS OF SAME STATE, AND TRANSFER OF CAUSES.

§ 472. Under Rev. St. 1889, § 1604, and Rev. St. 1899, § 1674 (Ann. St. 1906, p. 1217), the circuit court has jurisdiction of an action to enforce collection of \$71.32 as an assessment for street improvements.—*Robinson v. Levy* (Mo.) 577.

## COVENANTS.

### III. PERFORMANCE OR BREACH.

§ 102. A grantor's covenant of warranty of title *held* to have been breached when the Supreme Court reversed a judgment against a claimant in favor of the grantee and adjudged title in the claimant, so that it was unnecessary to file the mandate of the Supreme Court to entitle grantee to maintain an action for breach of covenant.—*Beach v. Nordman* (Ark.) 785.

§ 102. A clerical error in the mandate of the Supreme Court reversing a decree in favor of a grantee in describing the land in controversy *held* not to defeat an action on the covenant in the deed.—*Beach v. Nordman* (Ark.) 785.

### IV. ACTIONS FOR BREACH.

§ 121. A judgment for plaintiff in an action of covenant *held* an adjudication that defendant did not arrange for a defense to an ejectment suit, as was asserted by him in defense to a subsequent action.—*Leet v. Gratz* (Mo. App.) 642.

§ 121. The grantor called in to defend when the grantee was sued in ejectment, and, failing to do so, *held* bound by the judgment.—*Leet v. Gratz* (Mo. App.) 642.

§ 132. The grantee, in an action for breach of covenant, *held* entitled to recover costs and necessary expenses, including reasonable attorney's fees, incurred in a bona fide defense or assertion of his title.—*Beach v. Nordman* (Ark.) 785.

§ 132. Plaintiff, in an action of covenant, *held* entitled to recover a fee paid an attorney for services rendered and necessary to procure the interests of certain minors who sued him in ejectment, though he had already recovered for an attorney's fee paid in defending the ejectment suit.—*Leet v. Gratz* (Mo. App.) 642.

## COVERTURE.

See Husband and Wife.

## CRANES.

Injuries to railroad employes by mail cranes erected near the track. See Master and Servant, §§ 96, 270, 286, 295.

## CREDIBILITY.

Of witness, see Witnesses, §§ 330-392.

## CREDITORS.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances.

Rights and remedies of surety, see Principal and Surety, § 180.

Subrogation to rights of creditor, see Subrogation.

## CRIMINAL LAW.

Indictment, information, or complaint, see Indictment and Information.

### Particular offenses.

See Adulteration; Assault and Battery, §§ 58-96; Burglary; Embezzlement; False Imprisonment, § 43; Fires; Forgery; Gaming, § 72; Health, § 38; Homicide; Larceny; Libel and Slander, §§ 152, 159; Malicious Mischief; Nuisance, §§ 91, 92; Perjury; Rape; Robbery.

Against liquor laws, see Intoxicating Liquors, §§ 146, 169, 226-239.

Carrying weapons, see Weapons.

Obstruction of highway, see Highways, § 164.

Offenses against laws relating to trade-marks, see Trade-Marks and Trade-Names, § 51.

## I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

§ 26. To constitute one either a principal, accessory, aider, and abettor or accomplice, he must do some affirmative act, or omit a duty to the person injured which requires him to prevent the commission of the crime.—*Levering v. Commonwealth* (Ky.) 253.

## III. PARTIES TO OFFENSES.

§ 59. "Accomplice" defined.—*Levering v. Commonwealth* (Ky.) 253.

§ 59. "Principal" defined.—*Davis v. State* (Tex. Cr. App.) 159.

§ 59. One using an innocent party to consummate a crime would be a principal, whether present or absent, under Pen. Code 1895, art. 77, making one a principal who employs another who cannot be punished to commit an offense.—*Farris v. State* (Tex. Cr. App.) 798.

§ 75. "Accessory after the fact" defined, and mere failure to inform of the commission of the offense *held* not to make one an accessory after the fact.—*Levering v. Commonwealth* (Ky.) 253.

## V. VENUE.

### (A) PLACE OF BRINGING PROSECUTION.

§ 107. Act June 18, 1897, p. 16, c. 9, authorizing a trial for rape in designated counties *held* not to conflict with Const. art. 3, §§ 45, 56.—*Dies v. State* (Tex. Cr. App.) 979.

§ 107. The Sixth Amendment to the Federal Constitution *held* applicable to federal procedure only.—*Dies v. State* (Tex. Cr. App.) 979.

### (B) CHANGE OF VENUE.

§ 126. A motion for a change of venue, on the ground of prejudice against one indicted for false swearing in making a report of the condition of a bank required by St. 1909, § 593 (Russell's St. § 2182), *held* to have been improperly overruled.—*Anderson v. Commonwealth* (Ky.) 364.

## IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

As waiver of liability of officer for making illegal arrest, see False Imprisonment, § 7.

§ 292. A plea of former acquittal held insufficient.—Zinn v. State (Tex. Cr. App.) 136.

§ 302. It was not error to submit to the jury one count of an indictment, without first disposing of the other counts by entry of a nolle prosequi or order of discontinuance.—State v. Cox (Mo. App.) 680.

## X. EVIDENCE.

### *In particular criminal prosecutions.*

See Larceny, § 46; Malicious Mischief, §§ 8-9; Perjury, § 32; Robbery, § 23.

For maintenance of nuisance, see Nuisance, § 92.

For offense against liquor laws, see Intoxicating Liquors, §§ 226-236.

For unlawfully using trade-name, see Trade-Marks and Trade-Names, § 51.

### (A) JUDICIAL NOTICE, PRESUMPTIONS, AND BURDEN OF PROOF.

§ 304. The Court of Criminal Appeals cannot take judicial notice that the local option law has been adopted in any county.—Bills v. State (Tex. Cr. App.) 835.

§ 331. To establish the defense of insanity, it must be proven by preponderance of the evidence that accused was laboring under such defect of reason as not to know the nature of the act.—Smith v. State (Tex. Cr. App.) 966.

### (B) FACTS IN ISSUE AND RELEVANT TO ISSUES, AND RES GESTÆ.

§ 366. Declaration of decedent made some two or three hours after he was fatally stabbed held inadmissible as a part of the res gestæ.—McGowan v. Commonwealth (Ky.) 387.

§ 366. Declarations, made at the time of the occurrence, expressive of its character, motive, or object, held admissible as res gestæ, though in response to questions.—Hobbs v. State (Tex. Cr. App.) 811.

### (C) OTHER OFFENSES, AND CHARACTER OF ACCUSED.

Evidence of prior search in prosecution for carrying weapons, see Weapons, § 17.

§ 369. Where defendant is charged with the violation of law on a certain day and the evidence shows a violation on that day, the prosecution cannot show a similar act on other days.—State v. Missouri Pac. Ry. Co. (Mo.) 1173.

§ 369. On a prosecution of a railroad company under Laws 1907, p. 180, where the evidence showed a violation of law on the day alleged, it was error to admit evidence of a violation on other days.—State v. Missouri Pac. Ry. Co. (Mo.) 1173.

§ 369. In prosecution for theft, admission of evidence as to other offense held erroneous, where not limited to showing system and intent.—Gardner v. State (Tex. Cr. App.) 140.

§ 369. Evidence of extraneous and contemporary crimes is not admissible, where there is positive evidence supporting the prosecution.—Gardner v. State (Tex. Cr. App.) 148.

§ 369. In a trial for theft of cotton, certain testimony as to a theft by accused and an accomplice, five days later, of cotton from another party, held inadmissible.—Gardner v. State (Tex. Cr. App.) 148.

§ 369. On a trial for robbery from the person by threats and putting in fear, evidence is not

admissible of subsequent acts of defendant which constitute distinct robberies.—Harris v. State (Tex. Cr. App.) 839.

§ 370. Where defendant was indicted under St. 1909, § 1175 (Russell's St. § 3709), for false swearing in making a report of the condition of a bank required by section 593 (Russell's St. § 2182), prior reports were admissible to show that the false statements charged in the indictment were made knowingly.—Anderson v. Commonwealth (Ky.) 364.

§ 371. In a trial for receiving stolen cotton, evidence that accused had received cotton stolen from other parties about the same time was admissible.—Hanks v. State (Tex. Cr. App.) 150.

### (D) MATERIALITY AND COMPETENCY IN GENERAL.

§ 385. Results of a controverted judgment in one criminal case are not proper evidence in another.—Hardin v. State (Tex. Cr. App.) 974.

§ 392. Evidence of absence of persons from state held inadmissible.—Hardin v. State (Tex. Cr. App.) 974.

§ 396. Where the state had proved part of a conversation by a witness, held error to refuse to permit the defense to prove the entire conversation.—Underwood v. State (Tex. Cr. App.) 809.

§ 396. Evidence held admissible by reason of admission of similar evidence of adverse party.—Hardin v. State (Tex. Cr. App.) 974.

§ 396. Evidence held admissible in a perjury trial.—Hardin v. State (Tex. Cr. App.) 974.

### (E) ADMISSIONS, DECLARATIONS, AND HEARSAY.

§ 406. In a criminal prosecution, evidence as to admissions of defendant held admissible.—Davis v. State (Tex. Cr. App.) 138.

§ 415. Declaration of decedent made some two or three hours after he was fatally stabbed held not competent as substantive evidence for accused.—McGowan v. Commonwealth (Ky.) 387.

§ 419. In a prosecution for assault to murder, certain testimony held properly excluded as hearsay.—Pemberton v. State (Tex. Cr. App.) 837.

§ 419. On a trial for unlawfully selling intoxicating liquors, a witness held not competent to testify as to the amount of alcohol in the liquor.—Snead v. State (Tex. Cr. App.) 983.

### (G) ACTS AND DECLARATIONS OF CONSPIRATORS AND CODEFENDANTS.

§ 424. Confession of an accomplice, made on the morning after commission of crime in the absence of defendant, held inadmissible.—Gardner v. State (Tex. Cr. App.) 140.

### (I) OPINION EVIDENCE.

§ 459. Witness held competent to testify that he had the day after the shooting examined the shotgun of the person accused of the shooting, and that it appeared to have been recently fired.—Pemberton v. State (Tex. Cr. App.) 837.

§ 463. A witness held competent to testify that in her opinion wounds were caused by burns from a hot iron, and not by acid.—State v. Nieuhaus (Mo.) 73.

§ 463. A witness held competent to testify that wounds observed on a child were caused by burns.—State v. Nieuhaus (Mo.) 73.

§ 476. On a trial for homicide, the exclusion of the opinion of a physician, qualifying as an expert, as to whether the flow of blood from the wound inflicted on decedent would have been so immediate and in such quantities as to have

left on the ground and vegetation signs of blood, *held* erroneous.—*Simmons v. State* (Tex. Cr. App.) 141.

§ 488. The testimony of a physician on insanity, relied on by accused as a defense, *held* not objectionable as a reference to the failure of accused to testify.—*Tubb v. State* (Tex. Cr. App.) 858.

§ 490. The state, on redirect examination of a physician testifying as to the sanity of accused relying on insanity, *held* entitled to show that the physician's compensation was suggested by counsel for the state and was unconditional.—*Tubb v. State* (Tex. Cr. App.) 858.

§ 494. Where, in a murder prosecution, the coroner testified from his examination of decedent and of the powder which evidently caused her death that her death was caused by strychnia poison, the jury could give such weight to his testimony as they deemed it entitled to, though the coroner had made no post mortem examination.—*Levering v. Commonwealth* (Ky.) 253.

#### (J) TESTIMONY OF ACCOMPLICES AND CODEFENDANTS.

§ 507. One *held* not an accomplice to a murder by poisoning, within the statutes requiring corroboration of accomplice's testimony, who merely passively consented to the commission of the crime without warning decedent.—*Levering v. Commonwealth* (Ky.) 253.

§ 507. An accessory after the fact *held* not an accomplice, within Cr. Code Prac. § 241, in view of St. 1909, § 1129 (Russell's St. § 3156), providing the punishment of accessories after the fact.—*Levering v. Commonwealth* (Ky.) 253.

#### (L) EVIDENCE AT PRELIMINARY EXAMINATION OR AT FORMER TRIAL.

§ 543. As a general rule, testimony taken at the examining trial is admissible if the witness is beyond the jurisdiction at the time of trial.—*Hobbs v. State* (Tex. Cr. App.) 811.

§ 543. A witness' testimony taken at the examining trial, when he was cross-examined for accused and in his presence, *held* admissible, though the witness had been in the county of the venue for several months after remand for a second trial.—*Hobbs v. State* (Tex. Cr. App.) 811.

#### (M) WEIGHT AND SUFFICIENCY.

*In particular criminal prosecutions.*

See Burglary, § 41; Homicide, §§ 231-257; Larceny, § 55; Malicious Mischief, § 9; Rape, § 51.

For offense against liquor law, see Intoxicating Liquors, § 236.

§ 553. Testimony of an accomplice will not sustain a conviction, where he subsequently testified that such testimony was perjury.—*Hill v. State* (Tex. Cr. App.) 134.

#### XI. TIME OF TRIAL AND CONTINUANCE.

§ 575. It was error to force accused to trial at a term fixed by the commissioners' court for accepting pleas of guilty only; no provision having been made for a jury.—*Dobbs v. State* (Tex. Cr. App.) 799.

§ 594. An application for a continuance in a criminal case, in order to secure the testimony of one who was not summoned as a witness, and whom none of the witnesses ever saw near the place of the killing, was properly refused.—*Bice v. State* (Tex. Cr. App.) 163.

§ 594. A continuance for absent testimony was properly refused, where the witness was outside the state and his testimony on a former tri-

al was read.—*Buckner v. State* (Tex. Cr. App.) 802.

§ 595. An application for continuance, in a prosecution for assault to murder, *held* insufficient.—*Pemberton v. State* (Tex. Cr. App.) 837.

§ 598. A continuance asked for absent testimony is properly refused where the testimony is cumulative.—*Buckner v. State* (Tex. Cr. App.) 802.

§ 600. A party *held* authorized to contradict by other testimony statements imputed to an absent witness, as shown by an affidavit for a continuance received in evidence.—*Risner v. Commonwealth* (Ky.) 318.

§ 608. Evidence *held* to sustain a finding that testimony sought to be shown by witnesses for whose absence accused asked a continuance was probably not true.—*Hill v. State* (Tex. Cr. App.) 823.

§ 613. Continuing trial until the afternoon of following day because of the absence of defendant's counsel *held* a proper exercise of discretion.—*Curtis v. State* (Ark.) 521.

§ 614. An application for a continuance for absent witnesses *held* properly denied for want of diligence.—*Yardley v. State* (Tex. Cr. App.) 146.

§ 614. Where one continuance was granted and another application refused, which latter application was held error on appeal, a subsequent application was a third application.—*Bice v. State* (Tex. Cr. App.) 163.

§ 614. Trial court *held* not to have abused its discretion in denying a third application for a continuance.—*Bice v. State* (Tex. Cr. App.) 163.

§ 614. The third application for a continuance in a criminal case is addressed to the sound discretion of the court.—*Bice v. State* (Tex. Cr. App.) 163.

#### XII. TRIAL.

*In particular criminal prosecutions.*

For obstructing highway, see Highways, § 164. For offense against liquor laws, see Intoxicating Liquors, § 239.

#### (B) COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 634. The absence of the judge in an ante-room for about 15 minutes while accused's counsel was addressing the jury *held* not reversible error.—*Cravens v. State* (Tex. Cr. App.) 156.

§ 634. In all criminal cases the judge should remain in complete control of the trial.—*French v. State* (Tex. Cr. App.) 848.

§ 636. For the judge to enter the jury room during the deliberations of the jury, in the absence of accused and his counsel, and verbally explain a portion of his charge, is improper.—*Gardner v. State* (Tex. Cr. App.) 140.

§ 655. An oral charge to a jury, on impaneling it, *held* not error.—*Hill v. State* (Tex. Cr. App.) 823.

§ 656. The remarks of court in sustaining an objection to a question asked a witness on redirect examination *held* erroneous as a comment on the weight of the evidence.—*Simmons v. State* (Tex. Cr. App.) 141.

#### (C) RECEPTION OF EVIDENCE.

§ 662. The court may, without violating the rights of accused, compel a trial by admitting in evidence his affidavit for a continuance, on the ground of the absence of a witness, containing facts to which it is averred the absent witness would, if present, testify.—*Risner v. Commonwealth* (Ky.) 318.

§ 673. In a trial for receiving stolen cotton, evidence as to a confession of an accomplice *held* admissible to establish the theft of the cotton.—Hanks v. State (Tex. Cr. App.) 150.

§ 683. In a trial for receiving stolen cotton, evidence that accused had repeatedly received other cotton, all of which was found in his smokehouse when he was arrested, *held* admissible.—Hanks v. State (Tex. Cr. App.) 150.

#### (D) OBJECTIONS TO EVIDENCE, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

§ 695. An objection to the answer of a witness containing statements, some of which are admissible and others inadmissible, *held* too general to be considered on appeal.—Tubb v. State (Tex. Cr. App.) 858.

§ 695. An objection to certain testimony *held* to go mainly to the weight to be given to the testimony and not to its competency.—Tubb v. State (Tex. Cr. App.) 858.

#### (E) ARGUMENTS AND CONDUCT OF COUNSEL.

§ 713. A conviction will not be disturbed because of remarks of counsel for the prosecution concerning a further continuance, which were not made in the presence of the jury impaneled to try the case.—Curtis v. State (Ark.) 521.

§ 720. Where the party, in whose behalf statements of an absent witness contained in the affidavit for a continuance are read as a deposition, gives testimony which is contradicted by that attributed by the affidavit to the absent witness, counsel for the adverse party may in argument point out and comment on the contradiction.—Risner v. Commonwealth (Ky.) 318.

§ 720. In a prosecution for carrying a pistol, evidence *held* to justify comments on the evidence made by the county attorney.—McDonald v. State (Tex. Cr. App.) 181.

§ 721. In a prosecution for statutory rape, remarks of counsel as to defendant's failure to testify *held* reversible error.—Curtis v. State (Ark.) 521.

§ 721½. Remarks of a prosecuting attorney in a murder trial *held* not erroneous.—Jackson v. State (Tex. Cr. App.) 990.

§ 723. The argument of the district attorney *held* not to justify a reversal.—Yardley v. State (Tex. Cr. App.) 146.

§ 723. Argument of state's counsel *held* not ground for reversal.—Pemberton v. State (Tex. Cr. App.) 837.

§ 728. Certain argument of the prosecuting attorney *held* so prejudicial to accused as to require review on a mere exception thereto, without requesting a charge withdrawing them.—Smith v. State (Tex. Cr. App.) 966.

§ 730. Remarks of counsel in a prosecution for murder *held* not to constitute ground for reversal.—Jackson v. State (Tex. Cr. App.) 990.

#### (F) PROVINCE OF COURT AND JURY IN GENERAL.

§ 741. Where there is any evidence to establish the corpus delicti, it is for the jury to pass upon its sufficiency.—Levering v. Commonwealth (Ky.) 253.

§ 742. On a trial for cattle theft, *held* proper to submit to the jury the issue whether a witness was an accomplice.—Davis v. State (Tex. Cr. App.) 159.

§ 753. In a murder prosecution for poisoning accused's wife by giving her strychnia as a medicine, unless the state introduced some competent evidence tending to show that accused

willfully and maliciously administered poison as alleged, and that she took it believing it to be medicine, and died from its effects, the court should have directed an acquittal.—Levering v. Commonwealth (Ky.) 253.

§ 761. An instruction, in a prosecution for homicide, *held* not to assume that accused was guilty of either murder or voluntary manslaughter.—Sergeant v. Commonwealth (Ky.) 362.

§ 761. An instruction on the testimony of an accomplice *held* not open to a certain objection.—Davis v. State (Tex. Cr. App.) 159.

§ 761. An instruction allowing the jury to consider facts not proven in connection with the question of defendant's insanity *held* error.—Leary v. State (Tex. Cr. App.) 822.

§ 763. An instruction *held* not erroneous as on the weight of evidence.—Leary v. State (Tex. Cr. App.) 822.

§ 763. An instruction in an embezzlement trial *held* not erroneous for failing to leave it to the jury to determine, on a finding of certain facts, whether accused was guilty of embezzlement.—Henderson v. State (Tex. Cr. App.) 825.

§ 763. A charge *held* erroneous as on the weight of evidence.—French v. State (Tex. Cr. App.) 848.

§ 764. An instruction *held* not erroneous as on the weight of evidence.—Leary v. State (Tex. Cr. App.) 822.

#### (G) NECESSITY, REQUISITES, AND SUFFICIENCY OF INSTRUCTIONS.

##### *In particular criminal prosecutions.*

See Assault and Battery, § 96; Burglary, § 46; Larceny, § 77; Libel and Slander, § 159.

§ 770. It is improper to refuse to instruct on an issue raised by the evidence.—Evans v. State (Tex. Cr. App.) 167.

§ 772. In prosecution for violating local option law, instruction submitting question not raised by the evidence *held* properly refused.—Dawson v. State (Tex. Cr. App.) 136.

§ 778. An instruction *held* to sufficiently present the defense of insanity under the evidence.—Tubb v. State (Tex. Cr. App.) 858.

§ 775. In a prosecution for theft, accused's evidence *held* not to exclude the theory that he was present at the time of the theft, so as to require a charge on the subject of alibi.—Underwood v. State (Tex. Cr. App.) 809.

§ 778. In a criminal prosecution, an instruction as to consideration of evidence of other offenses *held* erroneous.—Fields v. State (Tex. Cr. App.) 806.

§ 778. An instruction, which shifts the burden of proof by requiring the jury to believe affirmatively as true the facts recited before they can acquit defendant, is erroneous.—Harris v. State (Tex. Cr. App.) 839.

§ 780. Instruction as to accomplice testimony *held* improperly refused.—Close v. State (Tex. Cr. App.) 137; Floyd v. Same (Tex. Cr. App.) 138.

§ 780. Instruction as to accomplice testimony *held* defective.—Close v. State (Tex. Cr. App.) 137; Floyd v. Same (Tex. Cr. App.) 138.

§ 780. In a trial for theft, a charge regarding the testimony of an accomplice *held* insufficient.—Gardner v. State (Tex. Cr. App.) 148.

§ 780. In a trial for receiving and concealing stolen property, accused *held* entitled to instruction as to the corroboration of the testimony of an alleged accomplice.—Hanks v. State (Tex. Cr. App.) 149.

§ 780. Where the relation of a witness to the crime charged is in doubt, it is proper for



the court to submit the issue as to whether the witness was or was not an accomplice.—*Davis v. State* (Tex. Cr. App.) 159.

§ 782. An instruction reciting facts as developed by the evidence, and requiring the jury to believe all of such facts before defendant would be entitled to an acquittal, is erroneous.—*Harris v. State* (Tex. Cr. App.) 839.

§ 783. In a trial for receiving stolen cotton, an instruction as to the effect of evidence of the receipt of other stolen cotton *held* properly refused.—*Hanks v. State* (Tex. Cr. App.) 150.

§ 783. The evidence which shows a distinct robbery from that charged should be limited by instructions in its application to the offense on trial.—*Harris v. State* (Tex. Cr. App.) 839.

§ 784. Where, in a trial for receiving stolen property, an accomplice testified positively to taking the property to accused, a charge on circumstantial evidence was properly refused.—*Hanks v. State* (Tex. Cr. App.) 150.

§ 784. The case of larceny made out *held* one of direct, and not circumstantial, evidence, so that a charge on circumstantial evidence was properly refused.—*Farris v. State* (Tex. Cr. App.) 798.

§ 789. In a prosecution for theft of a cow question of reasonable doubt *held* sufficiently charged, in view of the evidence and the other charges on the subject.—*Farris v. State* (Tex. Cr. App.) 798.

§ 814. Where the state's evidence in a prosecution for feloniously wounding and disfiguring, if true, establishes a felonious assault, and accused's evidence, if true, entitles her to an acquittal, a charge on simple assault is properly refused.—*State v. Nienhaus* (Mo.) 73.

§ 814. Hearsay evidence, admitted without objection, *held* sufficient basis for a charge.—*Leary v. State* (Tex. Cr. App.) 822.

§ 814. In a trial for embezzling property *held* unnecessary to instruct that the jury find that accused sold it as his own property.—*Henderson v. State* (Tex. Cr. App.) 825.

§ 822. A charge must be construed as a whole.—*Buckner v. State* (Tex. Cr. App.) 802.

§ 822. A charge submitting the defense of insanity *held* not misleading.—*Smith v. State* (Tex. Cr. App.) 966.

#### (H) REQUESTS FOR INSTRUCTIONS.

§ 828. It is not error to refuse oral instructions.—*Schoennerstedt v. State* (Tex. Cr. App.) 829.

§ 829. It is not error to refuse an instruction, where the instructions given omit no feature of the law applicable to the case.—*Risner v. Commonwealth* (Ky.) 318.

§ 829. In an embezzlement trial, an instruction *held* properly refused in view of one given.—*Henderson v. State* (Tex. Cr. App.) 825.

#### (J) CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

§ 859. On the return of the jury to have certain evidence repeated, a question which they desire to have asked should be first submitted to defendant.—*Jack v. State* (Tex. Cr. App.) 139.

§ 866. Verdict assessing imprisonment *held* not vitiated by experimental votes.—*Cravens v. State* (Tex. Cr. App.) 156.

#### (K) VERDICT.

§ 875. A verdict in a prosecution for the illegal sale of liquor, while somewhat informal for omitting the word "punishment," *held* sufficient.—*State v. Stamper* (Mo. App.) 1192.

§ 881. A verdict in a prosecution for burglary *held* sufficient, in view of Code Cr. Proc. 1895, art. 743.—*Jones v. State* (Tex. Cr. App.) 127.

#### XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 917. Though Rev. St. 1879, arts. 564, 565, do not, on application for continuance for absence of witness, permit inquiry into the truthfulness or materiality of the absent testimony, *held*, that evidence having been admitted on motion for new trial for denial of the continuance, and its overwhelming weight carrying certain conviction that the witness would not have testified as expected, the conclusion of the court in denying new trial would be sustained.—*Steel v. State* (Tex. Cr. App.) 850.

§ 939. A motion for a new trial *held* properly overruled because of lack of diligence.—*Evans v. State* (Tex. Cr. App.) 820.

§ 940. In a prosecution for assault with intent to murder, where the evidence showed that accused shot the injured party, the mere fact that a useless pistol was found in the house where accused stayed was unimportant, and it was not error to refuse a new trial for newly discovered evidence of that fact.—*Reyes v. State* (Tex. Cr. App.) 152.

§ 941. Cumulative evidence *held* not ground for new trial.—*Evans v. State* (Tex. Cr. App.) 820.

§ 955. Where a bill of exceptions evidencing the fact that state's counsel had alluded to accused's failure to testify was not approved by the court and was not proved by bystanders, *held*, that testimony to prove the fact on motion for a new trial was inadmissible.—*Reyes v. State* (Tex. Cr. App.) 152.

§ 956. Evidence on motion for new trial *held* to show that there was no agreement among jurors, in advance of balloting on the length of imprisonment, that the number of years should be determined by a quotient ballot.—*Reyes v. State* (Tex. Cr. App.) 152.

§ 958. A new trial *held* properly refused for newly discovered evidence.—*Terry v. State* (Tex. Cr. App.) 801.

§ 968. Objections to local option elections cannot be made the basis of a motion in arrest of judgment in a prosecution for an unlawful liquor sale.—*Reno v. State* (Tex. Cr. App.) 129.

§ 968. The death of the trial judge *held* not ground for arrest of judgment.—*Ellis v. State* (Tex. Cr. App.) 978.

§ 974. So much of an amended motion for a new trial as purported to be in arrest of judgment *held* properly stricken because it was not filed within two days after conviction.—*Reno v. State* (Tex. Cr. App.) 129.

#### XV. APPEAL AND ERROR, AND CERTIORARI.

##### (A) FORM OF REMEDY, JURISDICTION, AND RIGHT OF REVIEW.

See Courts, § 231.

§ 1017. Where the trial judge died after conviction and a successor was illegally appointed who passed on a motion for new trial, an appeal therefrom would be invalid and the appellate court would have no jurisdiction.—*Ellis v. State* (Tex. Cr. App.) 978.

##### (B) PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

§ 1037. It is not ground for reversal where the improper remarks of the prosecuting attor-

may are not of such grave character as to prejudice accused's case.—*Smith v. State* (Tex. Cr. App.) 986.

§ 1037. Certain arguments of the prosecuting attorney *held* not of such a grave character as obviously to prejudice accused's case and to present error, where no charge withdrawing them was requested.—*Smith v. State* (Tex. Cr. App.) 986.

§ 1037. Certain argument of the prosecuting attorney on a trial for rape *held* not so prejudicial to accused as to require review on appeal in the absence of a request for an instruction directing the jury to disregard the same.—*Dies v. State* (Tex. Cr. App.) 979.

§ 1037. To require the court on appeal to review an error based on the improper argument of the prosecuting attorney, counsel for accused must ask for a written instruction withdrawing the improper argument, unless the remarks are obviously of a character to impair the rights of accused.—*Dies v. State* (Tex. Cr. App.) 979.

§ 1049. Error in selecting a special judge *held* not reviewable, where no exception was taken in the trial court.—*Sergeant v. Commonwealth* (Ky.) 362.

§ 1054. Where accused, in a prosecution for violating the local option law, does not except to proof of the adoption of the law by parol evidence and does not raise the question in his motion for new trial, an objection to proving the adoption of the law in that manner will not be considered on appeal.—*Bills v. State* (Tex. Cr. App.) 835.

§ 1059. An assignment that the court erred in failing to charge the law applicable to the facts as presented by accused will not be considered, where the exception to the charge is so general that it would not direct the court's attention to the respect wherein the charge was thought to be insufficient.—*Tubb v. State* (Tex. Cr. App.) 858.

§ 1063. Where accused, in a prosecution for violating the local option law, does not except to proof of the adoption of the law by parol evidence, and does not raise the question in his motion for new trial, an objection to proving the adoption of the law in that manner will not be considered on appeal.—*Bills v. State* (Tex. Cr. App.) 835.

§ 1063. Where accused saved his objection to the admissibility of evidence by bill of exceptions, he was not required to set forth the same matter in his motion for new trial.—*Tubb v. State* (Tex. Cr. App.) 858.

§ 1064. The refusal to grant a continuance on the ground of the absence of a witness, and the admission in evidence of the affidavit for a continuance, containing facts to which the absent witness would, if present, testify, not presented in the motion for a new trial, are not reviewable on appeal.—*Risner v. Commonwealth* (Ky.) 318.

§ 1064. Errors in the argument of the prosecuting attorney, not mentioned in the motion for a new trial, will not be reviewed.—*Risner v. Commonwealth* (Ky.) 318.

§ 1064. A ground of motion for new trial *held* to challenge the charge of the court and to furnish a basis for review of a contention on appeal.—*Tubb v. State* (Tex. Cr. App.) 858.

#### (C) PROCEEDINGS FOR TRANSFER OF CAUSE, AND EFFECT THEREOF.

§ 1081. In the absence of the entry of the notice of appeal, the appeal will be dismissed.—*Grusendorf v. State* (Tex. Cr. App.) 131.

#### (D) RECORD AND PROCEEDINGS NOT IN RECORD.

§ 1087. Where a notice of appeal does not appear in the record, the appeal will be dismissed.—*Rowland v. State* (Tex. Cr. App.) 797.

§ 1087. Where no notice of appeal appears in the record, the appeal will be dismissed on motion.—*Sawyer v. State* (Tex. Cr. App.) 831.

§ 1088. An affidavit filed in the Court of Criminal Appeals in support of an assignment of error in denying a continuance is not a part of the record, and cannot be considered in disposing of the assignment.—*Bice v. State* (Tex. Cr. App.) 163.

§ 1090. In the absence of a statement of facts and bill of exceptions, an instruction *held* not reviewable.—*Zinn v. State* (Tex. Cr. App.) 136.

§ 1090. In the absence of a statement of facts and bill of exceptions, an instruction *held* not reviewable.—*Zinn v. State* (Tex. Cr. App.) 136.

§ 1090. Where the record contains no statement of facts or bill of exceptions, a conviction will not be reviewed.—*Jeffries v. State* (Tex. Cr. App.) 146.

§ 1091. Bill of exceptions to refusal of application for continuance *held* sufficient, though not giving the application.—*Steel v. State* (Tex. Cr. App.) 850.

§ 1092. A trial judge, in preparing a statement explaining a bill of exceptions, need not be sworn.—*Cravens v. State* (Tex. Cr. App.) 156.

§ 1092. An assignment that the court erred in not charging the law applicable to the facts presented by accused will not be considered, where the bill of exceptions was in fact never approved by the court.—*Tubb v. State* (Tex. Cr. App.) 858.

§ 1094. Where the record contained neither bills of exception nor a statement of facts, conviction will be affirmed.—*Burks v. State* (Tex. Cr. App.) 130.

§ 1094. Where the record on appeal is without a statement of facts or bills of exception, no question is presented for revision.—*Buchanan v. State* (Tex. Cr. App.) 801.

§ 1094. There being no bill of exceptions in the record, the judgment will be affirmed, where the facts support the verdict and the charge of the court is correct.—*Davis v. State* (Tex. Cr. App.) 966.

§ 1097. Where the indictment was sufficient, and the instructions were proper under the facts provable under the indictment, errors urged in the motion for new trial cannot be considered on appeal, where the record contained no statement of facts.—*Webb v. State* (Tex. Cr. App.) 131.

§ 1097. In the absence of a statement of facts on appeal, questions as to the sufficiency of evidence *held* not reviewable.—*Jackson v. State* (Tex. Cr. App.) 990.

§ 1099. The 30-day rule as to filing statements of facts does not apply to county courts, so that, where that court made no order authorizing the filing of a statement after adjournment, a statement of facts filed 30 days thereafter cannot be considered on a criminal appeal.—*Webb v. State* (Tex. Cr. App.) 131.

§ 1106. Where the record was not filed in the office of the clerk of the Supreme Court within 60 days after a misdemeanor judgment was entered, as required by Kirby's Dig. § 2614, the appeal will be dismissed.—*Gross v. State* (Ark.) 531.

§ 1112. The Court of Criminal Appeals will not consider affidavits filed to contradict statements by a trial judge as to matters presented by bill of exceptions.—*Cravens v. State* (Tex. Cr. App.) 156.

§ 1120. Where the record does not show what incompetent evidence was admitted, or

what competent evidence was excluded, an objection that incompetent evidence was admitted, and competent evidence excluded, will not be considered.—*Risner v. Commonwealth (Ky.)* 318.

§ 1123. An objection that the verdict was that of 1 man, and not of 12 not bottomed on any fact or exception in the record, nor explained in the brief of counsel, will not be considered.—*Risner v. Commonwealth (Ky.)* 318.

§ 1128. To be available on review, evidence showing misconduct of the jury must be filed during the term.—*Jarrett v. State (Tex. Cr. App.)* 833.

#### (G) REVIEW.

§ 1134. Under Cr. Code Prac. § 281, the selection of a jury from an adjoining county by the trial court *held* not reviewable.—*Sargent v. Commonwealth (Ky.)* 362.

§ 1137. Accused cannot complain of testimony brought out by himself.—*Snead v. State (Tex. Cr. App.)* 983.

§ 1141. The Court of Criminal Appeals cannot assume, in a prosecution for violating a local option law, that the law has been adopted in any county.—*Bills v. State (Tex. Cr. App.)* 835.

§ 1144. The special judge who heard a criminal case will be presumed to have qualified, in the absence of a contrary showing in the record.—*State v. St. Clair (Mo. App.)* 648.

§ 1144. In reviewing a ruling refusing a continuance, the court will presume that the application was at least a second application, in the absence of a contrary showing.—*Buckner v. State (Tex. Cr. App.)* 802.

§ 1144. Where there is no statement of facts in the record, it will be assumed that the proof sustained a conviction.—*Jackson v. State (Tex. Cr. App.)* 990.

§ 1150. An application for a change of venue on the ground of prejudice against accused being addressed to the discretion of the court, a conviction will not be set aside because of the denial of the application unless the court abused its discretion.—*Tubb v. State (Tex. Cr. App.)* 858.

§ 1152. Matters of practice and evidence occurring during a criminal trial are largely to be determined by the trial court, and ordinarily his conclusions in respect thereto are binding on appeal.—*Reyes v. State (Tex. Cr. App.)* 152.

§ 1156. The refusal of a new trial for failure of an important witness to attend cannot be revised on appeal.—*Evans v. State (Tex. Cr. App.)* 820.

§ 1159. The Supreme Court will not review a judgment of conviction because the verdict is flagrantly against the evidence, or not supported by sufficient evidence, but will only inquire whether there was any evidence tending to show guilt.—*Levering v. Commonwealth (Ky.)* 253.

§ 1159. Credibility of witnesses *held* for the jury, and not to be passed on by the appellate court.—*Levering v. Commonwealth (Ky.)* 253.

§ 1159. A verdict supported by evidence will not be disturbed on appeal.—*Risner v. Commonwealth (Ky.)* 318.

§ 1159. A verdict on conflicting evidence will not be disturbed on appeal.—*Jarrett v. State (Tex. Cr. App.)* 833.

§ 1160. The finding of the court on conflicting evidence on a motion for a new trial will not be disturbed on appeal.—*Jarrett v. State (Tex. Cr. App.)* 833.

§ 1160. A verdict on conflicting evidence, and approved by the trial court, will not be dis-

turbed on appeal.—*Tubb v. State (Tex. Cr. App.)* 858.

§ 1166½. The error in overruling a challenge of a juror for cause *held* harmless in view of the court giving to accused an additional peremptory challenge for the one used in rejecting the juror.—*Dies v. State (Tex. Cr. App.)* 979.

§ 1167. The imposition of the lower punishment allowed by law does not cure the error of refusing to require the prosecution to elect between distinct offenses shown by the evidence.—*Harris v. State (Tex. Cr. App.)* 839.

§ 1169. Error in treating a witness as an accomplice, and requiring her testimony to be corroborated, was not prejudicial to accused, where the witness was not an accomplice.—*Levering v. Commonwealth (Ky.)* 253.

§ 1169. In a prosecution for wounding and disfiguring under Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), the admission of testimony of the wounded person as to whether accused had ever put anything on the sores produced or done anything relative thereto, if improper, *held* not reversible error.—*State v. Nieuhaus (Mo.)* 73.

§ 1169. Evidence, in a prosecution for violation of the local option law, *held* to have no substantial bearing on defendant's guilt.—*Fields v. State (Tex. Cr. App.)* 806.

§ 1169. Evidence, in a prosecution for violation of the local option law, *held* to have little bearing on the subject of the prosecution.—*Fields v. State (Tex. Cr. App.)* 806.

§ 1169. Permitting a physician testifying for the state as an expert on sanity or insanity of accused to state a fact *held* not reversible error.—*Tubb v. State (Tex. Cr. App.)* 858.

§ 1169. Permitting the jailer in whose custody accused, relying on insanity, had been, to testify to the conduct of accused, *held* not prejudicial error.—*Tubb v. State (Tex. Cr. App.)* 858.

§ 1169. On a trial for rape the admission in evidence as a part of the prosecutrix's complaint to a third person, of her statement that accused had raped her *held* not erroneous in view of the facts and the act of the court in withdrawing the evidence.—*Dies v. State (Tex. Cr. App.)* 979.

§ 1169. On a trial for unlawfully selling intoxicating liquors, the error, if any, in admitting certain evidence, *held* not prejudicial.—*Snead v. State (Tex. Cr. App.)* 983.

§ 1170. The exclusion of testimony as to animosity existing between accused and an adverse witness *held* not prejudicial, where the animosity was fully shown by other witnesses.—*State v. Nieuhaus (Mo.)* 73.

§ 1170. Exclusion of evidence in a prosecution for carrying a pistol *held* harmless error.—*McDonald v. State (Tex. Cr. App.)* 131.

§ 1170. Exclusion of evidence in a larceny case *held* not prejudicial.—*Underwood v. State (Tex. Cr. App.)* 809.

§ 1170. Accused *held* not prejudiced by the court's refusal to permit the principal witness for the state to be recalled for the purpose of getting him to deny a statement, so as to impeach his testimony by another witness.—*Bills v. State (Tex. Cr. App.)* 835.

§ 1171. In a criminal prosecution, a remark of the prosecuting attorney *held* harmless.—*Davis v. State (Tex. Cr. App.)* 138.

§ 1172. In a prosecution of a druggist for illegally selling intoxicants, error in an instruction in requiring accused to prove, not only that the sale was against his order, but that he had a physician's prescription authorizing it, *held*

misleading and prejudicial.—*State v. Stamper* (Mo. App.) 1192.

§ 1172. Under Code Cr. Proc. 1895, art. 723, an instruction, in a prosecution for violation of the local option law, *held* harmless.—*Fields v. State* (Tex. Cr. App.) 806.

§ 1174. The error of the court in refusing to allow defendant to see a question which the jury desired to have asked a witness after they have returned into open court, after having retired to consider of their verdict, *held* harmless.—*Jack v. State* (Tex. Cr. App.) 139.

§ 1174. A conviction will not be set aside for misconduct of the jury in referring to and discussing accused's failure to testify, unless it fairly and reasonably appears in the light of all the circumstances that the reference and discussion did or might probably prejudice accused.—*Reyes v. State* (Tex. Cr. App.) 152.

§ 1174. Discussion by jury of accused's failure to testify *held* ground for reversal of the conviction.—*Reyes v. State* (Tex. Cr. App.) 152.

#### (H) DETERMINATION AND DISPOSITION OF CAUSE.

§ 1181. Where a question suggested for reversal on account of overruling an application for a continuance will not arise on another trial, it will not be decided.—*Close v. State* (Tex. Cr. App.) 137; *Floyd v. Same* (Tex. Cr. App.) 138.

§ 1182. The Supreme Court cannot affirm a misdemeanor judgment for failure to prosecute the appeal, where the record is not filed in the clerk's office within 60 days after judgment, as required by Kirby's Dig. § 2614; Supreme Court rule 7 not applying.—*Gross v. State* (Ark.) 531.

§ 1182. Where the record contains neither bill of exceptions nor statement of facts, and the indictment is in proper form, and no error is apparent, the judgment will be affirmed.—*Spillman v. State* (Tex. Cr. App.) 801.

#### XVI. SUCCESSIVE OFFENSES AND HABITUAL CRIMINALS.

§ 1202. Under Pen. Code 1895, art. 1014, a prior conviction of violating the Sunday law *held* a conviction of an offense similar in character to the charge that accused opened his theater for public amusement on Sunday.—*Muckenfuss v. State* (Tex. Cr. App.) 853.

§ 1202. The records of the corporation court of a city *held* to show the conviction of accused of similar offenses, within Pen. Code 1895, art. 1014.—*Muckenfuss v. State* (Tex. Cr. App.) 853.

#### CROPS.

Measure of damages for destruction of, see Damages, § 112.

#### CURTESY.

See Dower.

#### CUSTODY.

Of child, see Divorce, § 298.

Of jury, see Criminal Law, §§ 859, 866; Trial, § 307.

Of property levied on, see Attachment, § 178.

#### CUSTOMS AND USAGES.

§ 5. To make evidence of an alleged custom or usage admissible, it must be shown to have existed sufficiently long to have become generally known.—*Merchants' Grocery Co. v. Ladoga Canning Co.* (Ark.) 767.

§ 19. In an action by a consignee for damages to cotton after delivery by the carrier to a compress company, instead of to the consignee, the burden of proving a custom to deliver the cotton to the compress company was on the carrier.—*Arkansas Midland Ry. Co. v. Moody* (Ark.) 757.

#### DAMAGES.

Compensation for property taken for use, see Eminent Domain, § 155.

Opinion evidence as to amount, see Evidence, § 543½.

##### *Damages for particular injuries.*

See Death, §§ 86-99; False Imprisonment, §§ 53, 35; Fraud, §§ 59, 60; Libel and Slander, § 114; Malicious Prosecution, §§ 67, 68.

Breach by buyer of contract for sale of goods, see Sales, §§ 357, 364.

Breach by seller of contract for sale of goods, see Sales, §§ 413, 418.

Breach by vendee of contract for sale of land, see Vendor and Purchaser, §§ 330, 331, 350.

For loss of or injury to shipment of live stock, see Carriers, § 229.

Negligence in transmission of telegram, see Telegraph and Telephones, § 71.

Obstruction of surface waters, see Waters and Water Courses, § 125.

Pollution of water course, see Waters and Water Courses, § 76.

#### III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

##### (A) DIRECT OR REMOTE, CONTINGENT, OR PROSPECTIVE, CONSEQUENCES OR LOSSES.

Damages for false imprisonment, see False Imprisonment, § 34.

§ 23. Measure of damages for breach of contract, stated.—*Southwestern Telegraph & Telephone Co. v. Solomon* (Tex. Civ. App.) 214.

§ 26. Recovery can only be had for such future apprehended consequences of an injury or existing condition as will reasonably or probably result therefrom, and the jury in assessing damages therefor should be confined by the charge to such probable results.—*Rapid Transit Ry. Co. v. Allen* (Tex. Civ. App.) 486.

§ 38. In an action for personal injuries, a lessened capacity to earn money is a sufficient basis for the recovery of damages.—*St. Louis Southwestern Ry. Co. of Texas v. Niblack* (Tex. Civ. App.) 188.

§ 56. There is no right of recovery for mere injury to feelings caused by breach of contract.—*Southwestern Telegraph & Telephone Co. v. Solomon* (Tex. Civ. App.) 214.

##### V. EXEMPLARY DAMAGES.

For false imprisonment, see False Imprisonment, § 35.

§ 87. Exemplary damages cannot be recovered in the absence of a showing of actual damages.—*Beckham v. Collins* (Tex. Civ. App.) 431.

##### VI. MEASURE OF DAMAGES.

For fraud in inducing purchase of land, see Fraud, § 59.

##### (A) INJURIES TO THE PERSON.

See False Imprisonment, § 33.

§ 95. A passenger was only entitled, in an action for personal injuries, to just and adequate compensation for her injuries, pain, and suffering, where there was no element of wantonness in the case.—*Partello v. Missouri Pac. Ry. Co.* (Mo.) 1138.

§ 95. To allow compensation for mental and physical suffering, past and future, and also for diminished capacity to labor and earn money in the future, is not an allowance of double damages.—*Lyon v. Bedgood* (Tex. Civ. App.) 897.

§ 95. The allowance of damages for mental and physical suffering and also the value of lost time or capacity to attend to one's business or to earn money may be recovered for personal injuries without the verdict being subject to the objection of awarding double damages.—*Houston Electric Co. v. Seegar* (Tex. Civ. App.) 900.

#### (B) INJURIES TO PROPERTY.

Pollution of water course, see *Waters and Water Courses*, § 76.

§ 112. An instruction as to the measure of damages to crops *held* erroneous.—*Jonesboro, L. C. & E. Ry. Co. v. Cable* (Ark.) 550.

§ 112. In an action for the destruction of, and injury to, an onion crop, the measure of damages stated.—*Missouri, K. & T. Ry. Co. of Texas v. Riverhead Farm* (Tex. Civ. App.) 1049.

#### (C) BREACH OF CONTRACT.

§ 120. The measure of damages for breach of a builder's contract is the cost of completing the building, less the contract price.—*Franks v. Harkness* (Tex. Civ. App.) 918.

### VII. INADEQUATE AND EXCESSIVE DAMAGES.

#### *For particular injuries.*

Loss of or injuries to live stock in course of transportation, see *Carriers*, § 229.

§ 130. A verdict for \$658, in an action by a passenger for injuries received, *held* not excessive.—*Arkansas Midland R. Co. v. Rambo* (Ark.) 784.

§ 130. Evidence as to the nature of personal injuries considered, and *held*, that a verdict for \$8,000 is not so excessive as to justify a reversal.—*Southern Ry. Co. in Kentucky v. Brewer* (Ky.) 958.

§ 180. In a passenger's action for injuries sustained in a collision, evidence *held* to show that a verdict for \$20,000 was so excessive as to require a new trial.—*Partello v. Missouri Pac. Ry. Co.* (Mo.) 1138.

§ 131. A verdict for \$450, in an injury action against a carrier, *held* not excessive.—*St. Louis, I. M. & S. Ry. Co. v. Grimsley* (Ark.) 1064.

§ 132. A verdict awarding a servant \$20,320 for injuries sustained *held* excessive, and reduced to \$12,000.—*Aluminum Co. of North America v. Ramsey* (Ark.) 568.

§ 132. A verdict for \$800 *held* not excessive for personal injuries.—*Louisville & N. R. Co. v. Shelburne* (Ky.) 803.

§ 132. A verdict of \$7,500 for personal injury to the head *held* not excessive.—*Phelps v. Conqueror Zinc & Lead Co.* (Mo.) 705.

§ 132. The verdict in a personal injury action *held* not excessive.—*Texas & N. O. R. Co. v. McCoy* (Tex. Civ. App.) 446.

§ 132. Evidence in an action for personal injuries *held* to sustain a finding that plaintiff's injury might be permanent, so that a verdict for \$10,000 is not so great as to indicate that the jury were actuated by improper motives.—*Houston Electric Co. v. Seegar* (Tex. Civ. App.) 900.

§ 139. Evidence in an action against a United States marshal *held* to sustain the verdict.—*Sharp v. Layne* (Ky.) 292.

### VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

#### (A) PLEADING.

§ 142. Where a petition contains a general allegation of damages, and also specially avers the particular items of damage claimed, the special allegations will control.—*Houston & T. C. Ry. Co. v. Rogers* (Tex. Civ. App.) 1053.

§ 158. A petition, in an action for personal injuries, *held* sufficient to authorize the admission of certain evidence.—*Texas & N. O. R. Co. v. McCoy* (Tex. Civ. App.) 446.

§ 158. Allegations in a personal injury action *held* to warrant certain proof respecting plaintiff's mental condition.—*Rapid Transit Ry. Co. v. Allen* (Tex. Civ. App.) 486.

§ 158. Rule governing pleading of damage in a personal injury action stated.—*Rapid Transit Ry. Co. v. Allen* (Tex. Civ. App.) 486.

§ 158. Proof of impairment of the mental faculties will be received usually under allegations of grievous or permanent bodily injury.—*Rapid Transit Ry. Co. v. Allen* (Tex. Civ. App.) 486.

#### (B) EVIDENCE.

§ 163. In a passenger's action for sickness caused by his wrongful ejection, it was error to permit the jury to consider the amount paid out for medicines and doctors' bills, where there was no evidence as to the reasonableness of those expenditures.—*Missouri, K. & T. Ry. Co. of Texas v. Willis* (Tex. Civ. App.) 170.

§ 174. In an action for damages to grazing lands from herding sheep thereon, tramping down grass, consuming and polluting water, and injuring the tanks, where there was no market value of the grass, water, or tanks, the price plaintiff was paying the state for the pasturage was immaterial on the question of his damages.—*Tippett v. Corder* (Tex. Civ. App.) 186.

§ 174. In an action for damage to an onion crop, mode of proving damages stated.—*Missouri, K. & T. Ry. Co. of Texas v. Riverhead Farm* (Tex. Civ. App.) 1049.

§ 187. In an action for personal injuries, a judgment for at least nominal damages for impairment of earning capacity *held* justified under the evidence.—*St. Louis Southwestern Ry. Co. of Texas v. Niblack* (Tex. Civ. App.) 188.

§ 187. Where plaintiff's injuries are shown to justify the conclusion that his capacity to earn money has been lessened, the right to a recovery of some damages therefor is established.—*St. Louis Southwestern Ry. Co. of Texas v. Niblack* (Tex. Civ. App.) 188.

§ 188. Evidence *held* to warrant a recovery for the entire destruction of a crop.—*Jonesboro, L. C. & E. Ry. Co. v. Cable* (Ark.) 550.

#### (C) PROCEEDINGS FOR ASSESSMENT.

§ 206. Defendant could not require the court to appoint physicians to examine plaintiff, or compel plaintiff to submit to such examination.—*Missouri, K. & T. Ry. Co. of Texas v. Rogers* (Tex. Civ. App.) 939.

§ 216. In an action against a carrier for injuries sustained by falling through a seat in its depot, an instruction on plaintiff's measure of damages *held* not erroneous.—*St. Louis, I. M. & S. Ry. Co. v. Grimsley* (Ark.) 1064.

§ 216. An instruction *held* not misleading as to elements of damages allowable for personal injury.—*Phelps v. Conqueror Zinc & Lead Co.* (Mo.) 705.

§ 216. Where a passenger claimed damages for 20 days' loss of time, but his testimony showed 60 days' loss of time, *held* error to re-

fuse an instruction limiting recovery to 20 days.—Missouri, K. & T. Ry. Co. of Texas v. Willis (Tex. Civ. App.) 170.

§ 216. In an action for personal injuries, the petition *held* to authorize an instruction permitting the jury to consider plaintiff's lessened capacity to labor and earn money in the future in determining his damages.—Texas & P. Ry. Co. v. Crawford (Tex. Civ. App.) 193.

§ 216. A charge, in an action for expulsion from a depot waiting room, *held* not subject to objection as authorizing a double recovery for humiliation and pain, nor calculated to cause the jury to allow such a recovery.—Texas Midland R. Co. v. Geraldton (Tex. Civ. App.) 1004.

§ 216. A double recovery *held* not authorized by an instruction in a personal injury case.—Texas Midland R. Co. v. Geraldton (Tex. Civ. App.) 1004.

§ 220. The jury cannot give damages for items not sued for.—Beckham v. Collins (Tex. Civ. App.) 431.

§ 222. In an action for destruction of and injury to an onion crop, that the court in its findings set out certain evidence *held* not to show that it resorted to an improper measure of damages.—Missouri, K. & T. Ry. Co. of Texas v. Riverhead Farm (Tex. Civ. App.) 1049.

## DEATH.

Of party to action ground for abatement, see Abatement and Revival, §§ 61, 72.

Of trial judge after conviction of accused as affecting jurisdiction of appeal, see Criminal Law, § 1017.

Of trial judge after conviction of accused as ground for arrest of judgment, see Criminal Law, § 968.

Suspension of running of statute of limitation, see Limitation of Actions, § 80.

## II. ACTIONS FOR CAUSING DEATH.

### (A) RIGHT OF ACTION AND DEFENSES.

§ 7. An action to recover for death by wrongful act can only be maintained under St. 1909, § 6 (Russell's St. § 11), giving a right of action for death by wrongful act, which was enacted pursuant to Const. § 241; no such right of action existing at common law.—Smith's Adm'r v. National Coal & Iron Co. (Ky.) 280.

§ 11. At common law there is no right of action for negligent death.—Gutierrez v. El Paso & N. E. R. Co. (Tex.) 426.

§ 14. It is as much the law since, as before, the amendment of Rev. St. § 2864, by Acts 1905, p. 136 (Ann. St. 1906, p. 1637), fixing the amount of recovery for death, that one cannot recover for a death which was not the result of unskillfulness, negligence, or criminal intent.—Potter v. St. Louis & S. F. R. Co. (Mo. App.) 593.

§ 14. To sustain an action by a widow for herself and as next friend for her minor children for the unlawful killing of her husband, *held* only necessary to show an unlawful killing of decedent by defendant.—Gray v. Phillips (Tex. Civ. App.) 870.

§ 14. A defendant *held* not entitled to the perfect right of self-defense, and was liable to the widow and children of decedent for killing him.—Gray v. Phillips (Tex. Civ. App.) 870.

§ 15. Decedent's husband and children *held* not entitled to recover from a telephone company for her death, through the company breaking a general contract for telephone service, resulting in a delay in procuring a physician.—Southwestern Telegraph & Telephone Co. v. Solomon (Tex. Civ. App.) 214.

§ 19. A widow instituting a suit for the negligent death of her husband must show a compliance with the statutory conditions.—Gutierrez v. El Paso & N. E. R. Co. (Tex.) 426.

§ 23. Contributory negligence is a defense to an action brought pursuant to St. 1909, § 6 (Russell's St. § 11), giving a right of action for death by wrongful act, for the death of an infant, while employed in a coal mine in violation of St. 1909, § 331a (Russell's St. §§ 3237-3251a [5]), prohibiting the employment of infants under 14 years old in a mine.—Smith's Adm'r v. National Coal & Iron Co. (Ky.) 280.

§ 31. Under the federal employer's liability act (Act Cong. June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]), the widow of an employe of a carrier killed through the negligence of the latter *held* entitled to sue as administratrix for the use of herself as widow.—Gutierrez v. El Paso & N. E. R. Co. (Tex.) 426.

### (D) PLEADING AND EVIDENCE.

§ 52. In an action for death by the widow and minor children of decedent, the petition *held* to authorize the recovery of damages allowed for the loss of the assistance, care, and nurture of husband and father.—Houston & T. C. R. Co. v. Davenport (Tex.) 790.

§ 60. In an action for the unlawful killing of decedent, the opinion of an expert as to whether a pistol ball striking a body at a certain point would pass through the body or lodge therein *held* properly excluded.—Gray v. Phillips (Tex. Civ. App.) 870.

§ 65. In an action against railway companies for negligent death, life tables were properly admitted in evidence.—Southern Ry. Co. v. Adkins' Adm'r (Ky.) 321.

§ 75. Evidence in an action for wrongful death *held* to show such negligence as to closely border on criminal carelessness.—Potter v. St. Louis & S. F. R. Co. (Mo. App.) 593.

### (E) DAMAGES, FORFEITURE, OR FINE.

§ 86. "Pecuniary aid" for which recovery may be had for wrongful death, defined.—Missouri, K. & T. Ry. Co. of Texas v. Williams (Tex. Civ. App.) 1043.

§ 88. In an action for wrongful death, recovery is limited to the present value of the pecuniary aid plaintiffs have a reasonable expectation that decedent would have contributed to them had he lived, and excluding any allowance for grief and loss of society and affection.—Missouri, K. & T. Ry. Co. of Texas v. Williams (Tex. Civ. App.) 1043.

§ 89. In an action for wrongful death, recovery is limited to the present value of the pecuniary aid plaintiffs have a reasonable expectation that decedent would have contributed to them had he lived, and excluding any allowance for grief and loss of society and affection.—Missouri, K. & T. Ry. Co. of Texas v. Williams (Tex. Civ. App.) 1043.

§ 95. The measure of recovery by a widow and minor children for the unlawful killing of decedent stated.—Gray v. Phillips (Tex. Civ. App.) 870.

§ 97. Rev. St. 1899, § 2864, as amended by Acts 1905, p. 136 (Ann. St. 1906, p. 1637), fixes recovery for death at not less than \$2,000, and not to exceed \$10,000, "in the discretion of the jury," and the court cannot limit recovery to \$2,000.—Potter v. St. Louis & S. F. R. Co. (Mo. App.) 593.

§ 99. A verdict of \$3,000 for the death of a common laborer who was the sole support of his wife and three children is not excessive.—Potter v. St. Louis & S. F. R. Co. (Mo. App.) 593.

§ 99. In an action for the death of a locomotive engineer, who was 31 years of age, earning from \$165 to \$175 per month, and who left a wife and three children, a verdict for \$25,000 *held* not excessive.—Missouri, K. & T. Ry. Co. of Texas v. Williams (Tex. Civ. App.) 1043.

**(F) TRIAL, JUDGMENT, AND REVIEW.**

§ 102½. Where, in an action for negligent death, a motion for an autopsy of the body of decedent for the purpose of establishing defendant's theory of self-defense was properly denied, the refusal to permit the motion to be read to the jury was proper.—Gray v. Phillips (Tex. Civ. App.) 870.

§ 102½. The court has inherent power to order the exhuming of a dead body on it appearing that justice and right will be defeated in case such order is not made.—Gray v. Phillips (Tex. Civ. App.) 870.

§ 102½. In an action by a widow for herself and minor children for the unlawful killing of her husband by defendant, the denial of defendant's motion for an autopsy *held* not erroneous.—Gray v. Phillips (Tex. Civ. App.) 870.

§ 103. Whether a mother in control of a child, six years old, was guilty of negligence, precluding a recovery for the death of the child, *held* for the jury.—Day v. Consolidated Light, Power & Ice Co. (Mo. App.) 81.

§ 104. In an action for wrongful death, an instruction as to damages *held* not erroneous.—St. Louis, I. M. & S. Ry. Co. v. Garner (Ark.) 763.

§ 104. In an action by parents for the death of a minor child, an instruction *held* erroneous as imposing on defendant the burden of proving its freedom from negligence.—Day v. Consolidated Light, Power & Ice Co. (Mo. App.) 81.

§ 104. In an action for the unlawful killing of decedent, an instruction on self-defense *held* proper under the evidence.—Gray v. Phillips (Tex. Civ. App.) 870.

**DEBTOR AND CREDITOR.**

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances.

**DECEDENTS.**

Estates, see Descent and Distribution; Executors and Administrators.

Testimony as to transactions with persons since deceased, see Witnesses, §§ 144, 163.

**DECEIT.**

See Fraud.

**DECLARATION.**

In pleading, see Pleading, §§ 49, 62.

**DECLARATIONS.**

As evidence in civil actions, see Evidence, § 271. As evidence in criminal prosecutions, see Criminal Law, §§ 406-419.

Dying declarations, see Homicide, § 216.

**DEDICATION.**

**I. NATURE AND REQUISITES.**

§ 5. The common law upheld immemorially dedications by landowners and acceptance by the public as a valid method of creating highways, and this doctrine became, at an early date, part of the jurisprudence of this state.—State v. Muir (Mo. App.) 620.

§ 37. Continuous use by the public, as occasion arose, for a period of 12 years, of a dedicat-

ed strip along one side of a highway, is evidence of its acceptance; at least if it had continued so long and been so extensive that the public would be materially discommoded and private rights impaired by interrupting it.—State v. Muir (Mo. App.) 620.

§ 37. Rev. St. 1899 § 9472 (Ann. St. 1906, p. 4347), *held* to have no relevancy to the mode in which a voluntary dedication of land for a road may be accepted by the public.—State v. Muir (Mo. App.) 620.

**DEEDS.**

Acknowledgment of execution, see Acknowledgment.

Covenants in deeds, see Covenants.

In fraud of creditors, see Fraudulent Conveyances.

In trust, see Trusts, §§ 41, 56.

Reformation, see Reformation of Instruments.

*Deeds by or to particular classes of persons.*

See Husband and Wife, § 48; Infants, §§ 39-41.

*Deeds of particular species of, or estates or interest in, property.*

See Mines and Minerals, § 53.

*Particular classes of deeds.*

Of trust, see Mortgage.

Partition deeds, see Partition, § 9.

Tax deeds, see Taxation, § 781.

**I. REQUISITES AND VALIDITY.**

**(B) FORM AND CONTENTS OF INSTRUMENTS.**

§ 38. Description in deed *held* sufficiently definite to permit extrinsic evidence to identify property.—McCullum v. Buckner's Orphans' Home (Tex. Civ. App.) 886.

**(E) VALIDITY.**

§ 68. One possesses sufficient mental capacity to execute a deed of gift to a child when he possesses sufficient intelligence to understand his ordinary business, and what disposition he is making of his property.—Jones v. Thomas (Mo.) 1177.

§ 72. To prove confidential relations between a father and son, it must appear that the son had charge and control of the father, and that he cared for him, or that he had charge of and conducted his business.—Jones v. Thomas (Mo.) 1177.

**III. CONSTRUCTION AND OPERATION.**

**(B) PROPERTY CONVEYED.**

§ 119. The purpose of the execution of a second deed by the original grantors to the grantees *held* for the jury.—Poitevent v. Scarborough (Tex. Civ. App.) 443.

**(C) ESTATES AND INTERESTS CREATED.**

§ 120. A deed *held* not to convey a certain tract of land.—Potter v. Long (Mo.) 724.

§ 120. A deed construed to pass an estate to the grantees by purchase and not by descent.—Buxton v. Kroeger (Mo.) 1147; Same v. Lauman (Mo.) 1162; Same v. Dunn (Mo.) 1163.

§ 121. A purchaser for value under a quitclaim deed *held* to acquire only whatever title the grantor has.—Starr v. Bartz (Mo.) 1125; Same v. Kisner (Mo.) 1129.

§ 133. A deed construed to pass a contingent remainder.—Buxton v. Kroeger (Mo.) 1147; Same v. Lauman (Mo.) 1162; Same v. Dunn (Mo.) 1163.

**(E) CONDITIONS AND RESTRICTIONS.**

§ 149. A condition to a grant against alienation to any one is void, but conditions preventing alienation to a specified person, or his heirs, etc., are valid.—*Harkness v. Lisle* (Ky.) 264; *Lisle v. Same*, *Id.*

§ 149. A restraint on alienation for a reasonable time is valid.—*Harkness v. Lisle* (Ky.) 264; *Lisle v. Same*, *Id.*

**(F) LOSS OR RELINQUISHMENT OF RIGHTS.**

§ 181. Where the original deed in a vendor's chain of title has been destroyed in a fire which destroyed the county records, the defect in the title is cured by a quitclaim executed by his grantor and wife.—*Lang v. Murphy* (Mo. App.) 685.

**IV. PLEADING AND EVIDENCE.**

§ 193. In order to presume the existence of a deed, it is not necessary that there be evidence of a deed, or other writing, upon which to base such presumption.—*McCullum v. Buckner's Orphans' Home* (Tex. Civ. App.) 886.

§ 194. Where there is no evidence of the date of the delivery of a deed, it will be presumed to have been delivered on the date of execution.—*Beall v. Chatham* (Tex. Civ. App.) 492.

§ 196. Facts held not to show a fiduciary relation between parent and child so as to cast on the child the burden of proving that a conveyance to him from the parent was the latter's fair and free will.—*Huffman v. Huffman* (Mo.) 1.

§ 196. Where a confidential relation existed between grantor and grantee, the burden of proving that grantor possessed mental capacity to make a deed, and that the deed was his free act, uninfluenced by any improper conduct of grantee, rested on grantee.—*Jones v. Thomas* (Mo.) 1177.

§ 196. The law presumes that a grantor was of sound mind at the time he made the deed, and the burden of disproving that fact rests on the one asserting the contrary.—*Jones v. Thomas* (Mo.) 1177.

§ 200. Evidence in an action for money loaned held admissible as bearing on question of acceptance of deed.—*Pullis v. Somerville* (Mo.) 736.

§ 203. In a suit by an heir to set aside his ancestor's deed to another heir, declarations of the ancestor made prior to the execution of the deed held admissible to show a fixed purpose on his part to convey the land to the grantee.—*Jones v. Thomas* (Mo.) 1177.

§ 203. In a suit by an heir to set aside a deed of his ancestor to another heir, certain declarations of the ancestor held admissible to show his mental condition and the state of his affections.—*Jones v. Thomas* (Mo.) 1177.

§ 203. In a suit by an heir to set aside a deed of his ancestor to another heir, declarations of the ancestor showing improper acts on the part of the grantee and the members of his family are inadmissible to establish undue influence.—*Jones v. Thomas* (Mo.) 1177.

§ 208. Evidence in an action to recover money loaned held not to show an acceptance of deeds of property which defendant alleged that he had transferred to plaintiff.—*Pullis v. Somerville* (Mo.) 736.

§ 208. Evidence, in trespass to try title, as to the date of the delivery of a deed, held not sufficient to sustain a finding that as matter of law it was prior to the delivery of another deed of the same date.—*Beall v. Chatham* (Tex. Civ. App.) 492.

§ 211. Evidence held to justify a finding that deed by a parent to a child was not procured by undue influence.—*Huffman v. Huffman* (Mo.) 1.

§ 211. Evidence held to justify a finding that a grantor possessed sufficient mental capacity to execute a deed.—*Huffman v. Huffman* (Mo.) 1.

§ 211. Evidence held not to show duress in procurement of a deed of trust.—*Glascock v. Glascock* (Mo.) 67.

§ 211. Evidence held to justify a finding that a grantor possessed sufficient mental capacity to execute a deed of gift to a child.—*Jones v. Thomas* (Mo.) 1177.

§ 211. Evidence held to justify a finding that a deed was not procured by the undue influence of the grantee.—*Jones v. Thomas* (Mo.) 1177.

**DEFAMATION.**

See Libel and Slander.

**DEFAULT.**

Judgment by, see Judgment, §§ 107-145.

**DEFECTS.**

In railroad tracts and equipment as excuse for delay and delivery of goods by carrier, see Carriers, § 99.

**DEGREES.**

Of murder, see Homicide, § 23.

**DELAY.**

In transportation or delivery of goods by carrier, see Carriers, § 99.  
Laches, see Equity, § 87.

**DELEGATION.**

Of legislative powers, see Constitutional Law, § 62.

**DELIVERY.**

Of deed, see Escrows.  
Of goods by carrier, see Carriers, §§ 86, 94.  
Of goods to carrier, see Carriers, § 40.  
Of goods sold, see Sales, § 201.  
Of insurance policy, see Insurance, § 136.

**DEMAND.**

Necessity of demand in order to start running of interest on legacy, see Wills, § 734.

**DEMURRER.**

As part of record on appeal or error, see Appeal and Error, § 518.  
In pleading, see Pleading, §§ 210-221.

**DEPOSITARIES.**

Of deeds delivered as escrow, see Escrows.

**DEPOSITIONS.**

See Affidavits; Witnesses.  
Reading depositions at trial, see Trial, § 40.

§ 12. Under Civ. Code Prac. § 534, a witness who lives 40 miles from the place where a master commissioner is taking evidence may be required to give his deposition.—*Sealy v. Willis-ton* (Ky.) 959.

§ 79. Under Civ. Code Prac. § 583, an exception is properly sustained to a deposition not



directed to and filed with the clerk of the circuit court.—*Sealy v. Williston* (Ky.) 959.

§ 81. A deposition may be withdrawn and irregularities corrected by the officer taking it under the order of the court, and this can be done in the presence of the court.—*Gray v. Phillips* (Tex. Civ. App.) 870.

§ 81. Where depositions not properly returned by the officer taking them had not been tampered with, the court might permit their withdrawal for the correction of the irregularities, and then permit their use, on the officer making the required corrections.—*Gray v. Phillips* (Tex. Civ. App.) 870.

§ 107. An exception to a deposition for failure to comply with Civ. Code Prac. § 563, should be passed upon before beginning the trial on the merits.—*Sealy v. Williston* (Ky.) 959.

## DEPOSITS.

In bank, see Banks and Banking, §§ 119-154.

## DEPOTS.

Ejection of persons from railroad waiting room, see Carriers, §§ 372, 383, 384.

## DERAILMENT.

Of car causing injury to passenger, see Carriers, §§ 318, 320.

## DESCENT AND DISTRIBUTION.

See Dower; Executors and Administrators; Wills.

## II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.

### (B) SURVIVING HUSBAND OR WIFE.

§ 65. Under Rev. St. 1899, §§ 2933, 2935, 2936, 2939, 2940, 2941, 2942, 2943 (Ann. St. 1906, pp. 1690, 1693-1696), the failure of the widow of a husband dying without descendants to elect within the required time to take dower, as provided in sections 2939, 2940, 2941, held not to prevent her from taking absolutely one-half of the personal estate under section 2939.—*Brown v. Tucker's Estate* (Mo. App.) 96.

## III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

Right to appeal from judgment allowing claim against estate, see Executors and Administrators, § 256.

### (A) NATURE AND ESTABLISHMENT OF RIGHTS IN GENERAL.

§ 82. An heir held entitled to a conveyance from another heir of such part of the ancestor's land as would equalize her with the other heirs.—*Gilbert v. Gilbert* (Ky.) 355.

## DESCRIPTION.

In deed, see Deeds, § 38.  
Names of individuals, see Names.  
Of devisees or legatees in will, see Wills, §§ 525, 531.  
Of property conveyed, see Boundaries, §§ 8, 15; Deeds, § 119.  
Of property devised or bequeathed, see Wills, § 560.

## DESERTION.

Ground for divorce, see Divorce, § 37.

## DEVICES.

See Wills.

## DISABILITIES.

Contributory negligence of persons under disability, see Negligence, § 85.

## DISCHARGE.

*From indebtedness, obligation, or liability.*

See Compromise and Settlement; Judgment, § 801.

Liability as assignee, see Assignments for Benefit of Creditors, §§ 885-895.

Liability as guarantor, see Guaranty, § 70.

## DISCONTINUANCE.

Of action, see Dismissal and Nonsuit, §§ 1, 22.

## DISCOUNTS.

By bank, see Banks and Banking, §§ 177, 179.

## DISCRETION OF COURT.

Granting or refusing writ of certiorari, see Certiorari, § 9.

Granting or refusing new trial, see New Trial, § 6.

Review in civil actions, see Appeal and Error, §§ 979, 984.

Review of discretionary rulings, see Criminal Law, §§ 1150-1156.

Rulings on motion to set aside default judgment, see Judgment, § 139.

## DISCRIMINATION.

By carriers, see Carriers, § 14.

## DISMISSAL AND NONSUIT.

In justice court, see Justices of the Peace, § 106.

### I. VOLUNTARY.

§ 1. A nonsuit taken by plaintiff on the exclusion of a deposition was not voluntary, where recovery was precluded by such ruling, to which exception was taken.—*Pettis County v. De Bold* (Mo. App.) 88.

§ 22. The dropping out of one of several plaintiffs in equity before decree did not abate the suit at all.—*Breimeyer v. Star Bottling Co.* (Mo. App.) 119.

## DISQUALIFICATION.

Of judge, see Judges, §§ 43-51.

## DISSOLUTION.

Of injunction, see Injunction, §§ 167, 186.

## DISTRESS.

For rent, see Landlord and Tenant, § 274.

## DISTRIBUTION.

Of estate of bankrupt, see Bankruptcy, § 364.

Of estate of decedent, see Descent and Distribution.

## DISTRICT AND PROSECUTING ATTORNEYS.

Review of argument and conduct of prosecuting attorney, see Criminal Law, § 1039.

Signature to indictment, see Indictment and Information, § 33.

## DITCHES.

See Drains.

**DIVORCE.****II. GROUNDS.**

§ 37. A reasonable cause which will justify one spouse in abandoning the other must be such conduct as could be made the foundation for divorce.—*Craig v. Craig* (Ark.) 765.

§ 37. A husband *held* under the facts entitled to a divorce for desertion.—*Craig v. Craig* (Ark.) 765.

**IV. JURISDICTION, PROCEEDINGS, AND RELIEF.****(A) JURISDICTION, VENUE, AND LIMITATIONS.**

§ 62. A wife *held* to be a resident, within Ky. St. 1909, § 2120 (Russell's St. § 70), requiring one year's continuous residence next before suit for divorce.—*Cummings v. Cummings* (Ky.) 289.

**(B) PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.**

§ 79. A valid decree of divorce may be obtained in the county of the matrimonial domicile on service by publication where plaintiff continues to reside there and defendant's residence is unknown.—*Griffin v. Griffin* (Tex. Civ. App.) 910.

**(D) EVIDENCE.**

§ 133. In an action by a husband for divorce evidence *held* insufficient to sustain a finding that plaintiff was guilty of misconduct justifying desertion.—*Rose v. Rose* (Ark.) 752.

**(G) APPEAL.**

Jurisdiction as between different appellate courts, see Courts, § 231.

**(H) FEES AND COSTS.**

§ 195. An attachment in an action for divorce was properly sustained, where plaintiff recovered costs, though she did not recover all money.—*Lankford v. Lankford* (Ky.) 962.

**V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.**

§ 222. Where a husband sued for divorce files a cross-complaint, it is proper to allow the wife attorney fees as suit money in her defense to the cross-complaint.—*Craig v. Craig* (Ark.) 765.

§ 249. Where a husband conveyed property to his wife during marriage to defeat his creditors, he was not entitled to the restoration thereof on the wife securing a divorce, under Civ. Code Prac. § 228.—*Lankford v. Lankford* (Ky.) 962.

**VI. CUSTODY AND SUPPORT OF CHILDREN.**

§ 298. Where a mother voluntarily parted with her child when it was very young, and the father continued to keep it, he was entitled, on a divorce for desertion, to the custody of the child.—*Rose v. Rose* (Ark.) 752.

**DOCKET FEES.**

On motion to affirm judgment, see Appeal and Error, § 1127.

**DOGS.**

Action against railroad for killing dogs, evidence, of value, see Railroads, § 443.

Action against railroad for killing dog, presumptions and burden of proof, see Railroads, § 441.

Action against railroad for killing dog, venue, see Railroads, § 435.

**DOMICILE.**

§ 2. "Domicile" and "residence" defined and distinguished.—*State ex rel. Kelly v. Shepperd* (Mo.) 1169.

§ 4. Where a person has once acquired a residence or domicile, it is not lost by reason of his temporary absence therefrom on pleasure or business.—*State ex rel. Kelly v. Shepperd* (Mo.) 1169.

§ 5. In general, the domicile of the parents or person standing in loco parentis to a minor is the domicile of the minor.—*Smith v. Young* (Mo. App.) 628.

§ 5. In general, the removal of a child from one county to another by its guardian does not change the child's domicile.—*Smith v. Young* (Mo. App.) 628.

§ 5. Where the guardian of a child under 14 is its grandfather and next of kin, standing in loco parentis to him, his removal of the child from one county to another will operate to change the child's domicile.—*Smith v. Young* (Mo. App.) 628.

§ 5. Where, after the death of the mother of the child, the father died without revoking his promise not to remove the child from the custody of its grandparents, the grandfather assumed the position of parent, and his domicile became the child's domicile.—*Smith v. Young* (Mo. App.) 628.

**DOUBLE TAXATION.**

See Taxation, § 47.

**DOWER.**

Election of widow to take, see Descent and Distribution, § 65.

**I. NATURE AND REQUISITES.**

§ 12. A wife's conveyance directly to her husband having been valid, *held* it was immaterial whether her subsequent joinder with him in a deed thereof was under duress, the grantee having immediately reconveyed to the husband.—*Glascock v. Glascock* (Mo.) 67.

§ 28. Dower in land is taken free from the husband's debts.—*Brown v. Tucker's Estate* (Mo. App.) 96.

**II. INCHOATE INTEREST.****(B) BAR, RELEASE, OR FORFEITURE.**

§ 46. Plaintiff *held* not to have right of dower against defendant, who bought under a deed of trust of plaintiff and her husband, though he promised to buy for her.—*Glascock v. Glascock* (Mo.) 67.

**DRAINS.**

In cities, see Municipal Corporations, §§ 834-845.

**I. ESTABLISHMENT AND MAINTENANCE.**

§ 17. For two of the three commissioners of a drainage district organized under Rev. St. 1899, §§ 8318-8345 (Ann. St. 1906, pp. 3935-3947), to employ the third as engineer under the authority conferred by sections 8328, 8335, though by section 8325 two of them constitute a quorum, *held* not only to defeat the general intent of the law as to the exercise of the discretion of "three competent persons" required to be appointed commissioners, but to violate the absolute prohibition of such employment in section 8336.—*Seaman v. Cap-Au-Gris Levee Dist.* (Mo.) 1084.

§ 17. That a drainage district received the benefit of services of a commissioner employed as an engineer, in violation of Rev. St. 1899, § 8336 (Ann. St. 1906, p. 3944), did not prevent the district from repudiating the contract and declin-

ing to pay him, or estop it to plead its invalidity in defense to an action by him for compensation.—*Seaman v. Cap-An-Gris Levee Dist. (Mo.)* 1084.

## DRUNKARDS.

Joinder of counts for drunkenness and for disturbing the peace, see Indictment and Information, § 129.

§ 10. A private residence, where an entertainment was held, *held* not a "public place," so as to sustain a conviction for being drunk in a public place.—*Pugh v. State (Tex. Cr. App.)* 817.

## DUE PROCESS OF LAW.

See Constitutional Law, §§ 286, 297.

## DUPLICITY.

In indictment, see Indictment and Information, § 125.

## DYING DECLARATIONS.

See Homicide, § 216.

## EARNINGS.

Consideration of gross earnings of foreign corporation in the state in fixing value of its franchise for taxation, see Taxation, §§ 28, 385, 397.

## EASEMENTS.

Public easements, see Dedication; Highways.

## II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 61. Where defendants obstructed by a side-walk the entrance to a private alley across the lots of themselves and plaintiff, *held* he was entitled to injunction.—*Rabich v. Stone (Mo. App.)* 1195.

## EJECTION.

Of passenger, see Carriers, §§ 372-384.  
Of persons not passengers from railroad stations, see Railroads, § 274.

## EJECTMENT.

See Trespass to Try Title.

Conclusiveness in ejectment of prior judgment in forcible entry and detainer, see Judgment, § 713.

## I. RIGHT OF ACTION AND DEFENSES.

§ 19. Ejectment will not lie unless defendant is in actual possession of the land at the commencement of the action.—*Hayden v. Goodwin (Mo.)* 1129.

§ 28. Equitable matter constituting an estoppel in pais is ground for affirmative equitable relief, though it is also a good defense at law.—*Hubbard v. Slavens (Mo.)* 1104; *Waters v. Hubbard (Mo.)* 1112; *Hall v. Same, Id.*; *Devol v. Same, Id.*

## II. JURISDICTION, PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.

§ 39. Where plaintiff's ancestor and his estate had the purchase price of the land in controversy more than 50 years ago, plaintiffs would not be permitted to recover the land as against one in possession under an equitable title, unless such result was required by the sternest principles of law.—*Hubbard v. Slavens (Mo.)* 1104; *Waters v. Hubbard (Mo.)* 1112; *Hall v. Same, Id.*; *Devol v. Same, Id.*

## III. PLEADING AND EVIDENCE.

Alder of pleading by verdict, see Pleading, § 434.

§ 91. To show possession in defendants in ejectment at the commencement of suit, plaintiff may show that in a former action of forcible entry wherein plaintiff was defendant, on an adverse judgment therein, he delivered possession to defendants in ejectment, without the necessity of a writ of restitution.—*Hayden v. Goodwin (Mo.)* 1129.

§ 95. Evidence of defendant in ejectment *held* insufficient to establish an outstanding title.—*Swearingin v. Swearingin (Mo.)* 704.

§ 96. Evidence in ejectment *held* to show that defendants were in actual possession of the premises at the commencement of the action.—*Hayden v. Goodwin (Mo.)* 1129.

## ELECTION.

Between counts in indictment, see Indictment and Information, § 132.

Between testamentary provisions and other rights, see Wills, § 800.

Of widow to take dower, see Descent and Distribution, § 65.

## ELECTIONS.

### VIII. CONDUCT OF ELECTION.

§ 227. Certain election irregularities *held* to afford no ground for contest.—*Skelton v. Ulen (Mo.)* 82.

§ 229. Votes by nonresidents, though illegal, *held* not to affect the election of a particular candidate.—*Skelton v. Ulen (Mo.)* 82.

### X. CONTESTS.

§ 269. An election contest is in rem, and not in personam.—*Evans v. State (Tex. Cr. App.)* 167.

## ELECTRICITY.

Instructions excluding or ignoring issues, defenses or evidence in action for injuries caused by, see Trial, § 253.

*Res gestæ* in action for injuries caused by, see Evidence, § 125.

§ 14. A telephone company running its wires across a lot *held* to owe to one rightfully on the lot the duty to use ordinary care to prevent injury by the transmission through its wires of electricity escaping from other wires.—*Southwestern Telegraph & Telephone Co. v. Bruce (Ark.)* 564.

§ 14. A company distributing electricity through public streets is *held* to the highest degree of care.—*Lewis' Adm'r v. Bowling Green Gaslight Co. (Ky.)* 278.

§ 14. One maintaining electrically charged wires near the flat roof of a building *held* required to replace defective wires.—*Day v. Consolidated Light, Power & Ice Co. (Mo. App.)* 81.

§ 15. An electric company permitting an uncovered guy wire stretched over the roof of a building to become charged with electricity, in violation of ordinance, *held* liable for death of a person resulting therefrom.—*Burnett v. Ft. Worth Light & Power Co. (Tex. Civ. App.)* 175.

§ 16. One making merchandise of electricity and transmitting it along public thoroughfares *held* required to use the highest degree of care to prevent its escape.—*Day v. Consolidated Light, Power & Ice Co. (Mo. App.)* 81.

§ 16. An electric light and power company maintaining wires at the rear of the flat roof

of a building *held* required to maintain such wires in a safe condition and liable for the death of a child by contact with a defective wire.—*Day v. Consolidated Light, Power & Ice Co.* (Mo. App.) 81.

§ 17. A company supplying electricity cannot escape liability for negligence in the manner of distribution by turning it onto other wires not safely arranged to receive the current.—*Lewis' Adm'r v. Bowling Green Gaslight Co.* (Ky.) 278.

§ 17. Where injury was caused by a guy wire which would have been harmless had it not been charged with electricity from defendants' fault in failing to observe ordinances under which they were exercising their franchises in the city, it was immaterial as affecting their liability whether the guy wire was owned or controlled by them or either of them.—*Burnett v. Ft. Worth Light & Power Co.* (Tex. Civ. App.) 175.

§ 18. A child, six years old, playing on the flat roof of a building and coming in contact with a live electric wire maintained near the roof, is not chargeable with contributory negligence.—*Day v. Consolidated Light, Power & Ice Co.* (Mo. App.) 81.

§ 19. In an action against a telephone company for injuries occasioned by coming in contact with a broken electric wire charged with electricity in consequence of having come in contact with a trolley wire, evidence *held* to require the submission to the jury of the issue of the company's negligence.—*Southwestern Telegraph & Telephone Co. v. Bruce* (Ark.) 564.

§ 19. The rule that negligence is proved by proving an accident and resulting injury *held* to apply to electric companies in the control of their lines and apparatus.—*Southwestern Telegraph & Telephone Co. v. Bruce* (Ark.) 564.

§ 19. In an action for death of decedent through contact with a broken electric wire, whether defendant was negligent in failing to discover the break *held* for the jury.—*Lewis' Adm'r v. Bowling Green Gaslight Co.* (Ky.) 278.

§ 19. In an action for death of decedent through grasping a broken electric wire, whether decedent was guilty of contributory negligence *held* a jury question.—*Lewis' Adm'r v. Bowling Green Gaslight Co.* (Ky.) 278.

§ 19. In an action against an electric company for negligently causing a death by allowing a guy wire on the top of a building to become charged with electricity, in violation of a city ordinance, evidence *held* sufficient to show that the building was in the city.—*Burnett v. Ft. Worth Light & Power Co.* (Tex. Civ. App.) 175.

## ELEVATORS.

Liability of master for injuries to servant, see Master and Servant, § 217.

## EMBEZZLEMENT.

Applicability of instructions to case, see Criminal Law, § 814.

Refusal of request for instructions already given, see Criminal Law, § 829.

§ 5. The essential issue in a trial for embezzling property is whether accused intended to defraud the owner.—*Henderson v. State* (Tex. Cr. App.) 825.

§ 14. One *held* to embezzle property, and not the proceeds.—*Henderson v. State* (Tex. Cr. App.) 825.

§ 14. One who sells property as an agent, and who subsequently conceives an intent to and does misappropriate the proceeds, embezzles

the proceeds, and not the property.—*Henderson v. State* (Tex. Cr. App.) 825.

## EMINENT DOMAIN.

Public improvements by municipalities, see Municipal Corporations, §§ 307-582.

## II. COMPENSATION.

### (D) PERSONS ENTITLED AND PAYMENT.

§ 155. A railroad company in building through a farm must not unnecessarily injure a tenant's possession, and cannot build in front of his house without furnishing a reasonable way to come and go, and for failure to do so must fairly remunerate him, and could not lawfully tear down fences and expose his growing crops to cattle without being answerable therefor.—*Louisville & E. R. Co. v. Hardin* (Ky.) 381.

## IV. REMEDIES OF OWNERS OF PROPERTY.

§ 307. The rights of a farm tenant against a railroad company for injuries to his possession by the construction of its road through the premises being entirely severable from his landlord's rights under contract with the company, it is error, in an action by him for injuries to his possession, to give an instruction predicated on his right to recover under such contract.—*Louisville & E. R. Co. v. Hardin* (Ky.) 381.

## EMPLOYÉS.

See Master and Servant.

## ENTRY, WRIT OF.

See Ejectment.

## EQUITABLE ESTOPPEL

See Estoppel, §§ 91-101.

## EQUITY.

Equitable estoppel, see Estoppel, §§ 91-101.

*Particular subjects of equitable jurisdiction and equitable remedies.*

See Cancellation of Instruments; Fraudulent Conveyances; Injunction; Quieting Title; Receivers; Reformation of Instruments; Specific Performance; Trusts.

## I. JURISDICTION, PRINCIPLES, AND MAXIMS.

### (A) NATURE, GROUNDS, SUBJECTS, AND EXTENT OF JURISDICTION. IN GENERAL.

§ 19. Equity has jurisdiction in a suit to transfer title to land based on an equitable estoppel in pais.—*Hubbard v. Slavens* (Mo.) 1104; *Waters v. Hubbard* (Mo.) 1112; *Hall v. Same*, Id.; *Devol v. Same*, Id.

### (B) REMEDY AT LAW AND MULTIPLICITY OF SUITS.

§ 51. Equity can prevent a multiplicity of suits.—*Breimeyer v. Star Bottling Co.* (Mo. App.) 119.

## II. LACHES AND STALE DEMANDS.

§ 87. A claim may be stale, so that a court of equity will not enforce it under the facts shown, although it is not barred by limitation.—*East Jellico Coal Co. v. Hays* (Ky.) 307.

## IV. PLEADING.

### (F) AMENDED AND SUPPLEMENTAL PLEADINGS AND REVIVOR.

§ 296. The rights of the parties to a chancery suit are determined by the facts existing at the

commencement of the suit, unless something has since happened affecting the matter in issue, which the court may consider, if presented by a supplemental pleading.—*P. & M. J. Bannon v. Jackson* (Tenn.) 504.

§ 296. A contractor in a building contract, suing for compensation, *held* not entitled to avail himself of the architect's certificate, obtained after the commencement of the suit, unless the matter is presented by a supplemental bill.—*P. & M. J. Bannon v. Jackson* (Tenn.) 504.

## ERROR, WRIT OF.

See Appeal and Error.

## ESCROWS.

§ 4. Delivery in escrow of a contract of purchase and purchase-money notes may be to the seller's agent.—*J. I. Case Threshing Mach. Co. v. Barnes* (Ky.) 418.

## ESTABLISHMENT.

Of boundaries, see Boundries, §§ 35-48.

Of drains, see Drains, § 17.

Of highways, see Highways, §§ 29-78.

Of trusts, see Trusts, § 377.

Of will, see Wills, §§ 324, 386.

## ESTATES.

Created by deed, see Deeds, §§ 120-133.

Created by will, see Wills, §§ 590-602.

Decedents' estates, see Descent and Distribution; Executors and Administrators.

### Particular estates.

See Dower; Remainders.

Estates for years, see Landlord and Tenant.

Tenancy in common, see Tenancy in Common.

§ 1. An estate may be created by deed to commence in the future without any intervening estate to support the same.—*Buxton v. Kroeger* (Mo.) 1147; *Same v. Lauman* (Mo.) 1162; *Same v. Dunn* (Mo.) 1163.

§ 5. Right to alienate is an inherent and inseparable quality of vested fee-simple estates.—*Harkness v. Lisle* (Ky.) 204; *Lisle v. Same*, *Id.*

## ESTOPPEL.

By judgment, see Judgment, §§ 554, 604, 713-747.

### III. EQUITABLE ESTOPPEL.

Of tenant to dispute title of landlord, see Landlord and Tenant, § 61.

To rescind contract for sale of land, see Vendor and Purchaser, § 43.

### (B) GROUNDS OF ESTOPPEL.

§ 91. Where persons purchased a vendor's lien with notice that it had been already assigned to others, and brought suit against the lienees, obtaining judgment, the prior assignees *held* not estopped to assert their claim to the judgment.—*Powell v. Powell* (Mo.) 1113.

§ 94. An estate in land may be transferred by the failure of the owner to give notice of his title to a purchaser under circumstances amounting to fraud.—*Hubbard v. Slavens* (Mo.) 1104; *Waters v. Hubbard* (Mo.) 1112; *Hall v. Same*, *Id.*; *Devol v. Same*, *Id.*

§ 94. Heirs *held* not estopped to sue for their interest in land conveyed by a coheir.—*Starr v. Bartz* (Mo.) 1125; *Same v. Kisner* (Mo.) 1129.

§ 94. Constructive knowledge of what the records show relative to the title to real estate cannot be made the basis of a charge of fraudulent silence and estoppel, where there is positive proof

that there was no actual knowledge.—*Starr v. Bartz* (Mo.) 1125; *Same v. Kisner* (Mo.) 1129.

### (C) PERSONS AFFECTED.

§ 96. An estoppel in pais enforceable against plaintiff's ancestor *held* enforceable against plaintiffs to bar their claim to the land in question.—*Hubbard v. Slavens* (Mo.) 1104; *Waters v. Hubbard* (Mo.) 1112; *Hall v. Same*, *Id.*; *Devol v. Same*, *Id.*

### (D) MATTERS PRECLUDED.

§ 101. Since a bare legal title may be substantially defeated by estoppel, it is immaterial that a title may not be created thereby.—*Hubbard v. Slavens* (Mo.) 1104; *Waters v. Hubbard* (Mo.) 1112; *Hall v. Same*, *Id.*; *Devol v. Same*, *Id.*

## EVIDENCE.

See Affidavits; Depositions; Witnesses.

Admissibility of evidence under pleading, see Pleading, § 398.

Applicability of instructions to evidence, see Trial, §§ 250-253.

Instructions as to presumptions and burden of proof, see Criminal Law, § 778.

Questions of fact for jury, see Trial, §§ 136-143.

Reception at trial, see Criminal Law, §§ 662-683; Trial, §§ 40-85.

Verdict or findings contrary to evidence, see New Trial, 75.

### As to particular facts or issues.

See Adverse Possession, § 114; Boundaries, §§ 35-48; Damages, §§ 163-188; Deeds, §§ 193-211; Fraudulent Conveyances, §§ 297, 298; Partnership, § 55.

Agency, see Principal and Agent, §§ 21-23.

Authority of agent, see Principal and Agent, § 123.

Delivery of deeds, see Deeds, § 200.

Relation of carrier and passenger, see Carriers, § 246.

Testamentary capacity, see Wills, § 55.

Time of delivery of deed, see Deeds, § 194.

Undue influence in procuring making of will, see Wills, §§ 165, 166.

Validity of deed, see Deeds, § 203.

Value of property taken, see Larceny, § 46.

### In actions by or against particular classes of persons.

See Brokers, § 84; Principal and Agent, § 100; Street Railroads § 114.

### In particular civil actions or proceedings.

See Alteration of Instruments, § 27; Assault and Battery, § 35; Death, §§ 60-75; Divorce, § 133; Ejectment, §§ 91-96; False Imprisonment, §§ 22-31; Forcible Entry and Detainer, § 29; Habeas Corpus, § 85; Money Lent, § 7; Negligence, §§ 121, 134; Reformation of Instruments, §§ 43, 45; Trespass, § 44; Trespass to Try Title, § 39; Trover and Conversion, §§ 37-40.

For breach of contract, see Contracts, § 350.

For breach of contract to convey land, see Vendor and Purchaser, § 350.

For breach of contract of sale, see Sales, § 357.

For breach of covenant, see Covenants, § 121.

For breach of warranty, see Sales, §§ 439, 440.

For causing death, see Death, §§ 52-75.

For compensation of broker, see Brokers, § 84.

For failure to deliver shipment, see Carriers, § 94.

For injuries caused by city's obstruction of stream, see Municipal Corporations, § 845.

For injuries from operation of street railroad, see Street Railroads, § 114.

For injuries to animals on or near railroad tracks, see Railroads, § 441.

For injuries to passenger, see Carriers, § 316.

For injuries to persons at railroad crossings, see Railroads, § 348.  
 For injuries to persons on or near railroad track, see Railroads, §§ 396-398.  
 For injuries to servant, see Master and Servant, §§ 263-281.  
 For loss of, or injuries to shipment of live stock, see Carriers, § 228.  
 For obstruction of surface waters, see Waters and Water Courses, § 126.  
 For penalties for failure to enter satisfaction of mortgage, see Mortgages, § 312.  
 For pollution of water course, see Waters and Water Courses, § 76.  
 For purchase price of land, see Vendor and Purchaser, § 315.  
 For taxes, see Taxation, § 593.  
 For unfair competition, see Trade Marks and Trade Names, § 93.  
 On bill or note, see Bills and Notes, §§ 492-509.  
 On insurance policy, see Insurance, §§ 646, 665.  
 On note given for corporate stock, see Corporations, § 169.  
 To rescind contract for sale of land, see Vendor and Purchaser, § 123.  
 To try tax title, see Taxation, § 810.

#### *In criminal prosecutions.*

See Burglary, § 41; Criminal Law, §§ 304-553; Homicide, §§ 143-257; Larceny, §§ 46-59; Malicious Mischief, §§ 8, 9; Perjury, § 32; Rape, § 51.  
 For maintenance of nuisance, see Nuisance, § 92.

#### *Review and procedure thereon in appellate courts.*

Harmless error in rulings on, see Appeal and Error, §§ 1047-1057; Criminal Law, §§ 1169, 1170.  
 Review of questions of fact, see Appeal and Error, §§ 997-1010.  
 Review of rulings on, as dependent on prejudicial nature of error, see Appeal and Error, § 882.  
 Review of rulings on, as dependent on presentation in lower court of grounds of review, see Appeal and Error, §§ 203, 204.

### **I. JUDICIAL NOTICE.**

§ 10. The court will take judicial notice that a city is bounded by certain rivers.—*McKenzie v. Newlon* (Ark.) 553.

§ 10. Neither the trial court nor the court on appeal can take judicial notice of the existence of streets in municipalities.—*Vonkey v. City of St. Louis* (Mo.) 733.

§ 13. It is a matter of common knowledge that a mule is disposed to kick.—*Tolin v. Terrell* (Ky.) 290.

§ 22. The Supreme Court will take judicial notice of the existence in the state of a class of insurance companies having no capital stock, composed of members equally interested, and paying the losses by assessments levied and collected from the members.—*Ingle v. Batesville Grocery Co.* (Ark.) 241.

§ 41. Appellate courts take judicial notice of the beginning, but not of the ending, of circuit court terms.—*Breimeyer v. Star Bottling Co.* (Mo. App.) 119.

§ 48. Under Rev. St. 1895, art. 921, the amount specified by the county judge as the amount of the county treasurer's bond securing the payment of the school fund cannot be judicially known.—*Connor v. Zackry* (Tex. Civ. App.) 177.

### **II. PRESUMPTIONS.**

#### *As to particular facts or issues.*

Authority of attorney, see Attorney and Client, § 70.

Consideration for bill or note, see Bills and Notes, § 493.  
 Execution of deed, see Deeds, § 193.  
 Existence of trust, see Trusts, § 41.  
 Negligence of carrier, see Carriers, § 316.  
 Time of delivery of deed, see Deeds, § 194.  
 Validity of deed, see Deeds, § 196.

#### *In particular civil actions or proceedings.*

See Negligence, § 121.  
 For injuries to passenger, see Carriers, § 316.  
 For injuries to servant, see Master and Servant, § 263.

§ 80. It will be presumed from the statute of another state putting the common law in effect that the general doctrines of that law as they prevail in this state prevail also in that state, but it will not be presumed that the railroad fellow-servant law of this state is in force in another state.—*Ham v. St. Louis & S. F. R. Co.* (Mo. App.) 108.

### **III. BURDEN OF PROOF.**

#### *As to particular facts or issues.*

Alteration of instrument, see Alteration of Instruments, § 27.  
 Consideration for bill or note, see Bills and Notes, § 493.  
 Contributory negligence of servant, see Master and Servant, § 263.  
 Existence of custom, see Customs and Usages, § 19.

#### *In particular civil actions or proceedings.*

See Negligence, § 121.  
 For compensation of broker, see Brokers, § 84.  
 For injuries to person on or near railroad track, see Railroads, § 396.  
 For injuries to servant, see Master and Servant, § 263.  
 On bill or note, see Bills and Notes, §§ 492-497.  
 On insurance policy, see Insurance, § 646.

### **IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.**

In action for conversion, see Trover and Conversion, § 89.

#### **(B) RES GESTÆ.**

§ 121. A purchaser's declarations and instructions to his son as his agent, and his repudiation of the deed and directions for its return, held admissible as verbal acts, and not objectionable as hearsay.—*Hudson v. Slate* (Tex. Civ. App.) 469.

§ 125. In an action for death of decedent through contact with an electric wire, what decedent said on taking hold of the wire as to his purpose held admissible as part of the res gestæ.—*Lewis' Adm'r v. Bowling Green Gaslight Co.* (Ky.) 278.

#### **(D) MATERIALITY.**

§ 143. There is no error in sustaining an objection to the admission of an original petition, which had been amended and did not appear to contain anything material.—*Hudson v. Slate* (Tex. Civ. App.) 469.

### **V. BEST AND SECONDARY EVIDENCE.**

§ 157. The best evidence obtainable must be produced by the party who has the burden of proving any issue.—*Fidelity & Deposit Co. of Maryland v. Champion Ice Mfg. & Cold Storage Co.* (Ky.) 398.

§ 157. The best evidence of the amount of an employee's defalcations would be the testimony of witnesses from whom he collected the money that he failed to account for.—*Fidelity & Deposit Co. of Maryland v. Champion Ice Mfg. & Cold Storage Co.* (Ky.) 398.

§ 158. A witness' evidence as to statements contained in a letter *held* objectionable as not the best evidence, but such objection did not apply to his further statement that he had lost sight of certain land in question, and thought it had been included in a sale to A.—*Poitvent v. Scarborough* (Tex. Civ. App.) 443.

§ 177. Case stated under which it would be permissible to prove the defalcation of an employé by a witness who had examined the books and records of his employer.—*Fidelity & Deposit Co. of Maryland v. Champion Ice Mfg. & Cold Storage Co.* (Ky.) 393.

§ 178. Where the loss of an original deed was shown, parol evidence as to its execution and contents was admissible.—*Poitvent v. Scarborough* (Tex. Civ. App.) 443.

## VII. ADMISSIONS.

### (A) NATURE, FORM, AND INCIDENTS IN GENERAL.

§ 208. On the issue as to whether one signing a contract in the name of a firm was a partner, the admission of pleadings in another suit against the firm as an admission *held* error.—*S. W. Slayden & Co. v. Palmo* (Tex. Civ. App.) 1054.

### (D) BY AGENTS OR OTHER REPRESENTATIVES.

§ 243. Declarations of an agent of a shipper of horses, in charge of them, after they had reached their destination, are incompetent as against the shipper.—*Southern Express Co. v. Fox & Logan* (Ky.) 270.

§ 247. Statements, made by one engaged in the discharge of the duties of a carrier, *held* admissible in an action against the carrier.—*Missouri, K. & T. Ry. Co. of Texas v. Pettit* (Tex. Civ. App.) 894.

### (E) PROOF AND EFFECT.

§ 265. An admission based on information given by others *held* not conclusive.—*Bruner v. Seelbach Hotel Co.* (Ky.) 373.

## VIII. DECLARATIONS.

### (A) NATURE, FORM, AND INCIDENTS IN GENERAL.

§ 271. In an action between a purchaser and vendors involving the terms of a verbal contract, there was no error in excluding declarations of vendors, after the deed was prepared for delivery, that the purchaser was to assume and pay off a certain note.—*Hudson v. Slate* (Tex. Civ. App.) 493.

## IX. HEARSAY.

§ 320. The exception to the rule requiring the best evidence, made necessary by the volume of record evidence in particular cases, *held* not to go so far as to authorize the admission of hearsay evidence to prove the amount of an employé's defalcations in a case where the books of his employer did not show all amounts paid to him by different individuals.—*Fidelity & Deposit Co. of Maryland v. Champion Ice Mfg. & Cold Storage Co.* (Ky.) 393.

## XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

### (A) CONTRADICTING, VARYING, OR ADDING TO TERMS OF WRITTEN INSTRUMENT.

§ 393. One suing at law cannot contradict the terms of a written lease and memorandum of sale to which he was a party.—*Remmers v. Remmers* (Mo.) 1117.

§ 397. Where a written contract is complete on its face, parol evidence is not admissible to alter or add to its provisions.—*Reigart v. Manufacturers' Coal & Coke Co.* (Mo.) 61.

§ 397. Parol evidence is inadmissible to vary the terms of a written contract.—*Beckham v. Collins* (Tex. Civ. App.) 431.

§ 411. Where a writing shows on its face that all the terms agreed on are not embraced therein, parol evidence is admissible to show the omitted part.—*Reigart v. Manufacturers' Coal & Coke Co.* (Mo.) 61.

§ 413. Certain evidence *held* not to conflict with a written contract for the sale of stock.—*Wolfert v. Hochbaum* (Ark.) 525; *Modern Laundry v. Same, Id.*

§ 417. Parol evidence of a freight rate left blank in a contract of carriage *held* not to vary the contract.—*St. Louis, I. M. & S. Ry. Co. v. Furlow* (Ark.) 517.

### (B) INVALIDATING WRITTEN INSTRUMENT.

§ 429. Rule respecting admissibility of oral evidence to affect a written contract, stated.—*Remmers v. Remmers* (Mo.) 1117.

§ 433. In an action on a written contract, where defendant pleaded that, as written, it was executed by mistake, testimony was admissible to vary its terms.—*L. & J. A. Stewart v. Blue Grass Canning Co.* (Ky.) 401.

### (C) SEPARATE OR SUBSEQUENT ORAL AGREEMENT.

§ 444. Parol evidence of an agreement on which a written contract was executed *held* not to vary the contract.—*J. I. Case Threshing Mach. Co. v. Barnes* (Ky.) 418.

### (D) CONSTRUCTION OR APPLICATION OF LANGUAGE OF WRITTEN INSTRUMENT.

§ 460. The description of land in a deed *held* sufficiently definite to admit the deed in evidence and permit aid by evidence.—*McCollum v. Buckner's Orphans' Home* (Tex. Civ. App.) 886.

## XII. OPINION EVIDENCE.

### (A) CONCLUSIONS AND OPINIONS OF WITNESSES IN GENERAL.

§ 471. Statements of witnesses, testifying to injuries sustained to a shipment of live stock, *held* not objectionable as the conclusions of the witnesses.—*St. Louis Southwestern Ry. Co. of Texas v. Allen* (Tex. Civ. App.) 923.

§ 472. Testimony that a given act was careless or negligent is not admissible.—*International & G. N. R. Co. v. Garcia* (Tex. Civ. App.) 206.

§ 474. In an action for damages to grazing lands from herding scabby sheep thereon, and consuming and polluting water and injuring tanks, *held* that, where there was no market value of the grass, water consumed and polluted, or injury to the tanks, plaintiff, who was in the sheep business, could testify to the reasonable value of the water and damage to the lands through herding the scabby sheep at the tanks.—*Tippett v. Corder* (Tex. Civ. App.) 186.

§ 474. A witness *held* competent to testify to the effect jerks of the train had on cattle transported.—*Missouri, K. & T. Ry. Co. of Texas v. Pettit* (Tex. Civ. App.) 894.

§ 474. One *held* competent to testify as to the average rate of speed of a train carrying cattle.—*Missouri, K. & T. Ry. Co. of Texas v. Pettit* (Tex. Civ. App.) 894.

§ 474. One who had been a salesman at stock-yards for 10 years, and who was engaged in such business, was competent to testify as to the market price of cattle at such yards.—*Missouri, K. & T. Ry. Co. of Texas v. Pettit* (Tex. Civ. App.) 894.

§ 474. One held competent to testify as to the effect a delay in the shipment of cattle would have on their salable appearance.—*Missouri, K. & T. Ry. Co. of Texas v. Pettit* (Tex. Civ. App.) 894.

§ 477. When nonexpert evidence is admissible as to one's apparent health stated.—*Partello v. Missouri Pac. Ry. Co. (Mo.)* 1138.

§ 488. In an action for injuries to an orchard by fire, it was proper to permit witnesses to state their opinions as to the market value of the orchard before and after the fire, and to give their reasons therefor.—*St. Louis & S. F. Ry. Co. v. Shore* (Ark.) 515.

§ 492. If a witness is familiar with trains and accustomed to seeing them run, he need not be an expert to testify to the speed of a train.—*Potter v. St. Louis & S. F. R. Co. (Mo. App.)* 593.

#### (C) COMPETENCY OF EXPERTS.

§ 539½. A locomotive engineer of 17 years' experience held competent to testify as an expert as to the dangers of a peculiar coupling of an engine.—*Texas & N. O. R. Co. v. McCoy* (Tex. Civ. App.) 446.

§ 543½. Testimony as to depreciation in market value of cattle, caused by delay in furnishing cars for shipment, held erroneously admitted, in absence of showing of witness' knowledge of market value.—*Chicago, R. I. & G. Ry. Co. v. Kapp* (Tex. Civ. App.) 904.

§ 543½. One qualified as a dealer in live stock held competent to estimate the amount of the depreciation in value of a live stock shipment.—*St. Louis Southwestern Ry. Co. of Texas v. Allen* (Tex. Civ. App.) 923.

#### (D) EXAMINATION OF EXPERTS.

§ 553. Rule governing assumption of facts as a basis for hypothetical questions, stated.—*Galveston, H. & S. A. Ry. Co. v. Powers* (Tex. Civ. App.) 459.

#### (F) EFFECT OF OPINION EVIDENCE.

Sufficiency to take question to jury in probate proceedings, see Wills, § 324.

§ 568. Testimony of witnesses bearing close family, social, or business relations to a grantor as to his mental condition is entitled to great weight.—*Jones v. Thomas* (Mo.) 1177.

### XIV. WEIGHT AND SUFFICIENCY.

#### *As to particular facts or issues.*

See Partnership, § 55.

Agency, see Principal and Agent, § 23.

Authority of agent, see Principal and Agent, § 123.

Authority of corporate agent, see Corporations, § 432.

Bona fide purchase of land, see Vendor and Purchaser, § 244.

Delivery of deed, see Deeds, § 208.

Testamentary capacity, see Wills, § 55.

Undue influence in procuring making of will, see Wills, § 166.

Validity of deed, see Deeds, § 211.

#### *In particular civil actions or proceedings.*

See Assault and Battery, § 35; Death, § 75; Divorce, § 133; Ejectment, § 91; Negligence, § 134.

For breach of contract, see Contracts, § 350.

For injuries to persons on or near railroad track, see Railroads, § 398.

For injuries to servant, see Master and Servant, §§ 276-281.

On insurance policy, see Insurance, § 665.

§ 588. The jury have no right to arbitrarily reject the evidence of an unimpeached witness against whom there is no discrediting fact or

circumstance.—*Grand Fraternity v. Melton* (Tex.) 788.

§ 590. In an action for the death of a person killed by a train at a crossing, the jury in determining the question of discovered peril could disbelieve testimony of the fireman and engineer that the fireman was busy in firing the engine, and believe the testimony of decedent's sister, who saw the accident.—*International & G. N. R. Co. v. Tinon* (Tex. Civ. App.) 936.

§ 594. The jury cannot lawfully deny proper weight to undisputed facts with no suspicion cast thereon.—*Grand Fraternity v. Melton* (Tex.) 788.

§ 598. The rule that there can be no recovery where the evidence rendering defendant liable is no stronger than in favor of a contrary conclusion applies only to a case established by circumstantial evidence.—*Louisville Ry. Co. v. Holmes* (Ky.) 953.

### EXAMINATION.

Of expert witnesses, see Evidence, § 553.

Of witnesses in general, see Witnesses, §§ 240, 255.

### EXCEPTIONS.

For purpose of review, see Appeal and Error, § 501.

Necessity for purpose of review, see Appeal and Error, §§ 260, 274; Criminal Law, §§ 1049, 1054.

Taking exceptions at trial, see Trial, §§ 75, 85.

To pleading, see Pleading, §§ 210-221.

### EXCEPTIONS, BILL OF.

Approval by court, see Criminal Law, § 1092.

Making and filing for purpose of review, see Appeal and Error, § 511.

Necessity for purpose of review, see Appeal and Error, § 534; Criminal Law, § 1090; Mandamus, § 187.

Taking exceptions at trial, see Criminal Law, §§ 662-683; Trial, § 278.

### II. SETTLEMENT, SIGNING, AND FILING.

§ 40. Under Civ. Code Prac. § 334, the trial court held not authorized to extend the time for filing a bill of exceptions beyond the following term, where the record does not show a consent by the opposing party.—*Woolsey v. Kenyon* (Ky.) 943.

§ 41. A bill of exceptions cannot be prepared by the successful party, and the unsuccessful party may take the time given him by statute for that purpose.—*Louisville Home Telephone Co. v. Gordon* (Ky.) 315; *City of Louisville v. Louisville Home Telephone Co., Id.*

§ 53. In an equity suit, as a general rule, the trial court cannot be compelled to allow bills of exceptions that do not preserve the evidence on the merits.—*Hubbard v. Slavens* (Mo.) 1104; *Waters v. Hubbard* (Mo.) 1112; *Hall v. Same, Id.*; *Devol v. Same, Id.*

### EXCESSIVE DAMAGES.

See Damages, §§ 130-139.

### EXCISE.

Regulation of traffic in intoxicating liquors, see Intoxicating Liquors.

### EXECUTION.

See Attachment; Garnishment.

Against stockholder on judgment against corporations, see Corporations, § 256.



Exemptions, see Exemptions; Homestead.  
Necessity of levy in order to create judgment lien on excess of homestead claim, see Homestead, § 108.

#### IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

Right of officer to require indemnity bond before levy, see Sheriffs and Constables, § 90.

§ 115. Where a judgment is a lien on land, a sale under execution thereon relates back to the date of the judgment lien and cuts out an intervening deed by the judgment debtor.—*White v. Spencer* (Mo.) 20.

#### V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 163. An application to set aside an execution under Kirby's Dig. § 3224, on the ground that service was had, was properly denied after the term, in the absence of proof that defendant had a valid defense.—*Flowers v. United States Fidelity & Guaranty Co.* (Ark.) 547.

#### VII. SALE.

##### (A) MANNER, CONDUCT, VALIDITY, AND CONFIRMING OR VACATING.

§ 224. In an action by corporate creditors to subject land on which a director had a lien to the payment of corporate debts, the land could be sold in quantities less than the whole, without the appointment of a receiver for the corporation, under Rev. St. 1895, art. 2363.—*Galvin v. McConnell* (Tex. Civ. App.) 211.

#### EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Wills.

Effect of administration on limitation, see Limitation of Actions, § 80.

Testamentary trustees, see Trusts.

Testimony as to transactions with decedents, see Witnesses, §§ 144, 163.

#### I. ADMINISTRATION IN GENERAL.

Abatement of action for administration on death of creditor instituting same, see Abatement and Revival, §§ 61, 72.

#### II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 20. An order refusing the application of decedent's son for appointment as his administrator *held* not appealable.—*In re Flick's Estate* (Mo. App.) 93; *Flick v. Schenk*, Id.

§ 22. Under Rev. St. 1899, § 13 (Ann. St. 1906, p. 342), the appointment in an action to contest a will of an administrator pendente lite in lieu of the executor *held* not erroneous, though all interested persons had not been made parties to the action.—*Achor v. Sullenger* (Mo. App.) 1191.

#### IV. COLLECTION AND MANAGEMENT OF ESTATE.

##### (B) REAL PROPERTY AND INTERESTS THEREIN.

§ 135. Even if an administrator could be required to convey decedent's land, a petition to enforce conveyance is insufficient, where it fails to allege that there are debts of the estate for the payment of which a sale of the land is required, and that the probate court has ordered the sale.—*McQuitty v. Wilhite* (Mo.) 730.

§ 185. Rev. St. 1899, § 173 (Ann. St. 1906, p. 394), does not authorize specific performance by the administrator of an oral contract made by decedent.—*McQuitty v. Wilhite* (Mo.) 730.

§ 185. The authority given an administrator by Rev. St. 1899, §§ 129, 130, 146 (Ann. St. 1906, pp. 379, 380, 384), does not authorize an administrator to convey land in performance of a contract made by decedent, and hence cannot be required to do so by decree in equity.—*McQuitty v. Wilhite* (Mo.) 730.

#### VI. ALLOWANCE AND PAYMENT OF CLAIMS.

##### (B) PRESENTATION AND ALLOWANCE.

§ 227. To constitute a legal presentation of a claim against an estate within Rev. St. 1895, art. 2090, the claim, when presented, must be verified by affidavit stating the requisites prescribed by article 2070.—*Whitmire v. Powell* (Tex. Civ. App.) 433.

§ 227. The affidavit required by Rev. St. 1895, art. 2070, relating to the allowance of claims against an estate, must contain the statutory requisites, and the administrator cannot allow a claim where any of the essential requisites are omitted.—*Whitmire v. Powell* (Tex. Civ. App.) 433.

##### (C) DISPUTED CLAIMS.

Presumptions on appeal, see Appeal and Error, § 909.

§ 256. The administrator is the proper party to represent the estate of a decedent in respect to the allowance of claims against it; he representing all persons interested in the estate.—*Hall v. Rutherford* (Ark.) 548.

§ 256. A grantee of heirs of a decedent, who was not a party to the record in probate proceedings for the allowance of a claim against the estate, *held* to have no appeal from a judgment allowing the claim.—*Hall v. Rutherford* (Ark.) 548.

#### VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

##### (C) SALE.

§ 365. The fact that an executor purchased land of the estate at a sale procured by his instrumentality to settle the estate would not make the purchase void.—*Dennis v. Alves* (Ky.) 287.

#### X. ACTIONS.

Conformity of default judgment to pleading, see Judgment, § 117.

Requests for instructions to jury, see Trial, § 260.

§ 431. The words "any claim for money," in Rev. St. 1895, art. 2082, relating to actions against an estate, *held* to mean only the debt, and not the lien existing as security therefor.—*Whitmire v. Powell* (Tex. Civ. App.) 433.

§ 431. Under Rev. St. 1895, arts. 2015-2018, 2082, a suit to establish a claim against a decedent's estate *held* not maintainable unless it has been presented to and rejected by the executor or administrator.—*Whitmire v. Powell* (Tex. Civ. App.) 433.

§ 431. The remedy of the holder of purchase-money notes secured by vendor's lien and a deed of trust *held* to consist of the presentation of his claim, properly authenticated, to the administrator of the party liable for allowance, and to establish the claim by suit, on the administrator rejecting it.—*Whitmire v. Powell* (Tex. Civ. App.) 433.

§ 437. Rev. St. 1895, art. 2082, *held* to extinguish a claim against an estate which has been rejected by the administrator and for the establishment of which suit has not been brought within the statutory time.—*Whitmire v. Powell* (Tex. Civ. App.) 433.

§ 437. Statement of limitation of action against an executrix on a debt of testator.—*Lang v. Light* (Tex. Civ. App.) 1038.

§ 443. A claimant suing on a claim against an estate must not merely allege the presentation and rejection of the claim, but must also allege the proper authentication of the claim when presented.—*Whitmire v. Powell* (Tex. Civ. App.) 433.

§ 444. A pleading held to state a cause of action against an executrix merely as such, and not individually.—*Lang v. Light* (Tex. Civ. App.) 1038.

## EXEMPLARY DAMAGES.

See Damages, § 87.

## EXEMPTIONS.

See Homestead.

From license tax, see Licenses, § 19.

From taxation, see Taxation, § 247.

### I. NATURE AND EXTENT.

#### (B) PERSONS ENTITLED.

§ 16. Under Ky. St. § 1697 (Russell's St. § 4656), held, that the property of one who has no family is not exempt from execution.—*Jarboe v. Hayden* (Ky.) 961; *Burton's Adm'r v. Same, Id.*

## EXHIBITS.

Annexed to pleading, see Pleading, §§ 310, 311.

## EXHUMATION.

Of body of decedent on trial of action for causing death, see Death, § 102½.

## EXPENSES.

Of keeping impounded animals, see Animals, § 51.

## EXPERT TESTIMONY.

In civil actions, see Evidence, §§ 471-568.

In criminal prosecutions, see Criminal Law, §§ 459-494.

## EXPLOSIVES.

Injuries to adjoining property by blasting, see Adjoining Landowners, § 7.

§ 7. Rules of railway companies held properly admitted in an action against them for negligent death.—*Southern Ry. Co. v. Adkins' Adm'r* (Ky.) 321.

§ 7. Weight of the evidence in an action against railway companies for death caused by an explosion of a car of dynamite in their yard held to show that the explosion was caused by a violent kicking of cars against such car, and not by a rifle shot fired by a third person.—*Southern Ry. Co. v. Adkins' Adm'r* (Ky.) 321.

§ 7. In an action against railway companies for death caused by an explosion of a car of dynamite in their yard, plaintiff's right to recover held improperly restricted.—*Southern Ry. Co. v. Adkins' Adm'r* (Ky.) 321.

§ 7. One handling explosives is not liable for injury caused by an explosion thereof, if he has taken necessary precautions in attempting to save others from injuries through an explosion.—*Southern Ry. Co. v. Adkins' Adm'r* (Ky.) 321.

§ 7. Railway companies are liable for damage caused by an explosion of a car of dynamite, regardless of the cause of the explosion, if they failed to exercise care to prevent it.—*Southern Ry. Co. v. Adkins' Adm'r* (Ky.) 321.

## FACTORS.

See Brokers; Principal and Agent.

## FALSE IMPRISONMENT.

See Malicious Prosecution.

### I. CIVIL LIABILITY.

#### (A) ACTS CONSTITUTING FALSE IMPRISONMENT AND LIABILITY THEREFOR.

§ 7. Deprivation of citizen of liberty in violation of Bill of Rights held to authorize action of false imprisonment.—*Gold v. Campbell* (Tex. Civ. App.) 463.

§ 7. Under Code Cr. Proc. 1895, arts. 249, 252, and El Paso city ordinance No. 561, arrest of merchant in his own store without warrant for refusing to return money received by him in business transaction held unauthorized.—*Gold v. Campbell* (Tex. Civ. App.) 463.

§ 7. Liability of officer for illegal arrest held not waived by plea of guilty.—*Gold v. Campbell* (Tex. Civ. App.) 463.

§ 8. Chief of police sanctioning unlawful arrest by police officer held himself liable for false imprisonment.—*Gold v. Campbell* (Tex. Civ. App.) 463.

#### (B) ACTIONS.

§ 22. Under Pen. Code 1895, art. 593, any restraint put by fear or force upon the actions of another held prima facie unlawful.—*Gold v. Campbell* (Tex. Civ. App.) 463.

§ 22. In false imprisonment, malice held not necessary to be proved, where it is shown that imprisonment is unlawful.—*Gold v. Campbell* (Tex. Civ. App.) 463.

§ 26. In action for false imprisonment, information and warrant of arrest filed after false imprisonment held inadmissible to justify or mitigate the unlawful act.—*Gold v. Campbell* (Tex. Civ. App.) 463.

§ 31. In action against chief of police for false imprisonment, evidence held to show responsibility of defendant for unlawful detention of plaintiff.—*Gold v. Campbell* (Tex. Civ. App.) 463.

§ 33. Measure of damages, in action for false imprisonment, held to be within the sound discretion of the jury.—*Gold v. Campbell* (Tex. Civ. App.) 463.

§ 34. Rule as to damages for false imprisonment, stated.—*Gold v. Campbell* (Tex. Civ. App.) 463.

§ 34. Damages to business held too remote for recovery in action for false imprisonment.—*Gold v. Campbell* (Tex. Civ. App.) 463.

§ 35. In action for false imprisonment, exemplary damages held recoverable where defendant acted recklessly, willfully, and maliciously and with a design of oppressing and injuring plaintiff.—*Gold v. Campbell* (Tex. Civ. App.) 463.

### II. CRIMINAL RESPONSIBILITY.

§ 43. Under Pen. Code 1895, art. 618, "false imprisonment," defined.—*Gold v. Campbell* (Tex. Civ. App.) 463.

## FALSE SWEARING.

See Perjury.

## FEES.

For keeping impounded animals, see Animals, § 51.

Officers in general, see Officers, § 95.

Of sheriff or constable, see *Sheriffs and Constables*, § 29.

## FEE SIMPLE.

See *Estates*, § 5.

Creation by will, see *Wills*, §§ 597, 601.

## FELLOW SERVANTS.

See *Master and Servant*, §§ 177-198, 228, 287, 294.

## FENCES.

Amendment of statutes relating to fencing districts, see *Statutes*, § 141.

Special laws creating fencing districts, see *Statutes*, § 68.

§ 4. The presumption arising from an act creating a fencing district is that the owners of property in the district as changed by a subsequent act will be benefited.—*Henderson v. Dearing* (Ark.) 1066.

§ 16. Act April 13, 1907 (Acts 1907, p. 407), did not excuse the assessors from apportioning the fencing as required by prior acts; it not appearing that any effort had been made to make the apportionment without expense of a survey, or that the boundaries could not be sufficiently ascertained for all practical purposes from the owners of the lands.—*Henderson v. Dearing* (Ark.) 1066.

## FERRIES.

### II. REGULATION AND OPERATION.

§ 82. The absence of a screen on a ferryboat between the treadway occupied by a horse and the driveway *held* not the proximate cause of injuries to a person on the boat by being kicked by a mule in the driveway which was bitten by the horse in the treadway.—*Tolin v. Terrell* (Ky.) 290.

## FIDELITY INSURANCE.

See *Insurance*, §§ 133, 136, 146, 177, 264, 665.

## FILING.

Bill of exceptions, see *Exceptions*, Bill of, §§ 40-53.

Indictment or presentment, see *Indictment and Information*, § 14.

Oath of referee, see *Reference*, § 42.

Statement of grounds for contest of local option election, see *Intoxicating Liquors*, § 37.

## FINAL JUDGMENT.

Appealability, see *Appeal and Error*, § 78.

## FINDINGS.

On reference, see *Reference*, § 89.

Review on appeal or writ of error, see *Appeal and Error*, §§ 1008-1010.

Setting aside, see *New Trial*, § 75.

## FIRE ESCAPES.

Jurisdiction of particular appellate court on prosecution for failure to provide, see *Courts*, § 231.

## FIRES.

Disobedience to subpoena issued by insurance commissioner under fire-marshal law, see *Witnesses*, § 21.

Partial invalidity of fire-marshal law, see *Statutes*, § 64.

Subject and title of fire-marshal law, see *Statutes*, § 110½.

Validity of fire-marshal law under constitutional requirement of equality and uniformity, see *Taxation*, § 40.

§ 2. The fire marshal law (Acts 1907, p. 1538, c. 460), authorizing the Insurance Commissioner to investigate the origin of fires and to subpoena witnesses for that purpose, is remedial in its nature and should receive a liberal construction.—*Rhinehart v. State* (Tenn.) 508.

§ 9. Fire Marshal Law (Acts 1907, p. 1540, c. 460) § 6, providing for a tax on the business of insurance companies in the state for raising a fund for expenses in investigating the source of and preventing fires, is a valid exercise of the police power of the state.—*Rhinehart v. State* (Tenn.) 508.

§ 9. The investigation of the origin of fires by the Insurance Commissioner under the fire marshal law (Acts 1907, p. 1538, c. 460) may be held at the commissioner's office in the State Capitol.—*Rhinehart v. State* (Tenn.) 508.

§ 9. Fire Marshal Law (Acts 1907, p. 1540, c. 460) § 8, and Shannon's Code, § 7358, authorizes the Insurance Commissioner, in the investigation of any fire, to issue subpoenas for witnesses from any part of the state.—*Rhinehart v. State* (Tenn.) 508.

## FOOD.

Adulteration as a public offense, see *Adulteration*.

Concurrent and conflicting exercise of power by state and municipality, see *Municipal Corporations*, § 592.

## FORCIBLE DEFILEMENT.

See *Rape*.

## FORCIBLE ENTRY AND DETAINER.

### I. CIVIL LIABILITY.

Conclusiveness of judgment in subsequent action of, by defendant to recover same premises, see *Judgment*, § 718.

§ 9. A mere survey, without more, *held* not to interrupt possession, so as to authorize an action of forcible entry and detainer against the one otherwise in possession.—*Milem v. Freeman* (Mo. App.) 644.

§ 29. Proof of possession by H. interrupting that of defendant in forcible entry and possession cannot be had by testimony that H. was recognized and considered as the owner, and considered to be in possession.—*Milem v. Freeman* (Mo. App.) 644.

§ 29. Evidence *held* insufficient on possession of defendant in forcible entry and detainer, having been interrupted within three years.—*Milem v. Freeman* (Mo. App.) 644.

## FORECLOSURE.

Of mortgage, see *Mortgages*, § 534.

## FOREIGN CORPORATIONS.

See *Corporations*, §§ 642, 657.

Taxation of corporations and corporate property, see *Corporations*, § 166.

## FORFEITURES.

For causing death, see *Death*, §§ 86-99.

## FORGERY.

§ 28. An indictment for passing a forged instrument *held* defective.—*Forcy v. State* (Tex. Cr. App.) 834.

§ 84. Where the indictment alleged that accused passed as true a false instrument upon J., and the evidence showed that the instrument was passed upon J. & Sons, the variance is fatal.—*Forcy v. State* (Tex. Cr. App.) 834.

## FORMER ADJUDICATION.

See Judgment, §§ 554, 604, 713-747.

## FORMS OF ACTION.

See Action, §§ 25, 27; Ejectment; Trespass, §§ 20, 44; Trover and Conversion.

## FRANCHISES.

Of banks, see Banks and Banking, § 87.  
Taxation of, see Taxation, § 117.

## FRAUD.

See Fraudulent Conveyances.

Effect on limitation, see Limitation of Actions, § 100.

In insurance, see Insurance, § 264.

Of directors of corporation, see Corporations, § 335.

Procuring making of will, see Wills, §§ 155-166.

Set-off in action for false representations, see Set-Off and Counterclaim, § 29.

### I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 8. Essentials to constitute actionable deceit, stated.—*Remmers v. Remmers* (Mo.) 1117.

§ 13. Where one makes a representation without knowledge whether it is true or false, he is guilty of fraud if it be false.—*Miller v. Rankin* (Mo. App.) 641.

§ 13. A person may be liable as for fraud for false representations, if he had good reason to believe the representations to be false.—*Miller v. Rankin* (Mo. App.) 641.

§ 27. A purchaser induced by fraud to purchase land in gross cannot recover for a mere deficiency in the quantity of the land.—*Gordon v. Rhodes & Daniel* (Tex. Civ. App.) 1023.

### II. ACTIONS.

#### (A) RIGHTS OF ACTION AND DEFENSES.

§ 37. Under Sayles' Ann. Civ. St. 1897, art. 1194, subd. 7, an action against real estate brokers for deceit *held* properly brought in the county where the false representations were made and the contract of purchase was made and consummated.—*Gordon v. Rhodes & Daniel* (Tex. Civ. App.) 1023.

#### (B) PARTIES AND PLEADING.

§ 47. A petition, in an action against real estate brokers for deceit inducing the purchase of land, *held* to state a cause of action.—*Gordon v. Rhodes & Daniel* (Tex. Civ. App.) 1023.

#### (D) DAMAGES.

§ 59. The measure of damages of a purchaser induced by the fraud of the vendor to purchase is the difference between the value of the land and the sum paid for it.—*Gordon v. Rhodes & Daniel* (Tex. Civ. App.) 1023.

§ 59. In an action by the buyer of a gin for fraudulent representations of the seller as to its condition, plaintiff *held* not entitled to damages for expenses incurred and services performed by him in endeavoring to operate the gin.—*Wimple v. Patterson* (Tex. Civ. App.) 1034.

§ 59. In an action by the buyer of a gin against the seller and his agents for damages from false representations, defendants *held* not

entitled to complain of an instruction as to the measure of damages.—*Wimple v. Patterson* (Tex. Civ. App.) 1034.

§ 60. A purchaser induced by fraud to purchase land cannot recover for the loss sustained in consequence of the sale of his own land for less than its value to raise money to pay for the land purchased.—*Gordon v. Rhodes & Daniel* (Tex. Civ. App.) 1023.

§ 60. A purchaser of real estate rescinding the contract on the ground of the fraud of the broker inducing the purchase *held* not entitled to complain of the fact that the broker retained a specified sum under an understanding with the owner.—*Gordon v. Rhodes & Daniel* (Tex. Civ. App.) 1023.

### (E) TRIAL, JUDGMENT, AND REVIEW.

§ 65. In an action by the purchaser of a machine for damages for fraudulent representations by the seller's agents, an instruction *held* erroneous.—*Wimple v. Patterson* (Tex. Civ. App.) 1034.

## FRAUDS, STATUTE OF.

### V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

§ 44. Under the statute of frauds (Rev. St. 1899, § 3418 [Ann. St. 1906, p. 1951]), requiring contracts not to be performed within a year to be in writing, evidence of a prior oral agreement constituting a consideration *held* inadmissible to render valid an incomplete contract for the sale of coal.—*Reigart v. Manufacturers' Coal & Coke Co.* (Mo.) 61.

§ 44. A contract to bore a well *held* not within the statute of frauds.—*Hall v. Cook* (Tex. Civ. App.) 449.

### VII. SALES OF GOODS.

#### (A) CONTRACTS WITHIN STATUTE.

§ 84. Under the statute of frauds (Rev. St. 1899, § 3419 [Ann. St. 1906, p. 1963]), an invalid contract for the sale of coal of value in excess of \$30 cannot be rendered valid by evidence of a contemporaneous oral agreement constituting a consideration.—*Reigart v. Manufacturers' Coal & Coke Co.* (Mo.) 61.

### IX. OPERATION AND EFFECT OF STATUTE.

§ 129. An estate in land may be transferred from one to another without writing, by a verbal sale accompanied by actual possession.—*Hubbard v. Slavens* (Mo.) 1104; *Waters v. Hubbard* (Mo.) 1112; *Hall v. Same, Id.*; *Deval v. Same, Id.*

## FRAUDULENT CONVEYANCES.

### I. TRANSFERS AND TRANSACTIONS INVALID.

#### (B) NATURE AND FORM OF TRANSFER.

§ 34. A rescission of sale *held* in effect a resale void as to the original buyer's creditors under Rev. St. 1899, § 3410 (Ann. St. 1906, p. 1940).—*Tuttle v. Bracey-Howard Const. Co.* (Mo. App.) 86.

#### (F) CONFIDENTIAL RELATIONS OF PARTIES.

§ 104. A conveyance by a debtor through an intermediary to his wife *held* for the fraudulent purpose of defeating his creditors.—*Lankford v. Lankford* (Ky.) 962.

#### (H) PREFERENCES TO CREDITORS.

§ 115. In the absence of any statutory provision in relation thereto, there is nothing il-

legal in the act of a debtor in preferring one creditor over another.—*Fawcett's Assignee v. Mitchell, Finch & Co. (Ky.)* 956.

## II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

### (A) ORIGINAL PARTIES.

Right of husband to recover on divorce property fraudulently conveyed to his wife, see *Divorce*, § 249.

§ 174. A debtor, having conveyed his property to defraud his creditors, *held* not entitled to sue in equity to recover the same.—*Lankford v. Lankford (Ky.)* 962.

## III. REMEDIES OF CREDITORS AND PURCHASERS.

### (G) EVIDENCE.

§ 297. Certain proof *held* not to show that a grantor was solvent at the time of the execution of a conveyance, nor to show that it was not made with intent to defraud creditors.—*Martin v. Gwynn (Ark.)* 754.

§ 298. That one, while greatly embarrassed financially, made a voluntary conveyance of land to his child, without which land he could not pay his debts, *held* conclusive evidence of fraud.—*Martin v. Gwynn (Ark.)* 754.

### (I) TRIAL.

§ 306. Whether one claiming attached wire took possession within a reasonable time within *Rev. St. 1899, § 3410 (Ann. St. 1906, p. 1940)*, *held* a law question.—*Tuttle v. Bracey-Howard Const. Co. (Mo. App.)* 86.

## GAMING.

## III. CRIMINAL RESPONSIBILITY.

### (A) OFFENSES.

§ 72. A gathering of invited guests at an entertainment at a private residence would not make it a public place, within the gaming laws.—*Pugh v. State (Tex. Cr. App.)* 817.

## GARNISHMENT.

See Attachment; Execution.

## II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 51. Holders of orders for sums in hands of third persons executed, delivered, and presented for payment prior to service of garnishment on the third persons, *held* absolute assignments of defendants' interest in the assigned portion of the funds, and to entitle the holders to payment thereof.—*E. L. Wilson Hardware Co. v. F. J. & R. C. Duff (Tex. Civ. App.)* 440.

## V. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.

§ 109. A defendant *held* entitled to money paid by garnishee after service of writ in ignorance of the service.—*E. L. Wilson Hardware Co. v. F. J. & R. C. Duff (Tex. Civ. App.)* 440.

§ 110. Garnishment proceedings are purely statutory and cannot be extended beyond reaching the effects of a defendant in the garnishee's hands; *Sayles' Ann. Civ. St. 1897, art. 225*, providing that it shall not be lawful for the garnishee to pay defendant any debt or deliver him any effects after service of the writ.—*E. L. Wilson Hardware Co. v. F. J. & R. C. Duff (Tex. Civ. App.)* 440.

## GEOGRAPHICAL FACTS.

Judicial notice of, see *Evidence*, § 10.

## GIFTS.

Charitable gifts, see *Charities*.

## GOOD FAITH.

Of purchaser, see *Bills and Notes*, §§ 337-370; *Vendor and Purchaser*, §§ 224-244. To sustain claim of occupant of land for improvements, see *Improvements*, § 4.

## GRAND JURY.

See *Indictment and Information*.

## GRANTS.

Of public lands, see *Public Lands*.

## GROSS EARNINGS.

Consideration of gross earnings of foreign corporation in the state in fixing value of its franchise for taxation, see *Taxation*, §§ 28, 365, 397.

## GUARANTY.

See *Indemnity*; *Principal and Surety*.

## III. DISCHARGE OF GUARANTOR.

§ 70. Certain facts *held* no defense to a guaranty of performance of a contract of conditional sale of stock of goods by the buyer.—*Vette v. J. S. Merrell Drug Co. (Mo. App.)* 666.

## GUARDIAN AND WARD.

Change of domicile of infant under guardianship, see *Domicile*, § 5. Guardianship of insane persons, see *Insane Persons*, § 36.

## I. GUARDIANSHIP IN GENERAL.

§ 4. *Rev. St. 1899, § 3478 (Ann. St. 1906, p. 1991)*, declaring the father while living, and after his death the mother, to be the natural guardian and curator of the child, is declaratory of the common law.—*Smith v. Young (Mo. App.)* 628.

## II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

Collateral attack on judgment in proceedings for appointment of guardian, see *Judgment*, § 498.

§ 8. The jurisdiction of the probate court to appoint a guardian or curator for a minor is fixed by the domicile of the minor.—*Smith v. Young (Mo. App.)* 628.

§ 8. Probate courts are possessed of original and exclusive jurisdiction as to the appointment of guardians, and their right to proceed must be determined as a fact.—*Smith v. Young (Mo. App.)* 628.

§ 13. An order refusing to vacate the appointment of a guardian is appealable.—*Smith v. Young (Mo. App.)* 628.

## HABEAS CORPUS.

## II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 85. In habeas corpus proceedings by the father for the custody of a 12 year old child, evidence, in view of the rights of the parents, the child's welfare, and its preferences, *held* to require that the custody of the child be awarded to the mother.—*Jackson v. Clay (Ark.)* 546.

§ 99. In awarding the custody of infants, the court not only considers the rights of the

parents, but also the wishes of the child, when it is of sufficient age and intelligence.—*Jackson v. Clay* (Ark.) 548.

§ 99. The nature of the father's right to the custody of infant children, stated.—*Jackson v. Clay* (Ark.) 546.

§ 109. On habeas corpus to secure release of prisoner charged with crime, practice of remanding relator to custody of sheriff to await the action of grand jury approved.—*Ex parte Burdine* (Tex. Cr. App.) 152.

## HABITUAL CRIMINALS.

See Criminal Law, § 1202.

## HABITUAL DRUNKARDS.

See Drunkards.

## HARMLESS ERROR.

In civil actions, see Appeal and Error, §§ 1029-1073.

In criminal prosecutions, see Criminal Law, §§ 1160½-1174; Homicide, §§ 338, 340.

## HEALTH.

Adulteration as a public offense, see Adulteration.

## II. REGULATIONS AND OFFENSES.

§ 88. A city board of health could not establish a lien on a lot for a penalty, and for the expense of draining it, pursuant to Kirby's Dig. §§ 5722, 5723, if the owner refused to comply with an order not recorded to construct a sewer.—*Dinning v. Moore* (Ark.) 777.

## HEARING.

In probate proceedings, see Wills, § 824.

## HEARSAY EVIDENCE.

In civil actions, see Evidence, § 320.

In criminal prosecutions, see Criminal Law, § 419.

## HEIRS.

See Descent and Distribution.

## HEPBURN ACT.

See Carriers, § 180.

## HIGHWAYS.

See Bridges; Municipal Corporations, §§ 658, 755-824; Navigable Waters, § 20.

Accidents at railroad crossings, see Railroads, §§ 327-350.

Dedication of land for purpose of highway, see Dedication, § 5.

## I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

### (B) ESTABLISHMENT BY STATUTE OR STATUTORY PROCEEDINGS.

§ 29. A petition to establish a public highway should show that 10 of petitioners were freeholders of the county.—*Johnson v. West* (Ark.) 770.

§ 32. If proceedings to establish a public highway were void because the court had no jurisdiction, a remonstrator could have made himself a party to the proceeding by order of the court and showed the lack of jurisdiction.—*Johnson v. West* (Ark.) 770.

§ 47. A "first-class road" is not less than 40 nor more than 60 feet wide.—*Craighead v. State* (Tex. Cr. App.) 128.

§ 58. Under Kirby's Dig. § 3006, an appeal to the circuit court from an order establishing a highway *held* to supersede proceedings on the order until the appeal was dismissed.—*Johnson v. West* (Ark.) 770.

§ 60. In view of a remonstrator's delay in raising an objection to proceedings to establish a highway that the court had no jurisdiction, *held*, that certiorari to review the order establishing the highway should be denied.—*Johnson v. West* (Ark.) 770.

### (C) ALTERATION, VACATION, OR ABANDONMENT.

§ 72. Where it is shown that the damages have been paid to the owners of land over which a road, as changed, is located, and the new road is opened and used by the public, it is immaterial that the orders of the county court do not show acceptance of the road as changed.—*Pine Mountain R. Co. v. Finley* (Ky.) 413.

§ 78. Recovery of damages for the obstruction of the approach to a highway cannot be had, where the highway itself was discontinued before the obstruction occurred.—*Pine Mountain R. Co. v. Finley* (Ky.) 413.

## II. HIGHWAY DISTRICTS AND OFFICERS.

§ 90. General theory as to formation and extent of road districts, stated.—*Road Improvement Dist. No. 1 v. Glover* (Ark.) 544.

§ 90. The Legislature may authorize organization of a part of a county into a road district for repairing, maintaining, and improving roads already in existence; but such districts cannot be formed or authorized to lay out and establish new roads and impose on the county court the duty to maintain them, as provided by section 9, Act April 4, 1907 (Acts 1907, p. 348).—*Road Improvement Dist. No. 1 v. Glover* (Ark.) 544.

§ 90. As Act April 4, 1907 (Acts 1907, p. 340), providing for road improvement districts, does not provide for the assessment of lands benefited, or how it is to be made, it is inoperative.—*Road Improvement Dist. No. 1 v. Glover* (Ark.) 544.

## V. REGULATION AND USE FOR TRAVEL.

### (A) OBSTRUCTIONS AND ENCROACHMENTS.

§ 164. In a prosecution for willfully obstructing a highway, refusal to give a charge presenting the defense established by the testimony of accused *held* erroneous.—*Craighead v. State* (Tex. Cr. App.) 816.

## HOMESTEAD.

See Exemptions.

## I. NATURE, ACQUISITION, AND EXTENT.

### (A) NATURE, CREATION, AND DURATION OF ESTATE OR RIGHT IN GENERAL.

§ 1. "Homestead" defined.—*White v. Spencer* (Mo.) 20.

### (B) PERSONS ENTITLED.

§ 20. Under Ky. St. 1909, §§ 1702, 1708 (Russell's St. §§ 4661, 4667), the homestead of a debtor *held* not exempt from execution.—*Jarboe v. Hayden* (Ky.) 961; *Burton's Adm'r v. Same*, *Id.*

**(C) ACQUISITION AND ESTABLISHMENT.**

§ 32. An intent to occupy premises as a homestead when the debtor should be able to build a house thereon *held* insufficient to establish a homestead exemption.—*Flowers v. United States Fidelity & Guaranty Co. (Ark.)* 547.

**(D) PROPERTY CONSTITUTING HOMESTEAD.**

§ 58. Homestead defined.—*Flowers v. United States Fidelity & Guaranty Co. (Ark.)* 547.

**(E) LIABILITIES ENFORCEABLE AGAINST HOMESTEAD.**

§ 94. Under Ky. St. 1909, §§ 1702, 1708 (Russell's St. §§ 4661, 4667), the homestead of a debtor *held* not exempt from execution.—*Jarboe v. Hayden (Ky.)* 961; *Burton's Adm'r v. Same, Id.*

§ 103. Under Rev. St. 1899, §§ 3616, 3617, 3751 (Ann. St. 1906, pp. 2034, 2038, 2090), a judgment *held* a lien before execution on land in excess of that which the debtor was entitled to claim as a homestead exemption, which lien was superior to a conveyance by the debtor before levy.—*White v. Spencer (Mo.)* 20.

§ 105. A homestead is not exempt from sale on a judgment enforcing a special municipal assessment for street improvements.—*Robinson v. Levy (Mo.)* 577.

**IV. ABANDONMENT, WAIVER, OR FORFEITURE.**

§ 162. The intent to return, which will prevent a removal from a homestead from constituting abandonment, must continue during the entire absence.—*Lynch v. McGown (Tex. Civ. App.)* 884.

§ 62. To constitute an abandonment of a homestead, it must appear that there was a removal with a fixed intention never to return.—*Anstrong v. Neville (Tex. Civ. App.)* 1010.

§ 32. Conduct of a person *held* not to show a fixed intention never to return to his homestead.—*Armstrong v. Neville (Tex. Civ. App.)* 1010.

§ 10. A maker of a note secured by a vendor's lien may in a suit to foreclose the lien waive his homestead rights.—*Zeno v. Adoue (Tex. Civ. App.)* 1039.

§ 11. The abandonment of a homestead should not be found to exist unless it is clearly shown beyond all reasonable ground of dispute.—*Anstrong v. Neville (Tex. Civ. App.)* 1010.

**V. PROTECTION AND ENFORCEMENT OF RIGHTS.**

§ 16. Where, after judgment, the debtor conveyed land in excess of his homestead on which judgment was a lien, the debtor and the purchaser were bound by the selection thus made, that a purchaser of the excess at an execution sale under such judgment was entitled to recover the land in ejectment.—*White v. Spear (Mo.)* 20.

**HOMICIDE.****II. MURDER.**

§ 9. accused went to the place where his nephew and others were quarreling, and deliberately provoked the difficulty with intent to kill decent, it would be murder.—*Bice v. State (Tex. App.)* 163.

§ 23. Under White's Ann. Pen. Code, art. 708, one provoking a contest with the apparent intent of killing or doing serious bodily harm to his adversary *held* not justified in the killing of his adversary, even to save his own life.—*Gray v. Phillips (Tex. Civ. App.)* 870.

**III. MANSLAUGHTER.**

§ 49. Shooting by decedent towards a house in which accused's wife was, was not an insult to her as affecting the question whether the homicide was manslaughter.—*Buckner v. State (Tex. Cr. App.)* 802.

§ 49. Insults to accused's wife would reduce the killing by her husband of the person giving such insults to manslaughter.—*Hobbs v. State (Tex. Cr. App.)* 811.

§ 63. If accused provoked the difficulty with decedent with intent to commit a simple battery on him, the killing would be manslaughter.—*Bice v. State (Tex. Cr. App.)* 163.

**V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.**

§ 101. Insulting conduct towards accused's wife by decedent would not justify killing him.—*Hobbs v. State (Tex. Cr. App.)* 811.

§ 110. Certain proof *held* to show an actual attack by decedent on accused, authorizing the latter to defend against an actual attack.—*Simmons v. State (Tex. Cr. App.)* 141.

§ 115. A person has the same right to defend himself from serious bodily injury as he would to protect his life.—*McDowell v. State (Tex. Cr. App.)* 831.

§ 116. One may act upon threats communicated, if he believes they were made, regardless of whether they have been in fact made.—*Buckner v. State (Tex. Cr. App.)* 802.

§ 116. The punishment of a person charged with homicide must be predicated upon his intent and felonious purpose at the time he acted.—*Vinson v. State (Tex. Cr. App.)* 846.

§ 120. Harsh treatment and apprehension of injury or death *held* not to justify assassination.—*Sergeant v. Commonwealth (Ky.)* 362.

**VI. INDICTMENT AND INFORMATION.**

§ 135. Gist of the offense of assault with intent to murder, under Kirby's Dig. § 1588, stated, making it unnecessary for an indictment to allege the manner of using a knife in making an assault.—*State v. De Long (Ark.)* 524.

**VII. EVIDENCE.**

Opinion evidence, see Criminal Law, § 494.  
Testimony of accomplices, see Criminal Law, § 507.

**(A) PRESUMPTIONS AND BURDEN OF PROOF.**

§ 143. In a murder prosecution for poisoning accused's wife by giving her strychnia in tablets as medicine, the state must prove that she took the poison believing it to be a salutary medicine, and died from the effects of it.—*Levering v. Commonwealth (Ky.)* 253.

§ 147. In a murder prosecution for poisoning accused's wife by giving her strychnia, the commonwealth must show by competent evidence that accused willfully and maliciously caused the poison to be administered to his wife in the manner stated.—*Levering v. Commonwealth (Ky.)* 253.

**(B) ADMISSIBILITY IN GENERAL.**

Declarations of decedent, see Criminal Law, § 415.

Hearsay evidence, see Criminal Law, § 419.  
Res gestæ, see Criminal Law, § 366.

§ 163. On a trial for murder, it is not competent to prove the bad reputation of decedent for chastity.—*Hall v. State (Ark.)* 753.

§ 166. Evidence in a prosecution for murder held admissible to prove motive.—Sergeant v. Commonwealth (Ky.) 362.

§ 166. In a prosecution for assault with intent to murder, certain evidence held admissible to show accused's jealousy of prosecuting witness as the motive for the crime.—Reyes v. State (Tex. Cr. App.) 152.

§ 166. In a prosecution for assault with intent to murder, testimony of a woman that accused had been going with her for two or three years was admissible, where, when taken in connection with other evidence, it showed such a relationship as would furnish a basis for the motive for the assault.—Reyes v. State (Tex. Cr. App.) 152.

§ 174. In a prosecution for shooting persons while in bed with intent to murder them, testimony as to a piece of lead found on the bed clothes the next morning held admissible.—Pemberton v. State (Tex. Cr. App.) 837.

§ 190. On a trial for homicide, evidence of the difficulty between accused and decedent occurring about an hour before the fatal difficulty held admissible.—McGowan v. Commonwealth (Ky.) 387.

#### (C) DYING DECLARATIONS.

§ 216. Declaration of decedent made some two or three hours after he was fatally stabbed held inadmissible as a dying declaration, in the absence of testimony making it competent as a dying declaration.—McGowan v. Commonwealth (Ky.) 387.

#### (E) WEIGHT AND SUFFICIENCY.

Effect of opinion evidence, see Criminal Law, § 494.

§ 231. Evidence in a prosecution for murder held to show malice, necessary to authorize a verdict of guilty.—Sergeant v. Commonwealth (Ky.) 362.

§ 234. In a murder prosecution for poisoning accused's wife, evidence held to show that accused caused his wife to take poison; she believing that it was a medicine.—Levering v. Commonwealth (Ky.) 253.

§ 234. In a prosecution for assault with intent to murder, evidence held to show that the assaulted person was shot by accused.—Reyes v. State (Tex. Cr. App.) 152.

§ 250. Evidence held to sustain a conviction of murder.—Buckner v. State (Tex. Cr. App.) 802.

§ 257. Evidence held sufficient to sustain a conviction of assault to murder.—Pemberton v. State (Tex. Cr. App.) 837.

### VIII. TRIAL.

#### (B) QUESTIONS FOR JURY.

Direction of verdict, see Criminal Law, § 753.

§ 268. In a prosecution for murder by poison, whether decedent's death was caused by strychnia poisoning held for the jury.—Levering v. Commonwealth (Ky.) 253.

#### (C) INSTRUCTIONS.

Assumptions by judge as to facts, see Criminal Law, § 761.

On weight of evidence, see Criminal Law, § 763.

§ 286. Under Pen. Code 1895, art. 717, the jury in a prosecution for homicide should have been charged as to the weapon used and on the issue of aggravated assault.—McDowell v. State (Tex. Cr. App.) 831.

§ 297. In a homicide prosecution, where accused claimed that the killing was provoked by insults to his wife and was in self-defense, an

instruction held to properly present the issues.—Hobbs v. State (Tex. Cr. App.) 811.

§ 300. An instruction on self-defense held erroneous for failing to define how accused brought on the difficulty.—McGowan v. Commonwealth (Ky.) 387.

§ 300. On a trial for homicide, an instruction held to sufficiently present the issue of self-defense.—Simmons v. State (Tex. Cr. App.) 141.

§ 300. The law of threats is a substantive defense that should be presented in the charge in a homicide case wherever threats are shown regardless of whether they were made or communicated.—Buckner v. State (Tex. Cr. App.) 802.

§ 300. Instructions in a murder trial on the law of threats held erroneous.—Buckner v. State (Tex. Cr. App.) 802.

§ 300. Under evidence in prosecution for homicide, held, that an instruction as to self-defense generally should have been given.—McDowell v. State (Tex. Cr. App.) 831.

§ 300. In a prosecution for manslaughter, a charge on self-defense held erroneous as not requiring the jury to pass upon the matter from accused's standpoint.—Vinson v. State (Tex. Cr. App.) 846.

§ 300. In a prosecution for manslaughter, a charge on self-defense held erroneous.—Vinson v. State (Tex. Cr. App.) 846.

§ 302. In a murder case, held error to refuse to charge the Statute (Pen. Code 1895, art. 67), authorizing a defense of one's home.—Frenc' v. State (Tex. Cr. App.) 848.

§ 307. In a prosecution for manslaughter, held error not to charge on aggravated assault and battery, in view of Pen. Code 1895, arts. 717, 719.—Vinson v. State (Tex. Cr. App.) 846.

§ 308. Instruction that, while accused could go to the place where others were quarreling with his nephew in order to stop the trouble, he could not go there for the purpose of raising a row, or avenging any supposed wrong done to his nephew, held proper.—Bice v. State (Tex. Cr. App.) 163.

§ 308. An instruction as to murder in the second degree should charge that the killing must be unlawful, and that it must be done on malice aforethought.—McDowell v. State (Tex. Cr. App.) 831.

§ 308. Evidence held to authorize the submission of murder in the second degree.—Tubb v. State (Tex. Cr. App.) 858.

§ 309. An instruction that, if accused murdered decedent only with intent to batter him, he would be guilty of manslaughter, held objectionable on the ground that, if accused pursued decedent with a less intent than to take his life, he would be guilty of no more than manslaughter.—Bice v. State (Tex. Cr. App.) 163.

#### X. APPEAL AND ERROR.

§ 338. In prosecution for homicide provoked by alleged insults to accused's wife by decedent, which she communicated to accused, any error in permitting the state to cross-examine as to the actual facts as to the insults held not prejudicial.—Hobbs v. State (Tex. Cr. App.) 811.

§ 340. One convicted of murder in the first degree cannot complain of the error of a court in submitting the issue of manslaughter.—Tubb v. State (Tex. Cr. App.) 858.

§ 348. Under the circumstances, charge that the killing must have been done in sudden transport of passion, in order to reduce it to manslaughter, held not prejudicial, under Code Cr. Proc. 1895, art. 723.—Bice v. State (Tex. Cr. App.) 163.



**HOUSEBREAKING.**

See Burglary.

**HUSBAND AND WIFE.**

See Divorce; Dower.

Acknowledgment by married woman, see Acknowledgment, § 25.

Claim by husband under deed to wife as color of title, see Adverse Possession, § 70.

Competency as witnesses, see Witnesses, §§ 52, 192.

Election by husband between testamentary provisions and other rights, see Wills, § 800.

Insulting conduct towards wife of accused as justification for homicide, see Homicide, § 101.

Rights of survivor, see Descent and Distribution, § 85.

Transactions between in fraud of creditors, see Fraudulent Conveyances, § 104.

**I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.**

§ 25. Evidence *held* to show that a husband was authorized to place his wife's property with one charged with his embezzlement.—Henderson v. State (Tex. Cr. App.) 825.

§ 25. Though a husband may be appointed by his wife as her agent, the relation must be proved, not being presumed.—Henderson v. State (Tex. Cr. App.) 825.

**III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.**

Gift or trust, presumptions, see Trust, §§ 41, 86.

§ 48. A wife's conveyance directly to her husband *held* valid.—Glascok v. Glascok (Mo.) 67.

**VII. COMMUNITY PROPERTY.**

§ 255. Land purchased by a married woman *held* her separate property so far as the land was paid for out of her separate funds, and community property so far as it was paid for by funds borrowed by her on a note by herself and husband.—Barr v. Simpson (Tex. Civ. App.) 1041.

§ 257. The increase of cattle given to a married woman is community property.—Barr v. Simpson (Tex. Civ. App.) 1041.

§ 259. Money earned by a married woman by teaching school is community property in the absence of an agreement between herself and husband that it shall be her separate estate.—Barr v. Simpson (Tex. Civ. App.) 1041.

§ 267. Land conveyed by a married woman and her husband *held* not subject to a levy under execution issued under a judgment against the husband.—Barr v. Simpson (Tex. Civ. App.) 1041.

**HYPOTHETICAL QUESTIONS.**

In probate proceedings, see Wills, § 324.

**ICE.**

Liability of city for injuries caused by ice on sidewalk, see Municipal Corporations, § 771.

**IDEM SONANS.**

Names *idem sonans*, see Names, § 16.

**IMPAIRING OBLIGATION OF CONTRACT.**

See Constitutional Law, § 140.

**IMPEACHMENT.**

Of witness, see Witnesses, §§ 330-392.

**IMPLIED CONTRACTS.**

See Account Stated; Money Lent.

**IMPRISONMENT.**

See False Imprisonment.

Habeas corpus, see Habeas Corpus.

**IMPROVEMENTS.**

Public improvements, see Municipal Corporations, §§ 307-582.

§ 4. Rule respecting estoppel to dispute an ousted occupant's claim for betterments, stated.—Richmond v. Ashcraft (Mo. App.) 689.

§ 4. Rule as to how one's good faith in making improvements on land may be impeached, stated.—Richmond v. Ashcraft (Mo. App.) 689.

§ 4. Notice of a title adversely held is incompatible with the good faith required of an occupant to sustain his claim for improvements, regardless of his opinion concerning the validity of such title.—Richmond v. Ashcraft (Mo. App.) 689.

§ 4. Rev. St. 1899, § 3080 (Ann. St. 1906, p. 1768) authorizing the giving of notice to defeat a claim by an occupant for betterments, *held* not to make a certain exception.—Richmond v. Ashcraft (Mo. App.) 689.

§ 4. An instruction, under a claim by an ousted occupant of land for betterments, *held* erroneous for ignoring the effect of notice of defendant's title.—Richmond v. Ashcraft (Mo. App.) 689.

§ 4. An occupant's claim for betterments is not defeated merely because his title proves to be bad.—Richmond v. Ashcraft (Mo. App.) 689.

**INCOMPETENT PERSONS.**

See Insane Persons.

**INCREASE.**

Of cattle given to married woman as community property, see Husband and Wife, § 257.

**INDEMNITY.**

See Guaranty; Principal and Surety.

§ 15. A petition, in an action by the transferee of a note, *held* insufficient to justify the making of the payee a party defendant.—Young v. State Bank of Marshall (Tex. Civ. App.) 476.

§ 15. In an action by one tenant against another, where defendant brought in the owners, his allegations as to their duty *held* not to entitle him to judgment over against the owners.—Burkett & Barnes v. Dillon (Tex. Civ. App.) 917.

**INDEPENDENT CONTRACTORS.**

See Master and Servant, §§ 315-323.

Liabilities for injuries from blasting on adjoining land, see Adjoining Landowners, § 7.

Liability of master for injuries to employé as dependent on relation of parties, see Master and Servant, § 88.

**INDICTMENT AND INFORMATION.**

*For particular offenses.*

See Assault and Battery, §§ 74, 75, 86; Burglary, § 21; Forgery, § 34; Homicide, § 135; Libel and Slander, § 152; Malicious Mischief, § 4; Perjury, §§ 25, 26; Rape, §§ 22-27.

Maintaining nuisance, see Nuisance, § 91.

## II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

§ 14. After loss of the original indictment, accused may be required to plead to a substitute, and go to trial on such substitute.—*McDowell v. State* (Tex. Cr. App.) 831.

## III. FORMAL REQUISITES OF INDICTMENT.

§ 33. Since the Code does not require the commonwealth's attorney to sign an indictment, the signing or printing by mistake of the name of a person to it as commonwealth's attorney who is not such officer does not invalidate it.—*Brown v. Commonwealth* (Ky.) 281.

## V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 61. An indictment under St. 1909, § 1175 (Russell's St. § 3709), for false swearing in reporting the condition of a bank as required by section 593 (Russell's St. § 2182), is not defective because it fails to allege that the law requires the report to be sworn to as the court takes judicial notice thereof.—*Anderson v. Commonwealth* (Ky.) 364.

§ 114. An information *held* to charge former convictions of accused, within Pen. Code 1895, art. 1014, authorizing increased punishment on a second and third conviction for the same offense.—*Muckenfuss v. State* (Tex. Cr. App.) 853.

## VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 125. An indictment under Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), *held* not duplicious as charging two assaults.—*State v. Nieuhaus* (Mo.) 73.

§ 125. An indictment under Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), *held* not duplicitious because charging the offense to be committed in two different ways.—*State v. Niehaus* (Mo.) 73.

§ 125. An indictment for robbery *held* to charge two distinct offenses.—*Harris v. State* (Tex. Cr. App.) 839.

§ 129. A count for drunkenness and one for disturbing the peace may be joined in the same indictment.—*Jarrett v. State* (Tex. Cr. App.) 833.

§ 132. The prosecution will not be required to elect between offenses charged in an indictment alleging that defendant did "carnally know and abuse" prosecutrix.—*Curtis v. State* (Ark.) 521.

§ 132. The prosecution need not elect between counts charging separate misdemeanors.—*Jarrett v. State* (Tex. Cr. App.) 833.

§ 132. Though an indictment does not show on its face that it embraces distinct offenses, where the evidence discloses that fact, the prosecution should be required to elect on which offense it will rely.—*Harris v. State* (Tex. Cr. App.) 839.

## IX. ISSUES, PROOF, AND VARIANCE.

§ 176. One charged with violation of law on a certain day may be convicted on proof that he committed the act on any day within the period of limitation prescribed for prosecution.—*State v. Missouri Pac. Ry. Co.* (Mo.) 1173.

## XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AID BY VERDICT.

§ 202. Where accused did not demur to the indictment as duplicitious, and did not move to quash it or ask that the state be required to elect upon which offense alleged therein, if more than one, it would proceed to trial, du-

plicity, if any, was cured by the verdict.—*State v. Nieuhaus* (Mo.) 73.

## INDORSEMENT.

Of bill of exchange or promissory note, see Bills and Notes, §§ 182, 296-370.

## INFANTS.

See Guardian and Ward; Parent and Child. Change of domicile of infant under guardianship, see Domicile, § 5. Contributory negligence on part of children, see Negligence, § 85. Custody and support on divorce of parents, see Divorce, § 298. Habeas corpus to determine custody of, see Habeas Corpus, § 99.

## III. PROPERTY AND CONVEYANCES.

§ 39. An order for the sale of infants' real estate without the execution of a bond to the infants, as required by Civ. Code Prac. § 493, was void.—*Baldrige v. Baldrige* (Ky.) 253.

§ 39. A judgment confirming a sale of infants' real estate on the same day the application therefor was made, and before service on the infants, *held* premature, and without jurisdiction.—*Baldrige v. Baldrige* (Ky.) 253.

§ 39. An application for the sale of infants' real estate *held* not to stand for trial at the term at which the application was filed.—*Baldrige v. Baldrige* (Ky.) 253.

§ 41. An assignee of a judgment against an infant for taxes before sale thereunder to himself *held* not a bona fide purchaser, but entitled to a lien on the land for the amount of money paid to satisfy the judgment, with interest thereon.—*Turner v. City of Middlesboro* (Ky.) 422.

§ 41. The general rule that, when a judgment is reversed, it does not affect the title or possession of a purchaser at a sale thereunder before reversal, though he may be the plaintiff or a party to the action, *held* not to apply to the sale of an infants' land to one not a bona fide purchaser.—*Turner v. City of Middlesboro* (Ky.) 422.

## VII. ACTIONS.

§ 111. Kirby's Dig. § 6248, *held* to apply to a decree canceling a deed to an infant, who may, after attaining full age, show cause against it.—*Martin v. Gwynn* (Ark.) 754.

§ 111. Under Kirby's Dig. §§ 4431, 4433, 4434 and 6248, an infant seeking to vacate a decree canceling a deed must show facts establishing the validity of the deed.—*Martin v. Gwynn* (Ark.) 754.

§ 115. An infant *held* to have taken seasonable appeal from a judgment under Civ. Code Prac. § 391.—*Turner v. City of Middlesboro* (Ky.) 422.

## INFERIOR COURTS.

See Courts, § 170.

## INFORMATION.

Criminal accusation, see Indictment and Information.

## INHERITANCE.

See Descent and Distribution.

## INJUNCTION.

Relief against particular acts or proceedings. Collection of municipal assessments, see Municipal Corporations, § 538.

Collection of tax, see Taxation, §§ 606-611.  
 Issuance of municipal bonds, see Municipal Corporations, § 918.  
 Obstruction of easement, see Easements, § 61.

## II. SUBJECTS OF PROTECTION AND RELIEF.

### (A) ACTIONS AND OTHER LEGAL PROCEEDINGS.

§ 26. A defendant in numerous actions at law to enforce a primary liability created by statute who asserts no defense cannot sue to enjoin the actions to prevent a multiplicity of suits.—*Jones v. Harris* (Ark.) 1077.

### (B) PROPERTY, CONVEYANCES, AND INCUMBRANCES.

§ 48. Injunction *held* a proper remedy in case of repeated and continuous trespass.—*Hobart-Lee Tie Co. v. Stone* (Mo. App.) 604.

## IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

### (A) GROUNDS AND PROCEEDINGS TO PROCURE

§ 148. The bond required upon issuance of a temporary injunction by Rev. St. 1890, § 3037 (Ann. St. 1906, p. 2050), *held* to cover a so-called "temporary restraining order" having the effect of a temporary injunction.—*Akin v. Rice* (Mo. App.) 655.

### (B) CONTINUING, MODIFYING, VACATING, OR DISSOLVING.

§ 167. A motion to dissolve a temporary injunction, made after both sides had announced ready and the jurymen were taking their seats, was properly refused.—*Briggs v. New South Lumber Co.* (Tex. Civ. App.) 885.

§ 186. Damages upon dissolution of injunction *held* allowable, though accurate separation of services rendered in securing dissolution from those rendered on examination of the case on the merits be not possible.—*Akin v. Rice* (Mo. App.) 655.

## IN PAIS.

Estoppel, see Estoppel, §§ 91-101.

## IN PERSONAM.

Election contest, see Elections, § 269.

## IN REM.

Election contest, see Elections, § 269.

## INSANE PERSONS.

Burden of proof on defense of insanity, see Criminal Law, § 331.

## II. INQUISITIONS.

Affidavit of physician accompanying order of commitment to insane asylum as evidence to contradict physician, see Witnesses, § 392.

## III. GUARDIANSHIP.

§ 36. The record of the county court rendering judgment appointing a committee for a lunatic must show the jurisdictional facts, or the judgment will be open to collateral attack.—*Crown Real Estate Co. v. Rogers' Committee* (Ky.) 275.

§ 36. As against a collateral attack on a judgment of the circuit court appointing a committee for a lunatic, the court *held* authorized to presume that St. 1909, § 2157 (Russell's St. § 4248) relating to inquests, was complied with,

rendering the judgment valid.—*Crown Real Estate Co. v. Rogers' Committee* (Ky.) 275.

## INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy.

Of corporation, see Corporations, §§ 553-566.

## INSTRUCTIONS.

In civil actions, see Trial, §§ 191-296.

In criminal prosecutions, see Criminal Law, §§ 770-822; Homicide, §§ 286-309.

## INSULTING CONDUCT.

Towards wife of accused as justification for homicide, see Homicide, § 101.

## INSURANCE.

Judicial notice of mutual insurance associations, see Evidence, § 22.

## I. CONTROL AND REGULATION IN GENERAL.

Authority of insurance commissioner to compel attendance of witnesses in investigation of the origin of fire, see Fires, §§ 2, 9.

Delegation of legislative power to executive officers, see Constitutional Law, § 62.

Invalidity of act authorizing imposition of license tax on foreign insurance companies greater than those imposed upon domestic companies, see Licenses, § 7.

Uniformity of operation of act authorizing imposition of license tax on foreign insurance companies, see Statutes, § 74.

## II. INSURANCE COMPANIES.

### (B) MUTUAL COMPANIES.

§ 60. Sand. & H. Dig. §§ 4124, 4133, construed, and section 4133 *held* not to require the sureties of a mutual insurance company to pay the losses absolutely, but that their obligation ceases when the assessments are collected and paid over promptly by the company.—*Ingle v. Batesville Grocery Co.* (Ark.) 241.

§ 60. The liability of the sureties on the bond of a mutual insurance company, conditioned for the payment over of assessments to beneficiaries, is fixed by the bond itself, and not by the policy.—*Ingle v. Batesville Grocery Co.* (Ark.) 241.

§ 60. In an action on the bond of a mutual insurance company, conditioned for prompt payment over of assessments, the sureties may show that the assessments were promptly paid, notwithstanding a judgment against the company.—*Ingle v. Batesville Grocery Co.* (Ark.) 241.

§ 60. A judgment against an insurance company is evidence; in an action against sureties on a bond executed for the benefit of policy holders, unless the judgment against the company is based on a ground of liability not covered by the bond, and a judgment against the company *held* inadmissible, where the breach of the condition of the bond was not an issue in the action against the company.—*Ingle v. Batesville Grocery Co.* (Ark.) 241.

## V. THE CONTRACT IN GENERAL.

### (A) NATURE, REQUISITES, AND VALIDITY.

§ 133. Failure of an employé to sign a fidelity bond as obligor did not render the bond unenforceable as between the obligee and the surety.—*Title Guaranty & Surety Co. v. Bank of Fulton* (Ark.) 537.

§ 136. Insured cannot repudiate a contract of insurance without returning the policy.—*American Ins. Co. v. Dillahunt* (Ark.) 245.

§ 136. Facts held to show a sufficient delivery of an indemnity bond to render it enforceable.—Title Guaranty & Surety Co. v. Bank of Fulton (Ark.) 537.

### (B) CONSTRUCTION AND OPERATION.

§ 146. The liability of a mutual insurance company is fixed by the terms of the policy, without regard to the character of the company.—Ingle v. Batesville Grocery Co. (Ark.) 241.

§ 146. A fidelity bond issued by a paid surety is in the nature of an insurance policy, and must be strictly construed against the surety.—Title Guaranty & Surety Co. v. Bank of Fulton (Ark.) 537.

§ 163. An insurance policy held to be valid to the amount set forth in the policy, although it failed to enumerate all of the items covered by the policy.—American Ins. Co. v. Dillahunt (Ark.) 245.

§ 177. A surety company held not liable for a loss exceeding the sum specified in a fidelity bond which was renewed from time to time.—Fidelity & Deposit Co. of Maryland v. Champion Ice Mfg. & Cold Storage Co. (Ky.) 393.

## IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

### (A) GROUNDS IN GENERAL.

§ 264. Where a fidelity bond did not make the employer's representations warranties, they would be regarded as representations, the falsity of which would not avoid the bond in the absence of bad faith.—Title Guaranty & Surety Co. v. Bank of Fulton (Ark.) 537.

## XVIII. ACTIONS ON POLICIES.

Aider of defects in pleading by verdict in action on policy, see Pleading, § 433.  
Hearsay evidence in action on policy, see Evidence, § 320.

§ 618. Under Rev. St. 1899, § 8092 (Ann. St. 1906, p. 3843), an action on a town mutual policy held properly brought in the county where the property insured and destroyed was located.—Wicecarver v. Mercantile Town Mut. Ins. Co. (Mo. App.) 698.

§ 626. Under Rev. St. 1899, § 8092 (Ann. St. 1906, p. 3843), a return of service of process on a town mutual insurance company held insufficient to confer jurisdiction over the company.—Wicecarver v. Mercantile Town Mut. Ins. Co. (Mo. App.) 698.

§ 634. A plaintiff suing on a mutual fire policy held required to state in the petition facts showing an ascertainment of the loss 60 days prior to the institution of the suit.—Wicecarver v. Mercantile Town Mut. Ins. Co. (Mo. App.) 698.

§ 645. A petition in an action on a fire policy held sufficient to permit evidence of any and all forms of waiver by insurer.—Wicecarver v. Mercantile Town Mut. Ins. Co. (Mo. App.) 698.

§ 646. In an action for life insurance, defended on the ground of suicide, where plaintiff proved that insured died, he established a prima facie case, and the burden was on the defendant to prove its defense.—Grand Fraternity v. Melton (Tex.) 788.

§ 665. The surety of a bank cashier held not chargeable for alleged losses of currency proved only by letters of banks alleged to have shipped the currency and not otherwise shown to have been received by the obligee bank or the cashier.—Title Guaranty & Surety Co. v. Bank of Fulton (Ark.) 537.

§ 665. Evidence held not only to raise an issue for the jury as to the intention of insured in shooting himself, but to establish to a moral certainty that he shot himself with intent to commit suicide.—Grand Fraternity v. Melton (Tex.) 788.

§ 668. The court held not authorized to declare as a matter of law that proof of loss in a fire policy issued by a town mutual company was not furnished within a reasonable time, especially in view of Rev. St. 1899, § 7979 (Ann. St. 1906, p. 3793), though such provision is not applicable to town mutual insurance companies by virtue of section 6084 (page 3840).—Wicecarver v. Mercantile Town Mut. Ins. Co. (Mo. App.) 698.

## XX. MUTUAL BENEFIT INSURANCE.

### (A) CORPORATIONS AND ASSOCIATIONS.

Judicial notice of mutual insurance associations, see Evidence, § 22.

### (B) THE CONTRACT IN GENERAL.

§ 719. A subsequent amendment of a by-law held not to affect the amount otherwise payable on a benefit certificate in case of suicide.—Small v. Court of Honor (Mo. App.) 116.

§ 726. Death benefit certificates are contracts of insurance, subject to the rules of construction and interpretation applicable to such contracts.—Small v. Court of Honor (Mo. App.) 116.

### (E) BENEFICIARIES AND BENEFITS.

§ 766. During the life of an insured member his beneficiary has no vested right in the insurance, but he has a property right conferred by his certificate which cannot be destroyed or abridged without his consent clearly and unequivocally expressed.—Small v. Court of Honor (Mo. App.) 116.

§ 793. The mother of insured held not within the meaning of a policy payable to his "legal dependent."—Vaughn v. National Council, Junior Order United American Mechanics (Mo. App.) 115.

## INTEREST.

Effect as to credibility of witness, see Witnesses, § 363.

### I. RIGHTS AND LIABILITIES IN GENERAL.

§ 12. Where money was given defendant for investment and he deposits it with his own money and checks against it as his own money he is liable for interest thereon.—Pullis v. Somerville (Mo.) 736.

### III. TIME AND COMPUTATION.

Necessity of demand in order to start running of interest on legacy, see Wills, § 734.  
On accounting by trustee, see Trusts, § 219.

§ 56. Rule for calculating interest on partial payments stated.—Pullis v. Somerville (Mo.) 736.

§ 58. Interest in case of a mutual running account may be given on both sides until a balance is struck and after that on the balance.—Pullis v. Somerville (Mo.) 736.

§ 60. Computing interest with annual rests constitutes compound interest.—Pullis v. Somerville (Mo.) 736.

## INTERLOCUTORY INJUNCTION.

See Injunction, §§ 148-186.

## INTERLOCUTORY JUDGMENT.

Appealability, see Appeal and Error, § 78.

**INTERNATIONAL LAW.**

See Aliens.

**INTERPRETATION.**

*Of contracts, instruments or judicial acts and proceedings.*

See Contracts, §§ 147-198; Statutes, §§ 179-208; Wills, §§ 449-699.

Contract of sale, see Sales, §§ 62, 72, 85.

Municipal charters, see Municipal Corporations, § 58.

**INTERROGATORIES.**

To witnesses, see Depositions.

**INTERSTATE COMMERCE.**

Regulation, see Carriers, § 23; Commerce.

**INTERVENTION.**

In actions in general, see Parties, § 51.

**INTESTACY.**

See Descent and Distribution.

**INTOXICATING LIQUORS.****I. POWER TO CONTROL TRAFFIC.**

§ 6. Under Const. § 59, subsec. 27, and Id. §§ 61, 154, the Legislature *held* without authority to prohibit a citizen from having in his possession intoxicating liquors for his own use.—Commonwealth v. Campbell (Ky.) 383.

§ 10. A city *held* without power to prohibit a citizen from having in his possession, within the limits of the city, intoxicating liquors for his own use.—Commonwealth v. Campbell (Ky.) 383.

**III. LOCAL OPTION.**

Computation of time for notice of local option election, see Time, § 9.

Invalidity of local option election as ground for arrest of judgment in prosecution for unlawful sale of liquor, see Criminal Law, § 968. Judicial notice of adoption of local option, see Criminal Law, § 304.

Presumptions on appeal in criminal prosecution, see Criminal Law, § 1141.

Validity of laws making decision in local option contest conclusive in prosecution for illegal sale, see Constitutional Law, § 266.

§ 37. The county judge and two justices of the peace residing nearest the courthouse constitute the proper board to hear a local option election contest.—Derickson v. Conlee (Ky.) 955.

§ 37. In a local option election contest under Ky. St. 1909, § 2566, subd. 2 (Russell's St. § 4063, subd. 2), an answer alleging that a copy of the grounds of contest filed March 5, 1908, was served on the county judge before March 8d, *held* not a traverse of the petition alleging that notice was given as required by statute.—Derickson v. Conlee (Ky.) 955.

§ 37. Under Ky. St. 1909, § 2566, subd. 2 (Russell's St. § 4063, subd. 2), it is immaterial whether a copy of the grounds of a contest of a local option election is served on the county judge before or after the filing thereof with the county clerk.—Derickson v. Conlee (Ky.) 955.

§ 39. In a prosecution for violating the local option law, a statement by a witness that there was a local option law in the county *held* insufficient to show that fact so as to sustain a conviction for its violation.—Bills v. State (Tex. Cr. App.) 835.

§ 39. While, under the statute, contests of local option elections must be taken in due time, the court should in every prosecution for violating the local option law require the introduction of formal orders of the commissioner's court adopting local option in the county.—Bills v. State (Tex. Cr. App.) 835.

§ 40. Under Acts 30th Leg. 1907, p. 447, c. 8, one accused of violating the local option law *held* not entitled to show irregularities in the initiatory steps necessary to make local option effective.—Evans v. State (Tex. Cr. App.) 167.

§ 40. Thirty days having elapsed after local option went into effect in a county, its adoption could not be contested.—Terry v. State (Tex. Cr. App.) 801.

§ 40. Act 25th Leg. (Laws 1897, p. 223, c. 158), *held* to forbid the sale in a local option district by one who is not a druggist selling drug compounds in the preparation of which liquors are sold on the prescription of a physician and who has not obtained a license.—Snead v. State (Tex. Cr. App.) 983.

**IV. LICENSES AND TAXES.**

§ 45. The Baskin-McGregor law, Acts 30th Leg. (Laws 1907, p. 258, c. 138), *held* not to impliedly repeal Acts 25th Leg. (Laws 1897, p. 223, c. 158), providing for license in local option territory.—Snead v. State (Tex. Cr. App.) 983.

**VI. OFFENSES.**

§ 146. In order to constitute a sale of whisky in violation of the local option law, it is not necessary that the purchaser deliver to the seller the money for the whisky, but it is necessary that both parties assent to the sale and payment, if any is made or is to be made therefor.—Dawson v. State (Tex. Cr. App.) 136.

§ 169. If accused acted as agent of prosecuting witness when intoxicating liquors were bought, he cannot be convicted of violating the local option law.—Evans v. State (Tex. Cr. App.) 167.

**VIII. CRIMINAL PROSECUTIONS.**

Arrest of judgment, see Criminal Law, § 968. Refusal of instructions as to uncontradicted testimony, see Criminal Law, § 772.

Validity of laws making decision in local option contest conclusive in prosecution for illegal sale, see Constitutional Law, § 266.

§ 226. In a trial for violating the local option law, it was proper to admit enough orders of the commissioners' court to show that the county had adopted local option.—Evans v. State (Tex. Cr. App.) 167.

§ 231. On a trial for unlawfully selling intoxicating liquors, evidence that a third person who had sold the same kind of liquor had not been prosecuted *held* admissible.—Snead v. State (Tex. Cr. App.) 983.

§ 231. On a trial for selling intoxicating liquors, the testimony of witnesses that they had drank certain liquor bought from a third person *held* competent.—Snead v. State (Tex. Cr. App.) 983.

§ 233. In a prosecution for keeping a house where intoxicating liquors were unlawfully sold and kept for sale without a license, evidence as to the general reputation of the character of the house is admissible.—O'Brien v. State (Tex. Cr. App.) 133.

§ 233. Evidence, in a prosecution for violation of the local option law, *held* admissible.—Fields v. State (Tex. Cr. App.) 806.

§ 233. In a prosecution for violation of the local option law, evidence as to the possession

of United States license *held* admissible.—*Schoennerstedt v. State* (Tex. Cr. App.) 829.

§ 236. Evidence *held* to show a sale of intoxicating liquor by defendant within one year prior to the indictment.—*State v. Cox* (Mo. App.) 680.

§ 236. Evidence *held* to sustain a conviction for unlawfully selling intoxicating liquors.—*Reno v. State* (Tex. Cr. App.) 129.

§ 236. Evidence *held* insufficient to sustain a conviction of keeping a house where intoxicating liquors are unlawfully sold.—*O'Brien v. State* (Tex. Cr. App.) 133.

§ 236. A conviction for keeping a house where intoxicating liquors are unlawfully sold cannot be sustained on evidence of general reputation alone.—*O'Brien v. State* (Tex. Cr. App.) 133.

§ 236. In a prosecution for selling intoxicants in violation of the local option law, evidence *held* to sustain a finding that there was a sale as alleged.—*Bills v. State* (Tex. Cr. App.) 835.

§ 236. Evidence *held* to sustain a conviction of violating the local option law.—*Williams v. State* (Tex. Cr. App.) 838.

§ 239. In a prosecution of a druggist for illegally selling intoxicants, an instruction *held* erroneous, in that it required accused to prove, not only that the sale was contrary to his order, but that he had a physician's prescription authorizing it.—*State v. Stamper* (Mo. App.) 1192.

§ 239. In prosecution for sale of liquor in violation of local option law, instruction *held* not objectionable as placing burden of proof on defendant.—*Dawson v. State* (Tex. Cr. App.) 136.

§ 239. In a prosecution for violation of the local option law, *held* error not to charge that if the jury should find defendant's testimony to be correct, or there was reasonable doubt of his guilt, they should acquit.—*Schoennerstedt v. State* (Tex. Cr. App.) 829.

## **XI. CIVIL DAMAGE LAWS.**

Competency of witnesses, see *Witnesses*, § 52.

## **INTOXICATION.**

Common or habitual drunkards, see *Drunkards*.

## **INVESTIGATION.**

Of origin of fires, see *Fires*, §§ 2,

## **INVESTMENT COMPANIES.**

See *Banks and Banking*, § 310.

## **ISSUES.**

In civil actions, see *Pleading*, § 398.

In criminal prosecutions, see *Indictment and Information*, § 176.

Presented for review on appeal, see *Appeal and Error*, §§ 170-173.

## **JOINDER.**

Of causes of action, see *Action*, § 50.

Of offenses in indictment, see *Indictment and Information*, § 129.

## **JOINT ADVENTURES.**

§ 7. Joint purchasers of a mercantile stock *held* bound by an antecedent promise made by one, regardless of whether they were then partners.—*Elmer v. Campbell* (Mo. App.) 622.

## **JOINT TENANCY.**

See *Tenancy in Common*.

## **JUDGES.**

See *Courts; Justices of the Peace*.

Death of trial judge after conviction of accused as affecting jurisdiction of appeal, see *Criminal Law*, § 1017.

Death of trial judge after conviction of accused as ground for arrest of judgment, see *Criminal Law*, § 968.

Entering jury room in absence of accused as misconduct, see *Criminal Law*, § 636.

Mandamus to judge, see *Mandamus*, § 57.

Remarks and conduct in criminal prosecutions, see *Criminal Law*, § 655.

## **II. SPECIAL OR SUBSTITUTE JUDGES.**

Presumption as to qualification on appeal in criminal prosecution, see *Criminal Law*, § 1144.

§ 15. Where the judge of a division of a county circuit court did not request the judge of another division to hold court for him, as authorized by Laws 1901, p. 119 (Ann. St. 1906, § 1734), and Laws 1905, p. 123, § 7, it was proper to elect a special judge under Rev. St. 1899, § 1679 (Ann. St. 1906, p. 1220).—*State ex rel. American Nat. Bank of Louisville, Ky., v. Fidelity & Deposit Co.* (Mo. App.) 618.

§ 16. Under Ky. St. § 968 (Russell's St. § 2824), the selection of a substitute judge in a prosecution for homicide *held* not erroneous.—*Sergeant v. Commonwealth* (Ky.) 362.

§ 16. A regular circuit judge who calls in another judge to hold court for him thereby terminates the authority of a special judge elected as authorized by Rev. St. 1899, § 1679 (Ann. St. 1906, p. 1220).—*State ex rel. American Nat. Bank of Louisville, Ky., v. Fidelity & Deposit Co.* (Mo. App.) 618.

§ 18. The court record need not show the reason why a judge of a division of a county circuit court called in the judge of another division to hold court for him, as authorized by Laws 1901, p. 119 (Ann. St. 1906, § 1734), and Laws 1905, p. 123, § 7.—*State ex rel. American Nat. Bank of Louisville, Ky., v. Fidelity & Deposit Co.* (Mo. App.) 618.

## **III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.**

§ 25. A judge called in at the request of the regular judge to hold court has authority over a cause tried by him until the motions after the trial are disposed of, though the regular judge appears and holds court.—*State ex rel. American Nat. Bank of Louisville, Ky., v. Fidelity & Deposit Co.* (Mo. App.) 618.

## **IV. DISQUALIFICATION TO ACT.**

§ 43. A judge, who is a stockholder in a bank which is a creditor of a rival bank wrecked by an officer on trial for false swearing in making a report of the condition of the bank required by St. 1909, § 593 (Russell's St. § 2182), is disqualified and should vacate the bench on defendant's motion.—*Anderson v. Commonwealth* (Ky.) 364.

§ 49. The bias of a judge does not disqualify him from trying a case, unless it causes him to act corruptly, or with such oppression as to be equivalent to corruption.—*McDonald's Adm'r v. Wallsend Coal & Coke Co.* (Ky.) 349.

§ 51. An affidavit to remove the regular judge because of his disqualification by bias must be presented promptly on the discovery of

the facts.—*McDonald's Adm'r v. Wallsend Coal & Coke Co. (Ky.) 349.*

§ 51. An affidavit to remove the regular judge for bias *held* insufficient for failing to show affirmatively a personal bias toward the litigant or his case.—*McDonald's Adm'r v. Wallsend Coal & Coke Co. (Ky.) 349.*

## JUDGMENT.

Decisions of courts in general, see Courts, §§ 89-97.

*In actions by or against particular classes of persons.*

See Infants, § 111.

*In particular civil actions or proceedings.*

On appeal or writ of error, see Appeal and Error, §§ 1127-1180.

On attachment bond, see Attachment, § 353.  
To enforce municipal assessment, see Municipal Corporations, § 570.

### Review.

See Appeal and Error; Audita Querela.

Presumption to sustain on appeal or writ of error, see Appeal and Error, § 934.

## I. NATURE AND ESSENTIALS IN GENERAL.

§ 1. A judgment is the sentence of the law upon the record; the application of the law to the facts and pleadings.—*State ex rel. McManus v. Muench (Mo.) 25.*

§ 17. A decree and proceedings thereunder in a creditor's suit to settle an estate is void where defendants were not summoned, and did not appear.—*Duff v. Combs (Ky.) 259; Combs v. Duff, Id.*

§ 17. The statutory requirements as to citation must be followed, in order to give jurisdiction over the person, so as to support a default judgment.—*Latham Co. v. J. M. Radford Grocery Co. (Tex. Civ. App.) 909.*

## II. BY CONFESSION.

§ 70. A naturalization order, when granted, has all the effect of a judgment, and cannot be attacked or corrected after the term, except in the manner and for the causes for which judgments of a court of record may be assailed.—*In re O'Sullivan (Mo. App.) 651.*

## IV. BY DEFAULT.

### (A) REQUISITES AND VALIDITY.

§ 107. Where plaintiff demurred to the answer, the court should not, in the absence of defendant and without passing on the demurrer, render judgment against defendant.—*Plunkett v. State Nat. Bank (Ark.) 1079.*

§ 107. The error in entering a default judgment for plaintiff without disposing of the issues raised by defendant setting up a cross-action against codefendant is not excused by the fact that the court's attention was not called to the pleadings.—*Pecos & N. T. Ry. Co. v. Epps & Matsler (Tex. Civ. App.) 1012; Same v. Harlan (Tex. Civ. App.) 1013.*

§ 117. Under Civ. Code Prac. § 90, a decree of sale beyond the prayer of the petition in a creditor's suit to settle a decedent's estate *held* improper.—*Duff v. Combs (Ky.) 259; Combs v. Duff, Id.*

§ 126. A default judgment for plaintiff in an action against carriers for negligence in a shipment of cattle *held* erroneous because of want of evidence to sustain it.—*Pecos & N. T. Ry. Co. v. Epps & Matsler (Tex. Civ. App.) 1012; Same v. Harlan (Tex. Civ. App.) 1013.*

### (B) OPENING OR SETTING ASIDE DEFAULT.

§ 139. A motion to set aside a default judgment is addressed to the discretion of the trial court.—*Pecos & N. T. Ry. Co. v. Pearce (Tex. Civ. App.) 911.*

§ 143. The court *held* required to set aside a default judgment on the showing made.—*Pecos & N. T. Ry. Co. v. Pearce (Tex. Civ. App.) 911.*

§ 145. The refusal to set aside a judgment rendered against defendant in his absence after his answer tendering no valid defense *held* not erroneous.—*Plunkett v. State Nat. Bank (Ark.) 1079.*

## VI. ON TRIAL OF ISSUES.

### (A) RENDITION, FORM, AND REQUISITES IN GENERAL.

§ 203. Under Rev. St. 1899, §§ 694, 773 (Ann. St. 1906, pp. 703, 750), where a cause of action to quiet title and for trespass were joined, and separate forms of judgment entered on different days, such entries would be treated as a single judgment.—*Stone v. Perkins (Mo.) 717.*

§ 217. A judgment for plaintiff is not final unless it disposes of the matters pleaded by defendant setting up a cross-action against codefendant.—*Pecos & N. T. Ry. Co. v. Epps & Matsler (Tex. Civ. App.) 1012; Same v. Harlan (Tex. Civ. App.) 1013.*

### (B) PARTIES.

§ 239. In an action for negligence, it was not error to permit all defendants to be joined in one suit and judgment go against part of them.—*Probst v. Hinesley (Ky.) 389; Hinesley v. Beattie, Id.*

### (C) CONFORMITY TO PROCESS, PLEADINGS, PROOFS, AND VERDICT OR FINDINGS.

§ 250. Judgment, in an action for a balance due for labor performed, cannot include an item of expense not sued for.—*Sealy v. Williston (Ky.) 959.*

## VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

§ 306. A mistaken call for course, in a description in the judgment and petition in trespass to try title, *held* subject to correction, where the course intended would be plainly inferred.—*Poittevent v. Scarborough (Tex. Civ. App.) 443.*

§ 334. The writ of error coram nobis will lie only in cases where the court has proceeded on the assumption that a fact existed which was material to its right to proceed, when the fact did not exist at all.—*Smith v. Young (Mo. App.) 628.*

## IX. OPENING OR VACATING.

§ 336. A motion to vacate a judgment, filed at the term at which the judgment was entered, is a proper form of direct attack on the judgment.—*Smith v. Young (Mo. App.) 628.*

§ 336. A party moving to set a judgment aside must file his motion within four days after its rendition.—*Beecham v. Evans (Mo. App.) 1190.*

## XI. COLLATERAL ATTACK.

On judgment in tax suit, see Taxation, § 648.

### (B) GROUNDS.

§ 489. Where the record shows on its face that a judgment is obviously void, it may be assailed collaterally; otherwise it cannot be assailed at all in a collateral proceeding.—*Smith v. Young (Mo. App.) 628.*

§ 495. On a collateral attack on a judgment rendered by a court of record of general jurisdiction in the exercise of its ordinary jurisdiction, it will be presumed that the court acted correctly and with due authority.—*Crown Real Estate Co. v. Rogers' Committee* (Ky.) 275.

§ 496. Judgments of courts of limited jurisdiction exercising special powers are void on collateral attack, unless the facts necessary to confer jurisdiction appear of record.—*Crown Real Estate Co. v. Rogers' Committee* (Ky.) 275.

§ 498. Determination of the probate court, in a proceeding to appoint a curator for a minor, of the minor's domicile, cannot be collaterally attacked.—*Smith v. Young* (Mo. App.) 628.

§ 505. Where the chancellor in rendering a decree by consent exercised a jurisdiction not within the issues, the part of the decree outside the issues was void and subject to collateral attack, no appeal being necessary.—*State ex rel. McManus v. Muench* (Mo.) 25.

### (C) PROCEEDINGS.

§ 518. Where a judgment pleaded constitutes a link in plaintiff's chain of title, a contention by the adverse parties that the judgment was void for want of jurisdiction is a collateral attack on it.—*Dennis v. Alves* (Ky.) 287.

§ 521. A proceeding to vacate a judgment of the probate court of L. county appointing defendant the curator of a minor, on the ground that the minor was not domiciled in L. county, held a collateral attack on the judgment of the probate court of L. county.—*Smith v. Young* (Mo. App.) 628.

## XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

### (A) JUDGMENTS OPERATIVE AS BAR.

§ 554. A judgment in ejectment held not a bar to a subsequent ejectment action between the same parties for the same land, whether the title or defenses are the same or not.—*Stone v. Perkins* (Mo.) 717.

### (B) CAUSES OF ACTION AND DEFENSES MERGED, BARRED, OR CONCLUDED.

§ 604. The plea of *res judicata* in tax cases is to be limited to the taxes actually in litigation, and the judgment is not conclusive in respect to taxes assessed for other and subsequent years.—*State v. Enloe* (Tenn.) 223.

## XIV. CONCLUSIVENESS OF ADJUDICATION.

### (C) MATTERS CONCLUDED.

§ 718. The record of an action for forcible entry showing that defendant therein took actual possession of the premises is conclusive of that fact in a subsequent action of ejectment by such defendant to recover the same premises.—*Hayden v. Goodwin* (Mo.) 1129.

§ 726. A judgment for defendants, in a prior action for breach of a mail route contract, held a bar to a subsequent action for alleged subsequently accruing damages.—*National Surety Co. v. Coates* (Ark.) 555.

§ 743. Where the judgment under which defendant claims was a foreclosure of a tax lien against "unknown owners and M.," reciting that they "own or claim some right to, or interest in," the land, defendant cannot dispute the right of plaintiffs as heirs of M. to redeem such interest.—*Jackson v. Maddox* (Tex. Civ. App.) 185.

## (D) JUDGMENTS IN PARTICULAR CLASSES OF ACTIONS AND PROCEEDINGS.

§ 747. A judgment in a suit for partition held to dispose of the rights of all the parties.—*Whitmire v. Powell* (Tex. Civ. App.) 433.

### XV. LIEN.

Judgment lien on excess of homestead, see Homestead, § 108.

## XX. PAYMENT, SATISFACTION, MERGER, AND DISCHARGE.

§ 891. The obligee of a contract to which there are several obligors may have different judgments against them for a breach, but can only have one satisfaction.—*Vette v. J. S. Merrell Drug Co.* (Mo. App.) 666.

## JUDICIAL NOTICE.

In civil actions, see Evidence, §§ 10-48.  
In criminal prosecutions, see Criminal Law, § 304.

## JUDICIAL POWER.

See Constitutional Law, § 70.

## JUDICIAL SALES.

Of property of decedent, see Executors and Administrators, § 365.  
On execution, see Execution, § 224.  
Sale of infant's land to one not a bona fide purchaser, see Infants, § 41.

## JURISDICTION.

Effect of appearance, see Appearance.  
Want of jurisdiction ground for collateral attack on judgment, see Judgment, §§ 489, 498.

### *Jurisdiction of particular actions or proceedings.*

See Divorce, §§ 62-195; Ejectment, § 39; Habeas Corpus, §§ 85-109; Mandamus, §§ 146, 187.

For appointment of guardian, see Guardian and Ward, § 8.

### *Special jurisdictions and jurisdictions of particular classes of courts.*

See Courts; Equity, § 19.  
Appellate jurisdiction, see Criminal Law, § 1017.  
Justices' courts in civil cases, see Justices of the Peace, § 106.

## JURY.

Custody and conduct, see Criminal Law, §§ 859, 866.

Custody and conduct, see Trial, § 807.  
Disqualification or misconduct ground for new trial, see New Trial, § 52.

Instructions in civil actions, see Trial, §§ 191-296.

Instructions in criminal prosecutions, see Criminal Law, §§ 770-822.

Questions for jury in civil actions, see Trial, §§ 136-143.

Questions for jury in criminal prosecutions, see Criminal Law, §§ 741-764.

Taking case or question from jury at trial, see Trial, §§ 136-143.

Verdict in criminal prosecutions, see Criminal Law, §§ 875, 881.

## II. RIGHT TO TRIAL BY JURY.

Right to trial in districts where crime was committed, see Criminal Law, § 107.



§ 12. If the pleadings and evidence present a controverted question of fact, it is error to refuse a jury trial.—*Burnett v. Ft. Worth Light & Power Co.* (Tex. Civ. App.) 175.

### III. QUALIFICATIONS OF JURORS AND EXEMPTIONS.

Concurrent jurisdiction of circuit and justice courts, see Courts, § 472.

Review of questions as to qualification of, as dependent on presentation in lower court of grounds of review, see Appeal and Error, § 200.

### IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

§ 58. The jury wheel law (Laws 1907, p. 269, c. 139), providing for the selection of jurors in certain counties, did not repeal by implication Rev. St. 1895, art. 3219, providing for the summoning of talesmen by the sheriff where the regular panel has been exhausted.—*Houston Electric Co. v. Seegar* (Tex. Civ. App.) 900.

§ 66. Under Acts 30th Leg. 1907, p. 269, c. 139, providing for the selection of juries in counties having a population of more than 20,000, the clerk of the district court, and not the clerk of the criminal court, is the proper person to assist in drawing the jury.—*Jones v. State* (Tex. Cr. App.) 127.

§ 67. Under Rev. St. 1895, arts. 3150, 3184, the court held authorized to direct the sheriff to summon jurors for a case.—*Gray v. Phillips* (Tex. Civ. App.) 870.

### V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

§ 90. A juror would not be disqualified to serve, in an action by a corporation to recover on a subscription for stock, merely because he was related to a stockholder in the corporation other than a party to the action and who had no real interest in the action.—*Stone v. Monticello Const. Co.* (Ky.) 369.

§ 103. A juror in a criminal case held qualified, though he had formed a prior opinion.—*Bice v. State* (Tex. Cr. App.) 163.

§ 103. A juror held not disqualified by reason of the fact that he had formed an opinion of the guilt or innocence of accused relying on insanity.—*Tubb v. State* (Tex. Cr. App.) 858.

§ 105. The testimony of a juror as to his competency on a trial for rape held not to show his incompetency.—*Dies v. State* (Tex. Cr. App.) 979.

§ 110. Accused, having failed to strike a talesman when he had the opportunity, could not complain because such juror was disqualified.—*Bice v. State* (Tex. Cr. App.) 163.

§ 131. A party in a civil action having the right to strike off three jurors without cause may ask questions which may enable him to know who the jurors are and their relationship, that he may exercise his right intelligently though the answers to them would not disqualify the jurors.—*Stone v. Monticello Const. Co.* (Ky.) 369.

## JUSTICES OF THE PEACE.

### III. CIVIL JURISDICTION AND AUTHORITY.

§ 44. A justice's jurisdiction held to depend on the amount of each cause of action, and not the total of several demands joined.—*Winer v. Bank of Blytheville* (Ark.) 232.

### IV. PROCEDURE IN CIVIL CASES.

§ 106. A justice of the peace without jurisdiction could not prevent the dismissal of an action or withdrawal of the petition and an affidavit for publication of process.—*Himmelberger-Harrison Lumber Co. v. Keener* (Mo.) 42.

### V. REVIEW OF PROCEEDINGS.

#### (A) APPEAL AND ERROR.

§ 162. An appeal from a justice's judgment held to annul the judgment.—*Martin v. Butner* (Tex. Civ. App.) 442.

## JUSTIFICATION.

Of homicide, see Homicide, §§ 101-120.

## KNOWLEDGE.

Actual or constructive knowledge, see Notice, § 6.

Affecting competency of witness, see Witnesses, § 37.

Effect of ignorance of cause of action on limitation, see Limitation of Actions, § 100.

## LACHES.

*Affecting particular rights, remedies, or proceedings.*

See Ejectment, § 39; Equity, § 87.

Review on certiorari, see Certiorari, § 41.

## LANDLORD AND TENANT.

Parol or extrinsic evidence affecting lease, see Evidence, § 393.

### II. LEASES AND AGREEMENTS IN GENERAL.

#### (A) REQUISITES AND VALIDITY.

Lease of railroad, see Railroads, § 259.

### III. LANDLORD'S TITLE AND REVERSION.

#### (B) ESTOPPEL OF TENANT.

§ 61. A lessee held not estopped from disputing the lessor's title to a tract not within the boundaries of the land leased.—*Rogers v. Stevenson* (Tex. Civ. App.) 472.

### VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

#### (B) POSSESSION, ENJOYMENT, AND USE.

§ 142. In an action for injury to a leasehold caused by blasting for an adjoining building, evidence of the amount of plaintiff's restaurant business and the profits was admissible to determine the value of the use.—*Probst v. Hinesley* (Ky.) 389; *Hinesley v. Beattie*, Id.

§ 142. In an action for damages to a leasehold by blasting for an adjoining building, the court properly fixed the measure of damages as the diminution in the value of its use for the unexpired term.—*Probst v. Hinesley* (Ky.) 389; *Hinesley v. Beattie*, Id.

§ 142. In an action against a third person for damages to a leasehold, a plea that plaintiff was behind in his rent and had no rights under the lease is not available, where the damage was done prior to proceedings for eviction.—*Probst v. Hinesley* (Ky.) 389; *Hinesley v. Beattie*, Id.

**(E) INJURIES FROM DANGEROUS OR DEFECTIVE CONDITION.**

Right of tenants sued for injuries to remedy over against landlord, see Indemnity, § 15.

§ 166. A landlord who has covenanted to keep the premises in repair is liable for injuries to the tenant's property caused by breach of the covenant.—*Rife v. Reynolds* (Mo. App.) 652.

§ 166. A tenant on an upper room held liable for injuries to the goods of a tenant below.—*Burkett & Barnes v. Dillon* (Tex. Civ. App.) 917.

**VIII. RENT AND ADVANCES.****(A) RIGHTS AND LIABILITIES.**

§ 183. Where plaintiff occupies a place during several months with a view to buying the same if she was satisfied with it, and at the end of the time leaves it, not being satisfied with it, no agreement for the payment of rent will be implied from the circumstances.—*Pullis v. Somerville* (Mo.) 786.

**(B) ACTIONS.**

§ 233. The obligation to repair does not depend on employment of competent workmen; and, in an action for rent of premises abandoned for alleged failure to repair, it was not error to refuse a charge conveying the idea that plaintiff would do his duty if he employed such workmen.—*Central City Loan & Investment Co. v. Vincent* (Tex. Civ. App.) 912.

**(D) DISTRESS.**

Malicious suit, see Malicious Prosecution, § 68.

§ 274. To recover damages for suing out a distress warrant under *Sayles' Ann. Civ. St. 1897, arts. 3236, 3240*, the tenant must show that the warrant was both illegally and unjustly sued out.—*Beckham v. Collins* (Tex. Civ. App.) 431.

**LANDS.**

See Public Lands.

**LARCENY.**

See Embezzlement; Robbery.

**I. OFFENSES AND RESPONSIBILITY THEREFOR.**

§ 6. Criterion of value of property stolen stated.—*Close v. State* (Tex. Cr. App.) 137; *Floyd v. Same* (Tex. Cr. App.) 138.

§ 12. In a prosecution for theft of animals, where accused was alleged to have sold the animal while it was running the range, it was not necessary to the transfer of title that a bill of sale was made out and acknowledged by him.—*Farris v. State* (Tex. Cr. App.) 798.

§ 19. Theft from the person defined.—*Johnson v. State* (Tex. Cr. App.) 964.

§ 27. Under Pen. Code 1895, art. 77, one who fraudulently sold another's cow on the range by pointing it out to the purchaser, who was ignorant of its true ownership, held a principal.—*Farris v. State* (Tex. Cr. App.) 798.

§ 27. If accused conspired with the alleged purchaser of another's cow in consummating its theft, or used him as a guilty instrument for that purpose, he would be guilty as principal.—*Farris v. State* (Tex. Cr. App.) 798.

**II. PROSECUTION AND PUNISHMENT.****(B) EVIDENCE.**

Evidence of confession by accomplice, see Criminal Law, § 424.

Evidence of other offenses, see Criminal Law, § 369.

§ 46. Evidence as to value of goods handled by witness, which were of a quality superior to those stolen, held not admissible to show value of goods stolen.—*Close v. State* (Tex. Cr. App.) 137; *Floyd v. Same* (Tex. Cr. App.) 138.

§ 47. Evidence held admissible, in a trial for theft of property, to show the possession of the owner's employé.—*Hill v. State* (Tex. Cr. App.) 823.

§ 55. Evidence in a prosecution for larceny held sufficient to support a conviction.—*Daly v. State* (Tex. Cr. App.) 798.

§ 55. Evidence held to justify a conviction of theft from the person.—*Johnson v. State* (Tex. Cr. App.) 964.

§ 59. Evidence in prosecution for theft held insufficient to show value of the property.—*Close v. State* (Tex. Cr. App.) 137; *Floyd v. Same* (Tex. Cr. App.) 138.

**(C) TRIAL AND REVIEW.**

Credibility of witness as question for jury, see Criminal Law, § 742.  
Instructions as to alibi, see Criminal Law, § 775.

§ 77. On a trial for cattle theft, the court held required to submit the question whether accused was a principal accessory, accomplice, or receiver of stolen property.—*Davis v. State* (Tex. Cr. App.) 159.

§ 77. On a trial for larceny, the refusal to give instructions on reasonable explanation of accused's recent possession of the stolen property held not erroneous under the evidence.—*Davis v. State* (Tex. Cr. App.) 159.

§ 77. On a trial for cattle theft, the failure to give a charge held not erroneous in view of the evidence.—*Davis v. State* (Tex. Cr. App.) 159.

**LAW OF THE CASE.**

Decision on appeal, see Appeal and Error, § 1097.

**LEADING QUESTIONS.**

See Witnesses, § 240.

**LEASES.**

See Landlord and Tenant.

**LEGACIES.**

See Wills.

**LEGISLATIVE POWER.**

See Constitutional Law, § 62.

**LEVY.**

Of attachment, see Attachment, § 173.

**LEX LOCI.**

Law governing taking of collateral security for loan by bank, see Banks and Banking, § 179.

**LIBEL AND SLANDER.****I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.**

§ 16. Imputing to a person that he has killed a human being under circumstances authorizing his arrest and detention by officers of the law held libelous per se, under Gen. Laws 1909, p. 30.—*James v. Ft. Worth Telegram Co.* (Tex. Civ. App.) 1028.

§ 21. Where a newspaper published an account of a homicide, and included as a part of

the publication a picture of a person other than the one accused of the killing, referring to it as that of the person who did the killing by placing his name under it, the publication imputed the act to the person whose picture was published.—James v. Ft. Worth Telegram Co. (Tex. Civ. App.) 1028.

#### IV. ACTIONS.

##### (B) PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

§ 85. Allegation *held* insufficient to charge actionable libel or slander.—Remmers v. Remmers (Mo.) 1117.

§ 100. In a libel action against a newspaper, evidence of offer in the paper to correct erroneous statements *held* inadmissible, unless on an issue as to exemplary damages, when specially pleaded under McIlwaine's Dig. St. art. 3282b.—James v. Ft. Worth Telegram Co. (Tex. Civ. App.) 1028.

##### (D) DAMAGES.

§ 114. The law presuming injury from the publication of matter libelous *per se*, the libeled person is entitled to at least nominal damages from the publisher.—James v. Ft. Worth Telegram Co. (Tex. Civ. App.) 1028.

##### (E) TRIAL, JUDGMENT, AND REVIEW.

§ 123. In a libel action, where the evidence was undisputed that a publication, libelous *per se* as to plaintiff, was made by defendant, a verdict for plaintiff should have been directed.—James v. Ft. Worth Telegram Co. (Tex. Civ. App.) 1028.

#### V. SLANDER OF PROPERTY OR TITLE.

Conclusions in pleading in action for slander, see Pleading, § 8.

Liability of corporation for statements by officers or agents, see Corporations, § 423.

§ 132. The owner of a one-half interest in trees on a certain tract of land has no action for slander of title to property because of allegations that a certain company owns the land on which the trees stand.—Continental Realty Co. v. Little (Ky.) 310.

§ 139. A petition, in an action for slander of title to land, must allege that plaintiff holds the legal title to the land and is in possession of it, in order to recover as against a defendant setting up a claim thereto.—Continental Realty Co. v. Little (Ky.) 310.

§ 139. A petition, in an action for slander of title to property, because of alleged declarations of defendants, must set out the words constituting the slander and the special damage resulting therefrom.—Continental Realty Co. v. Little (Ky.) 310.

§ 139. A petition setting out title of plaintiff to certain land, construed.—Continental Realty Co. v. Little (Ky.) 310.

#### VI. CRIMINAL RESPONSIBILITY.

##### (B) PROSECUTION AND PUNISHMENT.

§ 152. In a prosecution for slander of a female, a variance *held* to exist between the allegations of the information and the proof.—Dobbs v. State (Tex. Cr. App.) 799.

§ 159. Under Pen. Code 1895, art. 751, the refusal, in a prosecution for slander of a female, of a charge that, if the general reputation of prosecutrix for chastity was bad, the jury should acquit, *held* error.—Dobbs v. State (Tex. Cr. App.) 799.

#### LICENSES.

For sale of intoxicating liquors, see Intoxicating Liquors, § 45.

Injuries to licensees, see Railroads, §§ 274, 282.

#### L. FOR OCCUPATIONS AND PRIVILEGES.

Delegation to executive officers of power to impose tax on foreign insurance company, see Constitutional Law, § 62.

Laws imposing, as class legislation, see Constitutional Law, § 208.

Partial invalidity of ordinance imposing license, see Municipal Corporations, § 111.

Uniformity of operation of act authorizing imposition of license tax on foreign companies, see Statutes, § 74.

§ 7. The rule that the amount of a license fee is a question for the taxing power, and that courts will not interfere with its discretion, is subject to the limitation that the tax shall not amount to a prohibition of any useful or legitimate occupation.—Fiscal Court of Owen County v. F. & A. Cox Co. (Ky.) 296.

§ 7. A license tax of \$200 on each four-horse wagon operated as a business for hauling freight for pay *held* invalid as prohibitive.—Fiscal Court of Owen County v. F. & A. Cox Co. (Ky.) 296.

§ 7. A license tax, requiring the owner of a four-horse wagon to pay nearly three times as much as the owner of a three-horse wagon, *held* void for unjust discrimination.—Fiscal Court of Owen County v. F. & A. Cox Co. (Ky.) 296.

§ 7. Under Const. §§ 60, 171, 180, 181, St. 1909, § 637 (Russell's St. § 4234), relating to discriminatory taxation of foreign insurance companies, *held* to be unconstitutional.—Western & Southern Life Ins. Co. v. Commonwealth (Ky.) 376.

§ 19. The trade of a barber is a "mechanical pursuit," within Const. art. 8, § 1, exempting persons engaged in mechanical pursuits from an occupation tax; and hence Acts 30th Leg. 1907, p. 273, c. 141, imposing a license tax on barbers, is invalid.—Jackson v. State (Tex. Cr. App.) 818.

#### LIENS.

*Liens acquired by particular remedies or proceedings.*

See Attachment, § 178; Execution, § 115; Garnishment, §§ 109, 110.

##### *Particular classes of liens.*

Corporation's lien on stock, see Corporations, § 169.

For penalties and expenses on lot owners' failure to comply with order of health board, see Health, § 38.

For purchase of tax title, see Taxation, §§ 825, 826.

Mortgage, see Mortgages, §§ 154, 155.

Of broker, see Brokers, §§ 40-56.

Pledge, see Pledges.

Vendor's lien on lands sold, see Vendor and Purchaser, §§ 257-276.

#### LIFE ESTATES.

See Dower; Remainders.

#### LIMITATION OF ACTIONS.

See Adverse Possession.

Laches, see Equity, § 87.

##### *Particular actions or proceedings.*

See Trespass to Try Title, § 25.

Against executrix, see Executors and Administrators, § 437.

To construe will, see Wills, § 699.

To restrain collection of municipal assessments, see Municipal Corporations, § 538.

**I. STATUTES OF LIMITATION.****(A) NATURE, VALIDITY, AND CONSTRUCTION IN GENERAL.**

§ 5. Under section 2 of the act of 1819 (2 Laws 1715-1820, p. 483, c. 28), embodied in Code 1858, § 2765, an unregistered deed *held* good as supporting a defensive right, notwithstanding section 1 of the act, embodied in Code 1858, §§ 2763, 2764, as amended by Acts 1895, p. 54, c. 38.—*Kittel v. Steger* (Tenn.) 500.

**(B) LIMITATIONS APPLICABLE TO PARTICULAR ACTIONS.**

§ 37. The right of a purchaser rescinding the contract of purchase, on the ground of the fraud of the broker to sue the broker, *held* barred by the four-year statute of limitations.—*Gordon v. Rhodes & Daniel* (Tex. Civ. App.) 1023.

**II. COMPUTATION OF PERIOD OF LIMITATION.****(A) ACCRUAL OF RIGHT OF ACTION OR DEFENSE.**

§ 55. Limitations of action for injuries caused by diversion of water on adjoining lands because of insufficient drain box constructed by railroad *held* to run from time of actual injury, and not from time of construction of the drain box.—*Texas & P. Ry. Co. v. Ford* (Tex. Civ. App.) 201.

**(D) DEATH AND ADMINISTRATION.**

§ 80. Rev. St. 1899, § 4267 (Ann. St. 1906, p. 2342), providing that, if a married woman entitled to sue to recover real estate shall die, her heirs may commence the action within three years after her death, *held* not to bar a certain action.—*Starr v. Bartz* (Mo.) 1125; *Same v. Kisner* (Mo.) 1129.

**(F) IGNORANCE, MISTAKE, TRUST, FRAUD, AND CONCEALMENT OF CAUSE OF ACTION.**

§ 100. In an action by a purchaser for the deceit of the broker of the vendor inducing the purchase, *held*, that failure to bring the action within four years was not excused.—*Gordon v. Rhodes & Daniel* (Tex. Civ. App.) 1023.

**IV. OPERATION AND EFFECT OF BAR BY LIMITATION.**

§ 175. A maker of a note secured by vendor's lien may in a suit to foreclose the lien waive the defense of limitation.—*Zeno v. Adoue* (Tex. Civ. App.) 1039.

**LIMITATION OF LIABILITY.**

Of carrier, see Carriers, §§ 150-166, 218.

**LIQUOR SELLING.**

See Intoxicating Liquors.

**LIS PENDENS.**

Pendency of other action ground for abatement, see Abatement and Revival, §§ 9, 14.

**LITTORAL RIGHTS.**

See Navigable Waters, § 39.

**LIVE STOCK.**

Carriage of, see Carriers, §§ 213-230.  
Injuries from operation of railroads, see Railroads, §§ 411-443.

**LOAN COMPANIES.**

See Banks and Banking, § 810.

**LOANS.**

By bank, see Banks and Banking, §§ 177, 179.  
Recovery of money loaned, see Money Lent.

**LOCAL LAWS.**

See Statutes, §§ 66, 74.

**LOCAL OPTION.**

Traffic in intoxicating liquors, see Intoxicating Liquors, §§ 37-40.

**LOCATION.**

Of railroads, see Railroads, § 58.

**LODGES.**

Validity of devise to Masonic hall, see Charities, § 19.

**LOGS AND LOGGING.**

Conversion of standing timber from realty to personalty, see Property, § 5.  
Cutting timber as adverse possession, see Adverse Possession, § 23.

§ 8. A purchaser of standing timber, who takes without notice of the transfer of notes given by a former purchaser on reconveyance of the timber by such purchaser, *held* an innocent purchaser.—*Standard Lumber Co. v. Colwell* (Ky.) 286.

§ 8. Under plaintiff's contract to cut and haul and pile logs on skidways to be furnished by defendant, *held*, that skidways not being ready, and he having piled the logs on the ground, he was not liable for expense of repiling them on the skidways.—*Ayer & Lord Tie Co. v. Martin* (Ark.) 1081.

§ 8. Evidence *held* sufficient to show a certain amount of logs were cut and hauled.—*Ayer & Lord Tie Co. v. Martin* (Ark.) 1081.

**LUMBER.**

See Logs and Logging.

**LUNATICS.**

See Insane Persons.

**MACHINERY.**

Production and use of electricity, see Electricity.

**MAIL CRANES.**

Injuries to railroad employes by mail cranes erected near the track, see Master and Servant, §§ 96, 270, 286, 295.

**MAINTENANCE.**

See Champerty and Maintenance.

**MALICE.**

See Malicious Mischief.

**MALICIOUS MISCHIEF.**

§ 4. An information for injuring personality *held* sufficient.—*Craighead v. State* (Tex. Cr. App.) 128.

§ 8. In a trial for willfully destroying telephone posts, witness could testify that the posts belonged to him and the other prosecuting witnesses.—*Craighead v. State* (Tex. Cr. App.) 128.

§ 8. Evidence *held* admissible in a trial for destroying telephone poles in a public road.—*Craighead v. State* (Tex. Cr. App.) 128.

§ 9. Evidence held to sustain a conviction for willfully injuring telephone posts in a public road.—*Craighead v. State* (Tex. Cr. App.) 128.

## MALICIOUS PROSECUTION.

See False Imprisonment.

### V. ACTIONS.

§ 67. Attorney's fees, as such, are not recoverable in a suit for damages for malicious prosecution.—*Beckham v. Collins* (Tex. Civ. App.) 431.

§ 67. Attorney's fees are not recoverable as such in a suit for the malicious suing out of an attachment.—*Beckham v. Collins* (Tex. Civ. App.) 431.

§ 68. Attorney's fees are not recoverable as such in a suit for the malicious suing out of a distress warrant.—*Beckham v. Collins* (Tex. Civ. App.) 431.

§ 68. Vexation is not an element of exemplary damages recoverable in a suit for the malicious suing out of a distress warrant.—*Beckham v. Collins* (Tex. Civ. App.) 431.

§ 71. Evidence in an action for the malicious suing out of a writ of sequestration considered, and held, that the giving of a peremptory instruction for defendant was error.—*Martin v. Butner* (Tex. Civ. App.) 442.

## MANDAMUS.

To compel appointment of administrator, see Executors and Administrators, § 20.

### I. NATURE AND GROUNDS IN GENERAL.

§ 1. Mandamus lies to compel action on the part of a public officer in a matter within his jurisdiction.—*State ex rel. Carter v. Bollinger* (Mo.) 1132.

§ 4. An order refusing the application of decedent's son for appointment as his administrator held not appealable.—*In re Flick's Estate* (Mo. App.) 98; *Flick v. Schenk*, Id.

### II. SUBJECTS AND PURPOSES OF RELIEF.

#### (A) ACTS AND PROCEEDINGS OF COURTS, JUDGES, AND JUDICIAL OFFICERS.

§ 57. The Court of Civil Appeals will not determine, on application for mandamus to compel the clerk of the lower court to deliver to appellant a transcript omitting certain papers, whether such papers are necessary.—*Baum v. McAfee* (Tex. Civ. App.) 883.

#### (B) ACTS AND PROCEEDINGS OF PUBLIC OFFICERS AND BOARDS AND MUNICIPALITIES.

§ 112. Demurrer to a bill by the state, in behalf of certain counties, to compel an assessment of railroad property, held properly sustained.—*State v. Enloe* (Tenn.) 223.

### III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 146. The use of the state's name in a bill for mandamus in behalf of counties to compel assessment of taxes on railroad property is altogether unnecessary; the counties having the right to sue in their own name, being the real parties complainant, and the appearance of the state in such a case being merely nominal.—*State v. Enloe* (Tenn.) 223.

§ 146. The right of counties to use the name of the state in suing for mandamus to compel the assessment of a tax is not authorized by Shannon's Code, § 495, and does not fall with-

in sections 5165-5187; and there is no statute authorizing the use of the state's name in such a case.—*State v. Enloe* (Tenn.) 223.

§ 187. In mandamus a bill of exceptions held necessary on appeal.—*Louisville Home Telephone Co. v. Gordon* (Ky.) 315; *City of Louisville v. Louisville Home Telephone Co.*, Id.

§ 187. In determining whether the public interest will justify a litigation along the lines laid down in a bill for mandamus by the state, it is incumbent on the Supreme Court to inquire into the nature of the contest into which the state would be plunged on overruling a demurrer thereto, sustained below, and remanding the cause for trial.—*State v. Enloe* (Tenn.) 223.

## MANDATE.

See Mandamus.

## MANSLAUGHTER.

See Homicide, §§ 49, 63.

## MARRIAGE.

See Divorce; Husband and Wife.

## MARRIED WOMEN.

See Husband and Wife.

Acknowledgment by, see Acknowledgment, § 25.

## MARSHALS.

Fire marshal law, see Fires, §§ 2, 9; Statutes, §§ 64, 110½.

Of United States, see United States Marshals.

## MASTER AND SERVANT.

### I. THE RELATION.

#### (A) CREATION AND EXISTENCE.

§ 1. A "servant" is one who is employed by another and is subject to the control of his employer.—*Messmer v. Bell & Coggeshall Co.* (Ky.) 346.

#### (B) STATUTORY REGULATION.

§ 11. Acts 1905, p. 386, c. 163, held constitutional.—*El Paso & S. W. Ry. Co. v. Alexander* (Tex. Civ. App.) 927.

### III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

Liability of charitable institutions, see Charities, § 45.

#### (A) NATURE AND EXTENT IN GENERAL.

Compromise and settlement of claim for injuries, see Compromise and Settlement, § 6. Contributory negligence as a defense in action for death of infant employed in violation of statutes, see Death, § 23.

§ 85. An employer does not insure the safety of his employé.—*Commerce Cotton Oil Co. v. Camp* (Tex. Civ. App.) 451.

§ 86. An action, brought in Missouri for injuries to a servant, must be governed by the law of the state in which the injury occurred.—*Ham v. St. Louis & S. F. R. Co.* (Mo. App.) 108.

§ 88. One held not an independent contractor, but a servant, for whose negligence in operating machinery, whereby another was injured, defendants were liable.—*Messmer v. Bell & Coggeshall Co.* (Ky.) 346.

§ 90. A master must exercise reasonable care to protect his servants from the hazards inci-

dent to their employment.—Burkard v. A. Leschen & Sons Rope Co. (Mo.) 35.

§ 90. The test of negligence, in an action for injuries to a servant, stated.—International & G. N. R. Co. v. Garcia (Tex. Civ. App.) 203.

§ 95. Under St. 1909, §§ 831a, 466 (Russell's St. §§ 3, 3237-3251a [5]), an infant employed in a mine in violation of the statute held entitled to recover for injuries occurring while the boy was riding out of the mine on the cars.—Smith's Adm'r v. National Coal & Iron Co. (Ky.) 280.

§ 96. Where defendant was negligent in maintaining a mail crane too near the track and in allowing the track near the crane to remain in a defective condition, it is no defense to an action for the death of an engineer by striking the crane that the postmaster was also negligent in placing the crane in position at an improper time.—Missouri, K. & T. Ry. Co. of Texas v. Williams (Tex. Civ. App.) 1043.

#### (B) TOOLS, MACHINERY, APPLIANCES, AND PLACES FOR WORK.

§ 101. A master having provided for the lowering of brick into a sewer by a rope which was the usual method held not liable for injuries resulting therefrom because of his failure to furnish iron boxes for the purpose.—Shinners v. Mullins (Mo. App.) 91.

§ 102. A master must use ordinary care to furnish a reasonably safe place of work.—Burkard v. A. Leschen & Sons Rope Co. (Mo.) 35.

§ 102. A master must furnish servants reasonably safe implements and a reasonably safe place of work, and is liable for injuries caused by his failure to do so.—Booth v. St. Louis, I. M. & S. Ry. Co. (Mo.) 1094.

§ 102. One must use reasonable care to provide his employé a reasonably safe place of work, and not to increase the natural hazards of the employment.—Welch v. Dieter (Mo. App.) 97.

§ 102. It is the duty of a master to exercise reasonable care to provide a servant a reasonably safe place to work.—Morgan v. Missouri Pac. Ry. Co. (Mo. App.) 103.

§ 102. It is the duty of a master to exercise reasonable care to provide the servant with a reasonably safe place in which to work so as not to enhance the natural risks of the employment.—Rowden v. Schoenherr-Walton Mining Co. (Mo. App.) 695.

§ 105. The fact that an equipment used by defendant was such as is in general use among reasonably prudent persons engaged in the same business is not conclusive that defendant exercised ordinary care.—Lyon v. Bedgood (Tex. Civ. App.) 897.

§ 107. Where work in hand is dangerous for the reason that it is to make safe an unsafe place, the general rule that the master must furnish the servant a safe place in which to work has no application.—Rowden v. Schoenherr-Walton Mining Co. (Mo. App.) 695.

§ 118. Duty of master to provide for inspection of mine roof, stated.—Rowden v. Schoenherr-Walton Mining Co. (Mo. App.) 695.

§ 118. The mere fact that a servant, to protect himself from threatened and obvious danger, makes it a practice to remove loose rocks from the roof of a mine over the place where he is required to work, does not, as matter of law, absolve the master from the performance of his duty to make reasonably safe an unsafe place before requiring the servant to work there, and throw the duty on the servant.—Rowden v. Schoenherr-Walton Mining Co. (Mo. App.) 695.

§ 118. Rule as to master's duty to furnish safe place to work, where conditions of work

and place are changing, held not to apply to certain employment in a mine.—Rowden v. Schoenherr-Walton Mining Co. (Mo. App.) 695.

§ 121. Ordinance held not to require the keeping of temporary flooring in place above second floor to protect workmen where to do so would interfere with the work.—Butz v. Murch Bros. Const. Co. (Mo. App.) 635.

§ 125. Where a servant engaged in piling wire told his foreman that a leaning column of wire looked dangerous, the foreman was negligent in assuring the servant that there was no danger, without first ascertaining whether the column should be braced.—Burkard v. A. Leschen & Sons Rope Co. (Mo.) 35.

#### (C) METHODS OF WORK, RULES, AND ORDERS.

§ 137. In an action by a servant for injuries, defendant held to have been negligent.—Morgan v. Missouri Pac. Ry. Co. (Mo. App.) 104.

§ 141. Duty of railroad companies to establish rules stated.—Chesapeake & O. Ry. Co. v. Barnes' Adm'r (Ky.) 261.

§ 146. There could be no recovery against a railroad company for the death of an employé because of the violation by an engineer of a rule requiring the bell to be rung before starting an engine, where the employé at the time of his death was not acting within his employment, but was in a place of danger by his own volition.—Chesapeake & O. Ry. Co. v. Barnes' Adm'r (Ky.) 261.

#### (D) WARNING AND INSTRUCTING SERVANT.

§ 153. An employer held required to inform an employé of the peculiar dangers attending a particular service.—Texas & N. O. R. Co. v. McCoy (Tex. Civ. App.) 446.

#### (E) FELLOW SERVANTS.

§ 177. The master is not liable for injuries caused by the negligence of fellow servants of an injured employé.—Lantry-Sharpe Contracting Co. v. McCracken (Tex. Civ. App.) 453.

§ 179. Act March 8, 1907 (Acts 1907, p. 162), abolishing the fellow-servant rule, is valid.—Aluminum Co. of North America v. Ramsey (Ark.) 568.

§ 187. "Vice principal" defined.—Burkard v. A. Leschen & Sons Rope Co. (Mo.) 35.

§ 187. A master is liable for injuries to a servant caused by the negligence of his vice principal in the superintendence or direction of the work.—Burkard v. A. Leschen & Sons Rope Co. (Mo.) 35.

§ 189. When an employé having power of superintendence, without power to employ and discharge, is a vice principal, stated.—Lantry-Sharpe Contracting Co. v. McCracken (Tex. Civ. App.) 453.

§ 189. Authority to employ and discharge subordinate employés makes an employé a vice principal.—Lantry-Sharpe Contracting Co. v. McCracken (Tex. Civ. App.) 453.

§ 190. Where an employé, himself free from negligence which would defeat a recovery, is injured or killed by a violation of the rules by a superior agent of the master, the master is liable.—Chesapeake & O. Ry. Co. v. Barnes' Adm'r (Ky.) 261.

§ 190. Two workmen held not fellow servants, one of them being a vice principal.—Burkard v. A. Leschen & Sons Rope Co. (Mo.) 35.

§ 190. A vice principal, while actually engaging in the work, is a fellow servant.—Lantry-Sharpe Contracting Co. v. McCracken (Tex. Civ. App.) 453.

§ 198. "Fellow servants" defined.—Burkard v. A. Leschen & Sons Rope Co. (Mo.) 35.

§ 198. The members of a train crew *held* to be fellow servants of a brakeman on another train.—Ham v. St. Louis & S. F. R. Co. (Mo. App.) 108.

#### (F) RISKS ASSUMED BY SERVANT.

§ 203. The only risks assumed by a servant are those which are incidental to the employment, and he does not assume risks which arise from the master's negligence.—Rowden v. Schoenherr-Walton Mining Co. (Mo. App.) 695.

§ 204. The defense of assumed risk *held* not available under Acts 1905, p. 386, c. 163.—El Paso & S. W. Ry. Co. v. Alexander (Tex. Civ. App.) 927.

§ 204. An instruction in an action by a switchman for injuries as to assumed risk *held* error under Acts 1905, p. 386, c. 163.—El Paso & S. W. Ry. Co. v. Alexander (Tex. Civ. App.) 927.

§ 205. Where a servant apprehends that his place of work is unsafe, but relies upon the master's assurance that it is safe, and is thereafter injured, the master is liable.—Burkard v. A. Leschen & Sons Rope Co. (Mo.) 35.

§ 206. If an injury occurred during the servant's discharge in a proper manner of a duty placed upon him to inspect premises, the cause would be one of the natural risks of the employment assumed by the servant.—Rowden v. Schoenherr-Walton Mining Co. (Mo. App.) 695.

§ 208. Company engaged in the construction of building *held* not liable to employé who fell through girders, as his injury was due to a usual hazard of his employment.—Butts v. Murch Bros. Const. Co. (Mo. App.) 635.

§ 217. A servant does not assume the risk of danger created by a negligent act of the master unless he is aware of the danger and appreciates it, though he may be guilty of contributory negligence barring a recovery in not learning of the danger.—St. Louis, I. M. & S. Ry. Co. v. Birch (Ark.) 243.

§ 217. A stone mason *held* to have assumed the risk of a slab falling while he was at work on the second story of a building.—Welch v. Dieter (Mo. App.) 97.

§ 217. Injuries to a servant by falling into an elevator shaft, under certain circumstances, *held* to result from assumed risks, for which there could be no recovery.—Swift & Co. v. Martine (Tex. Civ. App.) 209.

§ 218. An employé does not assume the risk which his ignorance and inexperience prevent him from knowing.—Texas & N. O. R. Co. v. McCoy (Tex. Civ. App.) 446.

§ 220. Where the master assures a servant that the place of work is safe, the servant's knowledge of its dangerous condition will not preclude recovery unless the danger is obvious.—Burkard v. A. Leschen & Sons Rope Co. (Mo.) 35.

§ 223. Where a railway employé was standing on the track while not engaged in any duty within the scope of his employment, *held*, that the only duty the company owed him was the duty to avoid injuring him after his position of peril was discovered.—Chesapeake & O. Ry. Co. v. Barnes' Adm'r (Ky.) 261.

§ 226. A servant assumes the risks that are incidental to the employment, and not those created by the negligence of his master.—Morgan v. Missouri Pac. Ry. Co. (Mo. App.) 106.

§ 226. A servant does not assume the risk of injuries from the negligent acts and practices of the master or his representatives of which he knew before the happening of the

act complained of.—International & G. N. R. Co. v. Garcia (Tex. Civ. App.) 208.

§ 226. A servant does not assume risks resulting from his master's negligence.—El Paso & S. W. Ry. Co. v. Alexander (Tex. Civ. App.) 927.

#### (G) CONTRIBUTORY NEGLIGENCE OF SERVANT.

As a defense in action for death of infant employed in violation of statutes, see Death, § 23.

§ 228. Acts 1907, p. 162, abrogating the fellow-servant rule, does not entitle a servant if the servant injured knew, or by the exercise of ordinary care could have known, of his fellow servant's negligence.—Aluminum Co. of North America v. Ramsey (Ark.) 568.

§ 232. In an action for the death of an employé, refusal of instruction as to contributory negligence *held* error.—Commerce Cotton Oil Co. v. Camp (Tex. Civ. App.) 451.

§ 234. If the servant's injuries were caused by the insecurity of a temporary brace which he and other servants nailed to the structure, he must be held to have known it and to be at least jointly responsible for its insecurity.—Lantry-Sharp Contracting Co. v. McCracken (Tex. Civ. App.) 453.

§ 235. Coal mine employes *held* not required to anticipate that the employer would run motor cars into the mine on the only path by which they could leave their work.—McDonald's Adm'r v. Wallsend Coal & Coke Co. (Ky.) 349.

§ 235. If, by express direction, or by implication from custom, acquiesced in by master and servants, the duty of inspecting and trimming a mine roof to prevent injury from falling material be delegated to a servant, and he be injured by his failure to discharge the duty properly, he cannot recover therefor from the master.—Rowden v. Schoenherr-Walton Mining Co. (Mo. App.) 695.

§ 235. Servant *held* not required to thoroughly inspect premises, but entitled to rely upon master's judgment.—Rowden v. Schoenherr-Walton Mining Co. (Mo. App.) 695.

§ 238. If a master orders a servant into a place of danger and the servant is injured, he is not guilty of contributory negligence, unless the danger is so glaring that a reasonably prudent person would not have entered into it.—Morgan v. Missouri Pac. Ry. Co. (Mo. App.) 106.

§ 243. A rule of a railroad company warning employes not to attempt to get on the end of an approaching car *held* not to apply to an attempt to get up the side of a moving car.—El Paso & S. W. Ry. Co. v. Alexander (Tex. Civ. App.) 927.

§ 246. An employé placed suddenly in a position of peril by the negligence of the employer *held* not guilty of contributory negligence in failing to select the safer of two ways presented for his escape.—McDonald's Adm'r v. Wallsend Coal & Coke Co. (Ky.) 349.

§ 248. That the danger to a servant from a leaning column of wire was so obvious as to make the servant negligent in continuing work after his foreman told him there was no danger would not absolve the foreman from the duty of bracing the column.—Burkard v. A. Leschen & Sons Rope Co. (Mo.) 35.

#### (H) ACTIONS.

Assumption of facts in instructions, see Trial, § 191.

Ignoring or excluding issues, defenses or evidence, see Trial, § 253.

Refusal of request for instructions already given, see Trial, § 260.

§ 262. Assumption of risk from danger caused by the master's negligence or arising from a faulty manner of work must be pleaded.—*International & G. N. R. Co. v. Garcia* (Tex. Civ. App.) 206.

§ 264. In a servant's action for injuries caused by the master's failure to furnish a safe place of work, defendant may, under a plea of contributory negligence, show the servant's knowledge of the unsafe condition of his place of work.—*Burkard v. A. Leschen & Sons Rope Co.* (Mo.) 85.

§ 264. In a servant's action for injuries, sustained while piling wire, by a column of wire falling upon him, whether plaintiff knew the danger, *held* not an issue under the pleadings.—*Burkard v. A. Leschen & Sons Rope Co.* (Mo.) 85.

§ 264. Evidence in support of defense of assumption of risk *held* relevant.—*Ham v. St. Louis & S. F. R. Co.* (Mo. App.) 108.

§ 264. When the particular risk is specified in the pleadings, no other risks may be shown.—*International & G. N. R. Co. v. Garcia* (Tex. Civ. App.) 206.

§ 265. In an action for injuries to a servant, the burden of proving plaintiff's contributory negligence rests on the defendant.—*Aluminum Co. of North America v. Ramsey* (Ark.) 568.

§ 265. In an action for death of a servant through the explosion of a locomotive boiler, a charge that the burden was on defendant to show contributory negligence *held* correct.—*Houston & T. C. R. Co. v. Davenport* (Tex.) 790.

§ 265. In an action for death of a servant through the explosion of a fire box on a locomotive, the burden of proving that defendant's negligence caused the explosion was on plaintiffs.—*Houston & T. C. R. Co. v. Davenport* (Tex.) 790.

§ 265. That decedent was killed while working in defendant cotton oil company's hull house by a falling of a mass of cotton seed hulls does not create a presumption of negligence of the company.—*Commerce Cotton Oil Co. v. Camp* (Tex. Civ. App.) 451.

§ 270. As tending to show that a defect in a shaft was a flaw, and not a key-seat cut for keying the shaft to hub, as contended by defendant, *held*, plaintiff could introduce evidence that the wheels on shafts of the size of the one in question were not secured by that means.—*Phelps v. Conqueror Zinc & Lead Co.* (Mo.) 705.

§ 270. Evidence that the equipment used by defendant is in general use among reasonably prudent persons engaged in the same business is admissible on the question of ordinary care.—*Lyon v. Bedgood* (Tex. Civ. App.) 897.

§ 270. Evidence as to the condition of a railroad track at a certain place in December is admissible as to its condition the previous May at the time of the accident in question, where there is further evidence that its condition was practically the same at both dates.—*Missouri, K. & T. Ry. Co. of Texas v. Williams* (Tex. Civ. App.) 1043.

§ 270. On the question of whether a railroad company was negligent in placing a mail crane so near its track as it had, it is proper to allow a witness to testify as to what he observed when the engine passed the crane.—*Missouri, K. & T. Ry. Co. of Texas v. Williams* (Tex. Civ. App.) 1043.

§ 276. In an action for the death of a railway brakeman, evidence *held* not to satisfy the burden upon plaintiff to show that the proved negligence of defendant's engineer in starting the train was the proximate cause of the death.—*Louisville & N. R. Co. v. Long's Adm'r* (Ky.) 359.

§ 276. In an action for injuries to an employe, evidence *held* not to show negligence of the employer.—*Morgan v. Temagami Min. Co.* (Mo. App.) 90.

§ 276. Evidence, in an action by a servant for injury, *held* to show that the act he was doing at the time of his injury was a necessary one and done in the discharge of his duty.—*El Paso & S. W. Ry. Co. v. Alexander* (Tex. Civ. App.) 927.

§ 277. In an action for the death of a boy while working in a coal mine, evidence *held* to show that he was employed by defendant's foreman.—*Smith's Adm'r v. National Coal & Iron Co.* (Ky.) 280.

§ 278. Evidence *held* insufficient to show that contractors were negligent toward a stone mason injured through a slab of stone falling.—*Welch v. Dieter* (Mo. App.) 97.

§ 278. Evidence *held* not to show negligence by the foreman in failing to warn plaintiff of danger.—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 453.

§ 278. Evidence *held* to show that defendant's foreman exercised ordinary care to guard against an accident.—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 453.

§ 279. Injury to a servant *held* to have been the result of a fellow servant's negligence.—*Shinners v. Mullins* (Mo. App.) 91.

§ 279. Evidence *held* to show that plaintiff's injuries were caused by the negligence of fellow servants.—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 453.

§ 281. In a servant's action for injuries sustained while piling wire, evidence *held* not to show that the danger was so obvious and imminent as to make it contributory negligence for plaintiff to continue after his foreman had told him there was no danger.—*Burkard v. A. Leschen & Sons Rope Co.* (Mo.) 35.

§ 281. Evidence in an action by a servant for injuries received while working in a pit underneath a locomotive *held* to show that plaintiff did not voluntarily go into the pit, but went there under the order of defendant's foreman.—*Morgan v. Missouri Pac. Ry. Co.* (Mo. App.) 106.

§ 285. In an action for injuries to a servant, a peremptory instruction for defendant on the ground that the foreman's acts were not the proximate cause of the injury *held* properly refused.—*International & G. N. R. Co. v. Garcia* (Tex. Civ. App.) 206.

§ 286. In an injury action by a servant against the master, evidence *held* sufficient to take the case to the jury on the issue as to whether the master was negligent in not furnishing a sufficient number of employes to properly do the work in connection with which the servant was injured.—*Louisville & N. R. Co. v. Shelburne* (Ky.) 303.

§ 286. Evidence in an action by a servant for injuries received while working in a pit underneath a locomotive considered, and, *held*, that whether defendant's foreman was negligent in ordering plaintiff into the pit was for the jury.—*Morgan v. Missouri Pac. Ry. Co.* (Mo. App.) 106.

§ 286. In an action for the death of an engineer, whether an explosion resulted from defects attributable to defendant's negligence *held* for the jury.—*Houston & T. C. R. Co. v. Davenport* (Tex.) 790.

§ 286. In a section hand's action for injuries sustained by being thrown from a hand car which was derailed by running over the foreman who fell from the car while attempting to knock rocks from the track, whether the foreman's act was negligent *held* for the jury.—



International & G. N. R. Co. v. Garcia (Tex. Civ. App.) 206.

§ 286. Under the evidence in an action for injuries to a servant, the question of the negligence of the master *held* for the jury.—El Paso & S. W. Ry. Co. v. Alexander (Tex. Civ. App.) 927.

§ 286. In an action for injury to a switchman, evidence *held* sufficient to take the question of the company's negligence to the jury.—Missouri, K. & T. Ry. Co. of Texas v. Jones (Tex. Civ. App.) 1000.

§ 286. In an action for injury to a switchman, directed verdict for the company on the ground that it had properly inspected its track *held* properly refused.—Missouri, K. & T. Ry. Co. of Texas v. Jones (Tex. Civ. App.) 1000.

§ 286. In an action for the death of a locomotive engineer by contact with a mail crane, *held*, that whether defendant was negligent in placing the crane where it was was a question for the jury.—Missouri, K. & T. Ry. Co. of Texas v. Williams (Tex. Civ. App.) 1043.

§ 286. In an action for the death of an engineer by contact with a mail crane, evidence *held* to raise for the jury the questions whether the condition of the track constituted negligence, and, if so, whether such negligence was the cause of the accident.—Missouri, K. & T. Ry. Co. of Texas v. Williams (Tex. Civ. App.) 1043.

§ 287. Where the evidence showed that the accident was caused by negligence of fellow servants without negligence by the employer, a verdict could be directed for defendant.—Lantry-Sharp Contracting Co. v. McCracken (Tex. Civ. App.) 453.

§ 288. Whether a servant called his foreman's attention to the leaning condition of a column of wire, and was assured that there was no danger, *held* a jury question.—Burkard v. A. Leschen & Sons Rope Co. (Mo.) 35.

§ 288. Evidence, in an action by a switchman for injuries, *held* not to show, as a matter of law, that he assumed the risk of injury.—El Paso & S. W. Ry. Co. v. Alexander (Tex. Civ. App.) 927.

§ 288. Under the evidence in an action for injuries received by a servant, the question of assumption of risk *held* for the jury.—El Paso & S. W. Ry. Co. v. Alexander (Tex. Civ. App.) 927.

§ 289. A servant's alleged contributory negligence is for the jury if reasonable men from all the facts proved could come to different conclusions.—Aluminum Co. of North America v. Ramsey (Ark.) 568.

§ 289. In an action for injuries to a railroad engineer, plaintiff *held* not negligent as a matter of law.—Aluminum Co. of North America v. Ramsey (Ark.) 568.

§ 289. In an action for the death of a boy killed while working in a coal mine by falling between the cars while riding out from work, whether he used ordinary care in passing over the cars under the circumstances *held* for the jury.—Smith's Adm'r v. National Coal & Iron Co. (Ky.) 280.

§ 289. In an action by a servant for injuries from a timber dropped while being lowered from a scaffold above him, whether he was negligent in failing to get out of the way *held* for the jury under the evidence.—Louisville & N. R. Co. v. Shelburne (Ky.) 303.

§ 289. A coal mine employé injured while going out of a mine *held* not guilty of contributory negligence as a matter of law.—McDonald's Adm'r v. Wallsend Coal & Coke Co. (Ky.) 349.

§ 289. Whether the danger was so obvious and imminent as to make it contributory negligence for a servant to continue work after the

master had assured him that the situation was not dangerous, is generally a jury question.—Burkard v. A. Leschen & Sons Rope Co. (Mo.) 35.

§ 289. The question of plaintiff's contributory negligence *held* for the jury.—Morgan v. Missouri Pac. Ry. Co. (Mo. App.) 106.

§ 289. In an action by a servant for injuries from the falling of rock from a mine roof, whether the servant was negligent *held* for the jury.—Rowden v. Schoenherr-Walton Mining Co. (Mo. App.) 695.

§ 289. In an action by a servant for injuries from the falling of rock from the roof of a mine, whether the master had made it one of the duties of the servant and his helper to inspect and trim the roof *held* under the evidence for the jury.—Rowden v. Schoenherr-Walton Mining Co. (Mo. App.) 695.

§ 289. Whether an engine wiper in a roundhouse, injured in assisting, as ordered by his foreman, in coupling a tender to an engine, was guilty of contributory negligence *held* for the jury.—Texas & N. O. R. Co. v. McCoy (Tex. Civ. App.) 448.

§ 289. Whether the violation of a rule is contributory negligence *held* for the jury.—El Paso & S. W. Ry. Co. v. Alexander (Tex. Civ. App.) 927.

§ 289. The violation of a rule *held* not contributory negligence per se.—El Paso & S. W. Ry. Co. v. Alexander (Tex. Civ. App.) 927.

§ 289. Evidence, in an action by a switchman for injuries received while attempting to open the knuckle on one of defendant's cars, *held* not to show, as a matter of law, that the method adopted by him to open the knuckle was contributory negligence.—El Paso & S. W. Ry. Co. v. Alexander (Tex. Civ. App.) 927.

§ 289. Evidence, in an action by a servant for injuries, *held* not to show, as a matter of law, that the proximate cause of his injury was his unnecessary choice of a dangerous way to perform his duty.—El Paso & S. W. Ry. Co. v. Alexander (Tex. Civ. App.) 927.

§ 289. Under the evidence in an action by a servant for injuries, the question of contributory negligence *held* for the jury.—El Paso & S. W. Ry. Co. v. Alexander (Tex. Civ. App.) 927.

§ 291. In a servant's action for injuries, an instruction *held* supported by the petition.—Burkard v. A. Leschen & Sons Rope Co. (Mo.) 35.

§ 291. In an action for injuries to a servant, an allegation as to assumption of risk *held* not to justify an instruction.—International & G. N. R. Co. v. Garcia (Tex. Civ. App.) 206.

§ 291. An instruction in an action against a cotton oil company for the death of an employé *held* improper.—Commerce Cotton Oil Co. v. Camp (Tex. Civ. App.) 451.

§ 291. Testimony that "nothing except rough usage in handling the lever could have broken the connection" is insufficient to require an instruction on the effect of want of care in handling the equipment in question.—Lyon v. Bedgood (Tex. Civ. App.) 897.

§ 293. In an action by a servant for injuries, charges precluding plaintiff's recovery unless his injury was the result of defendant's gross negligence *held* properly refused.—Louisville & N. R. Co. v. Shelburne (Ky.) 303.

§ 293. Instruction in an action for injury to an employé, even if given certain construction, *held* erroneous as submitting immaterial issue.—Butz v. Murch Bros. Const. Co. (Mo. App.) 635.

§ 293. Instruction in an action for injury to an employé *held* erroneous as ignoring certain

evidence in defense.—*Buts v. Murch Bros. Const. Co.* (Mo. App.) 635.

§ 293. A charge, in an action for injuries to a servant, *held not to impose* on defendant a greater burden than authorized by law.—*Swift & Co. v. Martine* (Tex. Civ. App.) 209.

§ 293. In an action for injuries to an employe, an instruction in favor of plaintiff based on the negligence of defendant's foreman *held* properly refused.—*Scott v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 890.

§ 293. An instruction as to the cause of the injury sued for *held* not sufficient in the presence of a request for a more specific instruction.—*Lyon v. Bedgood* (Tex. Civ. App.) 897.

§ 293. A requested instruction in an action by a switchman for injuries *held* properly refused as embraced in the charge by the court.—*El Paso & S. W. Ry. Co. v. Alexander* (Tex. Civ. App.) 927.

§ 293. In an engineer's action for injuries sustained by his train colliding with another train which had stopped, *held* error, under the evidence, to refuse a requested charge as to whether the employes of the standing train used due care in signaling the other train to stop.—*Missouri, K. & T. Ry. Co. of Texas v. Rogers* (Tex. Civ. App.) 899.

§ 294. Under Acts 1907, p. 162, an instruction that the jury, in considering whether an injured servant had exercised ordinary care, could consider the fact that he relied on his fellow servant performing his duty, etc., *held* not error.—*Aluminum Co. of North America v. Ramsey* (Ark.) 568.

§ 294. An instruction defining who are fellow servants, given under Rev. St. 1899, § 2875 (Ann. St. 1906, p. 1657), *held* error.—*Ham v. St. Louis & S. F. R. Co.* (Mo. App.) 108.

§ 294. There being no evidence that the negligence of plaintiff's foreman contributed to the accident causing his injuries, *held*, error to refuse an instruction for defendant.—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 453.

§ 295. An instruction, in an action for injuries to an employe, *held* to sufficiently submit the issue of assumed risk.—*Texas & N. O. R. Co. v. McCoy* (Tex. Civ. App.) 446.

§ 295. In an action for injuries to an employe, an instruction requested by plaintiff *held* properly refused because it ignored the issue of assumed risk.—*Scott v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 890.

§ 295. A requested instruction in an action by a switchman for injuries *held* properly refused as embraced in the charge by the court.—*El Paso & S. W. Ry. Co. v. Alexander* (Tex. Civ. App.) 927.

§ 295. An instruction in an action by a switchman for injuries *held* properly refused as ignoring evidence of negligence.—*El Paso & S. W. Ry. Co. v. Alexander* (Tex. Civ. App.) 927.

§ 295. Instruction as to assumption of risk *held* properly refused.—*Missouri, K. & T. Ry. Co. of Texas v. Williams* (Tex. Civ. App.) 1043.

§ 296. In an action for injuries to a servant, a requested charge *held* properly refused as withdrawing the question of contributory negligence from the jury.—*Aluminum Co. of North America v. Ramsey* (Ark.) 568.

§ 296. Requested instructions *held* properly refused as charging that certain facts, if found, showed plaintiff guilty of contributory negligence as a matter of law.—*Aluminum Co. of North America v. Ramsey* (Ark.) 568.

§ 296. A charge, in an action for injuries to a servant, *held* not objectionable as stating facts

constituting contributory negligence as matter of law and leaving the question to the jury.—*Swift & Co. v. Martine* (Tex. Civ. App.) 209.

§ 296. In an action for injuries to a brakeman, the refusal to charge on contributory negligence *held* error.—*Missouri, K. & T. Ry. Co. of Texas v. Rogers* (Tex. Civ. App.) 914.

§ 296. An instruction in an action by a switchman for injuries *held* properly refused.—*El Paso & S. W. Ry. Co. v. Alexander* (Tex. Civ. App.) 927.

§ 296. An instruction in an action by a switchman to recover for injuries *held* defective in the use of "very hazardous" instead of "hazardous."—*El Paso & S. W. Ry. Co. v. Alexander* (Tex. Civ. App.) 927.

§ 296. An instruction in an action by a switchman for injuries *held* not erroneous.—*El Paso & S. W. Ry. Co. v. Alexander* (Tex. Civ. App.) 927.

#### IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

##### (B) WORK OF INDEPENDENT CONTRACTOR.

Liability for injuries by blasting on adjoining land, see *Adjoining Landowners*, § 7.

§ 315. Where the law requires of an employer a certain standard of duty absolutely, he cannot escape liability for injuries to a third person on the ground that the work was done by an independent contractor.—*Pine Mountain R. Co. v. Finley* (Ky.) 413.

§ 315. Where an employer is negligent in the selection of his contractor, he cannot excuse himself from liability on the ground that the contractor was independent.—*Pine Mountain R. Co. v. Finley* (Ky.) 413.

§ 318. An "independent contractor" is one who is independent of his employer in the doing of his work, and may work when and how he prefers.—*Messmer v. Bell & Coggeshall Co.* (Ky.) 846.

§ 318. Where the employer, after giving a contract for certain work, undertakes to manage or control the same he destroys the relation of independent contractor.—*Pine Mountain R. Co. v. Finley* (Ky.) 413.

§ 319. Where the character of the business is of such a hazardous nature that it will necessarily injure a third person, the employer cannot escape liability on the ground that the work was done by an independent contractor.—*Pine Mountain R. Co. v. Finley* (Ky.) 413.

§ 319. A railroad company, in blasting to make excavations for a roadbed through a contractor, *held* bound to know rock and earth will be thrown on and injure land lying adjacent to the right of way.—*Pine Mountain R. Co. v. Finley* (Ky.) 413.

§ 323. If the work contracted to be done is unlawful, the employer is not excused from liability for injuries to a third person on the ground that it was done by an independent contractor.—*Pine Mountain R. Co. v. Finley* (Ky.) 413.

##### (C) ACTIONS.

§ 332. Liability of employer to third person for injuries from the use of dynamite or other explosives by a contractor is ordinarily a question for the jury.—*Pine Mountain R. Co. v. Finley* (Ky.) 413.

#### MATERIALITY.

Of alteration of written instrument, see *Alteration of Instruments*.

Of evidence in civil actions, see *Evidence*, § 143. Of evidence in criminal prosecutions, see *Criminal Law*, §§ 885-896.

## MAYHEM.

Duplicity in indictment, see Indictment and Information, § 125.

## MEASURE OF DAMAGES.

See Damages, §§ 95-120.

## MEETINGS.

Of directors of corporation, see Corporations, § 298.

School district meetings, see Schools and School Districts, § 57.

## MENTAL SUFFERING.

As element of damages, see Damages, § 56.

## MINES AND MINERALS.

Duty of mine owner to furnish servant safe place to work, see Master and Servant, § 118.

## II. TITLE, CONVEYANCES, AND CONTRACTS.

### (A) RIGHTS AND REMEDIES OF OWNERS.

§ 49. The essential elements of adverse possession of a mine by the surface owner after severance from the surface stated.—Gordon v. Park (Mo.) 1163.

§ 49. In ejectment for a coal mine, where defendant claimed by limitations, *held*, that an instruction should have been given, if requested, explaining what would constitute "continued" possession, as that word was used in an instruction given.—Gordon v. Park (Mo.) 1163.

§ 50. The judgment in ejectment for a coal mine *held* not objectionable for describing the property adjudged to plaintiff as "premises."—Gordon v. Park (Mo.) 1163.

### (B) CONVEYANCES IN GENERAL.

§ 55. A separate estate may be created in minerals either by grant or exception.—Gordon v. Park (Mo.) 1163.

§ 55. The grant of coal under the surface carries with it the use of the surface so far as necessary for mining operations.—Gordon v. Park (Mo.) 1163.

## III. OPERATION OF MINES, QUARRIES, AND WELLS.

### (B) MINING PARTNERSHIPS AND COMPANIES.

Liability of directors for fraud, see Corporations, § 335.

### (C) RIGHTS AND LIABILITIES INCIDENT TO WORKING.

Contributory negligence as a defense in action for death of infant employed in mine in violation of statute, see Death, § 23.

Mine operators as employers, see Master and Servant, §§ 95, 235, 277, 289.

## MINORS.

See Infants.

## MISREPRESENTATION.

See Fraud.

By insured, see Insurance, § 264.

## MISTAKE.

Ground for introduction of parol or extrinsic evidence to vary contract, see Evidence, § 433.

## MODIFICATION.

Of contract, see Contracts, § 243.

## MONEY LENT.

§ 7. Evidence in an action for money loaned as to good faith of defendant in making a transfer of stock to plaintiff *held* admissible.—Pullis v. Somerville (Mo.) 736.

§ 7. Evidence in an action to recover money loaned *held* to sustain a finding and judgment for plaintiff.—Pullis v. Somerville (Mo.) 736.

## MONEY RECEIVED.

Recovery of price paid for land, see Vendor and Purchaser, § 334.

Recovery of tax paid, see Taxation, § 543.

## MONOPOLIES.

Grants of privileges or immunities, see Constitutional Law, §§ 205, 208.

## MORTGAGES.

### I. REQUISITES AND VALIDITY.

#### (A) NATURE AND ESSENTIALS OF CONVEYANCES AS SECURITY.

§ 34. A deed absolute in form signed with the understanding that it was given in extinguishment of a debt *held* not a mortgage.—Stringfellow v. Braselton (Tex. Civ. App.) 204.

### III. CONSTRUCTION AND OPERATION.

#### (D) LIEN AND PRIORITY.

§ 154. A party taking a trust deed *held* chargeable with knowledge that a purchase-money note secured by a vendor's lien reserved in a prior deed was a claim against the land.—W. L. Moody & Co. v. Martin (Tex. Civ. App.) 1015.

§ 155. One taking a trust deed to secure a note given as additional security for a pre-existing debt *held* not a purchaser in good faith.—W. L. Moody & Co. v. Martin (Tex. Civ. App.) 1015.

### VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§ 312. To recover for failure of a mortgagee to enter satisfaction of the mortgage on the record after payment, the burden is upon the party aggrieved to show that the mortgagee failed to enter the satisfaction within 60 days after being requested to do so, in view of Kirby's Dig. § 5402.—Hill-Ingham Lumber Co. v. Neal (Ark.) 247.

§ 312. Evidence *held* not to show that a mortgagee receiving satisfaction of a mortgage failed to enter satisfaction on the record within 60 days after requested to do so by the mortgagor.—Hill Ingham Lumber Co. v. Neal (Ark.) 247.

### X. FORECLOSURE BY ACTION.

#### (J) SALE.

Right of dower as against purchaser on foreclosure of trust deed executed by husband and wife, see Dower, § 46.

§ 534. The purchaser of land on mortgage foreclosure acquires only the mortgagor's interest in the land.—Bishop v. Van Winkle (Ky.) 345.

## MOTIONS.

For particular purposes or relief.

Arrest of judgment in criminal prosecutions, see Criminal Law, §§ 968, 974.

Change of venue in civil actions, see Venue, § 36.  
 Continuance in civil actions, see Continuance.  
 Dissolution of injunction, see Injunction, § 167.  
 New trial in civil actions, see New Trial, §§ 124, 144.  
 New trial in criminal prosecutions, see Criminal Law, §§ 917-953.  
 Opening or setting aside default judgment, see Judgment, §§ 139-145.  
 Presentation of objections for review, see Appeal and Error, §§ 193-238.  
 Presumption of authority of attorney to receive notice of motion, see Attorney and Client, § 70.  
 Quashing or vacating execution, see Execution, § 163.  
 Relating to pleadings, see Pleading, §§ 352-369.  
 Retaxation of costs, see Costs, § 214.

## MULES.

Judicial notice of kicking propensities, see Evidence, § 13.

## MULTIPLICITY OF SUITS.

Jurisdiction of equity to avoid, see Equity, § 51.

## MUNICIPAL CORPORATIONS.

See Counties; Schools and School Districts, §§ 53-81.  
 Mandamus, see Mandamus, § 112.  
 Ordinances relating to intoxicating liquors, see Intoxicating Liquors.  
 Regulation of railroads, see Railroads, §§ 227, 249.  
 Street railroads, see Street Railroads.

## I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

### (B) TERRITORIAL EXTENT AND SUBDIVISIONS, ANNEXATION, CONSOLIDATION, AND DIVISION.

Judicial notice, see Evidence, § 10.

## II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

§ 57. Municipal corporations have only such power as is granted by the Legislature, unless otherwise provided in the Constitution.—*Mantel v. State* (Tex. Cr. App.) 855; *Sue Lung v. Same* (Tex. Cr. App.) 857.

§ 58. A grant of power to a municipal corporation by the Legislature will be construed more strongly against the corporation.—*Mantel v. State* (Tex. Cr. App.) 855; *Sue Lung v. Same* (Tex. Cr. App.) 857.

## IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

### (B) ORDINANCES AND BY-LAWS IN GENERAL.

§ 111. An ordinance, by-law, or order imposing license fees may be valid in part and invalid in part.—*Fiscal Court of Owen County v. F. & A. Cox Co.* (Ky.) 296.

## V. OFFICERS, AGENTS, AND EMPLOYEES.

### (A) MUNICIPAL OFFICERS IN GENERAL.

§ 173. Rule for charging sureties of chief of police on official bond for wrongful act of such officer, stated.—*Gold v. Campbell* (Tex. Civ. App.) 463.

### (B) MUNICIPAL DEPARTMENTS AND OFFICERS THEREOF.

§ 185. Municipal authorities held to possess discretionary power to select the policemen

to be dismissed pursuant to an ordinance reducing the police force.—*Wagner v. City of Louisville* (Ky.) 283.

§ 186. Where a police officer was wrongfully discharged, and his place was filled by the officers remaining, some one of whom drew the salary which the officer would have received, had he remained on the force, the officer could not recover from the city salary during the time he was discharged.—*Wagner v. City of Louisville* (Ky.) 283.

## IX. PUBLIC IMPROVEMENTS.

### (B) PRELIMINARY PROCEEDINGS AND ORDINANCES OR RESOLUTIONS.

§ 307. The appointment of a board of improvement by the council of a city is not invalid because the board was appointed by the same ballot on which a board of improvement for a sewer district was appointed.—*Boles v. Kelley* (Ark.) 1073.

§ 314. Under the statute, the board of improvement held required to determine how and to what extent streets shall be improved pursuant to petitions of property owners specifying the improvement desired.—*Boles v. Kelley* (Ark.) 1073.

### (C) CONTRACTS.

§ 330. A requirement of specified material to be used in a paving contract held improper, excluding competition.—*Muff v. Cameron* (Mo. App.) 116.

### (E) ASSESSMENTS FOR BENEFITS, AND SPECIAL TAXES.

Amendment of pleading to conform to proofs in action to set aside assessment, see Pleading, § 237.

§ 407. Under Const. art. 19, § 27, the Legislature held authorized to amend Kirby's Dig. § 5665, relating to street improvements, on the petition of resident owners, by striking out the word "resident."—*Boles v. Kelley* (Ark.) 1073.

§ 513. In a suit by abutting owners to cancel tax bills, the question of their invalidity on the ground that the contract for the improvement was not submitted to competition held not in issue.—*Muff v. Cameron* (Mo. App.) 116.

### (F) ENFORCEMENT OF ASSESSMENTS AND SPECIAL TAXES.

Against homestead, see Homestead, § 105.

Concurrent jurisdiction of circuit and justices' courts, see Courts, § 472.

Motion to make complaint more definite in proceedings to restrain enforcement of tax, see Pleading, § 367.

§ 538. Under Kirby's Dig. §§ 5740-5742, a complaint, in a suit by taxpayers against a board of improvement, held to state no cause for equitable relief.—*Boles v. Kelley* (Ark.) 1073.

§ 538. The allegation in the complaint, in a suit to restrain the enforcement of assessments for a local improvement, held not to show that the petition for the improvement was void because signers were procured by fraud and misrepresentation.—*Boles v. Kelley* (Ark.) 1073.

§ 538. The allegation in a complaint, in a suit to restrain the collection of assessments for a street improvement, held not to show a certain defect in laying out a paving district.—*Boles v. Kelley* (Ark.) 1073.

§ 538. Under Kirby's Dig. §§ 5679, 5685, a suit to restrain the collection of a street improvement assessment held barred.—*Boles v. Kelley* (Ark.) 1073.

§ 538. Owners of property assessed for a street improvement, who sue to enjoin the col-

lection of the assessment on the ground of the invalidity of the contract for the improvement, must make the contractor a party.—*Boles v. Kelley* (Ark.) 1073.

§ 558. Though the action provided by statute for the enforcement of a special assessment may be deemed a statutory action, when the court obtains jurisdiction thereof it does not proceed to judgment in the mere exercise of statutory powers, but in the exercise of its general jurisdiction.—*Robinson v. Levy* (Mo.) 577.

§ 570. A judgment for the enforcement of a special municipal assessment is not personal against a landowner because it recites that "defendant is indebted to" the city in the sum sought to be enforced, where it directs the amount of the judgment to be levied on the property assessed, which is described.—*Robinson v. Levy* (Mo.) 577.

§ 570. The allegation in a petition to enforce a special assessment for a street improvement that "this plaintiff is the owner of such tax bill, and the same nor any part has been paid," sufficiently shows that the tax has not been paid to withstand a collateral attack on the judgment.—*Robinson v. Levy* (Mo.) 577.

§ 570. Under Rev. St. 1899, § 672 (Ann. St. 1906, p. 686), the failure of a petition for the enforcement of a special tax bill to allege non-payment of such bill cannot be made the basis of a collateral attack.—*Robinson v. Levy* (Mo.) 577.

§ 570. In an action to enforce a special assessment for street improvements, certain defects held matters of defense, of which defendant cannot avail himself in a collateral proceeding.—*Robinson v. Levy* (Mo.) 577.

§ 570. A petition for the enforcement of a special municipal tax bill for a street improvement held sufficient to support the judgment as against a collateral attack.—*Robinson v. Levy* (Mo.) 577.

§ 582. A sheriff's deed on a sale on a judgment to enforce a special municipal assessment held sufficient, without stating whether the newspaper in which the notice of sale was published was a weekly or daily, or a weekly and daily.—*Robinson v. Levy* (Mo.) 577.

## X. POLICE POWER AND REGULATIONS.

### (A) DELEGATION, EXTENT, AND EXERCISE OF POWER.

§ 592. A pure food ordinance held invalid, as in violation of Dallas City Charter (Sp. Laws 1907, p. 580, c. 71) art. 2, § 3, subd. 37, and Code Cr. Proc. 1895, art. 931.—*Mantel v. State* (Tex. Cr. App.) 855; *Sue Lung v. Same* (Tex. Cr. App.) 857.

§ 592. Where there is a conflict between a statute and an ordinance, the ordinance must yield, if necessary to hold either invalid.—*Mantel v. State* (Tex. Cr. App.) 855; *Sue Lung v. Same* (Tex. Cr. App.) 857.

§ 592. The city of Dallas may adopt appropriate ordinances to protect the public health, if they conform to the state law on the same subject.—*Mantel v. State* (Tex. Cr. App.) 855; *Sue Lung v. Same* (Tex. Cr. App.) 857.

§ 604. A city ordinance, providing for the impounding of animals running at large, held a proper police regulation under Kirby's Dig. §§ 5450, 5451.—*McKenzie v. Newlon* (Ark.) 353.

## XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

### (A) STREETS AND OTHER PUBLIC WAYS.

§ 658. The nature of the interest of a city in its streets stated.—*Martin v. City of St. Joseph* (Mo. App.) 94.

## XII. TORTS.

### (A) EXERCISE OF GOVERNMENTAL AND CORPORATE POWERS IN GENERAL.

§ 736. A city held liable for a nuisance due to a dumping ground maintained by it, notwithstanding it was outside its corporate limits.—*City of Coleman v. Price* (Tex. Civ. App.) 905.

§ 736. A city in removing refuse from its streets and depositing it upon its dumping ground held engaged in corporate duty, and liable for a nuisance thereby created.—*City of Coleman v. Price* (Tex. Civ. App.) 905.

§ 742. In an action against a city for injury to property resulting from the maintenance of its dumping ground adjacent thereto, evidence held to justify the conclusion that the injury was permanent.—*City of Coleman v. Price* (Tex. Civ. App.) 905.

### (C) DEFECTS OR OBSTRUCTIONS IN STREETS AND OTHER PUBLIC WAYS.

§ 755. Cities are not insurers against accidents on streets and sidewalks.—*Elam v. City of Mt. Sterling* (Ky.) 250.

§ 771. A city held not liable for injuries to a pedestrian slipping on the ice on a sidewalk.—*Vonkey v. City of St. Louis* (Mo.) 733.

§ 771. Where the unsafe condition of a street was occasioned by the freezing at night of the snow thereon, the city was not liable for injuries to a pedestrian, about noon the following day, by slipping on the sidewalk.—*Vonkey v. City of St. Louis* (Mo.) 733.

§ 781. A city held not liable for injury caused by a horse taking fright at stone piled along street curbing.—*Elam v. City of Mt. Sterling* (Ky.) 250.

§ 799. Duty of cities and towns respecting the maintenance of streets stated.—*Elam v. City of Mt. Sterling* (Ky.) 250.

§ 816. Where one suing a city for personal injury relied on the proposition that crossing stones piled in the street tended to frighten horses of ordinary gentleness, the petition should have pleaded it.—*Elam v. City of Mt. Sterling* (Ky.) 250.

§ 821. Generally the question whether an object in a street tends to frighten horses of ordinary gentleness is a jury question.—*Elam v. City of Mt. Sterling* (Ky.) 250.

§ 821. In an action against a city for injuries from defects in a board walk, whether the defect had existed long enough for the city to have discovered it by ordinary care held for the jury.—*City of Covington v. Gates* (Ky.) 342.

### (D) DEFECTS OR OBSTRUCTIONS IN SEWERS, DRAINS, AND WATER COURSES.

§ 834. That the outlet of a culvert under a city street, too small for the stream it was to carry, was outside the city limits, held not to affect the city's liability for the overflow of the stream.—*Martin v. City of St. Joseph* (Mo. App.) 94.

§ 834. That a city maintaining a nuisance caused by a street obstructing a stream did not originally construct the street *held* not to affect its liability.—*Martin v. City of St. Joseph* (Mo. App.) 94.

§ 834. That a city used due care to keep in proper condition a street embankment, which obstructed a stream, by providing too small a culvert, after the city limits were extended to include the locality, *held* no defense to the city's liability for the overflow of the stream.—*Martin v. City of St. Joseph* (Mo. App.) 94.

§ 839. Where a city does not create a nuisance caused by a city street obstructing the flow of a stream, it is not liable for its maintenance, unless it maintains the same after notice and request to abate it.—*Martin v. City of St. Joseph* (Mo. App.) 94.

§ 845. The evidence being conflicting as to whether a city had received notice to abate a nuisance, it was a question for the jury whether the city was liable for the maintenance of the nuisance.—*Martin v. City of St. Joseph* (Mo. App.) 94.

§ 845. A petition, in an action against a city for injuries caused by the overflow of water from an insufficient culvert, *held* to state a cause of action as for a nuisance.—*Martin v. City of St. Joseph* (Mo. App.) 94.

### **XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.**

#### **(C) BONDS AND OTHER SECURITIES, AND SINKING FUNDS.**

§ 918. Under Const. §§ 157, 187, the issuance of bonds for the purchase or erection of school buildings for white children cannot be enjoined.—*Crosby v. City of Mayfield* (Ky.) 316.

### **MURDER.**

See Homicide, §§ 9, 23.

### **MUTUAL BENEFIT INSURANCE.**

See Insurance, §§ 719-793.

### **MUTUAL INSURANCE COMPANIES.**

See Insurance, § 60.

### **NAMES.**

See Trade-Marks and Trade-Names.

§ 16. The difference between the names "Zan" and "Zann" *held* immaterial.—*Zan v. Clark* (Tex. Civ. App.) 892.

### **NATIONAL BANKS.**

See Banks and Banking, § 262.

### **NATURALIZATION.**

See Aliens, § 69.

### **NAVIGABLE WATERS.**

See Ferries; Waters and Water Courses.

As boundaries, see Boundaries, § 15.

#### **I. RIGHTS OF PUBLIC.**

§ 20. A bridge over a navigable river, built under the authority of an act of Congress (Act June 27, 1882, 22 Stat. 109, c. 240), *held* presumptively built according to plans and location approved by the Secretary of War, as required by the act.—*Shreveport Cottonwood Co. v. Missouri Valley Bridge & Iron Co.* (Ark.) 750.

§ 20. A railroad maintaining a temporary false work to repair its bridge across a navi-

gable river *held* not liable for the loss of logs, caught in the drift accumulated by reason of the false work and lost.—*Shreveport Cottonwood Co. v. Missouri Valley Bridge & Iron Co.* (Ark.) 750.

### **III. RIPARIAN AND LITTORAL RIGHTS.**

§ 39. Statement of riparian rights of one having land bounded by a navigable river.—*Hobart-Lee Tie Co. v. Stone* (Mo. App.) 604.

### **NAVIGATION.**

See Navigable Waters, § 20.

### **NEGLIGENCE.**

Causing death, see Death, §§ 7-104.

Measure of damages, see Damages, § 95.

*By particular classes of persons.*

See Carriers, §§ 99, 117-136, 150-166, 177, 180, 282-321; Municipal Corporations, §§ 736-845; Railroads, §§ 227-443; United States Marshals, § 32.

Employers, see Master and Servant, §§ 85-296. Telegraph or telephone companies, see Telegraphs and Telephones, §§ 37-73.

*Condition or use of particular species of property, works, machinery, or other instrumentalities.*

See Bridges, §§ 42, 46; Electricity; Explosives; Railroads, §§ 227-443; Street Railroads, §§ 78-117.

Demised premises, see Landlord and Tenant, § 166.

### **I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.**

#### **(A) PERSONAL CONDUCT IN GENERAL.**

§ 2. To entitle one to sue for negligence in performing a contractual duty, no injury to person or property being shown, it must appear that the contract was made by him or was made for his benefit.—*Southwestern Telegraph & Telephone Co. v. Solomon* (Tex. Civ. App.) 214.

§ 15. Where an injury was the result of the concurrent negligence of two persons, and would not have occurred in the absence of either, either is liable.—*Southwestern Telegraph & Telephone Co. v. Bruce* (Ark.) 564.

### **II. PROXIMATE CAUSE OF INJURY.**

§ 56. To make one liable for negligent injuries, the negligence must be such that the injuries would not have occurred without it.—*Tolin v. Terrell* (Ky.) 290.

§ 56. In an action for injuries from defendant's negligence, plaintiff must prove negligence naturally resulting in the injury, and the absence of evidence upon any material point is as fatal as the absence of all evidence would be.—*Louisville & N. R. Co. v. Long's Adm'r* (Ky.) 359.

§ 61. Where an accident occurs from two causes, each due to negligence of different persons, each person whose acts contributed to the accident are liable for the injury resulting, and the negligence of one is no excuse for the negligence of the other.—*Missouri, K. & T. Ry. Co. of Texas v. Williams* (Tex. Civ. App.) 1043.

### **III. CONTRIBUTORY NEGLIGENCE.**

Of owner of shipment, see Carriers, § 121.

Of passenger, see Carriers, §§ 343, 347.

Of person injured at railroad crossing, see Railroads, §§ 327, 350.

Of person injured by electricity, see Electricity, § 18.

Of person injured by mule, see *Animals*, § 71.  
 Of person injured on or near railroad tracks, see *Railroads*, §§ 381, 387.  
 Of person killed, see *Death*, § 23.  
 Of servant, see *Master and Servant*, §§ 228-248, 289, 296.

#### (A) PERSONS INJURED IN GENERAL.

§ 83. Nature and application in general of the humanitarian doctrine stated.—*Matz v. Missouri Pac. Ry. Co. (Mo.)* 584.

§ 83. In this state, there is no such thing as comparative negligence; and, if the negligence of both parties co-operate, there is usually no liability, except for the humanitarian or last chance doctrine.—*Matz v. Missouri Pac. Ry. Co. (Mo.)* 584.

§ 83. Plaintiff should recover, notwithstanding his own negligence, if defendant could have avoided the injury.—*Potter v. St. Louis & S. F. R. Co. (Mo. App.)* 593.

§ 83. Plaintiff may recover for defendant's negligence, though his own exposed him to the risk of injury, if it was more immediately caused by defendant's omission.—*Potter v. St. Louis & S. F. R. Co. (Mo. App.)* 593.

#### (B) CHILDREN AND OTHERS UNDER DISABILITY.

Injuries from negligence in maintenance of electric wires, see *Electricity*, § 18.

§ 85. An infant is only required to exercise such care as may be reasonably expected of one of his age under like circumstances; the law recognising his lack of mature discretion.—*Smith's Adm'r v. National Coal & Iron Co. (Ky.)* 280.

### IV. ACTIONS.

#### (A) RIGHT OF ACTION, PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

§ 119. Rule where general allegations of negligence are followed by averments of particular negligent acts.—*Lantry-Sharpe Contracting Co. v. McCracken (Tex. Civ. App.)* 453.

#### (B) EVIDENCE

§ 121. The prima facie case of negligence established by the proof of an accident and resulting injury is not conclusive, but the burden shifts to the person charged with negligence, and to escape liability he must prove his freedom from negligence.—*Southwestern Telegraph & Telephone Co. v. Bruce (Ark.)* 664.

§ 121. Where an accident might have resulted from one of two causes, for one of which defendant is liable, plaintiff must prove that the injury arose from such cause.—*Morgan v. Temagami Min. Co. (Mo. App.)* 90.

§ 184. In an action for personal injuries occasioned by the throwing of a bottle from a roof garden of a hotel, evidence held to support a verdict for defendant.—*Bruner v. Seelbach Hotel Co. (Ky.)* 373.

#### (C) TRIAL, JUDGMENT, AND REVIEW.

§ 136. Where there is any evidence establishing the issue in favor of one charged with negligence, an instruction that his negligence has been conclusively proved held erroneous.—*Southwestern Telegraph & Telephone Co. v. Bruce (Ark.)* 564.

§ 136. If it is a question whether plaintiff's act was that of an ordinarily prudent person, the question is for the jury.—*Lewis' Adm'r v. Bowling Green Gaslight Co. (Ky.)* 278.

§ 186. While ordinarily the question of proximate cause is for the jury, where the injury is connected with the alleged negligence only

by speculation and conjecture, the question is for the court.—*Tolin v. Terrell (Ky.)* 290.

§ 136. Reasonable care held ordinarily a question for the jury.—*Sharp v. Layne (Ky.)* 292.

§ 136. Acts of negligence need not be characterized as such in order to raise a question for the jury.—*International & G. N. R. Co. v. Garcia (Tex. Civ. App.)* 206.

§ 136. If reasonable men might fairly differ whether, under the existing conditions, decedent acted as an ordinarily prudent person would have acted, he cannot be held negligent as matter of law.—*International & G. N. R. Co. v. Tinon (Tex. Civ. App.)* 936.

§ 188. In an action against a hotel company for personal injuries, an instruction as to the liability of the company for injuries inflicted by an intoxicated man in the hotel held not erroneous.—*Bruner v. Seelbach Hotel Co. (Ky.)* 373.

### NEGOTIABLE INSTRUMENTS.

See *Bills and Notes*.

### NEGROES.

Duty of carrier as to protection and care of negro passengers, see *Carriers*, § 282.

### NEWLY DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see *New Trial*, § 106.

Ground for new trial in criminal prosecution, see *Criminal Law*, §§ 969, 941.

### NEW TRIAL

Costs, see *Costs*, § 256.

In criminal prosecutions, see *Criminal Law*, §§ 917-958.

Necessity of motion for purpose of review, see *Appeal and Error*, §§ 292, 300.

Opening or vacating judgment, see *Judgment*, §§ 336, 386.

Review of discretionary rulings on motion for, see *Appeal and Error*, § 979; *Criminal Law*, § 1156.

Sufficiency of statement of constitutional question on motion for new trial in order to vest appellate jurisdiction in Supreme Court, see *Courts*, § 231.

### I. NATURE AND SCOPE OF REMEDY.

§ 6. The granting of a new trial for "misunderstanding and misconstruction of the agreed statement of facts" by the court is a proper exercise of the trial court's discretion.—*Groves v. Terry (Mo.)* 1167.

### II. GROUNDS.

#### (D) DISQUALIFICATION OR MISCONDUCT OF OR AFFECTING JURY.

§ 52. The court held not authorized to set aside a verdict as a quotient verdict, in the absence of a showing that it was arrived at in compliance with a previously formed agreement.—*Missouri, K. & T. Ry. Co. of Texas v. Light (Tex. Civ. App.)* 1058.

#### (F) VERDICT OR FINDINGS CONTRARY TO LAW OR EVIDENCE.

§ 75. In an action for damages for injury to a tract by the discharge of sewage in a stream running through it, a verdict for \$1,000 held properly set aside on the ground of the inadequacy of damages.—*Morris v. Missouri Pac. Ry. Co. (Mo. App.)* 687.

§ 75. Where there is a definite measure of damages, whether in a contract or tort action,

the trial court must set aside the verdict if it is satisfied that the damages awarded are inadequate under the clear weight of the evidence.—*Morris v. Missouri Pac. Ry. Co.* (Mo. App.) 687.

§ 75. A verdict is conclusive upon the amount of damages in actions for personal wrongs where there is no definite measure of damages, and the trial court cannot set it aside on the ground of inadequate damages, unless the amount awarded is so inadequate as to shock the understanding, and show that the verdict resulted from prejudice or passion.—*Morris v. Missouri Pac. Ry. Co.* (Mo. App.) 687.

#### (H) NEWLY DISCOVERED EVIDENCE.

§ 105. That one of plaintiff's witnesses had stated in the presence of two affiants that, though summoned, he knew nothing about the case, did not as a matter of law entitle defendant to a new trial for newly discovered evidence.—*Houston & T. C. R. Co. v. Davenport* (Tex.) 790.

### III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 124. A motion for a new trial for newly discovered evidence, which does not set out such evidence, or the names and addresses of the witnesses who would testify thereto, is fatally defective.—*Winn v. Grier* (Mo.) 48.

§ 144. Under Laws 1905, p. 21, c. 18, it was not an abuse of discretion to deny a new trial on the evidence of a single juror that it was agreed that the vote of the majority should constitute the verdict.—*Kalteyer v. Mitchell* (Tex.) 792.

### NEXT OF KIN.

See Descent and Distribution.

### NOLLE PROSEQUI.

Of criminal prosecutions, see Criminal Law, § 302.

### NON EST FACTUM.

Inconsistency of plea of payment, see Pleading, § 93.

### NONSUIT.

Before trial, see Dismissal and Nonsuit.

### NOTARIES.

Authority to administer oaths, see Oath, § 2.

### NOTES.

Promissory notes, see Bills and Notes.

### NOTICE.

As affecting particular classes of persons. See Carriers, § 180; Principal and Agent, § 178.

Bona fide purchaser, see Vendor and Purchaser, §§ 229, 230.

As affecting particular rights, duties, and liabilities.

Rights of occupying claimants to compensation for improvements as affected by notice of adverse title, see Improvements, § 4.

Of particular facts, acts, or proceedings not judicial.

Adverse claim to land, as affecting right of occupying claimant to compensation for improvements, see Improvements, § 4.

Loss of or injury to goods, see Carriers, § 180.

#### Of particular judicial proceedings.

Action or process, see Process, §§ 85-109.

§ 6. Rule respecting doctrine of notice, stated.—*Richmond v. Ashcraft* (Mo. App.) 689.

## NUISANCE.

### I. PRIVATE NUISANCES.

#### (A) NATURE OF INJURY, AND LIABILITY THEREFOR.

Liability of municipal corporation, see Municipal Corporations, § 736.

§ 1. A "nuisance" defined.—*Martin v. City of St. Joseph* (Mo. App.) 94.

### II. PUBLIC NUISANCES.

#### (C) ABATEMENT AND INJUNCTION.

Abatement of nuisance caused by city's obstruction of stream, see Municipal Corporations, § 845.

#### (D) CRIMINAL PROSECUTIONS.

§ 91. An indictment for maintaining a common-law nuisance held good as against a demurrer on the ground that it was not direct and certain, as required by Cr. Code Prac. § 124.—*Indian Refining Co. v. Commonwealth* (Ky.) 274.

§ 92. In a prosecution for maintaining a common-law nuisance in permitting oil and refuse from a refinery to enter a stream, it is competent for the state to show the effect the oil had on the stream in the county in which the indictment was found.—*Indian Refining Co. v. Commonwealth* (Ky.) 274.

### OATH.

Of referee, see Reference, § 42.

Of trial judge on making statement explaining bill of exceptions in criminal prosecution, see Criminal Law, § 1092.

§ 2. Notaries public did not at common law have the right to administer oath, and cannot exercise this power unless authorized by statute.—*Anderson v. Commonwealth* (Ky.) 364.

### OBJECTIONS.

To evidence at trial, see Trial, § 85.

To evidence in criminal prosecutions, see Criminal Law, § 695.

### OBLIGATION OF CONTRACT.

Laws impairing, see Constitutional Law, § 140.

### OBSTRUCTIONS.

Of easements, see Easements, § 61.

Of highways, see Highways, § 164.

Of surface waters, see Waters and Water Courses, § 118.

### OFFER.

Of proof, see Trial, § 40.

To purchase school land, see Public Lands, § 173.

To sell land, see Vendor and Purchaser, § 18.

### OFFICERS.

Embezzlement, see Embezzlement.

Mandamus, see Mandamus, § 112.

#### Particular classes of officers.

See Judges; Justices of the Peace; Receivers; Sheriffs and Constables; United States Marshals.



Bank officers, see Banks and Banking, § 282.  
Collectors of taxes, see Taxation, § 581.  
Corporate officers, see Corporations, §§ 297-340, 423-507.  
County officers, see Counties, §§ 99-101.  
Highway officers, see Highways, § 90.  
Municipal officers, see Municipal Corporations, §§ 173-186.  
School officers, see Schools and School Districts, §§ 53-57.

### III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 95. A *de jure* officer held not entitled to recover the salary drawn by the *de facto* officer pending the litigation involving the right to the office.—*Wagner v. City of Louisville (Ky.)* 283.

### IV. LIABILITIES ON OFFICIAL BONDS.

§ 129. Sureties on bond of public officer held liable for all defaults of the officer within the limit of what the law authorizes or enjoins upon him as such officer, but not for acts not done in his official capacity.—*Gold v. Campbell (Tex. Civ. App.)* 463.

§ 129. Acts of officers "virtute officii" and "colore officii," defined.—*Gold v. Campbell (Tex. Civ. App.)* 463.

### OILS.

Oil refinery as nuisance, see Nuisance, §§ 91, 92.

### OPENING.

Judgment, see Judgment, §§ 139-145.

### OPINION EVIDENCE.

In civil actions, see Evidence, §§ 471-568.  
In criminal prosecutions, see Criminal Law, §§ 459-494.

### OPINIONS.

Of courts, see Courts, §§ 89-97.

### ORDER OF PROOF.

At trial, see Trial, §§ 67, 68.

### ORDERS.

Review of appealable orders, see Appeal and Error.  
Publication of process, see Process, § 98.

### ORDINANCES.

Municipal ordinances, see Municipal Corporations, §§ 111, 307, 314, 592, 604.

### OUTSTANDING TITLE.

Cost of extinguishing outstanding title as set-off against price of land, see Vendor and Purchaser, § 310.

### PARENT AND CHILD.

See Guardian and Ward; Infants.  
Custody of children on divorce, see Divorce, § 298.  
Habeas corpus to determine custody of infant, see Habeas Corpus, § 99.

§ 2. A father's agreement to surrender control of an infant child to its grandparents was revocable, and was revoked as a matter of law by the father's death if the mother survived.—*Smith v. Young (Mo. App.)* 628.

### PAROL EVIDENCE.

In civil actions, see Evidence, §§ 398-400.

### PARTIAL INVALIDITY.

Of municipal ordinance, see Municipal Corporations, § 111.  
Of statute, see Statutes, § 64.

### PARTIES.

Death ground for abatement, see Abatement and Revival, §§ 61, 72.

*In particular actions or proceedings.*

See Ejectment, § 39; Mandamus, § 146; Specific Performance, § 106.

Criminal prosecutions, see Criminal Law, §§ 59, 75.

For unfair competition, see Trade-Marks and Trade Names, § 91.

To cancel written instrument, see Cancellation of Instruments, § 35.

*Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.*

See Judgment, § 239.

*Review as to parties, and parties to proceedings in appellate courts.*

Parties entitled to allege error, see Appeal and Error, § 1137; Criminal Law, § 1137.

Reversal as to one or more parties, see Appeal and Error, § 1175.

*To conveyances, contracts, or other transactions.*  
See Bonds, § 52; Contracts, §§ 15, 187; Fraudulent Conveyances, § 174.

Joint interest, see Joint Adventures.

Persons affected by estoppel, see Estoppel, § 98.

### III. NEW PARTIES AND CHANGE OF PARTIES.

§ 51. In a suit to foreclose vendors' liens, defendants held properly denied leave to implead third persons.—*Zan v. Clark (Tex. Civ. App.)* 892.

### V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 75. Failure to object, either by demurrer or answer, to the omission of a necessary party, is a waiver thereof under Rev. St. 1899, § 602 (Ann. St. 1906, p. 628).—*Mingus v. Bank of Ethel (Mo. App.)* 683.

§ 88. The objection of misjoinder of parties is waived by the failure to demur to the petition.—*Groves v. Terry (Mo.)* 1167.

§ 96. Defendant in equity did not waive misjoinder of plaintiffs by pleading over after demurrer, where the objection was also asserted as a defense.—*Breimeyer v. Star Bottling Co. (Mo. App.)* 119.

### PARTITION.

#### I. BY ACT OF PARTIES.

§ 9. The husband of an heir held to take no greater title, because joined with her as a joint grantee in a voluntary partition deed, than he would have taken as her husband, if not named at all.—*Starr v. Bartz (Mo.)* 1125; Same v. Kisner (Mo.) 1129.

### PARTNERSHIP.

See Joint Adventures.

#### I. THE RELATION.

##### (B) AS TO THIRD PERSONS.

§ 29. Partnership is to be determined from the intent of the parties as disclosed by the whole

contract.—*Mingus v. Bank of Ethel* (Mo. App.) 683.

§ 30. Agreement *held* not to indicate an intent to form a partnership; but that one party should share in the profits merely as compensation for his services.—*Mingus v. Bank of Ethel* (Mo. App.) 683.

§ 32. A voluntary association of independent, but connecting railroads for the expeditious handling of freight does not constitute a partnership.—*Atlantic Coast Line R. Co. v. Richardson* (Tenn.) 496.

#### (C) EVIDENCE.

§ 55. Certain fact *held* to tend to show that one person was merely an employe of another and rebut any presumption of partnership between them.—*Mingus v. Bank of Ethel* (Mo. App.) 683.

### IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

#### (A) REPRESENTATION OF FIRM BY PARTNER.

§ 128. A contract by a partner in the firm name *held* not within the scope of the firm business, and not binding on the firm unless ratified.—*S. W. Slayden & Co. v. Palmo* (Tex. Civ. App.) 1034.

§ 146. A note executed by a member of a trading partnership is binding on the partnership.—*Wallace & Reed v. Reed Bros.* (Tex. Civ. App.) 1019.

#### (D) ACTIONS BY OR AGAINST FIRMS OR PARTNERS.

§ 218. Whether dealing in cotton and cotton seed was within the apparent scope of a partnership, so as to constitute it a trading partnership, *held* for the jury.—*Wallace & Reed v. Reed Bros.* (Tex. Civ. App.) 1019.

### PASSENGERS.

See Carriers, §§ 246-384.

Liability of street car company for injuries to person on street through negligent act of passenger, see Street Railroads, § 78.

### PATENTS.

Public lands, see Public Lands, §§ 61, 151.

### PAYMENT.

See Compromise and Settlement.

Implied authority of agent to receive payment, see Principal and Agent, § 105.

Subrogation on payment, see Subrogation.

*Of particular classes of obligations or liabilities.* See Judgment, § 891; Mortgages, § 312.

Bid for purchase of school lands, see Public Lands, § 173.

Bill of exchange or promissory note, see Bills and Notes, §§ 427, 432.

Compensation for property taken for public use, see Eminent Domain, § 155.

Taxes, see Taxation, § 643.

### III. OPERATION AND EFFECT.

§ 48. A mere payment of a part of a claim, for which the party making the payment is not liable, is not an implied promise to discharge the remainder of the claim.—*P. & M. J. Bannon v. Jackson* (Tenn.) 504.

### IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

Inconsistency of plea of non est factum, see Pleading, § 93.

Payment as an affirmative defense in general, see Pleading, § 79.

§ 60. Where payment is pleaded, the plea is *held* in law to mean payment in money, and if otherwise, or if it rests on an independent agreement, the substantive facts of the agreement must be pleaded, and cannot be shown under a general denial or a simple plea of payment.—*People's Bank v. Stewart* (Mo. App.) 99.

### PENALTIES.

For disobedience of subpoena to witness, see Witnesses, § 21.

For failure to enter satisfaction of mortgage, see Mortgages, § 312.

### PERFORMANCE.

Of contract, see Contracts, §§ 284-305; Vendor and Purchaser, § 140.

Of contract of sale, see Sales, § 168.

Of covenant, see Covenants, § 102.

### PERJURY.

Weight and sufficiency of evidence in criminal prosecutions where witness subsequently states that the testimony was perjured, see Criminal Law, § 553.

### I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 9. A bank officer's report, required by St. 1909, § 593 (Russell's St. § 2182), may be sworn to before a notary, notaries being authorized by Civ. Code Prac. § 549, and St. 1909, § 3754 (Russell's St. § 4856), to administer oaths; and, if such report is false, the officer is guilty of false swearing denounced by section 1175 (Russell's St. § 3709).—*Anderson v. Commonwealth* (Ky.) 364.

### II. PROSECUTION AND PUNISHMENT.

Evidence of other offenses, see Criminal Law, § 370.

Pleading matters judicially noticed, see Indictment and Information, § 61.

§ 25. An indictment for perjury *held* sufficient, without showing how the perjured testimony was material.—*Yardley v. State* (Tex. Cr. App.) 146.

§ 26. An indictment under St. 1909, § 1175 (Russell's St. § 3709), for false swearing in making report of the condition of a bank required by section 593 (Russell's St. § 2182), *held* sufficient.—*Anderson v. Commonwealth* (Ky.) 364.

§ 32. Evidence *held* inadmissible in a perjury trial.—*Hardin v. State* (Tex. Cr. App.) 974.

### PERSONAL INJURIES.

See Assault and Battery, §§ 15, 35.

Measure of damages, see Damages, § 95.

Traveler on highway, see Municipal Corporations, §§ 755-821.

*Particular causes or means of injury.*

See Bridges, §§ 42, 46; Electricity, § 14; Negligence.

Operation of railroads, see Railroads, §§ 274, 282, 327-350.

*Particular classes of persons injured.*

Employe, see Master and Servant, §§ 85-296.

Passenger, see Carriers, §§ 282-321.

Person on or near railroad tracks, see Railroads, §§ 357-401.

Traveler on highway crossing railroads, see Railroads, §§ 327-350.

**PERSONAL PROPERTY.**

See Property.

**PER STIRPES.**

Taking per stirpes, see Wills, § 531.

**PETITION.**

To establish highway, see Highways, § 29.  
In pleading, see Pleading, §§ 49, 62.

**PHOTOGRAPHS.**

Use of photographs by public officers to identify persons accused of crime, see Torts, § 8.

**PICTURES.**

Use of photographs by public officers to identify persons accused of crime, see Torts, § 8.

**PLACE.**

Of holding meetings of school board, see Schools and School Districts, § 57.

**PLEA.**

In civil actions, see Pleading, §§ 79-107.  
In criminal prosecution, see Criminal Law, §§ 292, 302.

**PLEADING.**

Admissions in pleading, as evidence, see Evidence, § 208.  
Applicability of instructions to pleadings, see Trial, §§ 250-253.  
Conformity of judgment to pleadings, see Judgment, § 250.  
Taking pleadings to jury room on retirement of jury, see Trial, § 307.

*Allegations as to particular facts, acts, or transactions.*

See Damages, §§ 142, 158; Payment, § 60.  
Contributory negligence of passenger, see Carriers, § 343.

*In actions by or against particular classes of persons.*

Assignee, see Assignments, § 131.  
Banks, see Banks and Banking, § 226.

*In particular actions or proceedings.*

See Equity, § 296; Fraud, § 47; Libel and Slander, §§ 85, 100; Negligence, § 119; Specific Performance, § 114.

For breach of contract of sale, see Sales, § 413.  
For conspiracy to injure reputation, see Conspiracy, § 18.

For injuries caused by obstructions in street, see Municipal Corporations, § 816.

For injuries to servant, see Master and Servant, §§ 262, 264.

For loss of or injury to shipment, see Carriers, § 131.

For loss of or injury to shipment of live stock, see Carriers, § 227.

Indictment or criminal information or complaint, see Indictment and Information.

On attachment bond, see Attachment, § 349.

On bill or note, see Bills and Notes, §§ 462-487.

On claim against decedent's estate, see Executors and Administrators, §§ 443, 444.

On constable's bond, see Sheriffs and Constables, § 168.

On county treasurer's bond, see Counties, § 101.

On insurance policy, see Insurance, §§ 634, 645.

On stock subscription, see Corporations, § 268.

Pleas in criminal prosecutions, see Criminal Law, § 292.

To restrain collection of municipal assessments, see Municipal Corporations, § 538.

*Review of decisions and pleading in appellate courts.*

Harmless error in rulings on, see Appeal and Error, §§ 1089-1042.

Presumption as to time of filing, see Appeal and Error, § 916.

Review of rulings on as dependent on presentation in lower court of grounds of review, see Appeal and Error, § 193.

**I. FORM AND ALLEGATIONS IN GENERAL.**

§ 8. A petition, in an action for slander of title to property, *held* insufficient.—Continental Realty Co. v. Little (Ky.) 310.

§ 8. The statement in a supplemental pleading that the pleader intended to or did in fact declare upon a certain instrument is but the conclusion of the pleader, and adds nothing to the sufficiency of the original pleading.—Connor v. Zackry (Tex. Civ. App.) 177.

§ 34. The sufficiency of a petition challenged by objection at the trial on the ground that it fails to state a cause of action is determined by the rules which obtain as to such a question after verdict and judgment.—State ex rel. Rife v. Reynolds (Mo. App.) 653.

**II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.**

*In particular actions or proceedings.*

See Death, § 52; Libel and Slander, § 85.  
On bill or note, see Bills and Notes, §§ 462, 471.

§ 49. Under Rev. St. 1899, § 592 (Ann. St. 1906, p. 612), whether a petition based a cause of action on negligence or nuisance *held* immaterial.—Martin v. City of St. Joseph (Mo. App.) 94.

§ 62. Where plaintiff purchased land at judicial sale through his agent, he is entitled to land described in the sale, and is not limited by the language used by the agent in assigning to him the bid.—Sale v. Pulaski Stave Co. (Ky.) 404.

**III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.**

In action on bill or note, see Bills and Notes, § 475.

**(A) DEFENSES IN GENERAL.**

§ 79. The defenses of release because defendant was a surety and was discharged for want of notice of certain facts, accord and satisfaction, payment, or any defense going to show the extinguishment of a cause of action which once existed *held* affirmative defenses, and as such to be specially pleaded.—People's Bank v. Stewart (Mo. App.) 99.

§ 90. The answer may contain as many defenses as defendant may have, provided they are separately stated and are consistent.—People's Bank v. Stewart (Mo. App.) 99.

§ 90. An answer to a suit on notes *held* to plead one defense, breach of warranty, and to be good against general demurrer.—Adams v. Gary Lumber Co. (Tex. Civ. App.) 1017.

§ 98. The plea of non est factum is not inconsistent with the plea of payment; defenses being inconsistent only when the proof of one necessarily disproves the other.—People's Bank v. Stewart (Mo. App.) 99.

**(B) DILATORY PLEAS AND MATTER IN ABATEMENT.**

§ 107. Where the defect relied on is latent in the case and does not appear on the face of the proceedings, a plea in bar in the answer raising the defect by special plea does not waive the question of plaintiff's right to proceed.—Wiccar-

ver v. Mercantile Town Mut. Ins. Co. (Mo. App.) 698.

§ 107. Where the defect relied on in a special plea is one latent in the case and does not appear on the face of the proceedings so as to be available by demurrer or motion, it may be raised by special plea in the answer.—Wicecarver v. Mercantile Town Mut. Ins. Co. (Mo. App.) 698.

#### V. DEMURRER OR EXCEPTION.

As part of record on appeal or error, see Appeal and Error, § 518.

Rendering judgment against defendant without passing on demurrer to answer, see Judgment, § 107.

§ 210. A speaking demurrer does not exist in Missouri.—Hubbard v. Slavens (Mo.) 1104; Waters v. Hubbard (Mo.) 1112; Hall v. Same, Id.; Devol v. Same, Id.

§ 212. A plaintiff abandons his demurrer to the answer by failing to call for a ruling thereon, and by asking for a judgment on the merits.—Plunkett v. State Nat. Bank (Ark.) 1079.

§ 214. A demurrer to an amended petition admits that its allegations are true.—Breimeyer v. Star Bottling Co. (Mo. App.) 119.

§ 214. A demurrer admitting only matters well pleaded *held* not to admit the truth of averments of the legal interpretation of a bond sued on.—Eau Claire-St. Louis Lumber Co. v. Banks (Mo. App.) 611.

§ 214. The allegations of a petition must be taken as true on demurrer thereto.—Griffin v. Griffin (Tex. Civ. App.) 910.

§ 216. A complaint cannot be sustained as against a general demurrer on facts not alleged in the complaint.—Herf & Frerichs Chemical Co. v. Brewster (Tex. Civ. App.) 880.

§ 221. Under Kirby's Dig. § 6137, plaintiff in a suit for unliquidated damages was bound to prove the damages sustained, notwithstanding defendants refused to plead further after the overruling of their demurrer.—Greer v. Newbill (Ark.) 531.

§ 221. Where a demurrer was overruled to a complaint stating a cause of action for unliquidated damages, the complaint *held* sufficient to sustain findings on the merits, except as to the damages.—Greer v. Newbill (Ark.) 531.

#### VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

In action on bill or note, see Bills and Notes, § 487.

§ 237. In a suit to cancel tax bills issued for paying a street, an amendment to the petition to meet the evidence *held* properly refused.—Muff v. Cameron (Mo. App.) 116.

§ 258. A defective plea in abatement may be amended after evidence has been offered in support of the original plea and excluded on the ground that the plea was insufficient to admit the same.—Gray v. Fuller (Tex. Civ. App.) 919.

#### VII. SIGNATURE AND VERIFICATION.

In action by assignee, effect of failure to deny assignment under oath, see Assignments, § 131.

#### VIII. PROPERT, OYER, AND EXHIBITS.

§ 310. An exhibit is no part of the petition, even though it is attached, and the petition states it is made a part thereof.—Robinson v. Levy (Mo.) 577.

§ 310. An exhibit is no part of the pleading and per se tenders no issue calling for a separate verdict.—Pullis v. Somerville (Mo.) 736.

§ 310. An exhibit attached to an answer *held* not a part of the answer, though it was alleged so to be.—Hanks v. Hanks (Mo.) 1101.

§ 310. Exhibits do not constitute a part of the petition to which they are attached for the purposes of a demurrer thereto.—Hubbard v. Slavens (Mo.) 1104; Waters v. Hubbard (Mo.) 1112; Hall v. Same, Id.; Devol v. Same, Id.

§ 311. An exhibit will not cure a defect in a pleading, or supply the place of necessary averments.—Standard Lumber Co. v. Colwell (Ky.) 286.

§ 311. An exhibit filed with the pleading may be considered on demurrer to the pleading.—Standard Lumber Co. v. Colwell (Ky.) 286.

#### XI. MOTIONS.

§ 352. A motion to strike a pleading cannot be considered as a general demurrer thereto.—Hubbard v. Slavens (Mo.) 1104; Waters v. Hubbard (Mo.) 1112; Hall v. Same, Id.; Devol v. Same, Id.

§ 367. The allegation in the complaint, in a suit to enjoin the enforcement of assessments for a local improvement, *held* indefinite, authorizing motion to make the same more definite and certain.—Boles v. Kelley (Ark.) 1073.

§ 369. The court should have sustained defendant's motion to compel plaintiff to elect between two inconsistent defenses to defendant's counterclaim.—Lankford v. Lankford (Ky.) 962.

#### XII. ISSUES, PROOF, AND VARIANCE.

In action for libel or slander, see Libel and Slander, § 100; Negligence, § 119.

§ 398. Parties cannot claim to be surprised by evidence as to an issue where, prior to the trial, a deposition was taken in which the matter was fully gone into and discussed.—Probst v. Hinesley (Ky.) 389; Hinesley v. Beat-tie, Id.

#### XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AIDER BY VERDICT OR JUDGMENT.

§ 403. Plaintiffs' right to recover was not defeated by insufficiency of the petition where the deficiency was supplied by the answer.—Zan v. Clark (Tex. Civ. App.) 892.

§ 406. Where an alleged misjoinder of causes of action appeared on the face of the petition, defendants waived it by failing to demur on that ground.—Stone v. Perkins (Mo.) 717.

§ 406. A defendant who fails to demur for a defect patent on the face of the petition thereby waives his right to complain thereof by answering over, provided the petition is sufficient to sustain the judgment when construed by the rule obtaining after verdict.—Wicecarver v. Mercantile Town Mut. Ins. Co. (Mo. App.) 698.

§ 418. By answering over, plaintiffs waived their demurrer to defendant's equitable counterclaim, except as to the proposition that it did not state a cause of action as a cross-petition.—Hubbard v. Slavens (Mo.) 1104; Waters v. Hubbard (Mo.) 1112; Hall v. Same, Id.; Devol v. Same, Id.

§ 426. An exception to the denial of a motion to strike out part of a pleading is waived by pleading further.—Hubbard v. Slavens (Mo.) 1104; Waters v. Hubbard (Mo.) 1112; Hall v. Same, Id.; Devol v. Same, Id.

§ 428. Rule affecting the practice of challenging the sufficiency of a petition on oral objection to the introduction of evidence, stated.—Porter v. Illinois Southern Ry. Co. (Mo. App.) 680.

§ 433. A defect in a petition *held* cured by verdict.—Louisville & N. R. Co. v. Shelburne (Ky.) 303.

§ 433. Where there is no demurrer to a petition in a suit on an attachment bond for plaintiff's failure to aver nonpayment of damages sustained, the omission of the averment is cured by the verdict as provided by the statute of Jeofails. Rev. St. 1899, § 672 (Ann. St. 1906, p. 686).—State ex rel. Rife v. Reynolds (Mo. App.) 653.

§ 433. Rev. St. 1899, § 672 (Ann. St. 1906, p. 686), held merely declaratory of the common-law rule that a verdict aids a cause of action defectively stated.—Porter v. Illinois Southern Ry. Co. (Mo. App.) 680.

§ 433. Under Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), a petition against a railroad company for injury to crops by trespassing animals through defendant's failure to fence its right of way, etc., held sufficient after verdict.—Porter v. Illinois Southern Ry. Co. (Mo. App.) 680.

§ 433. Under Rev. St. 1899, § 672 (Ann. St. 1906, p. 686), a judgment in an action on a fire policy will not be reversed because of the failure of the petition to specifically allege that the loss was ascertained 60 days before the institution of the suit.—Wicecarver v. Mercantile Town Mut. Ins. Co. (Mo. App.) 698.

§ 433. A petition in an action on a fire policy held to show after verdict that the suit was instituted 60 days after the ascertainment of the loss as provided in the policy.—Wicecarver v. Mercantile Town Mut. Ins. Co. (Mo. App.) 698.

§ 434. Any failure of an answer in ejectment to comply with Civ. Code Prac. § 125, in setting forth tracts claimed by defendant, held cured by the tract and verdict.—Bryant v. Prewitt (Ky.) 343.

## PLEDGES.

§ 55. A payee of a note secured by notes deposited by a third person as collateral held entitled to sue the maker without pursuing his remedy to enforce the collateral, or he may sue the maker and enforce the collateral at the same time.—Plunkett v. State Nat. Bank (Ark.) 1079.

## POISONS.

Direction of verdict in prosecution for murder by poisoning, see Criminal Law, § 753.

Effect of opinion evidence in prosecution for murder by poison, see Criminal Law, § 494.

Murder by poisoning, see Homicide, §§ 143, 147, 234, 268.

Testimony of accomplices in prosecution for murder by poisoning, see Criminal Law, § 507.

## POLICE POWER.

See Constitutional Law, § 81.

Of municipality, see Municipal Corporations, §§ 592, 604.

## POLICY.

Of insurance, see Insurance.

## POLITICAL RIGHTS.

Suffrage, see Elections.

## POLLUTION.

Of water course, see Waters and Water Courses, § 76.

## POSSESSION.

See Adverse Possession.

Of demised premises, see Landlord and Tenant, § 142.

Of note, right to make payment to one out of possession, see Bills and Notes, § 427.

## POWERS.

Creation by will, see Wills, § 693.

Of attorney, see Principal and Agent.

## I. CREATION, EXISTENCE, AND VALIDITY.

§ 1. Nature of a collateral power stated.—Columbia Trust Co. v. Christopher (Ky.) 943.

§ 1. Powers appendant and in gross distinguished.—Columbia Trust Co. v. Christopher (Ky.) 943.

§ 1. Powers are either collateral or such as relate to an estate or interest given by the donor to the donee.—Columbia Trust Co. v. Christopher (Ky.) 943.

## II. CONSTRUCTION AND EXECUTION.

§ 23. The distinction between collateral powers and such as relate to an estate or interest given by the donor to the donee of the power is chiefly important respecting the extinguishment or suspension of such powers by the donee.—Columbia Trust Co. v. Christopher (Ky.) 943.

§ 23. Rule governing suspension or destruction of powers by the donee stated.—Columbia Trust Co. v. Christopher (Ky.) 943.

§ 23. Method whereby powers may be released, extinguished, or suspended stated.—Columbia Trust Co. v. Christopher (Ky.) 943.

§ 43. Even if a conveyance by a devisee did not pass good title, held, that equity would not permit the grantee to be disturbed.—Columbia Trust Co. v. Christopher (Ky.) 943.

## PRACTICE.

*In particular civil actions or proceedings.*

See Divorce, §§ 62-195; Ejectment; Habeas Corpus, §§ 85-109; Mandamus, §§ 146, 187; Prohibition; Trespass to Try Title, §§ 25-45.

*Particular proceedings in actions.*

See Abatement and Revival; Affidavits; Appearance; Continuance; Costs; Damages, §§ 142-222; Depositions; Dismissal and Non-suit; Evidence; Execution; Judgment; Jury; Limitation of Actions; Parties; Pleading; Process; Reference; Trial; Venue.

*Particular remedies in or incident to actions.*

See Attachment; Garnishment; Injunction; Receivers.

*Procedure in criminal prosecutions.*

See Criminal Law.

For offenses against liquor laws, see Intoxicating Liquors, §§ 226-239.

*Procedure in exercise of special or limited jurisdiction.*

In equity, see Equity.

*Procedure in or by particular courts or tribunals.*

See Courts.

In justices' courts, see Justices of the Peace, § 106.

*Procedure on review.*

See Appeal and Error; Audita Querela; Certiorari, § 41; Exceptions, Bill of; Justices of the Peace, § 162; New Trial.

## PREFERENCES.

In fraudulent conveyance, see Fraudulent Conveyances, § 115.

## PREJUDICE.

Ground for reversal in civil actions, see Appeal and Error, §§ 1029-1073.

Local prejudice ground for change of venue of criminal prosecutions, see Criminal Law, § 126.

**PRELIMINARY EXAMINATION.**

On criminal charge, see Criminal Law, § 543.

**PRELIMINARY INJUNCTION.**

See Injunction, §§ 148-186.

**PREMATURE JUDGMENT.**

Appealability as dependent on motion to set aside in lower court, see Appeal and Error, § 238.

Confirming sale of property of infant, see Infants, § 39.

**PRESCRIPTION.**

Acquisition of rights, see Adverse Possession, § 13.

**PRESENTMENT.**

Of claims against estate of decedent, see Executors and Administrators, § 227.

**PRESUMPTIONS.**

As to authority of attorney, see Attorney and Client, § 70.

In civil actions, see Evidence, § 80.

On appeal in criminal prosecutions, see Criminal Law, §§ 1141, 1144.

On appeal or error in civil actions, see Appeal and Error, §§ 907-934.

**PRINCIPAL AND ACCESSORY.**

See Criminal Law, §§ 59, 75.

**PRINCIPAL AND AGENT.**

Admissions by agent, see Evidence, §§ 243, 247.

Agency of husband for wife, see Husband and Wife, § 25.

Embezzlement by agent, see Embezzlement, § 14.

*Agency in particular relations, offices, or occupations.*

See Attorney and Client; Brokers.

Agency of partner for firm, see Partnership, §§ 123, 146.

Corporate agents, see Corporations, §§ 297-340, 423-507.

**I. THE RELATION.****(A) CREATION AND EXISTENCE.**

§ 21. Agency may be proved by testimony of the agent.—*Ayer & Lord Tie Co. v. Young* (Ark.) 1080.

§ 23. Evidence in an action against an alleged principal held to justify a verdict based on the existence of the agency.—*W. H. White & Son v. Ballard County Bank* (Ky.) 294.

**III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.****(A) POWERS OF AGENT.**

§ 105. One may pay a note to one whom the holder has led the payer to believe has authority to receive payment, but authority to collect some of a series of 29 notes did not authorize payment of all to the collector.—*Winer v. Bank of Blytheville* (Ark.) 232.

§ 123. Evidence held sufficient to show authority of agent.—*Ayer & Lord Tie Co. v. Young* (Ark.) 1080.

**(C) UNAUTHORIZED AND WRONGFUL ACTS.**

§ 156. Where an agent, acting within the scope of his employment, honestly believes representations made by him to induce a purchaser to contract with his principal to be true, he is

not liable.—*Wimble v. Patterson* (Tex. Civ. App.) 1034.

§ 156. Where one is induced by fraudulent representations of an agent to purchase property, the liability of the principal may be referred to the contract; such representations operating as a warranty.—*Wimble v. Patterson* (Tex. Civ. App.) 1034.

§ 156. Whether the principal or the agent knew the representations to be false, or believed them to be true, is immaterial in determining the liability of the principal for damages actually suffered.—*Wimble v. Patterson* (Tex. Civ. App.) 1034.

**(D) RATIFICATION.**

§ 171. Act of principal held not a ratification of agent's contract.—*Ayer & Lord Tie Co. v. Young* (Ark.) 1080.

**(E) NOTICE TO AGENT.**

§ 178. Circumstances under which a deed was given considered, and held, that the notary who took the acknowledgment of a deed was not the agent of the grantee, so that notice to the notary of infirmities in the deed was not notice to the grantee.—*Stringfellow v. Braselton* (Tex. Civ. App.) 204.

**(F) ACTIONS.**

§ 183. An agent may sue on a contract made in his own name for the benefit of his principal.—*Clubb v. St. Louis & S. F. R. Co.* (Mo. App.) 110.

§ 183. An owner of live stock shipped under a bill of lading issued to his agent in the latter's name may sue in his own name for injuries to the stock in transit.—*Clubb v. St. Louis & S. R. Co.* (Mo. App.) 110.

§ 184. An agent inducing the sale of his principal's property by false representations is not liable on the contract, but is liable in tort.—*Wimble v. Patterson* (Tex. Civ. App.) 1034.

§ 190. In an action by the buyer of a machine against the seller and his agents for fraudulent misrepresentations, it was error to refuse to permit an agent to testify that he believed the representations to be true.—*Wimble v. Patterson* (Tex. Civ. App.) 1034.

§ 194. A refusal to instruct on evidence not bearing on the issue held not erroneous.—*W. H. White & Son v. Ballard County Bank* (Ky.) 294.

§ 194. An instruction in an action against an alleged principal held not misleading.—*W. H. White & Son v. Ballard County Bank* (Ky.) 294.

**PRINCIPAL AND SURETY.**

See Bonds; Guaranty; Indemnity.

Liabilities of sureties on bonds in legal proceedings, see Attachment, §§ 349, 353.

Liabilities on bonds for performance of duties of trust or office, see Officers, § 129; Sheriffs and Constables, §§ 157, 168.

**II. NATURE AND EXTENT OF LIABILITY OF SURETY.**

§ 59. In an action on a bond for the performance of a contract, no intentment or presumptions outside those necessarily arising on the contract or bond are to be indulged in as against the surety.—*Eau Claire-St. Louis Lumber Co. v. Banks* (Mo. App.) 611.

§ 59. The rule that in actions on bonds a strict construction is to be indulged in, in favor of the obligors, is enforced only in favor of sureties, and has no application where the action was dismissed as to the surety and prosecuted against the principal alone.—*Akin v. Rice* (Mo. App.) 635.

**V. RIGHTS AND REMEDIES OF SURETY.****(B) AS TO PRINCIPAL.**

§ 180. Sureties' right to recover on a promise to pay *held* not to depend upon payment by them of the suretyship note.—*Elmer v. Campbell* (Mo. App.) 622.

**PRIORITIES.**

Of grants of public lands, see Public Lands, § 170.

Of mortgages, see Mortgages, §§ 154, 155.

**PRIVATE NUISANCES.**

See Nuisance, § 1.

**PRIVATE ROADS.**

Rights of way, see Easements.

**PRIVILEGED COMMUNICATIONS.**

Disclosure by witness, see Witnesses, § 192.

**PROBATE.**

Of will, see Wills, §§ 324, 386.

**PROCEDURE.**

See cross-references under Practice.

**PROCESS.**

Effect of appearance, see Appearance.  
To sustain judgment, see Judgment, § 17.

In actions against particular classes of persons.  
See Corporations, § 507.

*In particular actions or proceedings.*

See Divorce, § 79; Ejectment, § 39.  
To foreclose tax liens, see Taxation, § 634.

Particular forms of writs or other process.  
See Execution; Garnishment; Injunction; Mandamus; Prohibition.

**II. SERVICE.**

Presumptions on appeal, see Appeal and Error, § 914.

**(C) PUBLICATION OR OTHER NOTICE.**

To foreclose tax liens, see Taxation, § 634.

§ 85. The statute authorizing service by publication to confer jurisdiction on the court must be strictly followed.—*Harris v. Hill* (Tex. Civ. App.) 907.

§ 96. An order for the publication of process was not void because the affidavit was made eight days before the making of the order.—*Himmelberger-Harrison Lumber Co. v. Keener* (Co.) 42.

§ 98. The word "vacation" as used in Rev. St. 1879, c. 59, art. 4, § 3494, authorizing the clerk to order publication of process in vacation, included the time of an adjournment during term, both under Act March 15, 1883, p. 111, and independent thereof.—*Himmelberger-Harrison Lumber Co. v. Keener* (Mo.) 42.

§ 100. Where a summons is served on a non-resident actually within the state and the jurisdiction of the court, a warning order is not necessary.—*L. & J. A. Stewart v. Blue Grass Canning Co.* (Ky.) 401.

§ 109. Under Kirby's Dig. §§ 6053, 6054, the court *held* to acquire jurisdiction to cancel a deed to a nonresident without first requiring the filing of the bond prescribed by section 6254.—*Martin v. Gwynn* (Ark.) 754.

**III. DEFECTS, OBJECTIONS, AND AMENDMENT.**

§ 155. Where the return of service of process showed on its face that it was insufficient to confer jurisdiction over defendant, the court might disregard the matter when sought to be raised by answer in the form of a plea in abatement.—*Wicecarver v. Mercantile Town Mut. Ins. Co.* (Mo. App.) 698.

§ 166. Where the defect of jurisdiction over the person of defendant appears on the face of the return, defendant by answering to the merits waives its right to complain of the want of jurisdiction of the court.—*Wicecarver v. Mercantile Town Mut. Ins. Co.* (Mo. App.) 698.

**PROHIBITION.**

Of traffic in intoxicating liquors, see Intoxicating Liquors.

**I. NATURE AND GROUNDS.**

§ 6. Under Rev. St. 1899, §§ 6736, 9283 (Ann. St. 1906, pp. 3322, 4264), *held*, that prohibition would not lie to restrain the county board from constructing vaults for the county courthouse and to establish a fund for the payment of the expense.—*State ex rel. Carter v. Bollinger* (Mo.) 1132.

**PROMISSORY NOTES.**

See Bills and Notes.

**PROPERTY.**

Adjoining lands, see Adjoining Landowners, § 7.  
Constitutional guaranties of rights of property, see Constitutional Law, §§ 266, 297.  
Estates, see Estates.

*Particular species of property.*

See Animals; Improvements; Logs and Logging; Mines and Minerals; Trade-Marks and Trade-Names.

*Remedies involving or affecting property.*

See Divorce, § 249.  
Protection of rights of property by injunction, see Injunction, § 48.

*Transfers and other matters affecting title.*

See Adverse Possession.  
Dedication to public use, see Dedication.  
Taking for public use, see Eminent Domain.

§ 5. Standing timber, when sold by the owner of the land with the right to enter and remove it, becomes personal property, and ceases to be a part of the realty.—*Montgomery v. Peach River Lumber Co.* (Tex. Civ. App.) 1061.

**PROPOSITIONS.**

Accompanying assignment of errors, see Appeal and Error, § 742.

**PROVINCE OF COURT AND JURY.**

In civil action, see Trial, §§ 191-194.  
In criminal prosecutions, see Criminal Law, §§ 741-764.

**PROVOCATION.**

For murder, see Homicide, § 49.

**PROXIMATE CAUSE.**

Direct or remote consequences of injury, see Damages, §§ 23-56.  
Of injury in general, see Negligence, §§ 56, 61.  
Of injuries to person on ferry boat, see Ferries, § 32.

**PUBLICATION.**

Service of process, see Process, §§ 85-109.

**PUBLIC DEBT.**

See Counties, § 150; Municipal Corporations, § 918.

**PUBLIC IMPROVEMENTS.**

By municipalities, see Municipal Corporations, §§ 307-582.

**PUBLIC LANDS.****II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.****(F) SWAMP AND OVERFLOWED LANDS.**

§ 61. A subsequent land patent, issued by a county with knowledge of the issuance of a prior patent to the same land, passed no title.—*Stone v. Perkins* (Mo.) 717.

**III. DISPOSAL OF LANDS OF THE STATES.**

§ 151. A patent to land previously patented is void, under the statutes.—*Hamilton v. Steele* (Ky.) 378; *Brown v. Same*, Id.; *Crouch v. Same*, Id.

§ 170. The oldest of several conflicting grants carries the title.—*Kittel v. Steger* (Tenn.) 500.

§ 173. A deposit in the State Treasurer's office of a check on a bank by the highest bidder for school land open to competitive bidding *held* a payment, entitling the bidder to the land.—*Whitis v. Robison* (Tex.) 429.

**PUBLIC NUISANCES.**

See Nuisance, §§ 91, 92.

**PUBLIC SCHOOLS.**

See Schools and School Districts, §§ 53-81.

**PUBLIC SERVICE CORPORATIONS.**

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

**PUBLIC USE.**

Dedication of property, see Dedication.  
Taking property for public use, see Eminent Domain.

**QUASHING.**

Execution, see Execution, § 183.

**QUESTIONS FOR JURY.**

In civil actions, see Trial, §§ 136-143.  
In criminal prosecutions, see Criminal Law, §§ 741-764; Homicide, § 268.

**QUIETING TITLE.****I. RIGHT OF ACTION AND DEFENSES.**

§ 8. An injunction *held* to lie to prevent a cloud on title by a sale of a married woman's land under an execution against the husband.—*Barr v. Simpson* (Tex. Civ. App.) 1041.

**II. PROCEEDINGS AND RELIEF.**

§ 47. Trial of title in an action brought under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), is for the court and not for the jury.—*Stone v. Perkins* (Mo.) 717.

**QUITCLAIM.**

See Vendor and Purchaser, § 224.

**QUITCLAIM DEED.**

See Deeds, § 121.

**RAILROADS.**

See Street Railroads.

As employers, see Master and Servant.  
Carriage of goods and passengers, see Carriers.

**II. RAILROAD COMPANIES.**

What constitutes doing business within state within the law relating to service of process, see Corporations, § 642.

**IV. LOCATION OF ROAD, TERMINI, AND STATIONS.**

§ 58. Under Rev. St. 1895, arts. 4494, 4513, 4562, subd. 12, 4579, subd. 1, the Railroad Commission *held* empowered to compel a railroad company to establish a station at a place on the state line.—Railroad Commission of Texas v. Chicago, R. I. & G. Ry. Co. (Tex.) 794.

**V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.**

Lease of part of right of way to shipper as a discrimination, see Carriers, § 14.

§ 72. A consideration was necessary to sustain a contract by a landowner upon conveying a tract for a railroad right of way, releasing his right to recover damages for failure to discharge the statutory duty to construct necessary ditches.—*Missouri, K. & T. Ry. Co. of Texas v. Riverhead Farm* (Tex. Civ. App.) 1049.

§ 72. A contract contained in a deed conveying a tract for a railroad right of way, *held* not to release the company from its duty to construct ditches, under *McIlwaine's Dig. St. art. 4436*.—*Missouri, K. & T. Ry. Co. of Texas v. Riverhead Farm* (Tex. Civ. App.) 1049.

**VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.**

Accrual of cause of action for injury, see Limitation of Actions, § 55.

Pleading in action for failure to fence, aider of defects by verdict, see Pleading, § 433.

§ 103. Under Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), requiring companies "operating" railroads to maintain fences and cattle guards, it is immaterial who owns the road.—*Porter v. Illinois Southern Ry. Co.* (Mo. App.) 680.

§ 104. A landowner's rights against railroad companies, under Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), *held* subject to waiver.—*Porter v. Illinois Southern Ry. Co.* (Mo. App.) 680.

§ 114. The cause of action alleged *held* not based on breach of a contract to construct drains, but on defendant's duty to construct necessary drains and culverts, under *McIlwaine's Dig. St. art. 4436*.—*Missouri, K. & T. Ry. Co. of Texas v. Riverhead Farm* (Tex. Civ. App.) 1049.

§ 114. In an action against a railroad for damages to crops because of its failure to maintain proper drainage, findings *held* to show that judgment for plaintiff was based upon defendant's duty to construct culverts under *McIlwaine's Dig. St. art. 4436*, and not upon a contract.—*Missouri, K. & T. Ry. Co. of Texas v. Riverhead Farm* (Tex. Civ. App.) 1049.

**VII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION.**

Lease of part of right of way to shipper as a discrimination, see Carriers, § 14.



**X. OPERATION.**

Liability for injuries caused by explosion of car of dynamite, see Explosives, § 7.

**(B) STATUTORY, MUNICIPAL, AND OFFICIAL REGULATIONS.**

Evidence of other offenses in prosecution for failure to run trains, see Criminal Law, § 369.

Partial invalidity of statute imposing liability for damages from fire, see Statutes, § 64.

§ 227. "Train," "passenger train," "regular," defined.—State v. Missouri Pac. Ry. Co. (Mo.) 1173.

§ 227. "Regular passenger train," defined.—State v. Missouri Pac. Ry. Co. (Mo.) 1173.

§ 227. "Passenger train" and "regular passenger train" defined.—State v. Missouri Pac. Ry. Co. (Mo.) 1173.

§ 227. A railroad train composed of an engine and tender, two or more freight cars, combined baggage, mail and passenger car, and a passenger coach is a "passenger train" within Laws 1907, p. 180, requiring railroad carriers to run at least one passenger train over its road each way every day.—State v. Missouri Pac. Ry. Co. (Mo.) 1173.

§ 227. The term "local freight" defined.—State v. Missouri Pac. Ry. Co. (Mo.) 1173.

§ 249. Act April 18, 1907 (Act 1907, p. 836), making railroad companies liable for damages caused by fire from a locomotive in the operation of its road, is constitutional and valid.—St. Louis & S. F. Ry. Co. v. Shore (Ark.) 515.

**(C) COMPANIES AND PERSONS LIABLE FOR INJURIES.**

§ 259. Public service corporations, such as railroads, cannot lease property without legislative consent, and an attempt to do so is a nullity, and the lessor will be held liable for the torts of the lessee in operating the road, as though no lease had been made.—Booth v. St. Louis, I. M. & S. Ry. Co. (Mo.) 1094.

§ 259. If an employé of another road was injured by his employer's negligence while using a part of defendant's road, defendant would not be liable for such injuries, where it did not appear by what authority the other company was using its track, or whether it was using it under an unauthorized lease.—Booth v. St. Louis, I. M. & S. Ry. Co. (Mo.) 1094.

**(D) INJURIES TO LICENSEES OR TRAVELERS IN GENERAL.**

§ 274. The law does not permit even trespassers to be exposed wantonly, and a railroad company owes a licensee in its waiting room the duty of taking ordinary care to avoid injuring him.—Texas Midland R. Co. v. Geraldton (Tex. Civ. App.) 1004.

§ 274. An expulsion from a depot waiting room held a tort for which the company was liable independent of any contractual relation.—Texas Midland R. Co. v. Geraldton (Tex. Civ. App.) 1004.

§ 282. In an action by an employé of another road for injuries caused by being struck by a trolley wire strung over defendant's road while the other road was using defendant's track, defendant held not negligent because the trolley wire was less than 22 feet above the track, as required by Rev. St. 1899, § 1179 (Ann. St. 1906, p. 995).—Booth v. St. Louis, I. M. & S. Ry. Co. (Mo.) 1094.

§ 282. That a trolley wire strung over defendant's railroad was only 19 feet and 5 inches above the track did not, as a matter of law, require defendant to warn employées of another road, which it permitted to use its track, to

look out for danger.—Booth v. St. Louis, I. M. & S. Ry. Co. (Mo.) 1094.

§ 282. The rights of a railroad and those of a street railway in a public street being mutual, the railroad could not compel a street railway to maintain its trolley wires at a safe distance above the railroad track, so that it could not be said that the railroad permitted the street railroad to string its wires.—Booth v. St. Louis, I. M. & S. Ry. Co. (Mo.) 1094.

§ 282. In an action for injuries by being struck by a trolley wire strung over defendant's railroad track which plaintiff's employer was using at the time, where the petition only alleged that defendant permitted the street railroad to negligently string the wires, there was no issue as to whether defendant itself erected the wires.—Booth v. St. Louis, I. M. & S. Ry. Co. (Mo.) 1094.

**(F) ACCIDENTS AT CROSSINGS.**

§ 327. A traveler who attempts to cross a railroad track without looking and listening is guilty of contributory negligence precluding recovery for injuries sustained.—St. Louis, I. M. & S. Ry. Co. v. Garner (Ark.) 763.

§ 348. In an action for the death of a person killed by a train at a crossing, evidence held to support findings that the fireman discovered decedent's peril in time, that he might by the means at hand, and with regard to the duty owed the railroad company and the persons on the train, have averted the accident, and failed to use such means.—International & G. N. R. Co. v. Tinon (Tex. Civ. App.) 936.

§ 350. Whether decedent, struck by a train, was guilty of contributory negligence, held under the evidence for the jury.—St. Louis, I. M. & S. Ry. Co. v. Garner (Ark.) 763.

§ 350. In an action for the death of a person killed by a train at a crossing, evidence held to justify the submission of the issue whether decedent's danger was discovered by the fireman in time to have averted the injury by the means at hand.—International & G. N. R. Co. v. Tinon (Tex. Civ. App.) 936.

§ 350. The failure of a person approaching a railway crossing to stop, look, and listen is not negligence as matter of law.—International & G. N. R. Co. v. Tinon (Tex. Civ. App.) 936.

§ 350. In an action for the death of a person at a railway crossing, whether decedent was negligent in going upon the crossing under the circumstances held under the evidence for the jury.—International & G. N. R. Co. v. Tinon (Tex. Civ. App.) 936.

**(G) INJURIES TO PERSONS ON OR NEAR TRACKS.**

Applicability of instructions to case in action for injuries to persons on or near tracks, see Trial, § 252.

§ 357. Trainmen owe no duty to one guilty of contributory negligence in lying on the track, until after his peril is actually discovered.—Caldwell v. Houston & T. C. Ry. Co. (Tex. Civ. App.) 488.

§ 358. Under the evidence, held that there could be no recovery for the killing of a child crossing railroad tracks in front of an engine.—Matz v. Missouri Pac. Ry. Co. (Mo.) 584.

§ 358. Trainmen may assume that the track used for a footpath is clear of pedestrians late at night.—Caldwell v. Houston & T. C. Ry. Co. (Tex. Civ. App.) 488.

§ 369. Railway employées, while bound to keep a lookout for persons at street crossings, held not bound to take more than the usual precautions to discover a young child before backing the train.—Texas & N. O. R. Co. v. Brouillette (Tex. Civ. App.) 1014.

§ 375. Where the engineer saw plaintiff so near the track that she would be struck, and it was apparent that she was oblivious to her danger and failed to give any warning signal, the railroad company *held* liable.—*St. Louis Southwestern Ry. Co. v. Thompson* (Ark.) 541.

§ 376. It is the duty of a locomotive fireman, on discovering the peril of one near the track, to resort to all available means to avoid injuring him.—*Texas & P. Ry. Co. v. Crawford* (Tex. Civ. App.) 193.

§ 376. Trainmen, discovering an object on the track in front the train, must at least exercise ordinary care to ascertain what it is, and where, by failure to do so, a person lying on the track is killed, the company is liable.—*Caldwell v. Houston & T. C. Ry. Co.* (Tex. Civ. App.) 488.

§ 376. In an action against a railroad company for killing a person lying on the track, evidence *held* to show that the company was free from negligence as matter of law.—*Caldwell v. Houston & T. C. Ry. Co.* (Tex. Civ. App.) 488.

§ 381. A license to use a railroad track for a footpath does not include the right to use it as a place to lie or sit.—*Caldwell v. Houston & T. C. Ry. Co.* (Tex. Civ. App.) 488.

§ 387. If, by ordinary care, an engineer could have seen a person on the track in time to have saved his life by such care, his negligence, and not that of the person killed, is the direct, immediate, proximate cause of the injury, and plaintiff in such case may recover.—*Potter v. St. Louis & S. F. R. Co.* (Mo. App.) 593.

§ 390. Where the engineer saw plaintiff in time to have avoided striking her by ordinary effort, *held*, that the company was liable, though plaintiff was guilty of contributory negligence.—*St. Louis Southwestern Ry. Co. v. Thompson* (Ark.) 541.

§ 390. Trainmen, knowing of the peril of a person on the track, *held* required to use every means within their power consistent with the safety of the train to avoid running him down.—*Maxfield v. Texas & P. Ry. Co.* (Tex. Civ. App.) 483.

§ 396. One suing for the death of a person struck by a train because of the failure of the trainmen to exercise ordinary care, after discovering decedent's peril, has the burden of proving that the discovery of the peril of decedent was made in time to enable the trainmen by the exercise of proper care to avoid the collision.—*Caldwell v. Houston & T. C. Ry. Co.* (Tex. Civ. App.) 488.

§ 397. In an action for the death of a person killed by a train, the testimony of a passenger, sitting in the rear coach at the time of the accident, that she felt no jar, *held* competent in determining the truth of the engineer's testimony as to having brought the train to a sudden stop.—*Potter v. St. Louis & S. F. R. Co.* (Mo. App.) 593.

§ 398. Evidence *held* to sustain a finding that plaintiff was struck by a train as it passed her, and not to show that her injuries were due to her suddenly turning as the train passed and falling to the walk.—*St. Louis Southwestern Ry. Co. v. Thompson* (Ark.) 541.

§ 398. Evidence, in an action for killing a child run over by an engine, *held* insufficient to justify a verdict against the railroad company.—*Matz v. Missouri Pac. Ry. Co.* (Mo.) 584.

§ 398. In an action against a railroad for injuries to plaintiff through being struck by a train while walking near the track, evidence *held* to support findings that defendant was negligent, and that plaintiff was not guilty of contributory negligence.—*Texas & P. Ry. Co. v. Crawford* (Tex. Civ. App.) 193.

§ 398. In an action against a railroad company for killing a person lying on the track,

evidence *held* to show that decedent was guilty of contributory negligence.—*Caldwell v. Houston & T. C. Ry. Co.* (Tex. Civ. App.) 488.

§ 398. A person struck by a train *held* prima facie guilty of contributory negligence requiring plaintiff, basing a recovery on the failure to discover him sooner, to furnish evidence sufficient to rebut the prima facie case.—*Caldwell v. Houston & T. C. Ry. Co.* (Tex. Civ. App.) 488.

§ 400. In an action against a railroad for injuries through being struck by an engine, whether the injury could have been avoided had the fireman on discovering plaintiff's position warned him by ringing the engine bell *held* for the jury.—*Texas & P. Ry. Co. v. Crawford* (Tex. Civ. App.) 193.

§ 401. Evidence, in an action for the death of a child at a railroad crossing *held* to require an instruction predicated on the assumption that he came suddenly back on the track in front of the engine.—*Matz v. Missouri Pac. Ry. Co.* (Mo.) 584.

§ 401. An instruction in an action for the death of a person killed by an incoming train as he was walking toward a station, requiring him to look both ways at once and listen while he was walking along, *held* erroneous.—*Potter v. St. Louis & S. F. R. Co.* (Mo. App.) 593.

§ 401. Instructions in an action for death *held* not to conflict.—*Potter v. St. Louis & S. F. R. Co.* (Mo. App.) 593.

§ 401. In an action against a railroad for injuries through being struck by an engine while walking near the track, an instruction *held* properly refused.—*Texas & P. Ry. Co. v. Crawford* (Tex. Civ. App.) 193.

§ 401. In an action against a railroad for injuries through being struck by an engine, an instruction ignoring the duty of both the engineer and fireman to keep a lookout for persons who might be in a position of danger ahead of the train *held* properly refused.—*Texas & P. Ry. Co. v. Crawford* (Tex. Civ. App.) 193.

§ 401. In an action against a railroad for injuries through being struck by an engine, an instruction *held* not erroneous.—*Texas & P. Ry. Co. v. Crawford* (Tex. Civ. App.) 193.

§ 401. The petition, in an action against a railroad for injuries through being struck by an engine, *held* to support an instruction as to discovered peril.—*Texas & P. Ry. Co. v. Crawford* (Tex. Civ. App.) 193.

§ 401. An instruction submitting the issue of discovered peril to a person on the track *held* erroneous, for submitting the question whether or not an ordinarily prudent person would have used the means at hand to stop the train.—*Maxfield v. Texas & P. Ry. Co.* (Tex. Civ. App.) 483.

#### (H) INJURIES TO ANIMALS ON OR NEAR TRACKS.

§ 411. Where an animal is killed on an unfenced portion of a railroad track, the company is liable under Rev. St. 1895, art. 4528, regardless of any question of negligence.—*Rio Grande & E. P. Ry. Co. v. Garcia* (Tex. Civ. App.) 204.

§ 435. Statute requiring actions against a railroad for killing certain animals to be brought in the county where they were killed *held* not to apply to an action for killing a dog.—*El Dorado & B. Ry. Co. v. Knox* (Ark.) 779.

§ 441. Under Kirby's Dig. § 6773, making all railroads responsible for all damage done to property in operating its trains, the killing of a dog by a train was prima facie evidence of negligence.—*El Dorado & B. Ry. Co. v. Knox* (Ark.) 779.

§ 443. That a dog killed by defendant railroad was not assessed did not prove that it had

no value, especially in view of undisputed evidence that it was valuable.—*El Dorado & B. Ry. Co. v. Knox* (Ark.) 779.

## RAPE.

### II. PROSECUTION AND PUNISHMENT.

Venue, see Criminal Law, § 107.

#### (A) INDICTMENT AND INFORMATION.

§ 22. An indictment alleging the "unlawful and felonious carnal knowledge and abuse" of a female under 16 years of age need not allege that defendant and prosecutrix were not married.—*Curtis v. State* (Ark.) 521.

§ 23. The allegation that the assault was on "a female child under the age of consent, to wit, of the age of 15 years," is a sufficient allegation that prosecutrix was a female under the age of 16 years.—*Curtis v. State* (Ark.) 521.

§ 27. An indictment *held* sufficient under Kirby's Dig. § 2008, providing the punishment for carnally knowing and abusing any female child under the age of 16 years.—*Curtis v. State* (Ark.) 521.

#### (B) EVIDENCE.

§ 51. Evidence *held* to justify a conviction of rape.—*Dies v. State* (Tex. Cr. App.) 979.

#### (C) TRIAL AND REVIEW.

§ 59. Evidence on a trial for rape *held* to establish the offense rendering it proper to refuse to submit the issue of attempt to rape and assault with intent to rape.—*Dies v. State* (Tex. Cr. App.) 979.

## RATIFICATION.

Of act of agent, see Principal and Agent, § 171.

## REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer, §§ 9, 29; Trespass to Try Title.

## REAL ESTATE AGENTS.

See Brokers.

## REAL PROPERTY.

See Property.

## REASONABLE DOUBT.

See Criminal Law, § 789.

## REBUTTAL.

Evidence, see Trial, §§ 67, 68.

## RECEIVERS.

Of corporations in general, see Corporations, §§ 553-566.

### I. NATURE AND GROUNDS OF RECEIVERSHIP.

#### (A) NATURE AND SUBJECTS OF REMEDY.

§ 1. The remedy of a receivership is in all cases to be cautiously applied.—*Galvin v. McConnell* (Tex. Civ. App.) 211.

## RECEIVING STOLEN GOODS.

Evidence of other offenses in prosecution for, see Criminal Law, § 371.

Rebuttal testimony in prosecution for, see Criminal Law, § 683.

## RECORDS.

#### Of judicial proceedings.

Abstract for purpose of review, see Appeal and Error, § 581.

Transcript on appeal or writ of error, see Appeal and Error, §§ 501-714; Criminal Law, §§ 1087-1128.

## REDEMPTION.

From tax sales, see Taxation, §§ 696, 697.

## REFERENCE.

### II. REFEREES AND PROCEEDINGS.

§ 42. Under Rev. St. 1899, § 703 (Ann. St. 1906, p. 710), *held*, that it is not necessary to have the oath of a referee marked "Filed" by the clerk of court.—*Pullis v. Somerville* (Mo.) 736.

### III. REPORT AND FINDINGS.

§ 89. A separate finding by a referee for each item in an exhibit *held* unnecessary.—*Pullis v. Somerville* (Mo.) 736.

§ 100. Objections to report of a referee *held* not to raise the objection that plaintiff was allowed compound interest.—*Pullis v. Somerville* (Mo.) 736.

## REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

### II. PROCEEDINGS AND RELIEF.

§ 43. The vendor, who seeks a reformation of a deed for the omission by mistake of a provision that the vendee takes the land subject to a drainage assessment, has the burden of showing that the deed was not prepared in accordance with the agreement of the parties.—*Ezell v. Humphrey & Simonson* (Ark.) 758.

§ 45. Evidence *held* insufficient to show an agreement by which the vendee was to take the land subject to a drainage assessment, and that such provision was omitted by mutual mistake, entitling the vendor to a reformation.—*Ezell v. Humphrey & Simonson* (Ark.) 758.

§ 45. To justify the reformation of a written instrument, the evidence must be clear and satisfactory.—*Ezell v. Humphrey & Simonson* (Ark.) 758.

## REFRIGERATOR CARS.

Duty of carrier to keep in repair, see Carriers, §§ 117, 121, 131, 136.

## REGISTRATION.

See Trade-Marks and Trade-Names, § 51.

## REHEARING.

See New Trial.

## RELEASE.

See Compromise and Settlement; Payment.

Of mortgage, see Mortgages, § 312.

Release as an affirmative defense, see Pleading, § 79.

## RELEVANCY.

Of evidence in civil actions, see Evidence, §§ 121-143.

Of evidence in criminal prosecutions, see Criminal Law, § 366.

## REMAINDERS.

Creation by deed, see Deeds, § 133.

§ 1. A remainder is vested where there is a present capacity to convey an absolute title to

the remainder, and where the remainder is limited to a person not ascertained by the terms of the instrument it is contingent.—*Buxton v. Kroeger* (Mo.) 1147; *Same v. Lauman* (Mo.) 1162; *Same v. Dunn* (Mo.) 1163.

### REMONSTRANCE.

To establishment of highway, see *Highways*, § 32.

### REMOVAL OF CAUSES.

Change of venue or place of trial, see *Venue*, § 36.

### REMOVAL OF CLOUD.

See *Quieting Title*.

### RENT.

See *Landlord and Tenant*, §§ 183-274.

### REPAIRS.

Of refrigerator cars, see *Carriers*, §§ 117, 121, 131, 136.

### REPEAL.

Of statute, see *Statutes*, § 158.

### REPORT.

By trust companies, see *Banks and Banking*, § 310.  
On reference, see *Reference*, § 100.

### REPUTATION.

As to character of house where liquor is alleged to have been illegally sold, see *Intoxicating Liquors*, §§ 233, 236.  
Injury to as element of libel, see *Libel and Slander*, § 16.

### REQUESTS.

For instructions in civil actions, see *Trial*, §§ 255-266.  
For instructions in criminal prosecutions, see *Criminal Law*, §§ 828, 829.

### RESCISSION.

Cancellation of written instrument, see *Cancellation of Instruments*.  
Of contract for sale of goods, see *Sales*, § 92.  
Of contract for sale of land, see *Vendor and Purchaser*, §§ 85, 123.

### RES GESTÆ.

In civil actions, see *Evidence*, §§ 121, 125.  
In criminal prosecutions, see *Criminal Law*, § 366.

### RESIDENCE.

See *Domicile*.

### RES IPSA LOQUITUR.

Negligence in production or use of electricity, see *Electricity*, § 19.

### RES JUDICATA.

See *Judgment*, §§ 554, 604, 713-747.

### RESTRICTIONS.

In deeds, see *Deeds*, § 149.

### RESULTING TRUSTS.

See *Trusts*, §§ 63½, 86.

### RETAINER.

Of attorney, see *Attorney and Client*, §§ 70, 83.

### REVENUE.

See *Taxation*.

### REVERSIONS.

Of lessor, see *Landlord and Tenant*, § 61.

### REVIEW.

See *Appeal and Error*; *Audita Querela*; *Certiorari*; *Criminal Law*, §§ 1017-1182; *Justices of the Peace*, § 162.

### REVIVAL.

Of action, see *Abatement and Revival*, § 72.

### REVOCATION.

Of will, see *Wills*, §§ 179, 184.

### RIGHT OF WAY.

See *Easements*.

Of railroads, see *Railroads*, § 72.

### RIPARIAN RIGHTS.

See *Navigable Waters*, § 39; *Waters and Water Courses*, § 76.

### RISKS.

Assumed by employé, see *Master and Servant*, §§ 203-228, 262, 288, 295.

### ROADS.

See *Highways*.

Streets in cities, see *Municipal Corporations*, §§ 658, 755-821.

### ROBBERY.

Duplicity in indictment, see *Indictment and Information*, § 125.

Evidence of other offenses, see *Criminal Law*, § 369.

§ 1. To constitute robbery the person robbed must be deprived of his property by force, or by putting him in fear.—*Brown v. Commonwealth* (Ky.) 281.

§ 6. Evidence held to support a conviction for robbery.—*Brown v. Commonwealth* (Ky.) 281.

§ 23. On a trial for robbery in compelling the prosecutor to draw money from a bank and give the same to defendant, evidence is admissible that just before going to the bank defendant had, by putting the prosecutor in fear, taken a sum of money from him, and that defendant continued control of the prosecutor until after the money was procured from the bank.—*Harris v. State* (Tex. Cr. App.) 839.

### RULES.

For government of employés, see *Master and Servant*, §§ 141, 146.

### SALES.

Requirements of statute of frauds, see *Frauds*, *Statute of*, § 84.

*Sales of particular species of, or estates or interests in, property.*

See *Intoxicating Liquors*, § 146.

*Realty*, see *Vendor and Purchaser*.

**Sales on judicial or other proceedings.**

Foreclosure of mortgage, see Mortgages, § 534.  
 Of property of decedent under order of court, see Executors and Administrators, § 365.  
 On execution, see Execution, § 224.  
 Tax sales, see Taxation, §§ 634-691.

**I. REQUISITES AND VALIDITY OF CONTRACT.**

Requirements of statute of frauds, see Frauds, Statute of, § 44.

§ 35. There was a meeting of minds on a contract to sell wire, where the quantity, price, and terms were understood.—*Tuttle v. Bracey-Howard Const. Co.* (Mo. App.) 86.

**II. CONSTRUCTION OF CONTRACT.**

§ 62. A contract for the sale of an itemized list of articles at separate prices for each kind, and which provides that any article failing to give satisfaction may be returned to the seller, to be repaired or replaced, *held* a severable contract.—*American Standard Jewelry Co. v. R. J. Hill & Son* (Ark.) 781.

§ 72. A contract for the sale of a printing press *held* conditional on the buyer's determination that the press was satisfactory.—*Kidder Press Co. v. J. V. Reed & Co.* (Ky.) 950.

§ 85. A contract of sale *held*, in view of an agreement on which it was executed, not to have become operative.—*J. I. Case Threshing Mach. Co. v. Barnes* (Ky.) 418.

**III. MODIFICATION OR RESCISSION OF CONTRACT.****(A) BY AGREEMENT OF PARTIES.**

§ 92. A buyer's failure to pay for goods supports an agreement for a rescission of the contract of sale.—*Tuttle v. Bracey-Howard Const. Co.* (Mo. App.) 86.

**(C) RESCISSION BY BUYER.**

Rescission fraudulent as to creditors of buyer, see Fraudulent Conveyances, § 34.

**IV. PERFORMANCE OF CONTRACT.****(C) DELIVERY AND ACCEPTANCE OF GOODS.**

§ 168. A buyer of a machine, sold on condition that it should work to the buyer's satisfaction on refusing to accept for failure to comply with such condition, *held* entitled to retain the machine until reimbursed for advances made for expenses of the seller's experts.—*Kidder Press Co. v. J. V. Reed & Co.* (Ky.) 950.

**V. OPERATION AND EFFECT.****(A) TRANSFER OF TITLE AS BETWEEN PARTIES.**

§ 201. Title under a sale of wire f. o. b. place of shipment, without reservation of title until payment of the price, passed on delivery to the carrier.—*Tuttle v. Bracey-Howard Const. Co.* (Mo. App.) 86.

**VI. WARRANTIES.**

§ 288. If defects in fruit cans could not be discovered until the fruit had been placed in them and time allowed for fermentation, the buyer would not be estopped to recover for breach of warranty as to the quality because it retained and used them.—*L. & J. A. Stewart v. Blue Grass Canning Co.* (Ky.) 401.

**VII. REMEDIES OF SELLER.****(E) ACTIONS FOR PRICE OR VALUE.**

Applicability of instructions to case, see Trial, § 252.

§ 357. In an action for the purchase price of goods, plaintiff *held* to have the burden under the pleadings of showing that the goods contracted for were tendered defendants.—*American Standard Jewelry Co. v. R. J. Hill & Son* (Ark.) 781.

§ 364. In an action for the price of jewelry sold by samples by plaintiff to defendants under a written contract, an instruction *held* proper.—*American Standard Jewelry Co. v. R. J. Hill & Son* (Ark.) 781.

§ 364. In an action for the purchase price of goods, an instruction *held* not erroneous as stating that the burden was not on defendants to prove an alleged breach of warranty.—*American Standard Jewelry Co. v. R. J. Hill & Son* (Ark.) 781.

**VIII. REMEDIES OF BUYER.****(C) ACTIONS FOR BREACH OF CONTRACT.**

§ 413. In an action for breach of contract to sell certain cattle, the issue whether the cattle was the separate property of defendant's wife *held* immaterial.—*Gibbens & Roundtree v. Hart* (Tex. Civ. App.) 168.

§ 418. The measure of damages for the failure of the seller of cattle to deliver them is the difference between the contract price and the market value at the time and place of delivery.—*Gibbens & Roundtree v. Hart* (Tex. Civ. App.) 168.

**(D) ACTIONS AND COUNTERCLAIMS FOR BREACH OF WARRANTY.**

§ 439. A vendee alleging a breach of warranty must prove it.—*American Standard Jewelry Co. v. R. J. Hill & Son* (Ark.) 781.

§ 440. In an action by a buyer to recover the difference between the contract price of goods purchased and rejected and the price paid for other goods purchased to take the place of those rejected, evidence that the seller had resold the rejected goods for more than the contract price to the original buyer was inadmissible.—*Merchants' Grocery Co. v. Ladoga Canning Co.* (Ark.) 767.

§ 440. In an action by a buyer to recover the difference between the price of rejected goods and the price paid for goods purchased of another to take the place thereof, a card published by an individual quoting prices of the commodity *held* inadmissible.—*Merchants' Grocery Co. v. Ladoga Canning Co.* (Ark.) 767.

§ 446. A charge predicated plaintiffs' right to recover upon his compliance with a custom of trade if the jury found the custom to exist *held* error where the custom was not proved.—*Merchants' Grocery Co. v. Ladoga Canning Co.* (Ark.) 767.

§ 446. An instruction under a defense of breach of warranty against notes *held* properly refused.—*Adams v. Gary Lumber Co.* (Tex. Civ. App.) 1017.

**IX. CONDITIONAL SALES.**

§ 456. Instrument *held* not as to its first part a lease and as to its second part an option to purchase at the end of the term, but to constitute as a whole a conditional sale.—*Vette v. J. S. Merrell Drug Co.* (Mo. App.) 666.

§ 472. Certain person *held* not within the protection of Rev. St. 1899, § 3412 (Ann. St. 1906, p. 1945), requiring a contract of conditional sale to be evidenced by a writing and recorded as against a creditor of or purchaser from the buyer.—*Vette v. J. S. Merrell Drug Co.* (Mo. App.) 666.

§ 479. Defendant having purchased certain cattle from plaintiff under a conditional sale

with which he had not complied, plaintiff was entitled to recover the cattle.—*Bailey v. Napier* (Ky.) 948.

§ 479. Rev. St. 1899, § 3413 (Ann. St. 1906, p. 1947), held not to compel the owner of property conditionally sold to reclaim it and tender back part of the price, but only to prevent him from reclaiming it without a tender.—*Vette v. J. S. Merrell Drug Co.* (Mo. App.) 666.

## SATISFACTION.

See Compromise and Settlement; Payment. Of judgment, see Judgment, § 891. Of mortgage, see Mortgages, § 312.

## SCHOOLS AND SCHOOL DISTRICTS.

### II. PUBLIC SCHOOLS.

#### (A) ESTABLISHMENT, SCHOOL LANDS AND FUNDS, AND REGULATION IN GENERAL.

Judicial notice as to matters affecting bond of county treasurer for school funds, see Evidence, § 48.

Liability on county treasurer's bond for loss of school funds, see Counties, § 101.

#### (C) GOVERNMENT, OFFICERS, AND DISTRICT MEETINGS.

§ 53. Evidence held to authorize a finding that the resignation of a trustee of a school district was forged, so that an appointment to fill a vacancy was a nullity.—*Terry v. Terry* (Ky.) 284.

§ 55. A board of school district directors can discharge only such functions as are expressly prescribed by statute or arise by implication from those conferred.—*State v. Kessler* (Mo. App.) 85.

§ 57. Rev. St. 1899, § 9761 (Ann. St. 1906, p. 4476), construed to require meetings of school directors to be held within the district, making void a resolution under section 9763 (page 4477) adopted at a meeting held outside the district.—*State v. Kessler* (Mo. App.) 85.

#### (D) DISTRICT PROPERTY, CONTRACTS, AND LIABILITIES.

Exemption of county school land from taxation and effect of sale thereof on right to tax, see Taxation, § 247.

§ 72. Rights of a literary society and school district officers under Rev. St. 1899, § 9763 (Ann. St. 1906, p. 4477), stated.—*State v. Kessler* (Mo. App.) 85.

§ 81. Municipal and public bodies at common law, and school districts and other public quasi corporations, under Rev. St. 1899, § 6761 (Ann. St. 1906, p. 3328), held empowered to contract and provide in the contractor's bond for payment to laborers or materialmen for labor performed on or materials used in constructing a public building.—*Eau Claire-St. Louis Lumber Co. v. Banks* (Mo. App.) 611.

§ 81. A bond to secure performance of a building contract, construed.—*Eau Claire-St. Louis Lumber Co. v. Banks* (Mo. App.) 611.

§ 81. A bond given by a contractor constructing a schoolhouse for a school district held not to be the bond prescribed by Rev. St. 1899, § 6761 (Ann. St. 1906, p. 3328).—*Eau Claire-St. Louis Lumber Co. v. Banks* (Mo. App.) 611.

§ 81. An action on a contractor's bond prescribed by Rev. St. 1899, § 6761 (Ann. St. 1906, p. 3328), held to be brought in the name of the school district to the use of the person seeking to recover, under the express provisions of section 6762 (Ann. St. 1906, p. 3328).—*Eau Claire-St. Louis Lumber Co. v. Banks* (Mo. App.) 611.

## (E) DISTRICT DEBT, SECURITIES, AND TAXATION.

Submission to municipal voters of question of issuance of municipal bonds for establishment of schools, see Municipal Corporations, § 918.

## SECONDARY EVIDENCE.

In civil actions, see Evidence, §§ 157-178.

## SELF-DEFENSE.

See Homicide, §§ 110-120, 300.

## SEQUESTRATION.

Malicious sequestration, see Malicious Prosecution, § 371.

Removal of property under void writ as conversion, see Trover and Conversion, § 5.

## SERVICE.

Of process, see Process, §§ 85-109.

## SERVITUDES.

See Easements.

## SET-OFF AND COUNTERCLAIM.

In ejectment, see Ejectment, § 28.

### II. SUBJECT-MATTER.

§ 29. Under Kirby's Dig. § 6098, a defendant in an action for false representations held not entitled to set up as a counterclaim a claim based on plaintiff wrongfully securing the arrest of defendant on criminal charges.—*Jones v. Lewis* (Ark.) 561.

## SETTLEMENT.

See Account Stated; Compromise and Settlement; Payment.

By assignee for benefit of creditors, see Assignments for Benefit of Creditors, §§ 385-395.

Of bill of exceptions, see Exceptions, Bill of, §§ 40-53.

## SEWERS.

Defects or obstructions, see Municipal Corporations, §§ 834-845.

## SHERIFFS AND CONSTABLES.

See United States Marshals.

### II. COMPENSATION.

§ 29. Acts 1907, p. 328, amending Kirby's Dig. § 4402, is not void as in conflict with Const. art. 7, § 28, declaring that the county court shall have the exclusive original jurisdiction in all matters relating to taxes, disbursement of money, and matters of local concern.—*Cain v. Woodruff County* (Ark.) 768.

§ 29. Acts 1907, p. 328, amending Kirby's Dig. § 4402, allowing the sheriff 75 cents per day for keeping and feeding each prisoner confined in jail, is valid.—*Cain v. Woodruff County* (Ark.) 768.

### III. POWERS, DUTIES, AND LIABILITIES.

§ 77. In the absence of any constitutional limitation, the Legislature has power to define, add to, and vary the duties of a sheriff.—*Cain v. Woodruff County* (Ark.) 768.

§ 90. An officer's liability at common law for failure to levy execution stated, as well as his liability under statute and by practice of

the courts.—*Mayfield Woolen Mills v. Lewis* (Ark.) 558.

§ 90. Under Kirby's Dig. §§ 3246, 3247, an officer cannot arbitrarily refuse to levy execution unless a bond is given, and can only require such bond where property is actually claimed by another, or the circumstances justify an apprehension of litigation.—*Mayfield Woolen Mills v. Lewis* (Ark.) 558.

§ 106. Kirby's Dig. § 3286, imposing a penalty for failure to levy execution, is highly penal, and should not be extended to cases not within its plain meaning.—*Mayfield Woolen Mills v. Lewis* (Ark.) 558.

§ 106. A constable and his sureties held not liable, under Kirby's Dig. § 3286, for failure to sell goods under execution, under the circumstances stated.—*Mayfield Woolen Mills v. Lewis* (Ark.) 558.

#### IV. LIABILITIES ON OFFICIAL BONDS.

§ 157. Property owner's remedy for an unlawful seizure and sale for the payment of taxes is an action on the sheriff's bond.—*Bailey v. Napier* (Ky.) 948.

§ 168. Complaint held to sufficiently allege a cause of action against a constable and his sureties for failure to levy execution, under Kirby's Dig. § 3286, as well as a common-law liability for actual damages caused by his failure to do so.—*Mayfield Woolen Mills v. Lewis* (Ark.) 558.

#### SHIPPING.

See Ferries.

#### VII. CARRIAGE OF GOODS.

Parol evidence to vary contract, see Evidence, § 417.

#### SHOOTING.

See Assault and Battery, § 15.

#### SIGNATURES.

Signature to indictment, see Indictment and Information, § 83.

#### SLANDER.

See Libel and Slander.

#### SPECIAL LAWS.

See Statutes, §§ 66, 74.

#### SPECIFIC PERFORMANCE.

Compelling executor or administrator to specifically perform decedent's contracts, see Executors and Administrators, § 135.

#### I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

§ 10. If a person contracted to adopt children, and also to leave them his property as his heirs, the fact that he had died without adopting them would not preclude them from obtaining specific performance of the other part of the contract to leave them his property; the two obligations being distinct in character.—*Starnes v. Hatcher* (Tenn.) 219.

#### II. CONTRACTS ENFORCEABLE.

§ 86. A contract to leave property to certain persons at the owner's death held specifically enforceable.—*Starnes v. Hatcher* (Tenn.) 219.

#### IV. PROCEEDINGS AND RELIEF.

§ 106. An action to enforce a contract, made by a person since deceased, to convey land, cannot be maintained without making the heirs of decedent parties defendant.—*McQuitty v. White* (Mo.) 730.

§ 114. A bill for specific performance of a contract to adopt children and leave them property construed.—*Starnes v. Hatcher* (Tenn.) 219.

#### SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

#### STALE DEMAND.

See Equity, § 87.

#### STARE DECISIS.

See Courts, §§ 89-97.

#### STATEMENT.

Accompanying assignment of errors, see Appeal and Error, § 742.

By witness inconsistent with testimony, see Witnesses, §§ 379, 392.

Of case or facts for purpose of review, see Appeal and Error, §§ 561, 601; Criminal Law, § 1097.

Of plaintiff's claim, see Pleading, §§ 49, 62.

#### STATES.

Courts, see Courts.

Legislative power, see Constitutional Law, § 62.

Public lands, see Public Lands, §§ 151-173.

#### VI. ACTIONS.

§ 205. When the state is to be bound by proceedings to collect taxes or other debts due it by suits at law or in equity, it must appear by the Attorney General of the state, pursuant to Shannon's Code, § 5756, subsec. 5.—*State v. Enloe* (Tenn.) 223.

#### STATIONS.

Ejection of persons from railroad waiting room, see Carriers, §§ 372, 383, 384.

#### STATUTES.

For statutes relating to particular subjects, see the various specific topics.

Amendment of defects in statutes as exclusively a legislative function, see Constitutional Law, § 70.

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Presumptions as to laws of other states, see Evidence, § 80.

*Provisions relating to particular subjects.*

See Descent and Distribution; Limitation of Actions, §§ 5, 37.

Redemption from tax sale, see Taxation, § 696.

Statute of frauds, see Frauds, Statute of.

#### I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 58. A statute will not be held invalid, in a proceeding involving the validity of a municipal ordinance, merely because the ordinance is not in harmony with the statute.—*Mantel v.*

State (Tex. Cr. App.) 855; *Sue Lung v. Same* (Tex. Cr. App.) 857.

§ 64. In determining whether a statute partly constitutional is so divisible that the valid portion may stand, the test is the sufficiency, for practical working purposes, of the portion remaining after the provisions of the Constitution have been applied.—*R. H. Oliver & Son v. Chicago, R. I. & P. Ry. Co.* (Ark.) 238.

§ 64. Laws 1907, Act No. 193, p. 454, § 1, held so divisible that if void as to interstate business, it could be enforced within the state as to domestic business.—*R. H. Oliver & Son v. Chicago, R. I. & P. Ry. Co.* (Ark.) 238.

§ 64. If a statute imposing a liability for damages caused by fire in the operation of a railroad be void as to persons operating railroads other than railroad companies, or as to fire communicated by other methods than by a locomotive, those provisions may be eliminated, and leave the statute valid as applied to fires caused by a locomotive operated by a railroad.—*St. Louis & S. F. Ry. Co. v. Shore* (Ark.) 515.

§ 64. Even if Fire Marshal Law (Acts 1907, p. 1540, c. 460) § 4, should be held invalid as in conflict with Const. art. 1, § 7, forbidding unreasonable searches and seizures, the other provisions of the act for the investigation and prevention of fires are valid.—*Rhinehart v. State* (Tenn.) 508.

## II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 66. The Legislature may create a fencing district by a special act, and may thereafter change the boundaries of such district.—*Henderson v. Dearing* (Ark.) 1066.

§ 74. Under Const. §§ 60, 171, 180, 181, St. 1909, § 637 (Russell's St. § 4284), relating to discriminatory taxation of foreign insurance companies, held to be unconstitutional.—*Western & Southern Life Ins. Co. v. Commonwealth* (Ky.) 376.

## III. SUBJECTS AND TITLES OF ACTS.

§ 110½. The fire marshal law (Acts 1907, p. 1538, c. 460), entitled "An act to reduce the fire waste" in the state "by providing for the investigation of fires and to provide for the expense of such investigation," contains but one subject, as required by Const. art. 2, § 17.—*Rhinehart v. State* (Tenn.) 508.

## IV. AMENDMENT, REVISION, AND CODIFICATION.

§ 141. Act March 11, 1891 (Acts 1891, p. 66) creating a fencing district, having been amended by Act March 13, 1893 (Acts 1893, p. 91), in the manner provided by the Constitution, by re-enacting and publishing so much as was amended, subsequent amendments of the latter act in a similar manner by Act May 8, 1899 (Acts 1899, p. 302), and Act April 13, 1907 (Acts 1907, p. 407), became amendments of the original act.—*Henderson v. Dearing* (Ark.) 1066.

§ 141. In amending an amended part of an act, it is proper to re-enact and publish at length the amended part as amended, and when this is done all the amendments of the first amending act become amendments of the original act.—*Henderson v. Dearing* (Ark.) 1066.

## V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 158. Repeals by implication held not favored.—*Snead v. State* (Tex. Cr. App.) 983.

## VI. CONSTRUCTION AND OPERATION.

### (A) GENERAL RULES OF CONSTRUCTION.

§ 179. Rev. St. 1899, § 4160 (Ann. St. 1906, p. 2252), held to furnish additional rules for construing statutes which the court could use or not as the case might require.—*State ex rel. Kelly v. Shepperd* (Mo.) 1169.

§ 181. A statute will be construed so as to express the legislative intent.—*James v. United States Fidelity & Guarantee Co.* (Ky.) 406; *Same v. American Surety Co. of New York, Id.*

§ 184. Words used in a statute may be modified, altered, or supplied so as to keep the act from becoming inconsistent with the legislative intent.—*James v. United States Fidelity & Guaranty Co.* (Ky.) 406; *Same v. American Surety Co. of New York, Id.*

§ 188. Where the language of an act is free from ambiguity, and expresses an intelligent and definite meaning, the courts are bound to assume that this meaning was intended.—*Atlantic Coast Line R. Co. v. Richardson* (Tenn.) 490.

§ 189. Where the words used in a statute are plain, clear, and unambiguous, and the language expresses the legislative intent, the statute must be accepted as it is written.—*James v. United States Fidelity & Guarantee Co.* (Ky.) 406; *Same v. American Surety Co. of New York, Id.*

§ 192. The words "passenger train" and "regular passenger train" have no technical meaning in law, and should be construed in their ordinary sense pursuant to Rev. St. 1899, § 4160 (Ann. St. 1906, p. 2252).—*State v. Missouri Pac. Ry. Co.* (Mo.) 1173.

§ 197. The word "and" may be substituted for the word "or" when it is necessary to make a statute express the true legislative intent as gathered from the context, and the circumstances attending its enactment.—*James v. United States Fidelity & Guarantee Co.* (Ky.) 406; *Same v. American Surety Co. of New York, Id.*

§ 206. Statutes should be construed so as to avoid apparent repugnancies, and give effect to every word, clause, and provision thereof.—*Ingle v. Batesville Grocery Co.* (Ark.) 241.

§ 208. Words of doubtful meaning in a statute are to be interpreted by their context and in view of the purposes of the Legislature.—*State v. Missouri Pac. Ry. Co.* (Mo.) 1173.

### (B) PARTICULAR CLASSES OF STATUTES.

Statute authorizing service of process by publication, see Process, § 85.

Strict or liberal construction of statute relating to redemption from tax sale, see Taxation, § 696.



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§ 114. Where plaintiff was injured by a bundle of papers negligently thrown from a passing street car, evidence *held* insufficient to show that the papers were thrown by the conductor, and not by a passenger.—Louisville Ry. Co. v. Holmes (Ky.) 953.

§ 114. Where plaintiff, running along the side of one street car, was struck by a car coming in the opposite direction, *held* the evidence did not show negligence of the motorman of the latter car authorizing recovery.—O'Farrell v. Metropolitan St. Ry. Co. (Mo. App.) 615.

§ 117. In an action against a street railroad for injuries to a pedestrian struck by a car, evidence *held* to justify the submission of the question of defendant's negligence.—Louisville Ry. Co. v. Knocke's Adm'r (Ky.) 271.

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§ 21. One who is liable for the debt of another cannot, as against the principal creditor, assert his right of subrogation until he pays the debt in full.—Jones v. Harris (Ark.) 1077.

§ 21. The maker of a note *held* not entitled to be subrogated to the rights of the payee and another as to collaterals without first paying the note.—Plunkett v. State Nat. Bank (Ark.) 1079.

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§ 25. The power to fix the rate of taxation is in the General Assembly.—James v. United States Fidelity & Guarantee Co. (Ky.) 406; Same v. American Surety Co. of New York, Id.

§ 28. The Legislature cannot delegate its taxing power.—James v. United States Fidelity & Guarantee Co. (Ky.) 406; Same v. American Surety Co. of New York, Id.

§ 28. Ky. St. 1909, § 4080 (Russell's St. § 6053), *held* not to provide alternative methods for assessing franchises of foreign corporations, the word "and" being read into the statute in the place of the word "or" to effectuate the legislative intent; and hence the act is not unconstitutional as a delegation of the taxing power.—James v. United States Fidelity & Guarantee Co. (Ky.) 406; Same v. American Surety Co. of New York, Id.

**II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.**

§ 40. The assessment of the franchise of a foreign corporation for 1905 made under St. 1903, § 4080 (Russell's St. § 6053), as amended by the act of March 15, 1906 (Laws 1906,

p. 88, c. 22), *held* illegal.—*James v. American Surety Co. of New York* (Ky.) 411.

§ 40. Fire Marshal Law (Acts 1907, p. 1540, c. 460) § 6, *held* not in conflict with Const. art. 2, § 2, requiring all property to be taxed equally and uniformly according to its value.—*Rhinehart v. State* (Tenn.) 508.

§ 42. While Const. § 171, requires all property to be taxed, and the General Assembly is prohibited from exempting from taxation any property not specially exempted by section 170, every element of the property need not be taxed, the manner of classifying property for taxation being left to the Legislature, and, when the thing itself is taxed as a whole, each of its constituent elements is also taxed.—*Commonwealth v. Walsh's Trustee* (Ky.) 398.

§ 42. It is within the legislative discretion either to tax the constituent elements of the property as by taxing separately the corporate capital and corporate shares, or the separate estate of the life tenant and remainderman, etc., or to tax at its full value the thing which represents those various elements of property.—*Commonwealth v. Walsh's Trustee* (Ky.) 398.

§ 47. Where, after the consolidation of a number of leased roads under the name of defendant railroad, which was owned by a Virginia corporation, all the intangible property, including its franchise, of defendant corporation was assessed against the Virginia corporation, defendant could not again be assessed on its intangible property.—*Commonwealth v. Chesapeake & O. Ry. Co. in Kentucky* (Ky.) 287.

§ 47. The scheme of taxation adopted in this state seeks to avoid double taxation in any form; it being recognized as oppressive and vicious.—*Commonwealth v. Walsh's Trustee* (Ky.) 398.

§ 47. It would not be double taxation to tax a shareholder upon the shares in addition to taxing the corporation upon its capital.—*Commonwealth v. Walsh's Trustee* (Ky.) 398.

### III. LIABILITY OF PERSONS AND PROPERTY.

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#### (B) CORPORATIONS AND CORPORATE STOCK AND PROPERTY.

Power to tax insurance companies for purpose of raising funds for expenses in investigating origin of fires, see *Fires*, § 9.

§ 117. A tax assessed against a corporate franchise under St. 1909, § 4077 (Russell's St. § 6050), is purely a property tax, being a tax upon all intangible property of the corporation, including its capital.—*Commonwealth v. Walsh's Trustee* (Ky.) 398.

§ 117. The statutes on revenue and taxation deal with two classes of corporations, one of which exercised some special privilege not enjoyed by natural persons, upon which St. 1909, § 4077 (Russell's St. § 6050), imposes a franchise tax in addition to other taxes imposed by law, the other class being the ordinary commercial corporations which under section 4085 (Russell's St. § 6058) does not pay a franchise tax.—*Commonwealth v. Walsh's Trustee* (Ky.) 398.

§ 122. Under St. 1909, § 4088 (Russell's St. § 6061), shares of capital stock of a tele-

graph corporation paying taxes upon its franchise and all its tangible property situate in this state *held* not subject to taxation.—*Commonwealth v. Walsh's Trustee* (Ky.) 398.

§ 166. Under the constitutional provision requiring all property to be taxed, what is property as to a domestic corporation is property as to a foreign corporation.—*Commonwealth v. Walsh's Trustee* (Ky.) 398.

#### (D) EXEMPTIONS.

§ 247. Under Const. art. 11, § 9, art. 7, § 6, and Acts 1905, p. 72, c. 52, standing timber on county school lands *held* exempt from taxation so long as it is owned by the county, but not exempt after it is sold, though not severed.—*Montgomery v. Peach River Lumber Co.* (Tex. Civ. App.) 1061.

### IV. PLACE OF TAXATION.

§ 253. Rules for construction of statutes in Rev. St. 1899, § 4160 (Ann. St. 1906, p. 2252), relating to the meaning of "residence," *held* not applicable to chapter 149 (pages 4198-4322), relating to taxation.—*State ex rel. Kelly v. Shepperd* (Mo.) 1169.

§ 254. Place of a person's residence stated within Rev. St. 1899, c. 149 (Ann. St. 1906, pp. 4198-4322), providing that all personal property shall be assessed in the county and district where the owners reside.—*State ex rel. Kelly v. Shepperd* (Mo.) 1169.

§ 260. Personal property is taxable at the owner's domicile and in the school district in which he resides, and, if a person is taxed in the wrong district or county, the tax is illegal, and its collection cannot be enforced.—*State ex rel. Kelly v. Shepperd* (Mo.) 1169.

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#### (D) MODE OF ASSESSMENT OF CORPORATE STOCK, PROPERTY, OR RECEIPTS.

§ 365. The act of March 15, 1906 (Laws 1906, p. 88, c. 22), amending St. 1909, § 4080 (Russell's St. § 6053), by changing the method of assessing the franchises of foreign corporations, is prospective only in its operation.—*James v. American Surety Co. of New York* (Ky.) 411.

§ 397. The correct method of fixing the valuation of the franchises of foreign corporations under Ky. St. 1909, § 4080 (Russell's St. § 6053), determined.—*James v. United States Fidelity & Guarantee Co. (Ky.)* 406; Same *v. American Surety Co. of New York, Id.*

§ 397. The correct method of fixing the valuation of the franchises of a foreign corporation under St. 1909, § 4080 (Russell's St. § 6053), determined.—*James v. American Surety Co. of New York* (Ky.) 411.

#### (E) ASSESSMENT ROLLS OR BOOKS.

§ 437. Certain property *held* to have been included in an assessment.—*Commonwealth v. Chesapeake & O. Ry. Co. in Kentucky* (Ky.) 287.

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§ 543. Where, in an action against the members of the fiscal court and the county treasurer to recover a tax paid by plaintiff under protest, it appeared that the money was in the hands of the county treasurer, a judgment against him was proper, though a judgment against the county and the members of the fiscal court was improper.—Fiscal Court of Owen County v. F. & A. Cox Co. (Ky.) 296.

§ 543. No action can be maintained by a taxpayer against a county for taxes wrongfully collected, whether the taxes have been paid out by the county or not, though, where the taxes are in the hands of the collecting or disbursing officers, a direct action may be brought against them.—Fiscal Court of Owen County v. F. & A. Cox Co. (Ky.) 296.

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§ 561. Where a sheriff sells property for taxes and does not collect the purchase price, he is responsible therefor to the state and county.—Bailey v. Napier (Ky.) 948.

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§ 573½. A personal claim for taxes and foreclosure of lien on land *held* maintainable.—Central Hotel Co. v. State (Tex. Civ. App.) 880.

§ 593. In an action by the state to enforce a personal liability for taxes, penalties, and interest, and costs for failure to pay the same, the burden is on plaintiff to show that defendant owned the property at the time of the assessment, or when the same should have been legally assessed.—Central Hotel Co. v. State (Tex. Civ. App.) 880.

### (C) REMEDIES FOR WRONGFUL ENFORCEMENT.

§ 608. Injunction lies to restrain the collection of an illegal tax.—Fiscal Court of Owen County v. F. & A. Cox Co. (Ky.) 296.

§ 611. In a suit to enjoin the collection of taxes on timber standing on county school lands, on the ground that it was exempt from taxation, allegations of the petition *held* to show that the title to the timber was vested in plaintiff.—Montgomery v. Peach River Lumber Co. (Tex. Civ. App.) 1061.

§ 611. A finding merely that plaintiff had acquired through the county, by mesne conveyances, the right to cut and remove timber on county school lands did not show that title to the timber, while still on the land, was in plaintiff.—Montgomery v. Peach River Lumber Co. (Tex. Civ. App.) 1061.

§ 611. In a suit to enjoin the collection of taxes on timber standing on county school lands, petition *held* to show that plaintiff's theory was that the timber could not be taxed separately so long as it was not severed, irrespective of whether the county owned it, and hence was bad on general demurrer.—Montgomery v. Peach River Lumber Co. (Tex. Civ. App.) 1061.

## IX. SALE OF LAND FOR NONPAYMENT OF TAX.

§ 634. That an affidavit of nonresidence for an order for publication of process in a tax

proceeding was mistakenly filed with a justice of the peace before being filed in the circuit court did not affect its validity.—Himmelberger-Harrison Lumber Co. v. Keener (Mo.) 42.

§ 642. Under Sayles' Ann. Civ. St. 1897, art. 5232o, a notice in a tax suit for taxes due *held* fatally defective for failing to describe the land, and the judgment based thereon is void.—Harris v. Hill (Tex. Civ. App.) 907.

§ 647. A judgment in an action by a city on tax bills *held* erroneous because of dissimilarity between the description of the land in the petition and judgment.—Turner v. City of Middleboro (Ky.) 422.

§ 648. Where the judgment in a tax suit does not show that the court determined that due service had been made on the owners of the land, and the record shows a fatally defective notice, the judgment may be collaterally attacked.—Harris v. Hill (Tex. Civ. App.) 907.

§ 683. Where a sheriff, to collect delinquent taxes, levies on property which sells for more than the amount due, he must return the balance to the owner.—Bailey v. Napier (Ky.) 948.

§ 691. Where a sheriff seized live stock for nonpayment of taxes, he is entitled to reimbursement for the reasonable actual cost of keeping and caring for the stock.—Bailey v. Napier (Ky.) 948.

## X. REDEMPTION FROM TAX SALE.

§ 696. Statutes providing for the redemption of land from sale for taxes should be liberally construed.—Jackson v. Maddox (Tex. Civ. App.) 185.

§ 697. The widow and daughter of a deceased landowner holding possession of the premises by tenant have such an interest in the land as entitles them, under Sayles' Ann. Civ. St. 1897, art. 5232n, to redeem the land from sale for taxes within two years.—Jackson v. Maddox (Tex. Civ. App.) 185.

## XI. TAX TITLES.

### (A) TITLE AND RIGHTS OF PURCHASER AT TAX SALE.

§ 734. That a sheriff sold more property for nonpayment of taxes than was necessary, or failed to collect the price from the purchaser, did not affect the purchaser's title acquired at the sale.—Bailey v. Napier (Ky.) 948.

### (B) TAX DEEDS.

§ 781. A purchaser at a tax sale *held* to take only the title of the real owner, under Const. art. 8, § 13, and Rev. St. 1895, arts. 5232b, 5232h; and, the property being *held* adversely by third persons for the statutory period, his grantee was barred from recovering possession.—Patton v. Minor (Tex. Civ. App.) 920.

### (C) ACTIONS TO CONFIRM OR TRY TITLE.

§ 810. Effect of the statute requiring the original owner of land, in order to defeat a tax title, to show defects in the assessment, etc., stated.—Hamilton v. Steele (Ky.) 378; Brown v. Same, Id.; Crouch v. Same, Id.

### (D) RIGHTS AND REMEDIES OF PURCHASER OF INVALID TITLE.

§ 825. Rights of a tax sale purchaser, on his title being declared invalid, stated.—Hamilton v. Steele (Ky.) 378; Brown v. Same, Id.; Crouch v. Same, Id.

§ 826. Where the grantee of a purchaser of land at a tax sale was barred from recovering possession of the land by the adverse possession of other persons, *held* that he was entitled to be

subrogated to the state's lien upon the land for the taxes paid.—*Patton v. Minor* (Tex. Civ. App.) 920.

## TAXATION OF COSTS.

See Costs, § 214.

## TELEGRAPHS AND TELEPHONES.

### I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

Malicious removal of telephone poles, see Malicious Mischief, §§ 4, 8, 9.

### II. REGULATION AND OPERATION.

Right of action for death caused by failure to secure a physician by reason of telephone company not furnishing service, see Death, § 15.

§ 37. The person to whom a telegram was sent living several miles out of town, and nothing being said about extra charges for messenger services, *held* there was no negligence in failure to deliver, where the message was deposited in the post office.—*King v. Western Union Telegraph Co.* (Ark.) 521.

§ 66. Evidence *held* to sustain a verdict for plaintiff in a suit against a telegraph company for failure to deliver a death message.—*Western Union Telegraph Co. v. Rhine* (Ark.) 1069.

§ 71. \$750 recovery against a telegraph company for failure to deliver a death message *held* excessive by \$350.—*Western Union Telegraph Co. v. Rhine* (Ark.) 1069.

§ 73. An instruction that a telephone company was as a matter of law required to deliver a message on the day it was received at the point of destination, though after office hours, *held* erroneous.—*Western Union Telegraph Co. v. Gillis* (Ark.) 749.

## TENANCY IN COMMON.

### II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF CO-TENANTS.

§ 15. Title by adverse possession cannot be based on the possession of one of several joint tenants or tenants in common, as against the others, where they have no notice of an adverse claim.—*Hamilton v. Steele* (Ky.) 378; *Brown v. Same*, *Id.*; *Crouch v. Same*, *Id.*

### III. RIGHTS AND LIABILITIES OF CO-TENANTS AS TO THIRD PERSONS.

§ 43. Where one tenant in common without authority sells all the timber on the land, his co-tenant is entitled to recover from him and from purchasers with notice his share of the value of the timber taken.—*Collier v. Wm. Cameron & Co.* (Tex. Civ. App.) 915.

## TERRITORIES.

§ 11. The federal employer's liability act (Act Cong. June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]), *held* constitutional in its application to the territories, though unconstitutional in its application to interstate commerce.—*Gutierrez v. El Paso & N. E. R. Co.* (Tex.) 426.

## TESTAMENT.

See Wills.

## TESTAMENTARY CAPACITY.

See Wills, §§ 31, 55.

## TESTAMENTARY POWERS.

Construction and execution, see Powers, §§ 23, 43.

Creation, see Wills, § 693.

## THEATERS AND SHOWS.

Opening theater on Sunday, charging former convictions, see Indictment and Information, § 114.

Opening theater on Sunday, successive convictions, see Criminal Law, § 1202.

## THEFT.

See Larceny.

## THEORY.

Nature and theory of cause on appeal, see Appeal and Error, § 171.

## THREATS.

By parties to homicide, see Homicide, §§ 116, 300.

## TIMBER.

See Logs and Logging.

## TIME.

*For particular acts in or incidental to judicial proceedings.*

Affidavit for publication of process, see Process, § 96.

Filing bill of exceptions, see Exceptions, Bill of, § 40.

Filing motion to dissolve injunction, see Injunction, § 167.

Filing record on appeal or writ of error, see Criminal Law, § 1106.

Filing statements of facts in criminal prosecutions, see Criminal Law, § 1099.

For taking appeal or suing out writ of error, see Appeal and Error, § 345.

Granting or refusing certiorari, see Certiorari, § 41.

To set aside judgment, see Judgment, § 386.

*For particular acts not judicial.*

Delivery of deed, see Deeds, § 194.

Payment of interest, see Interest, §§ 56-60.

§ 9. Notice of a local option election *held* sufficient.—*State ex rel. Gunn v. Cordell* (Mo. App.) 655.

## TITLE.

Color of title, see Adverse Possession.

Of statutes, see Statutes, § 1104.

Removal of cloud, see Quieting Title.

Slander of title, see Libel and Slander, §§ 132, 139.

Sufficiency of title of vendor of land, see Vendor and Purchaser, § 140.

Tax titles, see Taxation, §§ 734-826.

Title of lessor, see Landlord and Tenant, § 61.

To deposits in bank, see Banks and Banking, § 129.

To land held adversely, see Adverse Possession, § 104.

To mine or mineral, see Mines and Minerals, §§ 49, 50.

## TORTS.

Accrual of action for, see Limitation of Actions, § 55.

Causing death, see Death, §§ 7-104.

Entry of judgment in action of, see Judgment, § 239.

*Liabilities of particular classes of persons.*

See Municipal Corporations, §§ 736-845.

Agents, see Principal and Agent, § 156.

Charitable institutions, *see* Charities, § 45.  
 Employes, *see* Master and Servant, §§ 815-332.

#### Particular torts.

*See* Assault and Battery, §§ 15, 35; Conspiracy, §§ 5, 18; False Imprisonment, §§ 7-35; Forcible Entry and Detainer, §§ 9, 29; Fraud; Libel and Slander; Malicious Prosecution; Negligence; Nuisance; Trespass; Trover and Conversion.

#### Remedies for torts.

*See* Trespass, §§ 20, 44; Trover and Conversion, §§ 13-40.

Measure of damages, *see* Damages, §§ 95, 112.

§ 8. Public officers, charged with the enforcement of the criminal laws, and having in their custody individuals charged with crime, may use photographs for the purpose of identifying the individuals accused.—*Mabry v. Kettering* (Ark.) 746.

§ 8. An order reinstating a temporary injunction restraining defendants from using the photographs of plaintiffs, confined in jail on criminal charges, will be dissolved on proof that defendants proposed to use the photographs to identify plaintiffs, charged with criminal offenses.—*Mabry v. Kettering* (Ark.) 746.

§ 22. While several may be guilty of several and distinct negligent acts, yet, if they concurrently produce an injury, they are all liable jointly and severally, and comparative degree in culpability will not affect the liability of either.—*Probst v. Hinesley* (Ky.) 389; *Hinesley v. Beattie*, *Id.*

### TOWNS.

*See* Counties; Municipal Corporations; Schools and School Districts, §§ 53-81.

### TRADE-MARKS AND TRADE-NAMES.

#### III. REGISTRATION, REGULATION, AND OFFENSES.

§ 51. Evidence *held* to sustain a conviction of unlawfully using a trade union label, in violation of Rev. St. 1899, § 10,367 (Ann. St. 1906, p. 4683).—*State v. St. Clair* (Mo. App.) 648.

#### IV. INFRINGEMENT AND UNFAIR COMPETITION.

##### (C) ACTIONS.

§ 91. Several bottlers of beverages *held* entitled to sue jointly to prevent unfair competition.—*Breimeyer v. Star Bottling Co.* (Mo. App.) 119.

§ 93. Evidence in a suit by bottlers to prevent another from using their bottles in marketing a product *held* to sustain findings for plaintiff.—*Breimeyer v. Star Bottling Co.* (Mo. App.) 119.

### TRANSCRIPTS.

Of record for purpose of review, *see* Appeal and Error, §§ 597-609; Criminal Law, §§ 1087-1128.

### TRANSFERS.

Of causes for trial, *see* Trial, § 11.

### TREES.

*See* Logs and Logging.

### TRESPASS.

As justification for assault on trespasser, *see* Assault and Battery, § 15.  
 Ejection of trespasser, *see* Carriers, §§ 372-384.

Injuries to trespassers, *see* Railroads, §§ 274, 282.

Restraining trespass, *see* Injunction, § 48.

To the person, *see* Assault and Battery, §§ 15, 35; False Imprisonment.

### II. ACTIONS.

#### (A) RIGHT OF ACTION AND DEFENSES.

§ 20. Trespass can be maintained on constructive possession.—*Hobart-Lee Tie Co. v. Stone* (Mo. App.) 604.

#### (C) EVIDENCE.

§ 44. Where plaintiffs owned the title to certain land not in the actual occupancy of any one, plaintiffs had sufficient possession to entitle them to sue for trespass, consisting of cutting timber therefrom.—*Stone v. Perkins* (Mo.) 717.

### TRESPASS TO TRY TITLE.

*See* Ejectment.

#### II. PROCEEDINGS.

§ 25. In trespass to try title only such defenses of limitation as pertain to such action are applicable.—*Poltevent v. Scarborough* (Tex. Civ. App.) 443.

§ 39. Evidence of payment of taxes *held* inadmissible under the issues in an action of trespass to try title.—*Beall v. Chatham* (Tex. Civ. App.) 492.

§ 39. Evidence, in an action of trespass to try title, *held* inadmissible.—*Beall v. Chatham* (Tex. Civ. App.) 492.

§ 44. Evidence, in trespass to try title, *held* to warrant the court in submitting to the jury the question whether one to whom the owner of the property had conveyed it had subsequently reconveyed the property.—*McCollum v. Buckner's Orphans' Home* (Tex. Civ. App.) 886.

§ 45. Instruction, in trespass to try title, *held* not erroneous.—*McCollum v. Buckner's Orphans' Home* (Tex. Civ. App.) 886.

### TRIAL.

*See* New Trial; Reference; Witnesses.

Disputed claims against estate of decedent, *see* Executors and Administrators, § 256.

Review as dependent on mode of trial in lower court, *see* Appeal and Error, § 848.

Trespass to try title to real property, *see* Trespass to Try Title.

#### Proceedings incident to trials.

*See* Continuance.

Entry of judgment after trial of issues, *see* Judgment, §§ 203-250.

Place of trial, *see* Venue, § 36.

Right to trial by jury, *see* Jury, § 12.

Summoning and impaneling jury, *see* Jury, §§ 58-67.

*Trial of actions by or against particular classes of persons.*

*See* Adjoining Landowners, § 7; Partnerships, § 218; Principal and Agent, § 194; Street Railroads, § 117; United States Marshals, § 34.

*Trial of particular civil actions or proceedings.*

*See* Fraud, § 65; Libel and Slander, § 123; Malicious Prosecution, § 71; Negligence, §§ 136, 138; Quietting Title, § 47; Trespass to Try Title, § 44.

Actions for causing death, *see* Death, §§ 102½-104.

For breach of contract of sale, *see* Sales, § 364.

For breach of contract to convey land, *see* Vendor and Purchaser, § 331.

For breach of warranty, *see* Sales, § 446.

For damages to grazing lands by animals, see Animals, § 100.  
 For death caused by operation of railroad, see Railroads, § 350.  
 For failure of railroad to construct drain, see Railroads, § 114.  
 For injuries caused by obstructions in street, see Municipal Corporations, § 821.  
 For injuries caused by servant, see Master and Servant, § 332.  
 For injuries from blasting on adjoining land, see Adjoining Landowners, § 7.  
 For injuries from defective bridges, see Bridges, § 46.  
 For injuries from operation of street railroads, see Street Railroads, § 117.  
 For injuries to passenger, see Carriers, §§ 320, 321.  
 For injuries to persons on or near railroad tracks, see Railroads, §§ 400-401.  
 For injuries to servant, see Master and Servant, §§ 285-296.  
 For loss of or injury to shipment, see Carriers, § 136.  
 For loss of or injury to shipment of live stock, see Carriers, § 230.  
 For negligence of telephone company, see Telegraphs and Telephones, § 73.  
 For property taken in exercise of power of eminent domain, see Eminent Domain, § 307.  
 For rent, see Landlord and Tenant, § 233.  
 On bill or note, see Bills and Notes, §§ 537, 538.  
 On insurance policy, see Insurance, § 668.  
 On note given for corporate stock, see Corporations, § 169.  
 Probate proceedings, see Wills, § 324.  
 Suits to set aside fraudulent conveyances, see Fraudulent Conveyances, § 308.  
 Suits to try tax titles, see Taxation, § 810.

#### *Trial of criminal prosecutions.*

See Boundaries, § 40; Burglary, § 46; Criminal Law, §§ 634-681; Homicide, §§ 268-309; Larceny, § 77; Rape, § 59.  
 Criminal prosecutions, see Criminal Law, §§ 575-614.

## II. DOCKETS, LISTS, AND CALENDARS.

§ 11. An action *held* an action at law rendering it proper to refuse to transfer it to the chancery court.—Jones v. Lewis (Ark.) 561.

## IV. RECEPTION OF EVIDENCE.

### (A) INTRODUCTION, OFFER, AND ADMISSION OF EVIDENCE IN GENERAL.

§ 40. If it is necessary to take the deposition of a large number of witnesses to prove payments made by them, it would be admissible for a party offering their evidence to have a brief summary of the essential facts stated by them made up in such form that the court or jury might understand it without the necessity of hearing all that the witnesses had to say.—Fidelity & Deposit Co. of Maryland v. Champion Ice Mfg. & Cold Storage Co. (Ky.) 393.

### (B) ORDER OF PROOF, REBUTTAL, AND REOPENING CASE.

§ 67. The trial court *held* not to have abused its discretion in permitting defendant to re-open his case in chief.—Wolfert v. Hochbaum (Ark.) 525; Modern Laundry v. Same, Id.

§ 67. Where defendant rested, and plaintiff offered his rebuttal testimony, defendant could not thereafter open his case in chief without the court's permission.—Wolfert v. Hochbaum (Ark.) 525; Modern Laundry v. Same, Id.

§ 68. In an action for injuries, the court did not abuse its discretion in permitting plaintiff to be recalled, after defendant's case was closed, to

testify as to how much his time was worth.—St. Louis, I. M. & S. Ry. Co. v. Grimsley (Ark.) 1064.

## (C) OBJECTIONS, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

§ 75. Where evidence that is inadmissible is objected to, but the objection is subsequently withdrawn, the party withdrawing the objection cannot afterwards insist it was error to admit the evidence.—Ham v. St. Louis & S. F. R. Co. (Mo. App.) 108.

§ 85. Where objections were made to the whole of declarations, a portion of which were properly admitted, there was no error in overruling them.—Hudson v. Slate (Tex. Civ. App.) 469.

§ 85. On single objection to evidence admissible in part there is no error in admitting it all.—Stubbs v. Marshall (Tex. Civ. App.) 1030.

## V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 122. In a servant's injury action, *held* prejudicial error for plaintiff's counsel to state in argument that defendant could have required an examination of plaintiff by physicians.—Missouri, K. & T. Ry. Co. of Texas v. Rogers (Tex. Civ. App.) 939.

§ 125. The argument of counsel for a negro suing for a personal injury made to a jury of white men *held* not objectionable as appealing to their prejudice.—Texas & N. O. R. Co. v. McCoy (Tex. Civ. App.) 446.

§ 133. Argument of counsel *held* not so inflammatory as to be ground for reversal, where the jury were pointedly charged not to consider it.—Swift & Co. v. Martine (Tex. Civ. App.) 209.

§ 133. The error, if any, in the argument of the counsel for plaintiff in a personal injury action *held* harmless in view of the court's charge.—Texas & N. O. R. Co. v. McCoy (Tex. Civ. App.) 446.

## VI. TAKING CASE OR QUESTION FROM JURY.

### (A) QUESTIONS OF LAW OR OF FACT IN GENERAL.

*As to particular facts, issues or subjects.*

Assumption of risk by servant, see Master and Servant, § 288.

Contributory negligence of servant, see Master and Servant, § 289.

Execution of deed, see Deeds, § 119.

Limitation of liability of carrier, see Carriers, § 166.

*In particular civil actions or proceedings.*

See Death, § 103; Libel and Slander, § 123; Malicious Prosecution, § 71; Negligence, § 136; Trespass to Try Title, § 44.

For injuries from defective bridges, see Bridges, § 46.

For injuries from operation of street railroad, see Street Railroads, § 117.

For injuries to passenger, see Carriers, §§ 320, 347.

For injuries to persons on or near railroad tracks, see Railroads, § 400.

For injuries to servant, see Master and Servant, §§ 285-289.

For loss of or injury to shipment, see Carriers, § 136.

On bill or note, see Bills and Notes, § 537.

§ 136. It is for the jury to settle issues of facts.—Winfrey v. Ragan (Mo. App.) 83.

§ 139. Questions as to the weight of evidence are for the jury.—Hall v. Cook (Tex. Civ. App.) 449.



§ 139. The trial court is not justified in taking from the jury a question of fact, unless the evidence is such that there is no issue to be determined.—Missouri, K. & T. Ry. Co. of Texas v. Williams (Tex. Civ. App.) 1043.

§ 140. The credibility of witnesses and inferences to be drawn from the facts are for the jury.—Texas Midland R. Co. v. Geraldton (Tex. Civ. App.) 1004.

§ 142. The credibility of witnesses and inferences to be drawn from the facts are for the jury.—Texas Midland R. Co. v. Geraldton (Tex. Civ. App.) 1004.

§ 143. Though the great preponderance of the evidence is in favor of the contentions of one of the parties, the adverse party who presents evidence to sustain the issue in his favor is entitled to the submission of the issues to the jury.—Jones v. Lewis (Ark.) 531.

§ 143. Where the evidence was conflicting as to whether defendant's possession of a coal mine which he claimed by limitation was continuous, the question was for the jury.—Gordon v. Park (Mo.) 1163.

§ 143. Where the evidence conflicts on questions of fact, their determination is for the jury.—Sims v. Hall (Mo. App.) 103.

## VII. INSTRUCTIONS TO JURY.

Harmless error in giving or refusing, see Appeal and Error, §§ 1064-1068; Criminal Law, § 1172.

Review as dependent on assignment of errors, see Appeal and Error, §§ 730, 739.

Review as dependent on prejudicial nature of error, see Appeal and Error, § 882.

Review as dependent on presentation in lower court of grounds of review, see Appeal and Error, § 216.

Review as dependent on record on appeal or writ of error, see Appeal and Error, § 699.

*As to particular issues or subjects.*

Assumption of risk, see Master and Servant, § 295.

Contributory negligence of servant, see Master and Servant, § 296.

*In particular civil actions or proceedings.*

See Death, § 104; Negligence, § 138.

For ejection of passenger, see Carriers, § 384.

For injuries to passenger, see Carriers, § 321.

For injuries to persons on or near railroad tracks, see Railroads, § 401.

For injuries to servant, see Master and Servant, §§ 291-296.

For negligence of telephone company, see Telegraphs and Telephones, § 73.

On bill or note, see Bills and Notes, § 538.

## (A) PROVINCE OF COURT AND JURY IN GENERAL.

§ 191. In an action for injuries to a servant, a requested charge, assuming that the foreman's act was not negligent, *held* erroneous.—International & G. N. R. Co. v. Garcia (Tex. Civ. App.) 206.

§ 191. In an action for injuries to a shipment of live stock, an instruction *held* erroneous as assuming a fact.—Missouri, K. & T. Ry. Co. of Texas v. Light (Tex. Civ. App.) 1058.

§ 192. It is not error for an instruction to assume existence of a fact shown by all the evidence.—Phelps v. Conqueror Zinc & Lead Co. (Mo.) 705.

§ 192. The court, in its instructions, may assume matters shown by uncontradicted evidence.—Missouri, K. & T. Ry. Co. of Texas v. Rogers (Tex. Civ. App.) 939.

§ 194. Instructions on contributory negligence so written as to invade the province of

the jury are improper.—Aluminum Co. of North America v. Ramsey (Ark.) 568.

§ 194. It is improper to charge that certain facts constitute negligence *per se*, unless they are declared by law to be negligence or induce an inference of negligence in all reasonable minds.—Aluminum Co. of North America v. Ramsey (Ark.) 568.

§ 194. In a passenger's injury action, an instruction as to the amount of damages *held* not erroneous as an instruction that the evidence warranted a verdict for any sum up to the amount named.—Partello v. Missouri Pac. Ry. Co. (Mo.) 1138.

§ 194. In an action for damages to land, a charge *held* not on the weight of evidence.—Tippett v. Corder (Tex. Civ. App.) 186.

## (B) NECESSITY AND SUBJECT-MATTER.

§ 202. Error in refusing defendant's request to submit an issue to the jury is available, though a peremptory instruction might have been awarded for defendant.—Lantry-Sharpe Contracting Co. v. McCracken (Tex. Civ. App.) 453.

§ 202. A party is entitled, when he requests it by a correct instruction, to have the facts establishing his cause of action or ground of defense and the law applicable thereto affirmatively stated by the court to the jury.—Lyon v. Bedgood (Tex. Civ. App.) 897.

§ 203. In view of an instruction given, eliminating all issues, save one, *held*, other instructions were unnecessary.—J. I. Case Threshing Mach. Co. v. Barnes (Ky.) 418.

§ 203. The court need not state the entire pleadings in the instructions.—International & G. N. R. Co. v. Garcia (Tex. Civ. App.) 206.

## (C) FORM, REQUISITES, AND SUFFICIENCY.

§ 229. It is error to repeat an issue in several instructions so as to give it undue prominence.—Stringfellow v. Braselton (Tex. Civ. App.) 204.

§ 229. Instructions, each presenting facts to some extent different from the others, are not subject to objection as constituting unnecessary repetition.—Central City Loan & Investment Co. v. Vincent (Tex. Civ. App.) 912.

## (D) APPLICABILITY TO PLEADINGS AND EVIDENCE.

§ 250. In an action against a contractor for breach of his contract to construct a building, an instruction *held* not objectionable as an abstraction.—Franks v. Harkness (Tex. Civ. App.) 913.

§ 251. In an action for the price of goods sold, an instruction *held* properly refused as not warranted by the issues and misleading.—American Standard Jewelry Co. v. R. J. Hill & Son (Ark.) 781.

§ 251. In an action by a bank against a person on his orders upon which a firm had been allowed to overdraw its account, where defendant did not plead payment of the orders sued on, a modification of charges permitting defendant's recovery if plaintiff had accepted from the firm its note in full satisfaction of defendant's liability would be improper.—People's Bank v. Stewart (Mo. App.) 99.

§ 252. Giving an instruction authorizing a recovery if there was an injury from a certain cause, when there was no evidence thereof, *held* error.—St. Louis, I. M. & S. Ry. Co. v. Furlow (Ark.) 517.

§ 252. In an action for the purchase price of jewelry sold under a severable contract, an instruction *held* properly refused as not based on

the evidence.—*American Standard Jewelry Co. v. R. J. Hill & Son (Ark.)* 781.

§ 252. In an action for injuries to a passenger, a refusal to give an instruction *held* not error.—*Arkansas Midland R. Co. v. Rambo (Ark.)* 784.

§ 252. Giving of an abstract instruction *held* error.—*Ayer & Lord Tie Co. v. Young (Ark.)* 1080.

§ 252. In a suit for killing dogs, *held*, that there was no error in striking out of an instruction a part not sustained by the evidence.—*Sims v. Hall (Mo. App.)* 103.

§ 252. An instruction submitting an issue not raised by the evidence was properly refused.—*International & G. N. R. Co. v. Garcia (Tex. Civ. App.)* 206.

§ 252. A charge on an issue not made by the evidence is properly refused.—*Texas & N. O. R. Co. v. McCoy (Tex. Civ. App.)* 446.

§ 252. In an action against a carrier for negligent delay in a shipment of cattle, an instruction relating to the damages suffered by the cattle which on another railroad *held* properly refused under the evidence.—*Missouri, K. & T. Ry. Co. of Texas v. Pettit (Tex. Civ. App.)* 894.

§ 252. An instruction in an action against a railroad company for injury to a child on its track *held* error.—*Texas & N. O. R. Co. v. Brouillette (Tex. Civ. App.)* 1014.

§ 253. An instruction, in an action against a telephone company for injuries to one coming in contact with a broken wire heavily charged with electricity, *held* erroneous as withdrawing from the jury the company's evidence of freedom from negligence.—*Southwestern Telegraph & Telephone Co. v. Bruce (Ark.)* 564.

§ 253. A requested charge which singles out one separate issue, and asks a finding thereon, while the cause of action is based on other issues alleged and proved, is properly refused.—*Missouri, K. & T. Ry. Co. of Texas v. Pettit (Tex. Civ. App.)* 894.

§ 253. An instruction in an action for injuries to a railway employé *held* properly refused because ignoring issues.—*Missouri, K. & T. Ry. Co. of Texas v. Rogers (Tex. Civ. App.)* 914.

§ 253. In a servant's injury action, a requested instruction *held* not objectionable as ignoring certain evidence.—*Missouri, K. & T. Ry. Co. of Texas v. Rogers (Tex. Civ. App.)* 939.

§ 253. An instruction is properly refused where it is misleading in ignoring a material fact involved.—*Missouri, K. & T. Ry. Co. of Texas v. Williams (Tex. Civ. App.)* 1043.

#### (E) REQUESTS OR PRAYERS.

§ 255. It is incumbent on a defendant desiring to have the discretion of the jury controlled as to the measure of damages to ask for an instruction to that effect.—*Potter v. St. Louis & S. F. R. Co. (Mo. App.)* 593.

§ 256. In an action for injuries to a pedestrian, struck by defendant's street car, an instruction defining ordinary care *held* sufficient, in the absence of a request for further instructions.—*Louisville Ry. Co. v. Knocke's Adm'r (Ky.)* 271.

§ 256. In an action for death by the widow and minor children of decedent, an instruction authorizing recovery of such sum as would compensate for the "pecuniary" loss sustained by decedent's death *held* not affirmatively erroneous.—*Houston & T. C. R. Co. v. Davenport (Tex.)* 790.

§ 256. The omission from an instruction of a material part of defendant's pleadings is not

error, in absence of a request.—*International & G. N. R. Co. v. Garcia (Tex. Civ. App.)* 206.

§ 256. A party complaining of an instruction correct as far as it goes, but not as full as might be desired, must present a special charge incorporating his view of the law on the subject.—*Gray v. Phillips (Tex. Civ. App.)* 870.

§ 256. One desiring a more detailed instruction than that given must request it.—*Franks v. Harkness (Tex. Civ. App.)* 913.

§ 256. Where an instruction is correct as a proposition of law and applicable to the case, failure to assert any limitation is not error in the absence of a special request for such limitation.—*Missouri, K. & T. Ry. Co. of Texas v. Williams (Tex. Civ. App.)* 1043.

§ 260. In an action for injuries to a servant, a requested charge on plaintiff's contributory negligence *held* covered by instructions given.—*Aluminum Co. of North America v. Ramsey (Ark.)* 583.

§ 260. It is not error to refuse instructions covered in substance by those given.—*St. Louis, I. M. & S. Ry. Co. v. Garner (Ark.)* 763.

§ 260. In an action for injuries sustained by falling through a defective seat in a depot while waiting to see passengers off, a requested instruction as to contributory negligence *held* properly refused, in view of other instructions given.—*St. Louis, I. M. & S. Ry. Co. v. Grimsley (Ark.)* 1064.

§ 260. The refusal of an instruction substantially covered by instructions given is not error.—*Texas & P. Ry. Co. v. Crawford (Tex. Civ. App.)* 193.

§ 260. The court, having instructed fully on a defense, properly refused an instruction charging directly on particular features of the evidence under such defense.—*Missouri, K. & T. Ry. Co. v. Woods (Tex. Civ. App.)* 196.

§ 260. Requested instruction, in action by administrators, *held* not covered by general charge.—*Booth v. Bursey (Tex. Civ. App.)* 193.

§ 260. Where the defense of contributory negligence was fairly presented by the court's charge, there was no error in refusing special charges thereon.—*Swift & Co. v. Martine (Tex. Civ. App.)* 209.

§ 260. It is not error to refuse a charge covered by the charge given.—*Texas & N. O. R. Co. v. McCoy (Tex. Civ. App.)* 446.

§ 260. It was not error to refuse instructions covered by one given.—*Galveston, H. & S. A. Ry. Co. v. Powers (Tex. Civ. App.)* 459.

§ 260. It is not error to refuse a requested charge covered by the charge given.—*Missouri, K. & T. Ry. Co. of Texas v. Pettit (Tex. Civ. App.)* 894.

§ 260. In an action by an employé for personal injuries, *held* error to refuse an instruction that plaintiff could not recover if the accident resulted from a defect in the machinery or equipment which could not have been discovered by defendant in the exercise of ordinary care.—*Lyon v. Bedgood (Tex. Civ. App.)* 897.

§ 260. A requested instruction which is covered by other instructions given is properly refused.—*El Paso & S. W. Ry. Co. v. Alexander (Tex. Civ. App.)* 927.

§ 260. An instruction covered by the general charge is properly refused.—*Adams v. Gary Lumber Co. (Tex. Civ. App.)* 1017.

§ 260. Requested instructions were properly refused where they were contained in those given, so far as they were applicable to the evidence.—*Walker v. International & G. N. Ry. Co. (Tex. Civ. App.)* 1020.

§ 260. It is proper to refuse an instruction, the substance of which is covered by the general instructions.—Missouri, K. & T. Ry. Co. of Texas v. Williams (Tex. Civ. App.) 1043.

§ 261. It is not error to refuse an instruction erroneous in part.—Lyon v. Bedgood (Tex. Civ. App.) 897.

§ 266. Where two requests for instructions cover substantially the same questions, the court is not required to give both of them.—Lyon v. Bedgood (Tex. Civ. App.) 897.

#### (F) OBJECTIONS AND EXCEPTIONS.

§ 278. The use of an objectionable word in an instruction should be raised by a specific objection, and not by a general one to the entire instruction.—Sloan v. Little Rock Ry. & Electric Co. (Ark.) 551.

§ 278. A general objection is insufficient to point out an ambiguity in an instruction.—Aluminum Co. of North America v. Ramsey (Ark.) 568.

§ 278. In an action against a carrier, a general objection to an instruction authorized the jury to find for plaintiff if his injuries were caused by the negligence of defendant, which made no mention of the effect of contributory negligence, *held* insufficient.—Arkansas Midland R. Co. v. Rambo (Ark.) 784.

#### (G) CONSTRUCTION AND OPERATION.

§ 295. The use, in an instruction, of the word "defendant," instead of "plaintiff," and the word "they" in referring to plaintiff, *held* harmless.—McCullum v. Buckner's Orphans' Home (Tex. Civ. App.) 886.

§ 295. A charge should be read in its entirety.—Franks v. Harkness (Tex. Civ. App.) 918.

§ 296. In an action against a street railroad company for injuries through being struck by a car, error in certain instructions *held* cured by a subsequent instruction.—Louisville Ry. Co. v. Knocke's Adm'r (Ky.) 271.

§ 296. Error in an instruction for plaintiff *held* not obviated by a conflicting instruction for defendant.—Butz v. Murch Bros. Const. Co. (Mo. App.) 635.

§ 296. The error in an instruction that a grantee in a deed would under specified circumstances be bound by knowledge of the notary of infirmities in the deed acquired in taking the acknowledgment *held* not cured by another instruction.—Stringfellow v. Braselton (Tex. Civ. App.) 204.

### VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

§ 307. Where the opposite party agreed in writing that expected testimony of an absent witness was true, and a paper containing a statement thereof was admitted in evidence, the paper also containing a statement of what another person would testify to, the other person having been a witness at the trial, the court did not err in refusing to permit the jury to take the paper with them in their retirement.—Hall v. Cook (Tex. Civ. App.) 449.

§ 307. Where an original petition in an action was not used as evidence in the trial, it was not entitled to be taken by the jury upon retirement.—Hall v. Cook (Tex. Civ. App.) 449.

### X. TRIAL BY COURT.

#### (A) HEARING AND DETERMINATION OF CAUSE.

Review as dependent on prejudicial nature of error, see Appeal and Error, § 1071.

### XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

§ 418. Where the *prima facie* case is not aided by subsequent evidence, a demurrer to the evidence may be considered on appeal, where urged as error in moving for a new trial.—Mats v. Missouri Pac. Ry. Co. (Mo.) 584.

### TROVER AND CONVERSION.

#### I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

§ 1. Any distinct act or dominion wrongfully exerted over another's property in denial of his right, or inconsistent with it, is a conversion.—Crawford v. Thomason (Tex. Civ. App.) 181.

§ 5. Moving a house and contents, under a void writ of sequestration, *held* to be conversion.—Crawford v. Thomason (Tex. Civ. App.) 181.

#### II. ACTIONS.

##### (A) RIGHT OF ACTION AND DEFENSES.

§ 13. When a wrong complained of amounts to a conversion, the injured party has the right to so treat it and to sue for the value of the property so taken, and also to refuse to accept the property when the wrongdoer offers to return it.—Crawford v. Thomason (Tex. Civ. App.) 181.

§ 22. One accused of conversion cannot question plaintiff's title or right of possession, nor defeat recovery by showing that the taking was in good faith, or under a mistake.—Crawford v. Thomason (Tex. Civ. App.) 181.

§ 22. When a wrong complained of amounts to a conversion, the injured party has the right to so treat it and to sue for the value of the property so taken, and also to refuse to accept the property when the wrongdoer offers to return it.—Crawford v. Thomason (Tex. Civ. App.) 181.

##### (C) EVIDENCE.

§ 37. In an action for conversion, evidence *held* inadmissible.—Crawford v. Thomason (Tex. Civ. App.) 181.

§ 39. In an action for conversion, evidence as to damages *held* inadmissible.—Crawford v. Thomason (Tex. Civ. App.) 181.

§ 40. Evidence in an action for conversion *held* to warrant a verdict for exemplary damages.—Crawford v. Thomason (Tex. Civ. App.) 181.

### TRUST COMPANIES.

See Banks and Banking, § 310.

### TRUST DEEDS.

See Mortgages.

### TRUSTEE PROCESS.

See Garnishment.

### TRUSTS.

Champertous deed from trustee to cestui que trust, see Champerty and Maintenance, § 7. Charitable trusts, see Charities. Conveyances in trust for creditors, see Assignments for Benefit of Creditors.

#### I. CREATION, EXISTENCE, AND VALIDITY.

##### (A) EXPRESS TRUSTS.

§ 41. On an issue whether land purchased by a husband, the title to which was conveyed to

his wife, was a gift to her, or a trust, the husband's use and occupation is consistent with the presumption of a gift.—*Poole v. Oliver* (Ark.) 747.

§ 41. The presumption of gift, arising from a deed to the wife of land purchased by the husband, may be rebutted by evidence of a contemporaneous agreement that the wife should take the land as trustee for the husband.—*Poole v. Oliver* (Ark.) 747.

§ 56. In a suit to set aside certain conveyances, evidence of a fiduciary relationship between the parties is admissible under a general allegation of fraud.—*Bleyer v. Bleyer* (Mo.) 709.

§ 56. Evidence *held* to require a finding that certain deeds in controversy were procured by fraudulent representations made to the grantors as to the character of the instruments.—*Bleyer v. Bleyer* (Mo.) 709.

#### (B) RESULTING TRUSTS.

§ 63½. A corporation *held* to have received a check in trust, and not as part of its general assets.—*Elmer v. Campbell* (Mo. App.) 622.

§ 86. Where a husband purchases land and has the deed made to his wife, the presumption is that he intended it as a gift to her, and a trust does not result in his favor.—*Poole v. Oliver* (Ark.) 747.

### III. APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

§ 169. Where the only issue in a suit by the beneficiary under a trust estate created by a will was the appointment of a new trustee, the power of the court over the subject-matter of the suit was exhausted after the appointment.—*State ex rel. McManus v. Muench* (Mo.) 25.

### IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§ 219. Rev. St. 1899, § 3711 (Ann. St. 1906, p. 2080), forbidding compound interest unless expressly agreed on, *held* not to apply to the accounting of a derelict trustee.—*Pullis v. Somerville* (Mo.) 736.

### V. EXECUTION OF TRUST BY TRUSTEE OR BY COURT.

§ 287. That a will creating a trust estate gave the trustee power, with the approval of a court, to sell the trust property, did not show that testator intended that the trust should be administered through the orders of the court.—*State ex rel. McManus v. Muench* (Mo.) 25.

### VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

#### (C) ACTIONS.

§ 377. A defendant who though a mere trustee for codefendants confessing judgment, controverted plaintiff's right to recover, *held* liable for costs.—*Zeno v. Adoue* (Tex. Civ. App.) 1039.

### UNDERTAKINGS.

See Bonds.

### UNDUE INFLUENCE.

Procuring making of deed, see Deeds, § 72.  
Procuring making of will, see Wills, §§ 155-166.

### UNITED STATES.

See Territories; United States Marshals.  
Decisions of United States courts as authority in state courts, see Courts, § 97.  
Public lands, see Public Lands, § 61.

### UNITED STATES MARSHALS.

§ 32. The duty of a United States marshal toward property in his possession under a writ *held* to be the exercise of ordinary care.—*Sharp v. Layne* (Ky.) 292.

§ 34. Evidence, in an action against a United States marshal to recover for damages to a steamboat which he had taken possession of under a writ from the United States court, *held* to raise a question for the jury whether the marshal, or the person placed by him in charge of the boat, had used reasonable care.—*Sharp v. Layne* (Ky.) 292.

§ 34. Instructions, in an action against a United States marshal for damages, *held* to correctly state the law of the case.—*Sharp v. Layne* (Ky.) 292.

### UNLAWFUL DETAINER.

See Forcible Entry and Detainer.

### USAGES.

See Customs and Usages.

### VACATION.

Of highways, see Highways, § 78.  
Of execution, see Execution, § 103.  
Of judgment, see Judgment, §§ 139-145, 336, 386.

### VALUE.

Opinion evidence, see Evidence, § 488.  
Of property stolen, see Larceny, § 6.

### VARIANCE.

Between pleading and proof in civil action, see Pleading, § 398.  
Between pleading and proof in criminal prosecutions, see Indictment and Information, § 176.

### VEHICLES.

License taxes, see Licenses, § 7.

### VENDOR AND PURCHASER.

See Sales.  
Specific performance of contract, see Specific Performance.

*Sales by or to particular classes of persons.*  
Of property of infant under order of court, see Infants, § 39.  
Purchasers at tax sale, see Taxation, §§ 734, 825, 826.  
Sales by or to tenant in common, see Tenancy in Common, § 43.

### I. REQUISITES AND VALIDITY OF CONTRACT.

Recovery of damages for deficiency in lands sold in gross, see Frauds, § 27.

§ 18. An instrument *held* an offer by plaintiff to sell land, which he could withdraw at any time before acceptance.—*Jones v. Lewis* (Ark.) 561.

§ 18. A contract for the conveyance of land to a certain person or to whom he might direct *held* not a mere option to be accepted by the grantee, nor one requiring him to personally direct to whom the land should be conveyed.—*S. W. Slayden & Co. v. Palmo* (Tex. Civ. App.) 1054.

§ 43. A vendor, who deliberately chooses to affirm a contract and resort to his remedy for fraud as more satisfactory at the time, *held* not entitled to the equitable remedy of rescis-

sion for fraud three months thereafter, when the property had increased in value far in excess of his damages.—*Minter v. Hawkins* (Tex. Civ. App.) 172.

§ 44. Evidence *held* to conclusively show that, after discovery of fraud, a vendor dealt with the property which he acquired as the consideration as his own, and treated the contract as a continuing one, and so lost his right to rescind.—*Minter v. Hawkins* (Tex. Civ. App.) 172.

§ 45. Whether a contract for the conveyance of land was signed on the understanding that it was to be approved by the grantee *held* properly submitted to the jury.—*S. W. Slayden & Co. v. Palmo* (Tex. Civ. App.) 1054.

### III. MODIFICATION OR RESCISSION OF CONTRACT.

#### (A) BY AGREEMENT OF PARTIES.

§ 85. Rule governing rescission of contracts respecting land, stated.—*Hill v. Hoeldtke* (Tex. Civ. App.) 217.

#### (C) RESCISSION BY PURCHASER.

§ 123. In an action to recover the property consideration given for land not conveyed free of incumbrance as agreed, evidence that the purchaser was unable to read or write *held* properly admitted as explaining why he had not discovered the liens when he made the deal.—*Hudson v. Slate* (Tex. Civ. App.) 469.

### IV. PERFORMANCE OF CONTRACT.

#### (A) TITLE AND ESTATE OF VENDOR.

§ 140. A vendor's failure to tender an abstract of the property on or before the date when the transaction was to be closed by the terms of the contract *held* to justify the vendee's refusal to accept one tendered thereafter.—*T. Carrabine & Co. v. Cox* (Mo. App.) 616.

§ 140. A vendor's offer to furnish an abstract of the property showing clear title, as agreed, if the vendee would pay certain notes and accept a \$1,500 bond, *held* not a compliance with the contract.—*T. Carrabine & Co. v. Cox* (Mo. App.) 616.

§ 140. A vendor *held* entitled under the contract to additional time after the date for passing title to perfect the title without giving a bond provided for therein, or to close the transaction by giving the bond, with a reasonable time thereafter to perfect the title.—*T. Carrabine & Co. v. Cox* (Mo. App.) 616.

### V. RIGHTS AND LIABILITIES OF PARTIES.

#### (A) AS TO EACH OTHER.

Adverse possession by grantor, see Adverse Possession, § 63.

#### (C) BONA FIDE PURCHASERS.

§ 224. A purchaser for value under a quitclaim deed *held* within the protection of the registry act.—*Starr v. Bartz* (Mo.) 1125; Same v. *Kisner* (Mo.) 1129.

§ 224. To fall within the exception that a quitclaim deed is not subject to equities to which the registry act applies, but is protected thereby, value must have been given therefor.—*Starr v. Bartz* (Mo.) 1125; Same v. *Kisner* (Mo.) 1129.

§ 224. A purchaser under a quitclaim deed *held* not a bona fide purchaser, and he takes subject to existing equities, except where protected by the registry act.—*Starr v. Bartz* (Mo.) 1125; Same v. *Kisner* (Mo.) 1129.

§ 229. One who has notice of facts putting him on inquiry *held* not a purchaser in good faith.—*W. L. Moody & Co. v. Martin* (Tex. Civ. App.) 1015.

§ 230. A deed purporting to convey the grantor's interest as an heir *held* not to apprise the purchaser that the property might have been acquired by the grantor's ancestor when married.—*Gilmer's Estate v. Veatch* (Tex.) 430.

§ 244. Evidence, in an action to quiet title, *held* to show that plaintiff was not a bona fide purchaser.—*East Jellico Coal Co. v. Hays* (Ky.) 307.

§ 244. Evidence, in trespass to try title, *held* to show that a former owner of the property, through whom plaintiff claims, was a purchaser for a valuable and adequate consideration.—*McCullum v. Buckner's Orphans' Home* (Tex. Civ. App.) 886.

### VI. REMEDIES OF VENDOR.

#### (A) LIEN AND RECOVERY OF LAND.

Bringing in new parties, see Parties, § 31.

§ 257. A deed of land reserving a vendor's lien to secure deferred payments *held* to vest only in the purchaser an equity in the land, and the superior legal title remains in the vendor.—*De Steaguer v. Pittman* (Tex. Civ. App.) 481.

§ 261. Evidence *held* to show that the owner of a vendor's lien transferred by assignment all his interest therein to others, and did not merely transfer the lien to them for collection.—*Powell v. Powell* (Mo.) 1113.

§ 261. Evidence *held* to show that persons purchasing a vendor's lien from the former owner after it had been assigned to another were not bona fide purchasers without notice of the prior assignees' claims.—*Powell v. Powell* (Mo.) 1113.

§ 265. Evidence *held* to show a defense to personal liability on vendor's lien notes through assumption of the debt.—*Hill v. Hoeldtke* (Tex. Civ. App.) 217.

§ 265. In an action to enforce personal liability on purchase-money notes which defendant agreed to pay, *held*, that he was entitled to specific performance of an agreement to rescind such assumption.—*Hill v. Hoeldtke* (Tex. Civ. App.) 217.

§ 265. Evidence *held* to show a defense to personal liability on vendor's lien notes through assumption of the debt.—*Hill v. Hoeldtke* (Tex. Civ. App.) 217.

§ 269. Where a vendor's lienor assigned the lien a second time, and the last assignees enforced it against the land, *held*, that the remedy of the prior assignees and true owners was not against the land in a suit against the lienors.—*Powell v. Powell* (Mo.) 1113.

§ 274. Fraud of a transferee of vendor's lien notes *held* no defense to suit thereon.—*Zan v. Clark* (Tex. Civ. App.) 892.

§ 276. One *held* a mere trustee for the maker of a note secured by a vendor's lien and not entitled to urge the defenses of limitation and homestead rights in a suit to foreclose the lien.—*Zeno v. Adoue* (Tex. Civ. App.) 1039.

#### (B) ACTIONS FOR PURCHASE MONEY.

Res gestæ, see Evidence, § 121.

§ 308. In an action for the price of land, the purchaser *held* estopped to set up a failure of consideration.—*Bates v. Whitt* (Ky.) 273.

§ 310. A purchaser cannot offset against the price the cost of extinguishing an outstanding title of which he knew at the time of the purchase.—*De Steaguer v. Pittman* (Tex. Civ. App.) 481.

§ 310. One *held* estopped from asserting any claim against the title of a purchaser of real estate, so that the purchaser's payment in satisfaction of the claim was not available as an

offset against the price.—*De Steaguer v. Pittman* (Tex. Civ. App.) 481.

§ 310. The defect in the title for the curing of which an expenditure by the purchaser may be made, and reimbursement claimed as an offset to the purchase price, *held* such as amounts to a breach of covenant of warranty.—*De Steaguer v. Pittman* (Tex. Civ. App.) 481.

§ 315. A purchaser who, in an action for the price, pleads an offset based on a payment to cure a defect in the title *held* required to prove an outstanding title which he was compelled to purchase to protect himself.—*De Steaguer v. Pittman* (Tex. Civ. App.) 481.

§ 315. A purchaser in a contract of sale of real estate *held* prima facie liable on a note given and accepted as a cash payment at the time of the execution of the contract.—*Beauchamp v. Couch* (Tex. Civ. App.) 924.

§ 316. A vendor *held* entitled to recover a specified sum as liquidated damages for the purchaser's failure to perform.—*Beauchamp v. Couch* (Tex. Civ. App.) 924.

### (C) ACTIONS FOR DAMAGES.

§ 330. Where plaintiff contracted to convey a farm and certain personal property for a named sum, the value of the personal property, if not delivered, should be deducted from the consideration.—*S. W. Slayden & Co. v. Palmo* (Tex. Civ. App.) 1054.

§ 331. In an action for breach of a contract to convey land, a verdict for plaintiff for the land at \$5 per acre, but not stating the total value of the land or the number of acres, *held* insufficient.—*S. W. Slayden & Co. v. Palmo* (Tex. Civ. App.) 1054.

## VII. REMEDIES OF PURCHASER.

### (A) RECOVERY OF PURCHASE MONEY PAID.

§ 334. A purchaser, who has paid money or property on a verbal contract for the purchase of land, cannot sue to recover the same if vendor is willing to execute the contract.—*Lang v. Murphy* (Mo. App.) 665.

### (B) ACTIONS FOR BREACH OF CONTRACT.

§ 350. In an action to compel complete performance of a contract by a purchaser, abstracts *held* competent evidence to determine whether vendor furnished abstracts showing good titles as agreed.—*Lang v. Murphy* (Mo. App.) 665.

## VENUE.

In criminal prosecutions, see Criminal Law, §§ 107, 126.

In action on insurance policy, see Insurance, § 618.

## III. CHANGE OF VENUE OR PLACE OF TRIAL.

§ 36. Under Rev. St. 1899, § 818 (Ann. St. 1906, p. 789), a change of venue may be awarded in proceedings under an assignment for benefit of creditors.—*In re T. S. Heath & Son* (Mo. App.) 125; *Heath v. Tucker*, Id.

## VERDICT.

In criminal prosecutions, see Criminal Law, §§ 875, 881.

Operation and effect as curing defects in pleading, see Indictment and Information, § 202; Pleading, §§ 433, 434.

Presumption to sustain on appeal and error, see Appeal and Error, § 930.

Review on appeal or writ of error, see Appeal and Error, §§ 999-1005.

Setting aside, see New Trial, § 75.

## VEXATION.

Element of exemplary damages for maliciously suing out distress warrant, see Malicious Prosecution, § 68.

## VICE PRINCIPALS.

See Master and Servant, §§ 177-198.

## VILLAGES.

See Municipal Corporations.

## VOTERS.

See Elections.

## WAGONS.

License taxes, see Licenses, § 7.

## WAIVER.

See Estoppel.

Of objections to particular acts, instruments, or proceedings.

See Appearance; Pleading, §§ 406-428; Trial, § 418.

Defects in record on appeal or writ of error, see Appeal and Error, § 644.

Defects in return of process, see Process, § 166.

Performance of contract, see Contracts, § 305.

Of rights or remedies.

Challenge to juror, see Jury, § 110.

Exemption of homestead, see Homestead, § 169.

Of process by appearance, see Appearance, § 20.

## WARDS.

See Guardian and Ward.

## WARNING.

To servant, see Master and Servant, § 153.

## WARRANTY.

By insured, see Insurance, § 264.

On sale of goods, see Sales, §§ 288, 439-446.

## WATERS AND WATER COURSES.

See Drains; Navigable Waters.

Water courses in cities, see Municipal Corporations, §§ 834-845.

## II. NATURAL WATER COURSES.

### (C) POLLUTION.

§ 76. In an action for damages for injury to land by the discharge of sewage in a creek which ran through it, the measure of damages would be the depreciation in the market value of the land caused by the injury.—*Morris v. Missouri Pac. Ry. Co.* (Mo. App.) 687.

§ 76. In an action for damages for injury to land by the discharge of sewage in a creek which ran through the land, evidence *held* to sustain a finding that the land possessed a value for building purposes greatly in excess of its value for agriculture, which value the sewage destroyed, to plaintiff's damage of not less than \$100 per acre.—*Morris v. Missouri Pac. Ry. Co.* (Mo. App.) 687.

## V. SURFACE WATERS.

§ 118. It is negligence for a railroad company, in constructing its road, to fail to provide openings sufficient to permit the free flow of water from adjoining land.—*Jonesboro, L. C. & E. Ry. Co. v. Cable* (Ark.) 550.

§ 119. Duty of a railroad company respecting the obstruction of water courses by its embankment, stated.—*St. Louis, I. M. & S. Ry. Co. v. Walker (Ark.)* 534.

§ 125. In action for damages to land caused by construction by railroad company of drain box insufficient to drain the land as it had previously been drained, measure of damages, stated.—*Texas & P. Ry. Co. v. Ford (Tex. Civ. App.)* 201.

§ 125. Time at which damages for wrongful obstruction of surface waters by railroad should be computed, stated.—*Texas & P. Ry. Co. v. Ford (Tex. Civ. App.)* 201.

§ 126. In an action against a railway company for damage caused by an insufficient opening in its embankment for the passage of water, it was improper to allow plaintiff to show that after the damage complained of the opening was enlarged.—*St. Louis, I. M. & S. Ry. Co. v. Walker (Ark.)* 534.

## WAYS.

Private rights of way, see Easements.

Public ways, see Highways; Municipal Corporations, §§ 658, 755-821.

## WEAPONS.

§ 11. A passenger in the waiting room of a depot just before the arrival of a train which he intends to take is a traveler within the meaning of the law, and has a legal right to carry arms.—*Texas Midland R. Co. v. Geraldton (Tex. Civ. App.)* 1004.

§ 17. Evidence in a prosecution for carrying a pistol held inadmissible.—*McDonald v. State (Tex. Cr. App.)* 131.

## WHEELS.

Jury wheels, see Jury, § 58.

## WIDOWS.

Dower, see Dower.

Rights under statutes of descent and distribution, see Descent and Distribution, § 65.

## WILLS.

See Descent and Distribution; Executors and Administrators.

Charitable bequests and devises, see Charities. Construction and execution of powers, see Powers, §§ 23, 43.

Construction and execution of trusts, see Trusts. Specific performance of contract to devise, see Specific Performance, § 86.

### II. TESTAMENTARY CAPACITY.

§ 31. The standard of mental capacity required to sustain a will stated.—*Winn v. Grier (Mo.)* 48.

§ 55. Evidence held insufficient to show testamentary incapacity.—*Winn v. Grier (Mo.)* 48.

### IV. REQUISITES AND VALIDITY.

#### (F) MISTAKE, UNDUE INFLUENCE, AND FRAUD.

§ 155. What constitutes undue influence sufficient to invalidate a will stated.—*Winn v. Grier (Mo.)* 48.

§ 165. Testator's declarations bearing on the question as to whether he was unduly influenced held admissible where there is independent evidence of undue influence.—*Stubbs v. Marshall (Tex. Civ. App.)* 1030.

§ 166. Evidence held insufficient to show undue influence invalidating a will.—*Winn v. Grier (Mo.)* 48.

#### (G) REVOCATION AND REVIVAL.

§§ 179, 184. A will or codicil may operate as a revocation of a prior will by reason of an express revocation or of an inconsistent disposition of the previously devised property.—*Deppen's Trustee v. Deppen (Ky.)* 352.

### V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

#### (H) EVIDENCE.

Competency of witnesses, see Witnesses, §§ 163, 192.

#### (I) HEARING OR TRIAL.

§ 324. On an issue of testamentary capacity the testimony of an expert witness held insufficient to take the question of testator's mental capacity to the jury.—*Winn v. Grier (Mo.)* 48.

#### (K) REVIEW.

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§ 449. A will and codicil held to dispose of the entire estate of testatrix to a son and daughter equally.—*Deppen's Trustee v. Deppen (Ky.)* 352.

§ 453. The construction of a will which produces equality is preferred to one that produces inequality, and it will not be presumed that testator intended to prefer one of his children to the others, unless this appears from a fair reading of the will.—*Cornwall v. Hill (Ky.)* 311.

§ 453. Where the language of a will is susceptible of two constructions, the court will adopt that construction which will make the devisees equal.—*Deppen's Trustee v. Deppen (Ky.)* 352.

§ 470. The court, in construing a will, must arrive at the intention of the testator from a consideration of the whole will, and the intention, when ascertained, must be carried into effect.—*Cook v. Hart (Ky.)* 357.

§ 472. Where there are two inconsistent devises in the same will, the latter prevails.—*Deppen's Trustee v. Deppen (Ky.)* 352.

§ 475. Where there are two inconsistent wills, or a will and a codicil, of different dates, the last will or codicil prevails, though the provisions of each as far as practicable must be given effect.—*Deppen's Trustee v. Deppen (Ky.)* 352.

§ 475. Where two instruments bearing different dates were admitted to probate, the court in ascertaining the intention of the testator must consider both, whether they are treated as wills or the last instrument is treated as a codicil.—*Deppen's Trustee v. Deppen (Ky.)* 352.

§ 481. Under St. 1909, § 4839 (Russell's St. § 3962), where it appears that a will was made in contemplation of a settlement with creditors, and a conveyance for carrying out that plan was made in about a month after its execution, the will should be read as speaking from the date of the conveyance, rather than that of its execution.—*Cornwall v. Hill (Ky.)* 311.

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§ 597. A devise to a son and his children *held* to pass a fee-simple, and not a life estate.—*Harkness v. Lisle* (Ky.) 264; *Lisle v. Same, Id.*

§ 601. A devise over of an estate devised in fee is void.—*Harkness v. Lisle* (Ky.) 264; *Lisle v. Same, Id.*

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